No. 19-1212

IN THE

Supreme Court of the United States

CHAD WOLF,
ACTING SECRETARY OF HOMELAND SECURITY, *et al.*,

Petitioners,

—v.—

INNOVATION LAW LAB, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

Cecillia Wang
Julie Veroff
Spencer Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

David D. Cole
Carmen G. Iguina Gonzalez
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Judy Rabinovitz
Counsel of Record
Lee Gelernt
Anand Balakrishnan
Celso J. Perez
David Chen
Michael K.T. Tan
Omar C. Jadwat
Steven Watt
Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
jrabinovitz@aclu.org

Counsel for Respondents

(*Additional Counsel Listed on Inside Cover*)

Melissa Crow
SOUTHERN POVERTY
LAW CENTER
1101 17th Street, NW, Suite 705
Washington, D.C. 20036

Gracie Willis
SOUTHERN POVERTY
LAW CENTER
150 East Ponce de Leon Avenue,
Suite 340
Decatur, GA 30030

Sean Riordan
AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN
CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111

Karen Musalo
Blaine Bookey
Sayoni Maitra
Anne Peterson
CENTER FOR GENDER AND
REFUGEE STUDIES
UC HASTINGS COLLEGE
OF THE LAW
200 McAllister Street
San Francisco, CA 94102

Counsel for Respondents

QUESTIONS PRESENTED

In January 2019, the Department of Homeland Security ("DHS") for the first time ever began requiring applicants for admission at the southern border who lacked valid documentation to return to Mexico to await their removal proceedings. The so-called "Migrant Protection Protocols" ("MPP") are purportedly authorized by 8 U.S.C. 1225(b)(2)(C). But a different provision, 8 U.S.C. 1225(b)(1), applies to those seeking admission who are deemed inadmissible for lack of documents, and the statute expressly excepts from 8 U.S.C. 1225(b)(2) any "alien . . . to whom [1225(b)(1)] applies."

The questions presented are:

1. Whether MPP is a lawful implementation of the statutory authority conferred by 8 U.S.C. 1225(b)(2)(C), which expressly does not apply to an "alien . . . to whom [1225(b)1)] applies."

2. Whether MPP is consistent with nonrefoulement obligations reflected in 8 U.S.C. 1231, where it has been implemented in such a way as to deny individuals notice of their right to nonrefoulement and a meaningful opportunity to establish their entitlement to protection.

3. Whether the issuance of MPP without notice-and-comment rulemaking violates the Administrative Procedure Act ("APA").

4. Whether the district court's preliminary injunction covering the entire U.S.-Mexico border is permissible in light of the border-wide scope of the organizational plaintiffs' work, and consequent injuries.

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INTRODUCTION

This case concerns an unprecedented policy, the Migrant Protection Protocols ("MPP"), under which the Department of Homeland Security ("DHS") forces people seeking protection from persecution or torture to pursue those claims from outside the country under life-threatening conditions where the possibility of obtaining a fair resolution of their claims is virtually nonexistent.[1] MPP is contrary to law because it purports to return asylum seekers to Mexico under a statute that expressly exempts them from such return; violates our country's nonrefoulement obligations as codified in the withholding statute; and was implemented without notice-and-comment rulemaking.

STATEMENT

A. LEGAL BACKGROUND

1. Section 1225(b)'s Two Categories

As this Court has recognized, 8 U.S.C. 1225(b) divides noncitizens seeking admission into two distinct categories. "[A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

Section 1225(b)(1) (hereinafter "(b)(1)") governs applicants determined to be inadmissible on one of two grounds—fraud or misrepresentation in connection with admission, 8 U.S.C. 1182(a)(6)(C), or lack of valid documents, *id.* 1182(a)(7). *See id.* 1225(b)(1)(A)(i). These applicants are subject to

[1] Mr. Chad Wolf has resigned as Acting Secretary of Homeland Security.

expedited removal, in which they are ordered removed "without further hearing or review," often in a matter of days. *Id.* If they seek asylum, they are referred for a credible fear interview by an asylum officer. *Id.* 1225(b)(1)(A)(i), (ii). Applicants who establish a "credible fear" are referred for further consideration of their asylum applications in regular removal proceeding governed by 8 U.S.C. 1229a. *Id.* 1225(b)(1)(B)(ii); 8 C.F.R. 208.30(f). Those that do not are summarily removed.

Section 1225(b)(2) (hereinafter "(b)(2)") governs "other aliens" seeking admission. 8 U.S.C. 1225(b)(2) (title). It "applies to all applicants for admission *not covered by § 1225(b)(1)*," *Jennings*, 138 S. Ct. at 837 (emphasis added). Subsection (b)(2) is comprised of three subparagraphs. Subparagraph (A) provides that "[s]ubject to subparagraphs (B) and (C)," applicants who are "not clearly and beyond a doubt entitled to be admitted shall be detained for a [regular removal] proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(A). Subparagraph (B), titled "Exception," carves out three categories of individuals to whom "[s]ubparagraph (A) shall not apply"—crewmen, stowaways, and, most relevant here, individuals "to whom [1225(b)(1)] applies." *Id.* 1225(b)(2)(B).

Subparagraph (C), the predicate for the return to Mexico policy at issue here, provides:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to

> that territory pending a proceeding under section 1229a of this title.

It applies only to individuals "described in subparagraph (A)." *Id.* 1225(b)(2)(C).

In *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520 (BIA 2011), the Board of Immigration Appeals ("BIA") held that an immigration officer can exercise discretion to place an applicant who would otherwise be subject to expedited removal under 1225(b)(1) into regular removal proceedings under 1229a. Section 1229a provides that "[u]nless otherwise specified," its regular removal proceedings are the "sole and exclusive" means for adjudicating admission and removal. 8 U.S.C. 1229a(a)(3). The statutory question here is whether this discretion allows the use of return authority for those individuals inadmissible on the grounds specified in (b)(1) and therefore subject to expedited removal.

B. The Nonrefoulement Obligation

Immigration law prohibits the return of noncitizens to a risk of persecution or torture. This "nonrefoulment" obligation stems from Article 33 of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention")[2] and Article 3 of the Convention Against Torture ("CAT").[3] Congress implemented Article 33 of the Refugee Convention in the withholding statute, 8 U.S.C. 1231(b)(3). *Sale v.*

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[2] Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (binding the United States to comply with Article 33 of the Refugee Convention).

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 114.

