No. 20-55279

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CRISTIAN DOE et al.,
Petitioners-Appellees,

v.

CHAD F. WOLF,
Acting Secretary of Homeland Security, et al.
Respondents-Appellants.

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

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF JURISDICTION..........4

STATEMENT OF THE ISSUES..........4

STATEMENT OF THE CASE..........5

A. Legal Background 5

B. Factual Background..........7

C. Procedural Background 9

SUMMARY OF THE ARGUMENT 15

STANDARD OF REVIEW 17

ARGUMENT 17

I. The District Court Erred in Holding that Class Members Who are Subject to the Return Authority in 8 U.S.C. § 1225(b)(2)(C) Possess a Statutory Right to Counsel..........17

A. The INA Does Not Provide a Right to Counsel to Aliens Who Are Subject to 8 U.S.C. § 1225(b)(2)(C). 17

B. Even if the APA Applied Here, Its Right-to-Counsel Provision by Its Plain Terms Does not Provide a Right to Counsel to Aliens Who are Subject to 8 U.S.C. § 1225(b)(2)(C). 25

C. In Any Event, the APA's Right-to-Counsel Provision Does Not Apply Here Because the INA Displaces It. 31

II. The Balance of Harms Favors the Government..41

CONCLUSION 43

TABLE OF AUTHORITIES

Cases

Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978) 41

AILA v. Reno, 18 F. Supp. 2d 38 (D.D.C. 1998) 5

Allen v. Milas, 896 F.3d 1094 (9th Cir. 2018) 31, 37, 40

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011) 42

Ardestani v. INS, 502 U.S. 129 (1991) ..... *passim*

Castillo-Villagra v. INS, 927 F.2d 1017 (9th Cir. 1992) 31, 32, 33, 34

Chamber of Commerce of United States v. Whiting, 563 U.S. 582 (2011) 17

Clardy v. Levi, 545 F.2d 1241 (9th Cir. 1976) 25

Clark v. Chappell, 936 F.2d 944 (9th Cir. 2019) 28

Clark v. Smith, 967 F.2d 1329 (9th Cir. 1992) 30

Clark v. Suarez Martinez, 543 U.S. 371 (2005) 7

DHS v. MacLean, 574 U.S. 383, 135 S. Ct. 913 (2015) 19

E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984 (9th Cir. 2006) 17

FCC v. Schreiber, 329 F.2d 517 (9th Cir. 1964) 25, 27

Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) 40

Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062 (2020) 36

Hamdi ex rel. Hamdi v. Napolitano, 620 F.3d 615 (6th Cir. 2010) 31, 34

Innovation Law Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) 7, 41

Innovation Law Lab v. Wolf, 951 F.3d 1073 (9th Cir. 2020) 14, 24, 26

Innovation Law Lab v. Wolf, 951 F.3d 986 (9th Cir. 2020) 14

Jennings v. Rodriguez, 138 S. Ct. 830 (2018) 5, 6, 30

Kim v. Ashcroft, 340 F. Supp. 2d 384 (S.D.N.Y. 2004) 38, 39

Kleindienst v. Mandel, 409 U.S. 753 (1972) 5

Landon v. Plasencia, 459 U.S. 21 (1982)..41

Marcello v. Bonds, 349 U.S. 302 (1955) .... *passim*

Martinez v. Holder, 383 F. App'x 637 (9th Cir. 2010) 31

Matter of E-R-M & L-R-M, 25 I & N Dec. 520 (BIA 2011) 6

Miss. River Corp. v. FTC, 454 F.2d 1083 (8th Cir. 1972).....................................26

Morales-Izquierdo v. Gonzales, 486 F.3d 484 (9th Cir. 2007) 35

Nguyen v. Sessions, 901 F.3d 1093 (9th Cir. 2018)...39

Padilla v. ICE, No. 19-35565, 2020 WL 1482393 (9th Cir. Mar. 27, 2020)..........19

Russello v. United States, 464 U.S. 16 (1983)...19

Salem v. Pompeo, No. 19 CV 0363 (SJ), 2020 WL 108561 (E.D.N.Y. Jan. 8, 2020)
....26

SEC v. Csapo, 533 F.2d 7 (D.C. Cir. 1976)...26

SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966)...25

Sierra Forest Legacy v. Rey, 577 F.3d 1015 (9th Cir. 2009) 42

Smiley v. Dir. Office of Workers Comp. Programs, 984 F.2d 278 (9th Cir. 1993).....
.... 12, 27, 29

Stanley v. Univ. of S. Cal., 13 F.3d 1313 (9th Cir. 1994).......................................40

United States v. Barajas-Alvarado, 655 F.3d 1077 (9th Cir. 2011)..... 13, 21, 22, 36

United States v. Quinteros Guzman, No. 3:18-cr-00031-001, 2019 WL 3220576 (W.D. Va. July 17, 2019) 20, 31, 34, 35

Wadler v. Bio-Rad Labs, Inc., 916 F.3d 1176 (9th Cir. 2019) 19

Winter v. NRDC, 555 U.S. 7 (2008) 41

Wolf v. Innovation Law Lab, No. 19A960 (Mar. 11, 2020) 14

Zuniga v. Barr, 946 F.3d 464 (9th Cir. 2019) 19

Statutes

28 U.S.C. § 1292(a)(1) 4

28 U.S.C. § 1331 4

28 U.S.C. § 1361 4

28 U.S.C. § 1651 4

28 U.S.C. § 2241 4

33 U.S.C. § 919(d) 29

5 U.S.C. § 551(12) 29

5 U.S.C. § 551(7) 29

5 U.S.C. § 554(a) 29

5 U.S.C. § 555(b) .... *passim*

5 U.S.C. § 559 .... 13, 36

5 U.S.C. § 702 4

5 U.S.C. § 706 4

8 U.S.C. § 1101 5

8 U.S.C. § 1182(d)(5) 6

8 U.S.C. § 1225(b)(1).. 5, 35, 38

8 U.S.C. § 1225(b)(1)(A)(i) 36

8 U.S.C. § 1225(b)(1)(A)(i) 21

8 U.S.C. § 1225(b)(1)(A)(ii) 6

8 U.S.C. § 1225(b)(1)(B)(iv) 2, 18, 38

8 U.S.C. § 1225(b)(2)..5

8 U.S.C. § 1225(b)(2)(A) 6

8 U.S.C. § 1225(b)(2)(C) .... *passim*

8 U.S.C. § 1228(b) 35

8 U.S.C. § 1228(b)(4)(B) 2, 15, 18

8 U.S.C. § 1229a 6, 35

8 U.S.C. § 1231(b)(3)(A) 24

8 U.S.C. § 1362 .... 2, 18

Regulations

20 C.F.R. § 702.334 29

8 C.F.R. § 235.3(b)(2)(i) 22

8 C.F.R. § 235.3(b)(4)..6

Other Authorities

Attorney General’s Manual on the Administrative Procedure Act (1947).............25

Black’s Law Dictionary (10th ed. 2014) 25, 27

H.R. Rep. 104-828 (Sept. 24, 1996) 35

INTRODUCTION

This case concerns a component of the Migrant Protection Protocols (MPP), a policy implementing statutory authority under the Immigration and Nationality Act (INA), 8 U.S.C. § 1225(b)(2)(C), to return aliens arriving in the United States by land from a contiguous territory to that territory during the pendency of full removal proceedings. In implementing MPP to comport with non-refoulement obligations, the Department of Homeland Security (DHS) mandated that asylum officers interview any alien who affirmatively articulates a fear of returning to Mexico to ascertain whether that alien would more likely than not be subject to persecution because of a protected characteristic or tortured if returned to Mexico. Although nothing in the INA requires that an alien be afforded counsel in those non-refoulement interviews, the district court in this case issued a class-wide preliminary injunction mandating that class members placed in MPP be given access to counsel before and during non-refoulement interviews based on the right-to-counsel provision in the Administrative Procedure Act (APA).

This Court should reverse the district court's preliminary injunction. The injunction rests on serious errors of law.

First, the INA does not provide the right to counsel that the district court ordered. The temporary return of aliens to Mexico under MPP is governed by 8 U.S.C. § 1225(b)(2)(C), which states that for aliens placed in full removal

proceedings that arrive "from a foreign territory contiguous to the United States," DHS "may return the alien to that territory pending" removal proceedings. Nothing in that provision supplies a right to counsel—and so there is none. That plain-text conclusion is confirmed by the INA more broadly. In other provisions of the INA, Congress explicitly provided a right to counsel in full "removal proceedings before an immigration judge," 8 U.S.C. § 1362, a right to be "represented . . . by . . . counsel" for aliens who are convicted of an aggravated felony and are placed in expedited removal proceedings, *id.* § 1228(b)(4)(B), and a right for aliens in expedited removal proceedings to "consult with a person or persons of the alien's choosing" prior to credible-fear interviews, *id.* § 1225(b)(1)(B)(iv). These provisions confirm that the absence from 8 U.S.C. § 1225(b)(2)(C) of a right to counsel reflects a deliberate choice that there is no right to counsel in MPP non-refoulement interviews.

Second, even if the APA (and not only the INA) applied here, the injunction is irreconcilable with the APA's right-to-counsel provision that it is based on, which provides no right to counsel in an MPP non-refoulement interview. That provision states that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel." 5 U.S.C. § 555(b). Class members are not "compelled" to appear at non-refoulement interviews. Rather, they voluntarily seek and appear at interviews: a class member affirmatively states a fear of returning to Mexico, and based on that

affirmative statement, is provided a non-refoulement interview. Because aliens are not "compelled" to appear for non-refoulement interviews, 5 U.S.C. § 555(b) does not give them the right to counsel that the district court ordered.

Third, and in any event, the APA's right-to-counsel provision does not apply because the INA supplants it. The law is settled that the INA "supplant[s] the APA in immigration proceedings." *Ardestani v. INS*, 502 U.S. 129, 133 (1991). The Supreme Court long ago "decided that" immigration proceedings "are not governed by the APA" "in light of the background" of the INA, "its laborious adaption of the [APA] to the deportation process, the specific points at which deviations from the [APA] were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings." *Id.* at 133-34 (discussing *Marcello v. Bonds*, 349 U.S. 302 (1955)). This caselaw confirms that the APA's right-to-counsel provision does not apply to non-refoulement interviews that DHS provides in exercising its statutory authority in the INA.

Finally, the balance of harms favors the government. The injunction the district court imposed improperly places restrictions on one of the few congressionally-authorized tools to address the crisis at the southern border and also creates national security concerns. The possibility of harm that petitioners assert

class members may face absent injunctive relief does not outweigh these tangible harms inflicted on the government.

STATEMENT OF JURISDICTION

Petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361, 1651, and 2241, and under 5 U.S.C. §§ 702 and 706. Compl. ¶ 32 (ER143). On January 14, 2020, the district court issued a class-wide preliminary injunction order. Order (ER1-21). The government filed a timely notice of appeal from that order. ER33-35. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Whether the district court erred in issuing an injunction based on its holding that the APA's right-to-counsel provision, 5 U.S.C. § 555(b), applies in non-refoulement interviews conducted under the INA provision authorizing DHS to return certain aliens to the contiguous territory from which they arrived, 8 U.S.C. § 1225(b)(2)(C).

II. Whether the district court erred in issuing an injunction imposing additional requirements on how the government implements MPP in light of equitable considerations governing injunctive relief, given that MPP is one of the few congressionally granted tools to address the migration crisis at the southern border and given that the injunction imposed creates national security concerns.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Legal Background

Exercising its "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," *Kleindienst v. Mandel*, 409 U.S. 753, 766 (1972), Congress has, in the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, established comprehensive procedures governing aliens' admission into and removal from the United States.

For applicants for admission, the "process of decision generally begins at the Nation's borders and ports of entry, where the Government must determine" whether aliens who arrive at or between ports of entry are "admissible." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). Aliens are subject to "primary inspection" and potentially to "secondary inspection" where immigration officers inspect aliens' "documents" to determine whether they are admissible. *AILA v. Reno*, 18 F. Supp. 2d 38, 42 (D.D.C. 1998). If an immigration officer determines that an alien is inadmissible, then that officer decides whether to place the alien into (1) expedited removal proceedings, *see* 8 U.S.C. § 1225(b)(1), or (2) full removal proceedings, *see id.* § 1225(b)(2). *Jennings*, 138 S. Ct. at 837. Expedited removal, codified at 8 U.S.C. § 1225(b)(1), provides for the swift removal of aliens who are "initially

determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation" "without further hearing or review." *Jennings*, 138 S. Ct. at 837. If the alien indicates an intention to apply for asylum or a fear of persecution or torture, then the alien is entitled to a credible-fear interview, and, depending on the results of that interview, further immigration proceedings. *Id.*; *see* 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4).

A broader category of inadmissible aliens, described in 8 U.S.C. § 1225(b)(2)(A), may be placed in full removal proceedings. Section 1225(b)(2)(A) provides that if an "applicant for admission" is "not clearly and beyond a doubt entitled to be admitted," then the alien "shall be detained for a [full removal] proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A). These full removal proceedings entail more extensive procedural protections than expedited removal proceedings. *See id.* § 1229a. "DHS has discretion to put aliens in [such full] removal proceedings even though they may also be subject to expedited removal." *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011).

Applicants for admission who are placed in full removal proceedings are "detained for" the duration of their "removal proceedings," unless they are temporarily paroled "for urgent humanitarian reasons or significant public benefit." *Jennings*, 138 S. Ct. at 837, 842; 8 U.S.C. §§ 1225(b)(2)(A), 1182(d)(5). As an alternative to mandatory detention, however, Congress has provided that certain

aliens who arrive in the United States by land may be temporarily returned to Mexico or Canada pending their full removal proceedings. Section 1225(b)(2)(C) provides: "In the case of an alien described in subparagraph (A) [of 8 U.S.C. § 1225(b)(2)] 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 of Homeland Security] may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C).[1]

B. Factual Background

In December 2018, the Secretary of Homeland Security announced the implementation of MPP. Under MPP, "citizens and nationals of countries other than Mexico ('third-country nationals') arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico pursuant to Section [1225](b)(2)(C) for the duration of their . . . removal proceedings." ER123. Under MPP, eligible aliens "are processed for standard removal proceedings, instead of expedited removal," and "wait in Mexico until an immigration judge" in the United States "resolves their . . . claims." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019) ("*Innovation I*").

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

The discretionary authority outlined in MPP is exercised in accordance with applicable non-refoulement principles. *See* ER125. Aliens who express a fear of persecution or torture in Mexico are entitled to a non-refoulement interview with an asylum officer. *See* ER129, 132-33. That fear can be expressed "before or after" aliens are processed for MPP. ER132. The non-refoulement interview, which assesses whether an alien would more likely than not be persecuted based on a protected ground or tortured if returned to Mexico, is conducted "in a non-adversarial manner, separate and apart from the general public," and the results of the interview "shall be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." ER129-30. "At the time of the interview, the USCIS officer should verify that the alien understands that he or she may be subject to return to Mexico . . . pending his or her immigration proceedings. The officer should also confirm that the alien has an understanding of the interview process." ER129. The USCIS officer "should take into account" "relevant factors," such as: (1) the "credibility of any statements made by the alien"; (2) "[c]ommitments from the Government of Mexico regarding the treatment and protection of aliens," along with "reliable assessments of current country conditions in Mexico"; and (3) "[w]hether the alien has engaged in criminal, persecutory, or terrorist activity." ER129-30.