Haitian Ctrs. Council, Inc., 509 U.S. 155, 178–79 (1993). Congress implemented Article 3 of CAT by providing that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a), Pub. L. No. 105-277, Div. G., Tit. XXI, 112 Stat. 2681 (codified at 8 U.S.C. 1231 note). Protection under the withholding statute and CAT are mandatory, meaning that DHS must provide protection to all who meet the statutory qualifications. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

In regular removal proceedings under 1229a, noncitizens must demonstrate "that it is more likely than not" that they face persecution or torture to qualify for these protections. 8 C.F.R. 208.16(b), (c); *see also INS v. Stevic*, 467 U.S. 408, 429–30 (1984). To meet this burden, they are entitled to a full evidentiary hearing before an immigration judge, notice of their rights, access to counsel, time to prepare, and administrative and judicial review. *See* 8 U.S.C. 1362; *id.* 1229a(b)(4)(A), (B), (b)(5); *id.* 1252(a); 8 C.F.R. 1240.3, 1240.15.

In (b)(1) expedited removal proceedings, immigration officers must affirmatively ask whether the individual has "any fear or concern about being returned to [their] home country or being removed from the United States." Supp. App. 1a–4a. (Form I-867AB); 8 C.F.R. 235.3(b)(2)(i). If fear is expressed, noncitizens are referred to an interview at which they need only demonstrate a "credible fear" of persecution, namely, a "significant possibility" that they can meet the ultimate more-likely-than-not standard in regular

removal proceedings. 8 U.S.C. 1225(b)(1)(A)(ii), (b)(1)(B)(v). Individuals may consult with and bring an attorney to their credible fear interview. 8 C.F.R. 208.30(d)(4). The asylum officer must "elicit all relevant and useful information," ensure noncitizens understand the process, 8 C.F.R. 208.30, summarize the material facts stated by the applicant, review that summary with the applicant for any corrections, and create a written record of his or her decision, 8 U.S.C. 1225(b)(1)(B)(iii)(II); 8 C.F.R. 208.30(d)(6), (e)(1). Individuals are entitled to review by an immigration judge of negative credible fear determinations. 8 C.F.R. 208.30(g).

B. FACTS

Until recently, individuals who arrived at the southern border without valid documents were placed into expedited removal proceedings under (b)(1). If they expressed a fear of persecution that an asylum officer deemed credible, they were referred for regular removal proceedings under 1229a. In certain circumstances the government would place individuals directly into regular removal proceedings as a matter of discretion. All those referred for regular proceedings were allowed to remain in the United States, often in detention, pending completion of those proceedings.

In December 2018, DHS announced its "return[] to Mexico" policy under the title "Migrant Protection Protocols" ("MPP"). Pet. App. 179a. Under MPP, non-Mexican asylum seekers who arrive at the southern border without proper documents may now be placed into regular removal proceedings but returned to Mexico until those proceedings conclude. As a result, for the first time ever, the government is

forcing thousands of asylum seekers to wait in highly dangerous regions of Mexico for the months or years it takes to conclude their asylum proceedings.

DHS began implementing MPP in January 2019, without notice and comment. Months earlier, members of Congress had explicitly warned DHS of the "dangerous conditions [that] would make it all but impossible for families, children and other vulnerable individuals to access asylum" if made to wait in Mexico. J.A. 423. And the agency had before it numerous undisputed reports detailing threats faced by migrants, including: rape, human trafficking, and kidnapping, J.A. 373, 378, 404, 417; persecution by cartels, other criminal organizations, and corrupt Mexican officials, J.A. 393, 396, 417; and unlawful deportations from Mexico to Central America, J.A. 373, 378. DHS was also aware of reports that Mexico was unable to protect migrants from these dangers. J.A. 411. In the face of this evidence, DHS relied on a four-page "Press Release" by Mexican officials, J.A. 147–50, to assert that asylum seekers would receive "protections [in Mexico] while they await a U.S. legal determination," Pet. App. 180a.

The agency has returned asylum seekers to border regions that the State Department considers as hazardous active-combat zones. U.S. Dep't of State, *Mexico Travel Advisory*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last visited Jan. 13, 2021). The State Department has warned that "gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault" are common there, and that "local law enforcement has limited capability to respond to crime incidents." *Id.*; *see also* J.A. 544, 559, 575 (State Department

report documenting violence against migrants by criminal groups and Mexican authorities).

MPP exempts from return persons "more likely than not to face persecution or torture in Mexico." Pet. App. 156a. Yet it makes this protection nearly impossible to access, imposing an unprecedented combination of a high burden of proof with an absence of any meaningful procedural protections. Instead of the "credible fear" required in expedited removal, applicants subject to MPP must meet the ultimate more-likely-than-not standard used in regular removal proceedings to adjudicate claims for withholding protection, without any of the procedural protections that those proceedings offer. And unlike any other removal setting, DHS does not even notify individuals in MPP of their right to protection from persecution or torture in Mexico—instead requiring them to affirmatively express a fear of return. J.A. 59.

DHS does not regularly release data on the fate of those in MPP, but in October 2019, it reported that of 55,000 noncitizens placed into MPP, less than 2% were exempted based on satisfying the fear standard MPP requires. Pet. App. 205a, 212a.

DHS claimed MPP would provide a "safer and more orderly process" for asylum seekers at the border. Pet. App. 176a. But the program has done just the opposite. *See* Human Rights First, et. al. Amicus Br. Thousands subjected to MPP remain in Mexico awaiting their removal proceedings. Virtually all were placed in MPP solely because they lacked proper documents—a common situation for asylum seekers, who are often unable to obtain proper papers precisely because they are fleeing persecution. Pet. App. 24a. The dangers they face in Mexico, the challenges of

obtaining legal assistance from Mexico, and the delays in the scheduling of their removal proceedings, have led many to abandon altogether *bona fide* claims for protection. *See* Human Rights First, et. al. Amicus Br.

Only about 7% of individuals in MPP have legal representation, compared to 60% of those in the United States.[4] Of 42,372 MPP cases that had been adjudicated on the merits by Immigration Judges as of November 2020, only about 615 individuals had been granted asylum or other relief. *See* TRAC Immigration, *Details on MPP*, *supra* n.4. Independent reporting confirms that asylum seekers face a pattern of kidnappings, extortion, and death—and that many persons subject to MPP are forced to abandon their claims as a result. *See* Human Rights First, et. al. Amicus Br.

The incoming administration has described MPP as "effectively clos[ing] our country to asylum seekers, forcing them to choose between waiting in dangerous situations, vulnerable to exploitation by cartels . . . [and] taking a risk to try crossing between the ports of entry." *The Biden Plan for Securing Our Values as a Nation of Immigrants*, https://joebiden.com/immigration/ (last visited Jan.

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[4] *Compare* TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/ (last visited Jan. 13, 2021) (hereinafter "TRAC Immigration, *Details on MPP*") (noting 5,148 of a total 69,333 cases are represented) *with* Executive Office for Immigration Review ("EOIR") Adjudication Statistics, Current Representation Rates (Oct. 13, 2020), https://www.justice.gov/eoir/page/file/1062991/ download (last visited Jan. 13, 2021) (noting 60% of immigrants represented in removal proceedings in the U.S.).

13, 2021). The incoming administration has named ending MPP a priority. *Id.*

C. PROCEDURAL HISTORY

Plaintiffs include 11 asylum seekers fleeing persecution in Central America, who have been returned to Mexico under MPP, and six legal service providers who represent asylum seekers who arrive through the southern border. Pet. App. 54a.

Plaintiffs brought this suit in February 2019, and moved for a preliminary injunction on five grounds: (1) MPP violates 8 U.S.C. 1225(b) because it is being applied to asylum seekers whom the statute expressly exempts from contiguous-territory return; (2) MPP fails to provide minimally adequate procedures necessary to comply with the nonrefoulement obligation reflected in 8 U.S.C. 1231; (3) MPP's procedures are arbitrary and capricious in their implementation of the agency's statutory nonrefoulement obligation; (4) DHS failed to comply with the APA's notice-and-comment obligations; and (5) MPP is arbitrary and capricious because the agency's asserted justifications were not rationally connected to the policy's design. Pet. App. 73a–78a.

The district court issued a preliminary injunction and "enjoined and restrained [DHS] from continuing to implement or expand the 'Migrant Protection Protocols.'" Pet. App. 83a. A motions panel of the Ninth Circuit granted DHS's request to stay the injunction pending appeal. *Id.* 107a. Judge Watford concurred but wrote separately to express concern that DHS "adopted procedures so ill-suited to achieving [the goal of compliance with nonrefoulment obligations] as to render them arbitrary and capricious." *Id.* 108a.

The court of appeals subsequently upheld the preliminary injunction, holding that it was likely that MPP was not statutorily authorized, Pet. App. 18a, and that MPP "does not comply with the United States' anti-refoulement obligations under [8 U.S.C.] 1231(b)," *id.* 38a. It noted that MPP requires asylum seekers, "unprompted and untutored in the law of refoulement, [to] volunteer that they fear returning to Mexico," even to receive a fear screening. *Id.* 30a–31a. The court did not reach plaintiffs' other claims. *Id.* 38a.

Under the APA, and in light of the fact that the plaintiff organizations serve clients across the southern border, the court held that "the offending agency action should be set aside in its entirety rather than only in limited geographical areas." Pet. App. 40a. It thus upheld the injunction's application across the southern border. *Id.* 41a.

Judge Fernandez dissented, but noted the "dearth of support for the government's unique rule that an alien processed under the MPP must spontaneously proclaim his fear of persecution or torture in Mexico." Pet. App. 46a–47a.

DHS moved to stay the merits decision, which the merits panel granted in part, limiting the injunction's scope to the Ninth Circuit. Pet. App. 93a. This Court then granted DHS's motion to stay the injunction in full pending resolution of a petition for certiorari. *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (Mar. 11, 2020).

SUMMARY OF ARGUMENT

I. Section 1225(b) establishes two distinct categories of applicants for admission, (b)(1) and

(b)(2), each subject to distinct procedures. The text and structure of 1225(b) make clear that the return authority, the basis for MPP, is inapplicable to "an alien . . . to whom [(b)(1)] applies." 8 U.S.C. 1225(b)(2)(B)(ii).

Subsection (b)(1) applies to all individuals determined to be inadmissible for lack of valid documents, or fraud or misrepresentation, and provides for their expedited removal without a hearing, unless they demonstrate a "credible fear" of persecution. 8 U.S.C. 1225(b)(1)(B)(ii). Subsection (b)(2), by contrast, expressly applies to "*other aliens*," and provides for regular removal proceedings. *Id.* 1225(b)(2), (b)(2)(A) (emphasis added). That (b)(1) and (b)(2) describe distinct categories is confirmed by subparagraph (B) of (b)(2), entitled "Exception." It provides that "[s]ubparagraph (A)" of (b)(2) "shall not apply to an alien . . . to whom [(b)(1)] applies." *Id.* 1225(b)(2)(B)(ii). Congress could not have been clearer: it expressly carved out of (b)(2) those covered by (b)(1).

The contiguous-territory-return provision applies only to applicants "described in subparagraph (A)" of (b)(2). *Id.* 1225(b)(2)(C). Because the statute expressly excepts (b)(1) applicants from subparagraph (A), they are not "described in subparagraph (A)" and cannot be subjected to contiguous-territory return. DHS is therefore violating 1225(b)(2) by subjecting to MPP (b)(1) applicants inadmissible solely for lack of valid documents.

Congress sensibly made the return authority available for (b)(2) applicants who can only be removed through regular removal proceedings, which can take months or years to resolve, and not for (b)(1)

applicants who are subject to expedited removal and may be summarily removed in days. The text of 1225(b)(2) reflects Congress's reasonable expectation that temporary return to a contiguous territory is not necessary for those who can be promptly removed, and not warranted for those who, under (b)(1), are referred for a regular removal proceeding if they establish a "credible fear" of persecution.

DHS's contrary reading is incompatible with the statute's text and structure. DHS contends that (b)(1) and (b)(2) are not distinct, but "overlap[ping]," categories, and that it can choose in which category to place applicants for admission who it determines lack valid documents. DHS maintains that because it placed plaintiffs in regular removal proceedings, they are (b)(2) applicants, not (b)(1) applicants, and are thereby subject to contiguous-territory return. But while the BIA has upheld DHS's "enforcement discretion" to forebear placing (b)(1) applicants in expedited removal, and to place them instead in regular removal proceedings, "enforcement discretion" does not authorize DHS to apply a statute, (b)(2), that by its own terms "shall not apply" to (b)(1) applicants.