If the interviewing officer determines that an alien who undergoes a non-refoulement interview has failed to establish that he or she more likely than not will be persecuted in Mexico based on a protected characteristic or tortured, then that alien is returned to Mexico and is furnished "instructions explaining when and to which" port of entry "to report to attend his or her [immigration] hearing." ER135. "On the day of the hearing, an alien returned to Mexico under the MPP will arrive at" a port of entry "at the time designated—generally a time sufficient to allow for . . . processing, pre-hearing consultation with counsel (if applicable), and timely appearance at hearings." *Id.* MPP guidance provides that aliens placed in MPP will be allowed "sufficient" time to confer with their attorneys, if they have retained counsel, before their removal hearings. ER136.

For the non-refoulement interview itself, however, "provided [that] the MPP assessments are part of either primary or secondary inspection," DHS's guidance states that it is "unable to provide access to counsel during the assessments given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals." ER129.

C. Procedural Background

On November 5, 2019, the named petitioners, two aliens subject to MPP and awaiting non-refoulement interviews, filed this suit in the Southern District of California. They alleged that their inability to consult with retained counsel before

and during non-refoulement interviews: (1) violated their statutory right to counsel under the APA, which provides that "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel," and that "[a] party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding," 5 U.S.C. § 555(b), *see* Compl. ¶¶ 160-65; (2) was not in "accordance with law" in violation of the APA, *id.* ¶¶ 166-72; (3) violated their procedural-due-process rights, *id.* ¶¶ 173-78; (4) violated their substantive due-process rights, *id.* ¶¶ 179-85; and (5) violated their First Amendment rights to receive legal advice, *id.* ¶¶ 186-89 (ER159-63). The named petitioners sought a TRO mandating that the government provide them access to counsel before and during their non-refoulement interviews, as well as class-wide preliminary injunctive relief providing the same access to counsel on behalf of all individuals in DHS custody in California with retained counsel subject to MPP and awaiting or undergoing non-refoulement interviews.

On November 12, 2019, the district court granted the named petitioners' TRO motion. ER2. As a result of the TRO, the named petitioners underwent non-refoulement interviews with their attorneys present and were determined to have a fear of torture in Mexico, precluding them from being subject to MPP. *Id.*

On January 14, 2020, the district court granted the named petitioners' class-certification motion and certified a class of all individuals detained in custody in

"California awaiting or undergoing non-refoulement interviews pursuant to the 'Migrant Protection Protocols' program and who have retained lawyers." ER2, ER158. That same day, the court granted the named petitioners' motion for class-wide preliminary injunctive relief. ER20-21.

On the merits, the court held that petitioners were likely to succeed on their claim that the APA supplied a right to counsel prior to and during non-refoulement interviews for persons who already had retained counsel prior to their non-refoulement interviews. Order 7-11 (ER7-11). The court held that the fact that the "INA is silent on whether asylum seekers may access retained counsel prior to and during non-refoulement interviews," supported its conclusion because "it is impossible to evince from the INA whether there is a right to counsel in non-refoulement interviews because the INA does not mention non-refoulement interviews at all." Order 10-11. In the court's view, there was no evidence of "Congressional consideration" of whether asylum seekers have a "right to retained counsel prior to and during non-refoulement interviews." Order 11. And the court held that it was "textually inappropriate" to consider "§ 1225(b)(2)(C)" as settling whether there is a right to counsel in non-refoulement interviews because of the "lack of mention of non-refoulement interviews" in "§ 1225(b)(2)(C)." *Id.* n.4.

Turning to the text of the APA's right-to-counsel provision, the court noted that section 555(b) "contains two distinct provisions on access to retained counsel,"

the first of which provides a right to counsel for any person "compelled to appear in person before an agency or representative thereof." Order 14 (quoting 5 U.S.C. § 555(b)). The court held that this first provision "applies," and thus "did not address the applicability of the second provision" of section 555(b). *Id.* The court held that in view of the "circumstances in which the non-refoulement interview takes place," in conjunction with the fact that "[a] non-refoulement interview is merely the next step in a long, multi-stage immigration process," class members were "'compelled' to appear for the purposes of § 555(b)." Order 15. The court relied on *Smiley v. Dir. Office of Workers Comp. Programs*, 984 F.2d 278, 282 (9th Cir. 1993), which held that individuals have a "statutory right to be advised and represented by counsel" in "hearings held under the Longshore Act." The court stated a conclusion that a holding that class members are not compelled to appear at non-refoulement interviews "would suggest § 555(b) does not apply in workers' compensation hearings," but the Ninth Circuit in *Smiley* "held otherwise." Order 15.

Finally, the court distinguished *Ardestani v. INS*, 502 U.S. 129 (1991) and *Marcello v. Bonds*, 349 U.S. 302 (1955), two cases in which the Supreme Court had held that the INA displaces the APA. The court explained that *Ardestani*'s holding that the INA displaces the APA in "immigration proceedings" was limited to the "narrower category of deportation proceedings" and did not address non-refoulement interviews in the context of section 1225(b)(2)(C). Order 9. The court

further explained that, "[d]istilled to their core holdings, both cases [*Ardestani* and *Marcello*] concern solely deportation proceedings, not *all* immigration proceedings." Order 8-9 (emphasis in original). The court rejected the argument that a holding that *Ardestani* and *Marcello* do not apply to non-refoulement interviews "would necessarily extend to expedited removal proceedings"—in which this Court has held there is no right to counsel because no "applicable statute" provides such a right, *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011)—because "expedited removal proceedings and non-refoulement interviews are not comparable immigration proceedings." Order 9. The court emphasized that the "INA provision concerning expedited removal proceedings is complex, specialized, and specific to expedited removal proceedings," while the "INA contains no provision concerning non-refoulement interviews," a distinction the court deemed "crucial" because a "[s]ubsequent statute may not be held to supersede or modify [the APA's protection of the right to access of retained counsel], except to the extent that it does so expressly." *Id.* (quoting 5 U.S.C. § 559).

Because the court held that petitioners were likely to succeed on their APA right-to-counsel claim, it declined to address the remaining claims that petitioners raised in their preliminary injunction motion. Order 15 n.6. The court also held that petitioners established that class members would suffer irreparable injury in the absence of preliminary relief because "[t]he presence of counsel was clearly helpful"

to petitioners and because of the "stakes of a non-refoulement interview and the interview's fact-intensive nature." Order 16. The court likewise held that the equities supported a class-wide injunction because "class members face the possibility of being returned to Mexico" erroneously in the absence of injunctive relief and the because the "additional procedural requirements" mandated by the injunction "are required by federal law." *See* Order 17-19. Finally, the court held that the "text of § 555(b)" mandated "in-person access to retained counsel prior to . . . non-refoulement interviews," but held that only "telephonic access" to counsel during non-refoulement interviews was necessary since "[p]etitioners have conceded telephonic access to counsel during the non-refoulement interviews is sufficient." Order 20.

Thereafter, in a different pending case, this Court restored a nationwide injunction of MPP based on different claims and issues, before later staying the injunction outside of the Ninth Circuit. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) ("*Innovation II*"); *Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir. 2020). On March 11, the Supreme Court stayed the injunction in its entirety pending the timely filing and disposition of a petition for a writ of certiorari, and judgment from the Supreme Court in the event the petition for a writ of certiorari is granted. *See Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020). In view of the stay granted by the Supreme Court, MPP is operational nationwide, including

jurisdictions covered by the Ninth Circuit. A petition for a writ of certiorari was filed on April 10, 2020. *See Wolf v. Innovation Law Lab*, No. 19-1212.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's preliminary injunction.

I. The district court's injunction rests on errors of law.

A. To start, the INA does not provide a right to counsel for non-refoulement proceedings conducted under DHS's exercise of the authority in 8 U.S.C. § 1225(b)(2)(C). Section 1225(b)(2)(C) states that for aliens placed in full removal proceedings that arrive "from a foreign territory contiguous to the United States," the Secretary of Homeland Security "may return the alien to that territory" pending their removal proceedings. Nothing in that provision supplies a right to counsel—and so there is none. That plain-text conclusion is confirmed by the INA more broadly: when Congress wanted to provide a right to counsel in various immigration-related proceedings, it knew how to do so—as it did in full removal proceedings, *see* 8 U.S.C. § 1362, in expedited removal proceedings concerning aliens convicted of an aggravated felony, *see id.* § 1228(b)(4)(B), and prior to credible-fear interviews conducted as part of expedited removal proceedings under section 1225(b)(1). *See id.* § 1225(b)(1)(B)(iv). Congress provided no such right in U.S.C. § 1225(b)(2)(C). Because non-refoulement interviews only occur as part of

return decisions under section 1225(b)(2)(C), the district court was wrong to hold that aliens undergoing non-refoulement interviews have a right to counsel.

B. The APA's right-to-counsel provision—even if it applied—would not supply a right to counsel for class members. That provision confers a right to counsel when a person is "*compelled* to appear in person before an agency or representative." 5 U.S.C. § 555(b) (emphasis added). An alien who has a non-refoulement interview is not "compelled" to appear. Non-refoulement interviews occur only if the alien affirmatively takes voluntary action by articulating a fear of returning to Mexico.

C. In any event, the APA's right-to-counsel provision does not apply here because the INA displaces it. In the INA, Congress "supplant[ed]" the APA in immigration proceedings." *Ardestani v. INS*, 502 U.S. 129, 133 (1991) (citing *Marcello v. Bonds*, 349 U.S. 302, 310 (1955)). That is not a sound reading of those decisions. And the district court offered no plausible basis for reconciling its holding with its recognition that the INA displaces the APA in expedited removal proceedings (which are *not* deportation proceedings) but does not displace the APA in non-refoulement interviews that occur when DHS exercises its authority under 1225(b)(2)(C). *See* Order 9. The district court believed that the "INA provision concerning expedited removal proceedings [expressly] supersedes the APA" in a way that section 1225(b)(2)(C) does not, *id.*, but its view does not withstand scrutiny.

II. Considerations of harm and the equities also favor reversal. MPP is one of the few congressionally-authorized tools to address the burgeoning crisis on

the southern border, and the injunction imposed by the district court places unfounded restrictions on the government's ability to utilize that tool while also hampering national security. The "possibility" that class members would suffer harm without injunctive relief does not outweigh the harms imposed on the government by the injunction. Order 18.

STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for abuse of discretion, but "the district court's interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (quotation marks, brackets, and ellipsis omitted).

ARGUMENT

This Court should reverse the district court's injunction.

I. The District Court Erred in Holding that Class Members Who are Subject to the Return Authority in 8 U.S.C. § 1225(b)(2)(C) Possess a Statutory Right to Counsel.

A. The INA Does Not Provide a Right to Counsel to Aliens Who Are Subject to 8 U.S.C. § 1225(b)(2)(C).

The district court erred when it concluded that "[i]t is impossible to evince from the INA whether there is a right to counsel in non-refoulement interviews" under MPP. Order 10-11. MPP non-refoulement interviews only occur under

section 1225(b)(2)(C) and that provision does not provide any right to counsel, so there is no right to counsel in non-refoulement interviews.

The INA is a "comprehensive federal statutory scheme for regulation of immigration and naturalization." *Chamber of Commerce of United States v. Whiting*, 563 U.S. 582, 587 (2011). As part of this comprehensive regime, Congress promulgated a statutory provision that exclusively governs the temporary return of aliens to the contiguous territory from which they arrived: section 1225(b)(2)(C), which provides that: "[i]n the case of an [eligible] alien . . . 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] may return that alien to that territory pending" the alien's removal proceedings. 8 U.S.C. § 1225(b)(2)(C). No aspect of this provision supplies a right to counsel as part of any decision concerning an alien's return to the contiguous territory from which that alien arrived. So there is no right to counsel in non-refoulement interviews when DHS exercises its statutory authority to return aliens under MPP.

This plain-text understanding is confirmed by the INA more broadly. In other parts of the INA, Congress explicitly provided a right to counsel in different proceedings. In full "removal proceedings before an Immigration Judge," Congress provided that aliens "shall have the privilege of being represented" by counsel. 8 U.S.C. § 1362. Aliens who have been convicted of an aggravated felony and are

placed in expedited removal proceedings "have the privilege of being represented (at no expense to the government) by ... counsel." *Id.* § 1228(b)(4)(B). And for all other aliens who are placed in expedited removal proceedings and are referred for a credible-fear interview, aliens have a right to "consult with a person or persons of the alien's choosing prior to the [credible-fear] interview. *Id.* § 1225(b)(1)(B)(iv). The absence of any right to counsel in 8 U.S.C. § 1225(b)(2)(C) shows that Congress decided that there is no such right for any aspect of the return process: "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *DHS v. MacLean*, 574 U.S. 383, 135 S. Ct. 913, 919 (2015); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Wadler v. Bio-Rad Labs, Inc.*, 916 F.3d 1176, 1186 (9th Cir. 2019) (same). The "silence" in 8 U.S.C. § 1225(b)(2)(C) as to any right to counsel in the return process is "especially significant because"—as just noted—"its neighboring subsection," § 1225(b)(1)(B)(iv), provides a limited consultation right prior to credible-fear interviews. *Padilla v. ICE*, 953 F.3d 1134, 1149 (9th Cir. 2020). This Court has held that the "broader legislative context" of the "INA" informs whether a right to counsel attaches to a particular "immigration proceeding[]." *Zuniga v. Barr*, 946

F.3d 464, 469 (9th Cir. 2019) (holding that aliens who have been convicted of an aggravated felony and are placed in expedited removal proceedings have a "statutory right to counsel" because "the statute [§ 1228] contemplates" such a right). That broader context decisively shows that no such right attaches to the non-refoulement interviews here. "[W]hen Congress intended an alien to have a right to counsel, it knew how to make that right clear." *United States v. Quinteros Guzman*, No. 3:18-cr-00031-001, 2019 WL 3220576, at *10 (W.D. Va. July 17, 2019). Engrafting a right to counsel in non-refoulement interviews conducted under MPP subverts the choice that Congress made in 8 U.S.C. § 1225(b)(2)(C) to supply no such right.