Accepting DHS's argument would require rewriting the statute. Where the statute's "Exception" clause expressly directs that (b)(2) "shall not apply" to anyone "to whom [(b)(1)] applies," DHS would read it to except only those "against whom DHS has invoked expedited removal." DHS's further argument—that one is "described in" (b)(2) as long as one is "not clearly and beyond a doubt entitled to be admitted"—would read out the "Exception" clause altogether. To fall within (b)(2), the statute as written requires that one must be *both* (1) "not clearly and beyond a doubt entitled to admission;" *and* (2) not "an alien . . . to

whom (b)(1) applies." 8 U.S.C. 1225(b)(2)(A), (B)(ii), When Congress makes a statutory definition "subject to" an "exception," as it did in (b)(2), one cannot simply ignore the exception.

II. MPP also violates the withholding statute, 8 U.S.C. 1231(b)(3)(A), by keeping applicants in the dark regarding their nonrefoulement rights, and by providing them with no meaningful chance to demonstrate their entitlement to this mandatory relief. It imposes the standard generally reserved for regular removal proceedings—more likely than not—in a summary interview with no procedural safeguards. And it fails even to provide notice to applicants of their right to seek protection.

DHS claims that no matter how deficient its procedures, the withholding statute provides no enforceable rights, and does not apply where DHS "returns" rather than "removes" an individual to persecution. But this Court has already held that 1231 claims are reviewable where, as here, plaintiffs rely on a cause of action outside of 1231 itself. And the distinction between "returns" and "removals" is antithetical to the purpose of the withholding statute: to implement Article 33 of the Refugee Convention, adopted in the wake of the Holocaust to prohibit any sending of individuals to persecution, no matter what label the government attaches. Congress did not implement mandatory protections against persecution only to allow the government to bypass them by deeming an expulsion a "return" rather than a "removal."

DHS also contends that MPP's procedures satisfy the statute, because the statute does not specify particular procedures. But by depriving

individuals of any notice and holding them to a more-likely-than-not burden in a summary proceeding, MPP ensures that meritorious claims for protection will not be raised, and if raised, will not be adequately assessed—a de facto deprivation of precisely what 1231 provides.

III. DHS also violated the APA by implementing MPP's nonrefoulement regime without notice-and-comment rulemaking. MPP is a legislative rule subject to notice-and-comment, not a mere statement of general policy or procedural rule. It constrains agency officers' discretion in individual cases and creates rights and obligations. It imposes a bright-line rule that determines whether and how MPP applies, and binding obligations on DHS officers: they *must* refer a noncitizen for a fear interview if the noncitizen affirmatively states a fear of return, and they *may not* return a noncitizen to Mexico if an asylum officer determines the noncitizen is more likely than not to be persecuted or tortured there. MPP also establishes the substantive standard and criteria by which DHS determines whether a return would violate nonrefoulement. DHS was obligated to use notice-and-comment procedures whether the nonrefoulement obligation stems from MPP itself or the withholding statute because MPP's nonrefoulement regime adopts a wholly new, binding approach different from that described in 1231(b)(3) and its implementing regulations.

IV. DHS argues that, even if MPP is illegal, the Court should narrow the injunction, which covers the southern border. But DHS concedes that even a border-wide injunction is proper if necessary to protect the plaintiffs before the court. That is true here, because the plaintiff organizations serve clients

across the southern border, and MPP cuts them off from future clients, imperiling their budgets and operations.

Because the relief is precisely tailored to the plaintiffs' border-wide injuries, and therefore satisfies the test DHS proposes, this case provides no occasion to consider DHS's suggestion that courts must always ensure that nonparties do not benefit from an injunction. In any event, DHS's proposal would upend a startling amount of settled practice, as courts for decades have enjoined illegal government policies in their entirety, especially in the APA context. This Court and Congress have consistently approved of that longstanding practice.

ARGUMENT

I. MPP VIOLATES 8 U.S.C. 1225(b), WHICH LIMITS CONTIGUOUS-TERRITORY RETURN TO INDIVIDUALS WHO ARE INELIGIBLE FOR EXPEDITED REMOVAL.

8 U.S.C. 1225(b) establishes two categories of applicants for admission, set forth in separate subsections, (b)(1) and (b)(2). DHS concedes that contiguous-territory return, the statutory basis for MPP, applies only to applicants "described in [(b)(2)](A)." 8 U.S.C. 1225(b)(2)(C); Pet. Br. 20–21. By subjecting to contiguous-territory return individuals covered by (b)(1) who are expressly *excepted* from (b)(2), MPP exceeds statutory authority.

A. Subsections (b)(1) and (b)(2) Describe Two Distinct Categories of Applicants for Admission and Provide DHS with Distinct Authorities for Each.

The text and structure of 1225(b) provide multiple, consistent, and mutually reinforcing signs that (b)(1) and (b)(2) applicants are distinct categories subject to distinct DHS authorities. In fact, this Court has already recognized that the text of 1225 divides applicants "into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings*, 138 S. Ct. at 837; *see also id.* at 842 ("Section 1225(b) divides . . . applicants [for admission] into two categories.").

Section 1225(b)(1) provides: "If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review." 8 U.S.C. 1225(b)(1)(A)(i). Subsection (b)(1) therefore applies to those determined to be inadmissible due to lack of valid documents (1182(a)(7)), or fraud or misrepresentation (1182(a)(6)(C)). Such individuals are removed through expedited removal, often in a matter of days, unless they demonstrate a "credible fear" of persecution, which entitles them to regular removal proceedings under 1229a. 8 U.S.C. 1225(b)(1)(B)(ii); 8 C.F.R. 208.30(f).

Section 1225(b)(2), by contrast, applies, as its title indicates, to "*other aliens*," (emphasis added), *i.e.*, to aliens "other" than those to whom (b)(1) applies. By its plain text, (b)(2) applies to those who are *both* (1) "not clearly and beyond a doubt entitled to be

admitted," and (2) not a crewman, stowaway, or "an alien . . . to whom [(b)(1)] applies." 8 U.S.C. 1225(b)(2)(A), (B). Applicants covered by (b)(2) may not be subjected to expedited removal, and are instead "detained for a [regular removal] proceeding under section 1229a." *Id.* 1225(b)(2)(A). The return authority is nested within (b)(2) and applies only "[i]n the case of an alien described in subparagraph (A)" of (b)(2). *Id.* 1225(b)(2)(C).