The district court acknowledged that "the INA provides access to retained counsel prior to [credible fear interviews during expedited removal proceedings] and during formal removal proceedings" and that there is no "mention of a right to access counsel" in 8 U.S.C. § 1225(b)(2)(C). Order 10-11 n.4. The district court concluded, however, that it was "impossible to evince from the INA whether there is a right to counsel in non-refoulement interviews because the INA does not mention non-refoulement interviews at all." *Id.* But the district court's focus on the absence of non-refoulement interviews in the text of the INA was misplaced because, as the government has demonstrated, non-refoulement interviews only occur pursuant to § 1225(b)(2)(C) and simply exercise the statutory authority in § 1225(b)(2)(C). *See* ER125 ("[A] third-country national should not be involuntarily

returned to Mexico pursuant to Section [1225](b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, [or] nationality."). The district court appeared to recognize this fact, *see* Tr. 25:1-5 (ER60) ("[Section] 1225(b)(2)(C) is the statutory mechanism by which MPP is put into place."); *id.* at 43:18-19 (ER78) ("1225(b)(2)(C) is the authority that the Government uses for the whole program."). And, as explained above, Congress's intent in section 1225(b)(2)(C) is apparent from the provision's text and the INA's structure: there is no right to counsel in any proceeding that may occur as part of any implementation of the return authority under § 1225(b)(2)(C), including non-refoulement interviews.

This Court's precedent in *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011), confirms that the district court erred. In *Barajas-Alvarado*, this Court rejected the claim that aliens in expedited removal proceedings who have not been convicted of an aggravated felony have a "right to counsel" because no "applicable statute . . . indicate[s] that such aliens have any such right." 655 F.3d at 1088. This conclusion stemmed from the fact that section 1225(b)(1), apart from the limited consultation right prior to credible-fear interviews, *see* 8 U.S.C. § 1225(b)(1)(B)(iv), does not mention any right to counsel and simply provides that aliens in expedited removal proceedings shall be "removed from the United States without further hearing or review." *Id.* § 1225(b)(1)(A)(i); *Barajas-Alvarado*, 655 F.3d at 1081. Section 1225(b)(1) also does not specify what

procedures are used for expedited removal, leading the agency to, as in the return context, "promulgate[]" "procedures for expedited removal" unmentioned in the INA. *Barajas-Alvarado*, 655 F.3d at 1081; *see also* 8 C.F.R. § 235.3(b)(2)(i). The absence of these procedures from the statute led this Court to hold that the "applicable statute" provides no right to counsel. *Barajas-Alvarado*, 655 F.3d at 1088. Similarly, the applicable statute governing returns to Mexico under MPP, 8 U.S.C. § 1225(b)(2)(C), supplies no right to counsel, so the district court should have likewise held that there is no right to counsel in the non-refoulement interviews that occur as part of the authority exercised under section 1225(b)(2)(C).

The district court concluded that any comparison between "expedited removal proceedings and non-refoulement interviews" was a "non-sequitur" because the two "are not comparable immigration proceedings." Order 9. But that is not a ground for disregarding *Barajas-Alvarado*'s plain teaching, which is that the absence from an INA provision of a right to counsel means that the provision does not afford a right to counsel and the court should not read such a right into the statute. The district court also attempted to distinguish *Barajas-Alvarado* on the basis that there, this Court's "reasoning necessarily depend[ed] on Congressional consideration of both expedited removal proceedings and formal removal proceedings." Order 11. The "Congressional consideration" the district court alluded to, however, *id.*, is just as apparent here as it was in *Barajas-Alvarado*. Specifically, this Court in *Barajas-*

Alvarado attached importance to the fact that the INA and its implementing regulations "provide a right of counsel" in "formal removal proceedings, as compared to expedited removal proceedings, where they do not," except for the right to counsel in section 1228 for aliens convicted of an aggravated felony. 655 F.3d at 1088. Similarly, "compar[ing]" return decisions and non-refoulement interviews, *id.*, to "expedited removal proceedings and formal removal proceedings," Order 11, compels the conclusion that there is no right to counsel in non-refoulement interviews because Congress specifically provided for a right to counsel and a right to consult, respectively, in the latter two proceedings, while no comparable right in the return statute exists.

In a footnote, the district court attempted to sidestep the import of the fact that "§ 1225(b)(1)(B)(iv) . . . provides for the right to consult with counsel prior to a [credible fear interview]" while there is no "mention of a right to access counsel . . . in immigration proceeding[s]" carried out under 8 U.S.C. § 1225(b)(2)(C) by reiterating that "§ 1225(b)(2)(C) says nothing about the duty of non-refoulement or the mechanisms by which Respondents comply with this obligation." Order 11 n.4. This is yet another example of the district court improperly attempting to decouple non-refoulement interviews that occur under MPP from the single statutory source that they spring from, § 1225(b)(2)(C). And the district court's focus on the "duty of non-refoulement," Order 11 n.4, is particularly misplaced, as petitioners' claim is

not predicated on any alleged breach of a substantive duty of non-refoulement, unlike other claims raised in different cases before this Court, *see Innovation II*, 951 F.3d at 1089, but is instead limited to asserting that the existing procedures governing access to counsel in non-refoulement interviews are inadequate. *See* ER159-60 (Compl. ¶¶ 160-165). For this reason, the district court's alarmist statement that "[if] Respondents' argument were true and § 1225(b)(2)(C) concerned the procedures of a non-refoulement interview, then, by extension, the lack of mention of non-refoulement interviews ... could be used to argue Congress did not intend for there to be a duty of non-refoulement altogether," Order 11 n.4, is irrelevant. Moreover, the district court's reasoning fails on its own terms because non-refoulement interviews that occur under MPP pursuant to section 1225(b)(2)(C) and the duty of non-refoulement are not coextensive; in other parts of the INA not at issue here, Congress specifically addressed the duty of non-refoulement without mentioning non-refoulement interviews.[2]

[2] In 8 U.S.C. § 1231(b)(3)(A), for example, Congress specifically codified the "duty of non-refoulement," *id.*, in full removal proceedings by mandating that no alien may be removed to a country where "the alien's life or freedom would be threatened in that country because of the alien's race, religion, [or] nationality, membership in a particular social group, or political opinion."

B. Even if the APA Applied Here, Its Right-to-Counsel Provision by Its Plain Terms Does not Provide a Right to Counsel to Aliens Who are Subject to 8 U.S.C. § 1225(b)(2)(C).

The district court also erred when it held that the APA (assuming that it, and not only the INA, applies here) provides a right to counsel for class members in their MPP non-refoulement interview. Order 14-15. By its plain terms, the APA's right-to-counsel provision does not provide class members that right.

The APA provision on which the district court relied provides a right to counsel if "[a] person [is] compelled to appear in person before an agency." 5 U.S.C. § 555(b). By its plain terms, this Court has recognized that this provision "grant[s] the right to counsel to any witness subpoenaed to appear before any federal agency." *SEC v. Higashi*, 359 F.2d 550, 551 (9th Cir. 1966); *see FCC v. Schreiber*, 329 F.2d 517, 525 (9th Cir. 1964) ("The first sentence [of § 555(b)] reverses [previous] law . . . holding that witnesses subpoenaed in an administrative investigation may be denied representation by counsel. If the person is compelled to appear, he is entitled to counsel."); *id.* at 535 n.32 (Browning, J. dissenting in part) ("It is clear, of course, that this provision relates only to persons whose appearance is compelled or commanded, and does not extend to persons who appear voluntarily or in response to mere request by an agency." (quoting the Attorney General's Manual on the Administrative Procedure Act at 61-62 (1947)). Thus, whether this provision applies accordingly turns on whether an individual "appears at [the] proceedings

voluntarily," *Clardy v. Levi*, 545 F.2d 1241, 1244 (9th Cir. 1976), as reflected in the ordinary meaning of the word "compel": "cause or bring about by force, threats, or overwhelming pressure." Black's Law Dictionary (10th ed. 2014). Other courts have likewise recognized that this provision is limited to situations where individuals involuntarily appear before agencies. *See SEC v. Csapo*, 533 F.2d 7, 10 (D.C. Cir. 1976) ("[The provision] provides that any person summoned to appear before a federal agency is entitled to the assistance of counsel."); *Miss. River Corp. v. FTC*, 454 F.2d 1083, 1093 (8th Cir. 1972) ("The [s]tatute . . . appears to be designed for the protection of witnesses, not for the benefit of litigants."); *Salem v. Pompeo*, No. 19 CV 0363 (SJ), 2020 WL 108561, at *5 (E.D.N.Y. Jan. 8, 2020) ("The government is correct that, '[c]ompelled' is a term of art connoting an obligatory, involuntary action . . . . Plaintiffs cite no cases in which the term 'compelled' in [§] 555(b) is understood outside the context of a summons or subpoena.").