The text of each of (b)(2)'s three subparagraphs makes clear that contiguous-territory return does *not* apply to (b)(1) applicants. Subparagraph (A), which provides the authority to detain (b)(2) applicants for regular removal proceedings, begins with the clause, "[*s*]*ubject to subparagraphs B and C*." 8 U.S.C. 1225(b)(2)(A) (emphasis added). Subparagraph (B), entitled "Exception," then carves out three categories of noncitizens to whom "[s]ubparagraph (A) shall not apply"—"crewm[e]n," *"alien[s] . . . to whom [(b)(1)] applies,"* and "stowaway[s]." *Id.* 1225(b)(2)(B)(i)–(iii) (emphasis added). Congress could not have been clearer: applicants for admission "to whom [(b)(1)] applies" are expressly excepted from subparagraph (A).

Subparagraph (C) then sets forth the return authority, which by its terms applies only "[i]n the case of an alien described in subparagraph (A)." 8 U.S.C. 1225(b)(2)(C). Because subparagraph (B) excludes from subparagraph (A) an "alien . . . to whom [(b)(1)] applies," such individuals are not "described in subparagraph (A)," and not subject to contiguous-territory return.

The structure of 1225(b), as set out above, reinforces the unambiguous text. The statute uses two

separate subsections to describe two distinct categories of applicants for admission: (b)(1) applies to those determined to be inadmissible for lack of valid documents, fraud, or misrepresentation, and subjects them to an expedited removal procedure, and (b)(2) applies to "other aliens," who cannot be summarily removed but can be returned to a contiguous territory. Had Congress intended the return authority to apply to applicants under both (b)(1) and (b)(2), it could have placed the provision in a separate section, as it did with neighboring (b)(3). *See* 8 U.S.C. 1225(b)(3) (authorizing immigration officers to challenge decisions "favorable to the admission of any alien"). Its decision to place the return authority within (b)(2), and to expressly "except" from (b)(2) persons "to whom [(b)(1)] applies," confirms that the authority to return does not extend to (b)(1) applicants.

DHS's decision to apply MPP to (b)(1) applicants defies the text of Section 1225(b) and Congress's coherent statutory scheme. It invokes an authority that by its terms and structure is limited to one group of applicants and applies it to another group that Congress *deliberately excepted* from that authority. If DHS believes that it needs the return authority for (b)(1) applicants already subject to summary removal, it is free to ask Congress to amend the statute.

B. Congress's Choice to Reserve Contiguous-Territory Return for Individuals Not Eligible for Expedited Removal Makes Sense.

Exempting individuals to whom (b)(1) applies from contiguous-territory return is consistent with Congress's design. Congress devised a specific tool to

deal with the flow of applicants who sought to enter without valid documents or through fraud or misrepresentation: expedited removal without a hearing. Expecting that most (b)(1) applicants would be swiftly removed with this device, and only those found to have a "credible fear" of persecution would be entitled to a regular removal hearing, Congress sensibly reserved the return authority for the "other aliens" under (b)(2)—those who had a statutory entitlement to regular removal hearings regardless of whether they had any credible asylum claims.[5]

The statute that enacted expedited removal, The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, reflects the balance Congress struck in addressing the precise concerns DHS now invokes as reasons for instituting MPP: "Thousands of smuggled aliens arrive in the United States each year with no valid entry documents and declare asylum immediately upon arrival." H.R. Rep. No. 104-469, at 117 (1995). In response, Congress devised expedited removal, codified under 1225(b)(1), "to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted to the United States"—namely, people

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[5] DHS argues that because 1225(b)(2)(B) appeared in the draft of the statute introduced in the House before the return provision was added, its carve-outs were not intended to limit application of the return authority. Pet. Br. 28. But what governs is the text as actually enacted. *See West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of [Congress's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."). Moreover, when Congress added the return provision, 1225(b)(2)(B) was already part of the text. Had Congress intended the return provision to apply to people expressly excepted by (b)(2)(B), it could have said so.

without valid documents or who seek to enter through fraud or misrepresentation. H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.). At the same time, Congress was aware that (b)(1) applicants would include asylum seekers, who are often forced to flee without proper documents, and designed a system that balanced the need to address border flows with specific asylum protections. The statute provides a mechanism to weed out non-meritorious asylum claims while permitting those who have a "significant possibility" of obtaining asylum to pursue their cases in the United States. *See* 8 U.S.C. 1225(b)(1)(B)(v).[6]

DHS complains that it is now overburdened by (b)(1) applicants who request asylum. But the statute permits it to summarily remove all who lack a "credible fear" of persecution. And in any event, DHS's concern does not warrant ignoring Congress's clear

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[6] As the court of appeals noted, Congress's decision to make contiguous-territory return available for (b)(2) applicants but not (b)(1) applicants is consistent with its recognition that many (b)(1) applicants are asylum seekers, because people fleeing persecution "commonly have fraudulent documents or no documents." Pet. App. 24a. Congress's recognition of this fact is reflected in the "credible fear" screening mechanism that it established as part of the expedited removal process. And it is reflected in Congress's decision to except from contiguous-territory return not only those (b)(1) applicants who could be swiftly removed, but also those who pass a "credible fear" screening and are placed in regular removal proceedings. DHS counters that (b)(2) applicants can also seek asylum. But unlike (b)(1) applicants, for whom the basis for inadmissibility—lack of valid documents—is itself associated with seeking asylum, (b)(2) applicants are inadmissible on a range of other grounds, none linked to asylum. To the extent that individual (b)(2) applicants seek asylum, DHS can take this into consideration on a case-by-case basis in deciding whether to exercise its discretionary return authority.

textual dictate: those "to whom [(b)(1)] applies" are excepted from (b)(2), and therefore not subject to contiguous-territory return. Nothing in the legislative history of 1225 reflects an intention to permit DHS to subject (b)(1) applicants to contiguous-territory return, and the text, which must govern in any event, is precisely to the contrary.

C. DHS's Interpretation Is Contrary to the Statute's Plain Meaning.

DHS argues that (b)(1) and (b)(2) describe not "separate categories" of applicants, as this Court stated in *Jennings*, 138 S. Ct. at 837, but "overlap[ping]" ones. Pet. Br. 25.[7] In its view, all who are covered by (b)(1) are *also* covered by (b)(2), affording DHS "enforcement discretion" to choose whether to subject individuals who arrive without valid documents to the procedures under (b)(1) or (b)(2). If it invokes (b)(2), DHS contends, it is free to subject individuals to contiguous-territory return.