Under the statute's plain text, it does not confer a right to counsel in non-refoulement interviews. Non-refoulement interviews do not occur unless aliens potentially amenable to MPP take the affirmative, voluntary step of articulating a fear of return to Mexico to the agency. *See* Order 4 ("As applied to the MPP, asylum seekers must first express a fear of returning to Mexico, and those that do are then detained by CBP pending a non-refoulement interview with USCIS Asylum Officers."); *Innovation II*, 951 F.3d at 1089 ("[A]sylum seekers must volunteer,

without any prompting, that they fear returning."). So unlike a "summons or a subpoena," *Salem*, 2020 WL 108561, at *5, non-refoulement interviews occur only if aliens take an affirmative step of articulating a fear of returning to Mexico "without any prompting." *Innovation II*, 951 F.3d at 1089. Because appearance at non-refoulement interviews is voluntary and is triggered by the alien, not the agency, aliens undergoing non-refoulement interviews are not "compelled" to appear under any plausible definition of that term. 5 U.S.C. § 555(b).

The district court acknowledged that the right to counsel under this APA provision applies only when an individual is "compelled to appear in person before an agency." Order 14-15. And the court acknowledged that "asylum seekers must articulate a fear of return to Mexico before non-refoulement interviews commence." Order 15. But the court held that class members were "compelled" to appear because "[a] non-refoulement interview is merely the next step in a long, multi-stage immigration process, and it is irrelevant to the applicability of § 555(b) whether or not [p]etitioners triggered that process." *Id.* That view is irreconcilable with the plain meaning of "compelled," which is to "cause or bring about by force, threats, or overwhelming pressure." Black's Law Dictionary (10th ed. 2014). Because class members voluntarily "trigger[] [the] process" for a non-refoulement interview, Order 15, they are in no sense "compelled" to appear for such an interview. This case is a far cry from a subpoena, *see Schreiber*, 329 F.2d at 525, or a summons, as

class members are not coerced or commanded to appear at their non-refoulement interviews.

The district court relied on a single sentence from this Court's decision in *Smiley v. Dir., Office of Worker Programs*, 984 F.3d 278, 282 (9th Cir. 1993), which held that for "hearings under the Longshore Act," individuals have a "statutory right to be advised and represented by counsel." *See* Order 15 ("To hold otherwise would suggest § 555(b) does not apply in workers' compensation hearings—hearings that are initiated by the same individuals claiming a right to counsel under § 555(b). The Ninth Circuit has, however, held otherwise."). But *Smiley* is inapposite for two reasons.

First, and foremost, the single citation to § 555(b) in *Smiley* did not apply the right to counsel provision that the district court relied on. As the district court noted, "[s]ection 555(b) contains two distinct provisions on access to retained counsel," the provision that formed the basis for the decision below, and a second provision stating that a "party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." Order 14 (quoting 5 U.S.C. § 555(b)).[3] Although the opinion in *Smiley* does not say which part of

[3] To the extent petitioners ask this Court to affirm on the alternative ground that the second provision of § 555(b) supports the injunction below, that argument should be rejected because: (1) the district court, "in the first instance," should address that issue on remand, *Clark v. Chappell*, 936 F.2d 944, 971 (9th Cir. 2019); (2) as the government argued below, non-refoulement interviews are not "agency

§ 555(b) applies, this Court was likely referring to the "second provision" of section 555(b), Order 14, because the agency proceeding in question in *Smiley* was a "hearing[] held under the Longshore Act" on the record that determined whether or not workers' compensation benefits were awarded. 984 F.2d at 282. Such a proceeding is a textbook example of an "agency proceeding" within the meaning of the second provision of section 555(b). *See* 5 U.S.C. § 554(a) ("This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record."); 33 U.S.C. § 919(d) ("[A]ny hearing held under [the Longshore Act] shall be conducted in accordance with the provisions of section 554 of title 5."); 5 U.S.C. § 551(7), (12) (noting that an "agency proceeding" includes an "adjudication"). Indeed, *Smiley* never even mentions the word "compelled."

Second, the holding in *Smiley* was predicated on the explicit statutory requirement that "hearings under the Longshore Act shall be conducted pursuant to the Administrative Procedure Act," 984 F.2d at 278, and cited, along with § 555(b), regulations specific to the Longshore Act that provide a right to counsel. *See id.*; 20 C.F.R. § 702.334 ("The claimant and the employer or carrier may be represented by persons of their choice."). It is impossible to separate the statement in *Smiley* that

proceeding[s]" within the meaning of section 555(b), Dkt. 30 at 15-16; and (3) in any event, the remaining arguments the government advances on appeal warrant reversal even if the second provision of § 555(b) applied, which it does not.

the claimant had a "right to be advised and represented by counsel," 984 F.2d at 278, from the statute and regulations specific to the Longshore Act providing that right.

The district court also attached importance to the fact that "[p]rior to non-refoulement interviews, asylum seekers are detained in" DHS custody and held that these "circumstances" supported its conclusion that class members are "compelled" to appear at their non-refoulement interviews. Order 15. That too was error, as these "circumstances," *id.*, were not a product of agency compulsion, but instead the direct result of the decision made by class members to enter the United States illegally and to "seek[] admission into the United States." *Clark v. Smith*, 967 F.2d 1329, 1331 (9th Cir. 1992). The district court did not cite a single case that has endorsed such a theory of implicit compulsion in the context of the right to counsel in section 555(b). Moreover, the expedited and full removal statutes "mandate detention" "until removal proceedings have concluded." *Jennings*, 138 S. Ct. at 844. It is therefore anomalous to hold, as the district court did, that time spent in "CBP custody," Order 15, amounts to specific action taken by USCIS to compel appearance at non-refoulement interviews when aliens subject to expedited or full removal proceedings who are not undergoing non-refoulement interviews are generally subject to detention.

C. In Any Event, the APA's Right-to-Counsel Provision Does Not Apply Here Because the INA Displaces It.

Finally, the district court erred in holding that the APA provides a right to counsel to class members because the INA supplants the APA. Order 8-10.