But DHS's argument that (b)(1) and (b)(2) describe "overlap[ping]" categories, Pet. Br. 25, errs by focusing on only one part of the definition of who is subject to (b)(2)—applicants "not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). DHS ignores the second part of the (b)(2) definition, as set forth in its "exception" clause: one must also *not* be a crewman, stowaway, or "alien . . . to whom [(b)(1)]

[7] DHS contends that the cited language from *Jennings* merely reflects that 1225(b)(2)(A)'s requirement of regular removal proceedings applies to applicants not placed in expedited removal. Pet. Br. 26. But the opinion says nothing to this effect, while specifically relying on the distinction between (b)(1) and (b)(2) applicants in analyzing which detention provisions apply to each category. *See Jennings*, 138 S. Ct. at 837.

applies." *Id*. 1225(b)(2)(B)(i)–(iii). When one statutory provision expressly *excludes* those to whom another provision "applies," the provisions manifestly do not "overlap."[8]

For the same reason, DHS errs in contending that an applicant is "described in" (b)(2)—and therefore subject to the return authority—as long as the applicant is "not clearly and beyond a doubt entitled to be admitted." Pet. Br. 21. DHS argues that this reflects (b)(2)'s "salient identifying features." *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019); *see* Pet. Br. 21, 28. But (b)(2)'s exception clause is equally salient. Thus, (b)(2) describes a person who is *both* (1) "not clearly and beyond a doubt entitled to be admitted," *and* (2) not an "alien . . . to whom [(b)(1)] applies." 8 U.S.C. 1225(b)(2)(A), (B)(ii).

DHS argues that when it exercises its "enforcement discretion" not to place an individual described in (b)(1) into expedited removal, and instead refers them for regular removal proceedings, it is exercising its authority under (b)(2), and therefore such individuals are no longer individuals "to whom [(b)(1)] applies." Pet. Br. 24, 26. DHS seems to assume that the only authority for placing applicants for

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[8] DHS suggests that because its charging decision affects whether an applicant is subject to (b)(1) or (b)(2), the two categories are not distinct. Pet. Br. 25 (citing 8 C.F.R. 235.3(b)(3)). But the regulation DHS cites reinforces the distinction between the two categories: (b)(1) is reserved for applicants charged with inadmissibility *only* on the grounds specified in (b)(1)—lack of documents, fraud, or misrepresentation; (b)(2) is reserved for applicants charged on any "additional" ground. The applicants MPP returns to Mexico have been charged only with one of the two grounds of inadmissibility specified in (b)(1): 1182(a)(6)(C) or (7).

admission into regular removal proceedings comes from (b)(2). But this authority comes from 8 U.S.C. 1229a, which authorizes regular removal proceedings to adjudicate *any* charges of inadmissibility or deportability, and "[u]nless otherwise specified" is "the sole and exclusive procedure for determining whether an alien may be admitted to the United States." *Id.* 1229a(a)(2), (3). Indeed, (b)(1) applicants who pass a "credible fear" screening are entitled to regular removal proceedings under 1229a. 8 U.S.C. 1225(b)(1)(B)(ii); 8 C.F.R. 208.30(f). The notice of rulemaking that provides for such hearings makes no mention of (b)(2). 62 Fed. Reg. 444 (Jan. 3, 1997).

Although the BIA has upheld DHS's enforcement discretion not to invoke (b)(1)'s expedited removal authority, *Matter of E-R-M-*, 25 I. & N. Dec. at 521; *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), it does not follow that (b)(2) applies.[9] Neither the statute nor "enforcement discretion" gives DHS the authority to apply (b)(2). Enforcement discretion allows DHS to *forebear* enforcing an applicable statute. It does *not* give it discretion to *enforce* a statute—here, 1225(b)(2)—that by its express terms does not apply. Nor does it give DHS authority to change the *legal category* that (b)(1) assigns to

[9] DHS misleadingly cites these cases as support for the proposition that (b)(1) applicants whom it chooses not to place in expedited removal thereby become (b)(2) applicants, even suggesting that this issue is settled. Pet. Br. 26–27. But *Matter of E-R-M-* merely holds that DHS "has the discretion to place [(b)(1) applicants] directly into section [1229a] removal proceedings." 25 I. & N. Dec. at 521. It nowhere identifies (b)(2) as the source of this authority. Neither, for that matter, did the Attorney General in *Matter of M-S-*. As explained above, the authority to place (b)(1) applicants into regular removal proceedings stems from 1229a, not from (b)(2).

individuals determined to be inadmissible for fraud, misrepresentation, or lack of valid documents. The statute dictates that (b)(1) applies to them, and (b)(2) does not.

DHS asserts that whether (b)(1) applies to a person hinges on a DHS officer's discretionary decision to place an applicant into expedited removal. Pet. Br. 27 (contending that "respondents are not aliens 'to whom [(b)(1)] applies,' because *DHS did not 'appl[y]' Section 1225(b)(1)'s expedited-removal procedure* to any of them") (citations omitted) (emphasis added). But this is contrary to the text of both (b)(1) and (b)(2). Subsection (b)(1) applies to any applicant for admission who "an immigration officer determines . . . is inadmissible under 1182(a)(6)(C) or (a)(7)." 8 U.S.C. 1225(b)(1). It does not require that an officer make an additional discretionary determination to invoke (b)(1)'s expedited removal procedures. And the language of (b)(2)'s exception, "to whom [(b)(1)] applies," plainly asks only whether the statutory subsection, "paragraph (b)(1)," applies—not whether DHS has exercised discretionary authority to put the person in expedited removal proceedings. The subject of "applies" in "to whom [(b)(1)] applies" is (b)(1) itself, not DHS. In contrast, when Congress intends to give the agency a choice of provisions to apply, it makes the agency the subject. *See* 8 U.S.C. 1225(b)(1)(A)(iii)(I) ("The Attorney General *may apply* [1225(b)(1)(A)](i) and (ii) . . . to any or all aliens described in [1225(b)(1)(A)(iii)](II).") (emphasis added).

Consistent with this reading, Congress used the verb "applies" in (b)(2)'s exception in the intransitive form, meaning that it does not require a direct object: the statute "applies," full stop. By

contrast, when Congress makes the agency's choice to "apply" a statute determinative, it uses "apply" in the transitive form: "the Attorney General may apply [1225(b)(1)(A)](i) and (ii)." 8 U.S.C. 1225(b)(1)(A)(iii)(I). *See* Amicus Br. of Constitutional Accountability Center.