The law is settled that the INA "supplant[s] the APA in immigration proceedings." *Ardestani v. INS*, 502 U.S. 129, 133 (1991). The Supreme Court long ago "decided that" immigration proceedings "are not governed by the APA" in light "the background" of the INA, "its laborious adaption of the [APA] to the deportation process, the specific points at which deviations from the [APA] were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings." *Id.* at 133-34 (discussing *Marcello v. Bonds*, 349 U.S. 302 (1955)). Thus, "the INA expressly supersedes the hearing provisions of the APA" and "immigration proceedings" are "not governed by the APA." *Id.* at 133; *see Castillo-Villagra v. INS*, 927 F.2d 1017, 1026 (9th Cir. 1992) ("Part of the ratio decidendi in *Ardestani* was that 'immigration proceedings . . . are not governed by the APA.'"); *see also Allen v. Milas*, 896 F.3d 1094, 1102-03 (9th Cir. 2018) ("Congress may also preempt application of some or all of the APA . . . . The immigration laws provide a good example of these principles." (internal quotations omitted)); *Martinez v. Holder*, 383 F. App'x 637, 639 (9th Cir. 2010) ("Martinez's argument that he was entitled to be represented by

counsel at the border pursuant to the Administrative Procedure Act is without merit."). Other courts have similarly recognized that the INA displaces the APA in immigration proceedings. *See Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 623 (6th Cir. 2010) ("[I]mmigration proceedings . . . are not governed by the APA because Congress intended the provisions of the . . . INA . . . to supplant the APA in immigration proceedings." (internal quotations omitted)); *Quinteros Guzman*, 2019 WL 3220576, at *10 ("[T]he APA's provision regarding representation by counsel does not apply to an expedited removal [proceeding] under § 1225(b) . . . . [W]hen Congress passed the legislation including the expedited removal procedures, it did so against the backdrop of the holdings in *Marcello* and *Ardestani* which had established the general proposition that the APA did not apply to immigration proceedings.").

To be sure, the APA, at 5 U.S.C. § 559, provides that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly." But the Supreme Court in *Marcello* expressly accounted for that provision in holding that an explicit magic-words repudiation of the APA in the INA was not necessary to hold that the INA supplanted the APA because of the text and structure of the INA. *See Marcello*, 349 U.S. at 310 ("Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement . . . that modifications must be express. But . . . [u]nless we are to

require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act."); *see also Castillo-Villagra*, 972 F.2d at 1025 (acknowledging 5 U.S.C. § 559, yet holding that the "INA displaces the APA" on the question of "whether administrative notice was appropriate" in proceedings before the BIA even though "*Marcello* arguably [was] not dispositive" because "the alien concedes deportability").

Under the long-settled rule described in these cases, the INA "supplant[s] the APA" here, including the APA's right-to-counsel provision. *Ardestani*, 502 U.S. at 133. There was no basis for the district court to rely on the APA in holding that class members have a right to counsel in their non-refoulement interviews.

The district court held that *Ardestani* and *Marcello* did not compel that conclusion because, according to the court, "[d]istilled to their core holdings, both cases concern solely deportation proceedings, not *all* immigration proceedings." Order 8 (emphasis in original). That is not a sound reading of those cases and cannot be reconciled with the district court's own recognition that the APA does not apply to expedited removal proceedings conducted under 8 U.S.C. § 1225(b)(1). *See* Order 9. To start, *Ardestani* held that "the provisions of the Immigration and Nationality Act . . . supplant the APA in *immigration proceedings*." 502 U.S. at 133 (emphasis added); *id.* at 134 ("[W]e conclude that administrative *immigration*

proceedings do not fall under section 554." (emphasis added)); *see also Castillo-Villagra*, 927 F.2d at 1026 ("Part of the ratio decidendi in *Ardestani* was that immigration proceedings . . . are not governed by the APA."). The Supreme Court issued this holding despite separately discussing "deportation proceedings" in the same section of the opinion. *Ardestani*, 502 U.S. at 133-34. Courts have therefore held, based on *Ardestani*, that the APA does not apply in "immigration proceedings" that are not deportation proceedings, including full removal proceedings, *see Hamdi*, 620 F.3d at 623, and expedited removal proceedings that occur under section 1225(b)(1), *see Quinteros Guzman*, 2019 WL 3220576, at *10.

The district court also thought that the logic underlying both *Ardestani* and *Marcello* was confined to deportation proceedings. Order 8 ("Both cases emphasize the INA's laborious adaption of the [APA] to the deportation process and the INA's language asserting that it shall be the *sole* and *exclusive* procedure for deportation proceedings." (emphasis in original; internal quotations omitted)); *Marcello***,** 349 U.S. at 309 ("Section 242(b) expressly states: The procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien under this section."). This Court has held, however, that the reach of *Ardestani* is not limited to situations where the "sole and exclusive" clause described above is operative. In a case where an "alien concede[d] deportability"—nullifying the effect of the sole and exclusive clause that the district court emphasized—and "*Marcello*

arguably was not dispositive," this Court held that the APA is still displaced by the INA because of the "ratio decidendi in *Ardestani* . . . that immigration proceedings . . . are not governed by the APA." *Castillo-Villagra*, 972 F.2d at 1026; *id.* at 1025-26 (holding that "question" of whether "administrative notice was appropriate" in proceedings before the BIA had to be analyzed "under the INA" "[i]n light of *Ardestani*").

The "laborious adaptation of the" APA and the "specific points at which deviations from the" APA were made, *Ardestani*, 502 U.S. at 133-34, Order 8, is just as apparent in the present iteration of the INA as it was in the deportation proceedings at issue in *Ardestani* and *Marcello*. Congress adopted procedures approximating the hearing procedures in the APA in different proceedings, *see* 8 U.S.C. § 1229a, *id.* § 1228(b), and "specific[ally] "devia[ted]" from those procedures in other proceedings, *see* 8 U.S.C. § 1225(b)(1), including the return context at issue, *see* 8 U.S.C. § 1225(b)(2)(C). The "background" of section 1225, *Ardestani,* 502 U.S. at 133, buttresses the conclusion that the INA's displacement of the APA is not limited to deportation proceedings. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), legislation that, among other things, codified "expedited removal" proceedings codified at 8 U.S.C. § 1225(b)(1) and return decisions codified at 8 U.S.C. § 1225(b)(2)(C). *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 488-90 nn. 3, 5, 8-9 (9th Cir. 2007);

H.R. Rep. 104-828 at 33-37 (Sept. 24, 1996). Section 1225 was enacted "against the background of the holdings in *Marcello* and *Ardestani*, which had established the general proposition that the APA did not apply to immigration proceedings." *Quinteros Guzman*, 2019 WL 3220576, at *10; *see also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) ("We normally assume that Congress is aware of relevant judicial precedent when it enacts a new statute.").

Finally, the district court failed to offer any plausible explanation for the fact that its logic, if correct, would result in the APA's right to counsel applying in expedited removal proceedings conducted under 8 U.S.C. § 1225(b)(1). As noted above, in *Barajas-Alvarado*, this Court held that aliens in expedited removal proceedings under section 1225(b)(1) have no right to counsel because no "applicable statute" provides such a right. 655 F.3d at 1088. Expedited removal proceedings are not deportation proceedings; unlike deportation proceedings, which were "determined on the record after a hearing," *Ardestani*, 502 U.S. at 133, in expedited removal proceedings, aliens are removed "without further hearing or review" unless they indicate an intent to apply for asylum. 8 U.S.C. § 1225(b)(1)(A)(i). And 8 U.S.C. § 1225(b)(1) does not even mention, let alone expressly negate, the APA. So if the district court were correct that *Ardestani* and *Marcello* apply "solely [to] deportation proceedings" and that "the APA's protection of the right to access of retained counsel" applies unless it is "expressly"

"supersede[ed] or modif[ied]," Order 8-9 (quoting 5 U.S.C. § 559), then under the district court's reasoning, the APA's right to counsel would apply in expedited removal proceedings that occur under section 1225(b)(1). But this Court has already squarely foreclosed such a conclusion, because no "*applicable* statute . . . indicat[e]s that such aliens have any such right." *Barajas-Alvarado*, 655 F.3d at 1088 (emphasis added).