Plaintiffs' reading is reinforced by the two other exceptions in (b)(2)(B)—for "crewm[e]n" and "stowaway[s]." The scope of these exceptions is defined by the statutorily defined category the individual is determined to fall within, and not by an immigration official's decision to process them in a particular way. 8 U.S.C. 1225(b)(2)(B)(i)–(iii); *see also id.* 1101(a)(10) (defining "crewman" as "a person serving in any capacity on board a vessel or aircraft"), (a)(49) (defining "stowaway" as "any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment"). "Words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (internal quotation marks omitted). Therefore, the exception for individuals "to whom [(b)(1)] applies" should similarly be read to mean individuals determined to fall within the statutorily defined category of applicant, not those whom DHS has chosen to process through particular procedures.

DHS finally contends that, "even if [plaintiffs] were 'aliens to whom [(b)(1)] applies,'" they would still be "described in [(b)(2)(A)]," and therefore subject to contiguous-territory return, because (b)(2)(B)(ii) only affects "the operative clause" of (b)(2)(A). Pet. Br. 27. But nothing in the text of either subparagraph (A) or (B) suggests that only *part* of subparagraph (A) "shall not apply." The whole of subparagraph (A)—including

the description of an alien in that subparagraph—is "[s]ubject to subparagraph[] (B)." 8 U.S.C. 1225(b)(2)(A). And subparagraph (B) provides that the whole of subparagraph (A) "shall not apply" to those "to whom [(b)(1)] applies." 8 U.S.C. 1225(b)(2)(B)(ii).

In sum, DHS's interpretation cannot be squared with the text or structure of 1225(b), which makes plain that the return authority does not apply to persons, like plaintiffs, "to whom [(b)(1)] applies."

II. MPP VIOLATES THE WITHHOLDING STATUTE BY FAILING TO AFFORD ADEQUATE PROCEDURES TO GUARD AGAINST RETURN TO PERSECUTION IN MEXICO.

The court of appeals correctly concluded that MPP's procedures for protecting individuals from return to persecution in Mexico are so deficient that they violate the withholding statute, 8 U.S.C. 1231(b)(3), and are therefore contrary to law under the APA. Pet. App. 25a–38a. Congress enacted the withholding statute to "implement the principles agreed to" in the Refugee Convention, including nonrefoulement, which requires that the United States not "expel or return" noncitizens to any place where they face a likelihood of persecution. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quotations omitted). MPP's nonrefoulement regime violates the withholding statute by holding individuals to a more-likely-than-not burden in a summary proceeding, without notice of their rights or a meaningful opportunity to meet their burden.

A. MPP's Compliance with the Withholding Statute is Reviewable Under the APA.

DHS maintains that 1231(h) prohibits review of this claim. Pet. Br. 30–31. It never raised this argument below, and has therefore forfeited it. *See Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1846 (2019) (non-jurisdictional defense raised for first time on appeal is forfeited); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015) ("Absent unusual circumstances," Court "will not entertain arguments not made below.").

In any event, the argument fails. Section 1231(h) merely states that "[n]othing in [1231] . . . create[s] any substantive or procedural right or benefit that is legally enforceable . . . against the United States." Plaintiffs' claims are brought under the APA and challenge agency action in "excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. 706(2)(C); *see also id.* 702 (providing right of review). As this Court recognized in *Zadvydas*, the existence of a distinct cause of action (there, habeas) means that 1231(h) poses no obstacle. *See Zadvydas v. Davis,* 533 U.S. 678, 687 (2001) ("[1231(h)] simply forbids courts to construe *that section* 'to create any . . . procedural right or benefit that is legally enforceable'"); *cf. Jama v. ICE*, 543 U.S. 335 (2005) (reviewing challenge to process by which removal destination is designated under 8 U.S.C. 1231(b)(2)).

DHS maintains that *Zadvydas* is distinguishable because there "the government invoked [1231] as the source of its detention authority," whereas plaintiffs here "invoke Section 1231 as a purported constraint on the government's

contiguous-territory-return authority." Pet. Br 32. But DHS misreads *Zadvydas*. The detainees in *Zadvydas* in fact invoked 1231(a)(6) as a *restraint* on the government's authority to detain, and this Court agreed, holding that "*the statute* [*i.e.,* 1231(a)(6)] . . . limits an alien's post-removal-period detention to a period reasonably necessary to [effectuate removal]." *Zadvydas*, 533 U.S. at 689 (emphasis added). *Zadvydas*'s holding that 1231(h) did not bar a habeas claim alleging a violation of 1231 applies equally to this case because, like the detainees in *Zadvydas*, plaintiffs here have a cause of action, under the APA, to challenge agency action "that is without statutory authority." *Id.* at 688. Section 1231(h) therefore does not bar plaintiffs' APA claim.

DHS's position is also inconsistent with the conceded availability of judicial review of withholding in a petition for review. DHS suggests that review of withholding is available there, notwithstanding 1231(h), because withholding is specified in the judicial review section of the Immigration and Nationality Act. *See* Pet. Br. at 31. But the provision on which it relies provides simply that "[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in . . . 1231(b)(3)(C) . . . unless . . . a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." 8 U.S.C. 1252(b)(4). This provision thus *presumes* that application of the withholding statute is reviewable, and merely specifies an evidentiary standard to be employed in such review. Moreover, 1252(b)(4) was not introduced until 2005, *see* REAL ID ACT of 2005, Pub. L. No. 109-13, Div. B, § 101(e), 119 Stat. 231, 305 , yet there is no dispute that prior to 2005, claims

under the withholding statute were reviewable on petitions for review. *See, e.g.*, *Gonzales v. Thomas*, 547 U.S. 183 (2006). Finally, under DHS's view, there would be *no* ability to challenge the misapplication of the withholding statute, even where an individual faces a *certainty* of persecution, so long as the government delivers them to persecution before entry of a final removal order.

B. The Withholding Statute Bars Both Temporary and Permanent Transfers of Individuals to Countries Where They Face Persecution.

DHS contends that returning individuals to Mexico, even if they face certain persecution there, does not implicate 1231(b)(3), because that statute "pertains only to the *removal* of an alien, not to a temporary *return* . . . pending removal proceedings." Pet. Br. 32 (emphasis in original). But the withholding statute, like the Refugee Convention it implements, is designed to protect individuals from being sent to countries where they face persecution, regardless of the label applied to the transfer. There is nothing in the statute or the treaty to support the counterintuitive proposition that it is permissible to deliver a person to persecution or torture as long as the delivery is temporary. Pet. App. 26a–27a (reviewing history of Congress's enactment of withholding provision). DHS's argument to the contrary would create an unprincipled loophole in a prohibition created in response to the Holocaust. No one involved in drafting the Refugee Convention would have agreed it permissible to return Jews to Nazi Germany so long as the "return" was temporary.