The district court believed that because "the INA provision concerning expedited removal proceedings in section 1225 is complex, specialized, and specific to expedited removal proceedings," "the INA's expedited removal proceeding provision supersedes the APA." Order 9. But the district court did not substantiate that conclusion with statutory text "expressly" "supersed[ing]" the APA, 5 U.S.C. § 559, with good reason: no such "express[]" repudiation of the APA is found anywhere in section 1225. Order 9. Without such an express statement, the district court necessarily must have relied on Congress's enactment of "specialized" immigration proceedings, *id.*, outside the deportation context as "preempt[ing] application of some or all of the APA." *Allen*, 856 F.3d at 1102. The concession that such preemption applies, though, is fatal to the district court's reasoning, because the same preemption applies with equal force to § 1225(b)(2)(C), as the return statute is no less "specialized" or "specific." Moreover, the district court's conclusion amounts to an implicit acknowledgement that the logic underlying

Ardestani and *Marcello* is not confined to deportation proceedings. *Compare Ardestani*, 502 U.S. at 133-34 ("[T]he INA expressly supersedes . . . the APA in light of . . . the specific points at which deviations from the Administrative Procedure Act were made.") *with* Order 9 ("The INA provision concerning expedited removal proceedings is complex, specialized, and specific to expedited removal proceedings."). And though the district court portrayed section 1225(b)(1) as being distinguishable because of its "complex[ity]," Order 9, even a cursory glance at 8 U.S.C. § 1225(b)(1) belies this claim. Outside of articulating the procedures applicable to credible-fear interviews, and review of credible-fear determinations, the expedited removal statute is simple, providing for removal "without further hearing or review,"; the statute does not specify what procedures are used to remove aliens placed in expedited removal, and it does not mention or address the right to counsel at all past the credible fear stage. *See* 8 U.S.C. § 1225(b)(1), (b)(1)(B)(iv).

The district court also attempted to support its conclusion that the APA is not "supersede[d]" in non-refoulement interviews that occur under MPP, Order 9, with district court cases holding that section 555(b) mandates that visa applications must be adjudicated within a particular period of time. *See* Order 10 ("[A]lthough there is no statutory or regulatory deadline by which [U.S. Citizenship and Immigration Services] *must* adjudicate an application, at some point, defendants' failure to take any action runs afoul of section 555(b) [of the APA]." (quoting *Kim v. Ashcroft*, 340

F. Supp. 2d 384, 393 (S.D.N.Y. 2004) (emphasis in original)). But the reasoning in those cases is inapt for multiple reasons. First, and foremost, those cases concerned an entirely different part of 5 U.S.C. § 555(b), that the agency act "within a reasonable time." Second, the cases in the visa context that the district court relied on predicated their conclusions on the practical consequences that might ensue: "[w]ere it otherwise, the CIS could hold adjustment applications in abeyance for decades without providing any reasoned basis for doing so." *Kim*, 340 F. Supp. 2d at 393. Even if such reasoning is permissible, it is immaterial here because the district court did not explain how or why similar consequences would follow in this case. That failure is particularly glaring because the INA specifically contemplates and provides a right to counsel in certain proceedings. It just does not provide such a right to class members in their non-refoulement interviews.

An additional reason the district court's decision should not be upheld is that under the district court's reasoning, multiple provisions of the INA would be superfluous. *See* Tr. at 24:13-17 (ER59). Since, according to the district court, the APA right to counsel applies in proceedings that: (1) are not deportation proceedings; and (2) lack an express statement disavowing the APA, Order 8-9, the APA right to counsel would also apply prior to credible-fear interviews in expedited removal proceedings, in expedited removal proceedings for aliens convicted of an aggravated felony, and in full removal proceedings, making 8

U.S.C. § 1225(b)(1)(B)(iv), 8 U.S.C. § 1228(b)(4)(B), and 8 U.S.C. § 1362 duplicative and unnecessary, a result Congress could not have intended. *See Nguyen v. Sessions*, 901 F.3d 1093, 1097 (9th Cir. 2018) ("In construing a statute, we are obliged to give effect, if possible, to every word Congress used."). In sum, the logical consequences of the decision below underscore what is readily apparent: the specialized statutory sections of the INA, including section 1225(b)(2)(C) "preempt" the APA. *Allen*, 896 F.3d at 1102.

Since the APA's right-to-counsel provision does not apply to non-refoulement interviews, the injunction the district court imposed should be reversed because the district court incorrectly held that petitioners had established "likely success on the merits," which is the "most important" factor in assessing whether a preliminary injunction should issue. Order 7; *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Reversal is particularly appropriate because the injunction petitioners obtained was a "mandatory injunction" compelling the government to take "affirmative action" altering the status quo. *Garcia*, 786 F.3d at 740. Accordingly, the burden on petitioners to demonstrate an entitlement to injunctive relief was "doubly demanding"; they had to "establish that the law and facts *clearly favor*[ed] [their] position, not simply that [they were] likely to succeed." *Id.* (emphasis in original); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994) ("Because mandatory preliminary injunctions are disfavored in this circuit, we are compelled

to review the record to determine whether the facts and the law clearly favor [plaintiff].").

II. The Balance of Harms Favors the Government.

The district court erred in holding that the balance of harms favored granting petitioners' preliminary injunction motion. Order 16-19.

MPP is "one of the few congressionally authorized measures available to process the approximately 2,000 migrants who are currently arriving at the Nation's southern border on a daily basis," so any injunction that places restrictions on the manner in which the government can use that tool inflicts tangible and immediate harm. *Innovation I*, 924 F.3d at 510. The injunction "deeply intrudes into the core concerns of the executive branch" by improperly dictating how DHS must exercise its statutory authority under section 1225(b)(2)(C). *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978). Moreover, as the government demonstrated below, the injunction the district court imposed undermines national security by impeding immigration officers from discharging their duties with respect to both criminal investigations and the flow of illegal immigration. Non-refoulement interviews under MPP occur in the same location as ongoing sensitive law enforcement operations, and in-person visitation from counsel during non-refoulement interviews impairs the ability of sensitive law enforcement investigations to proceed. *See* Order 17; *Winter v. NRDC*, 555 U.S. 7, 33 (2008) ("[W]e see no basis for jeopardizing

national security, as the present injunction does."). And the injunction strains the already-limited capacity of border patrol stations, further hamstringing the government's ability to mitigate the crisis on the southern border. *See* Order 17. Finally, the government has a "weighty" "interest in efficient administration of the immigration laws at the border." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

The harms asserted by class members do not outweigh the significant harms the injunction imposes on the government. First, the named petitioners were already "taken out of . . . MPP" at the time the preliminary injunction issued, Order 2, so any alleged past harm that they avoided because of access to counsel, *see id.* at 16, is irrelevant, as the relevant inquiry is whether class members are "likely to suffer irreparable harm" in the future "in the absence of preliminary relief." *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009). The district court found that "class members face the possibility of being forced to return to Mexico" "if injunctive relief is not granted," Order 18, but petitioners were required to establish that class members were "*likely*" to suffer "irreparable harm," not just that irreparable harm is "possible." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (emphasis in original).

The district court discounted the "additional procedural requirements" mandated by the injunction because it held that these "procedural requirements are required by federal law, specifically the APA." Order 17-18. As the government

has demonstrated, however, that conclusion is erroneous. And though the district court held that the government "failed to demonstrate" why the injunction would "impede the efficient administration of immigration laws at the border," *id.* at 18, the district court acknowledged record evidence from the government showing that the injunction would present both "national security" and resource concerns. Order 17.

CONCLUSION

The Court should reverse the district court's preliminary injunction.

Respectfully submitted,

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Dated: April 30, 2020

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

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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 10,226 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 April 30, 2020, 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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