Article 33 of the Refugee Convention, entitled "Prohibition of expulsion or return ('refoulement')," provides: "No Contracting State shall expel or *return* ('refouler') a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on [a protected ground]." Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276 (emphasis added). Nothing in Article 33 distinguishes between an interim return and a permanent removal.

Congress implemented this broad protection in the Refugee Act of 1980, and specifically 8 U.S.C. 1253(h)(1) (1980), the precursor to 1231(b)(3). *See Cardoza-Fonseca*, 480 U.S. at 436 (noting a "primary purpose" of the Refugee Act "was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees"); 126 Cong. Rec. H1,519–29 (daily ed. Mar. 4, 1980) ("These provisions are consistent with our international obligations under the United Nations Convention and Protocol, and the conferees intend that the new sections be implemented consistent with those international documents."); 126 Cong. Rec. S1,753–55 (daily ed. Feb. 26, 1980) (same). Accordingly, the withholding provision of the Refugee Act "parallel[ed] Article 33," *Aguirre-Aguirre*, 526 U.S. at 427, providing that "[t]he Attorney General shall not deport *or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country [on account of a protected ground]." 8 U.S.C. 1253(h)(1) (1980) (emphasis added).

DHS argues that the 1980 statute's use of the term "return" referred only to an "exclusion" based on a "final determination" of inadmissibility, not a

temporary return. Pet. Br. 33–34. But there is no evidence that Congress drew such a distinction, or that *anyone* thought that returning someone temporarily to persecution was permitted under our international obligations.

DHS then relies on the fact that in 1996, as part of IIRIRA, Congress altered the language of the INA through a technical amendment that generally substituted "remove" as an all-purpose term for all immigration-based expulsions from the United States, whether at the border or from the interior. *See* Pub. L. No. 104-208, Div. C, § 308(d)(4), 110 Stat. 3009-617. According to DHS, this housekeeping measure—which replaced "deport or return" in the withholding statute with the new term "remove"—means that the withholding provision no longer prohibits "returns." Pet. Br. at 33–34. But there is no evidence that this was anything other than general relabeling designed to substitute "removal" for "exclusion" and "deportation." It is entirely implausible that Congress meant by this technical amendment to authorize temporary delivery of noncitizens to persecution. "Congress does not make radical . . . changes through technical and conforming amendments." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) (internal quotation marks omitted).

Indeed, under DHS's interpretation, even a Mexican national who sought asylum in the United States—from persecution in Mexico—could be "returned" to the persecution she fled for the months or years it takes to resolve her removal proceedings. While DHS has elected not to apply MPP to Mexican asylum seekers, this does not save its construction of the statute. *See, e.g., United States v. Santos*, 553 U.S. 507, 522 (2008) ("[T]he meaning of . . . a statute cannot

change with the statute's application."). DHS cannot circumvent Congress's unequivocal directive that the "Attorney General may not remove" refugees to persecution, 8 U.S.C. 1231(b)(3), simply by choosing to expel a person before a decision is made on whether she can be "removed," and labeling that expulsion a "return" rather than a "removal." *See King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) ("We cannot interpret federal statutes to negate their own stated purposes.") (quotation omitted).

C. MPP's Manifestly Deficient Procedures Violate the Withholding Statute and Are Contrary to Law Under the APA.

Withholding is a mandatory form of protection: if a noncitizen shows a likelihood of persecution, the government *must not* send them to that country. Yet MPP denies individuals any notice of this protection. And it requires individuals to meet the ultimate burden of proof in an informal interview with no meaningful opportunity to make their case. By making it nearly impossible to demonstrate eligibility for protection from return, MPP violates 1231(b)(3).

First, MPP fails to provide notice of the right to be protected. Immigration officers do not tell individuals that any protection from return to Mexico is available, nor do they ask individuals whether they fear being returned to Mexico. *See, e.g.*, Pet. App. 108a–109a, 157a; Pet. Br. 35. Only if individuals *spontaneously* volunteer that they fear harm in Mexico will they receive an assessment of that fear. Pet. App. 157a, 186a.

In other immigration proceedings, immigration officers must provide notice of the right to seek withholding. In expedited removal proceedings,

immigration officers must advise individuals that the United States provides protection for people who face "persecution, harm or torture upon return to their home country" and that if they "fear or have a concern about being removed from the United States or about being sent home," they should say so "because [they] may not have another chance." Supp. App. 2a (Form I-867A) (form for expedited removal); 8 C.F.R. 235.3(b)(2)(i) (requiring immigration officers to use Form I-867AB).[10] Officers must also affirmatively ask whether individuals "have any fear about being returned to [their] home country or being removed from the United States," and whether they would "be harmed if [they] are returned to [their] home country or country of last residence." Supp. App. 3a (Form I-867B). *See also* 8 C.F.R. 238.1(b)(2)(i) (in administrative removal proceedings, requiring notice to noncitizen that they "may request withholding of removal to a particular country if he or she fears persecution or torture in that country"); Detention and Deportation Officer's Field Manual § 14.8(b)(2) (2006), *available at* https://bit.ly/38B42JR (last visited Jan. 13, 2021) (in reinstatement of removal proceedings, requiring sworn statement that includes "the following question and the alien's response thereto: 'Do you have any fear of persecution or torture should you be removed from the United States?'"). To deprive foreign nationals, the vast majority of whom do not

[10] The agency explained that it imposed these obligations to satisfy the statutory requirement that "[t]he Attorney General shall provide information concerning the asylum interview . . . to aliens who may be eligible." 62 Fed. Reg. at 10,318 (citing 8 U.S.C. 1225(b)(1)(B)(iv)). It has done so for more than twenty years because it deemed it necessary to "adequately protect potential asylum claimants." *Id.* at 10,319.

speak English and have no access to a lawyer, of this most basic information virtually ensures that they will be returned to persecution in Mexico through nothing more than enforced ignorance.

MPP's second deficiency is that it requires individuals to meet their ultimate burden in an informal interview, without any of the procedural tools necessary to do so. Individuals must convince an asylum officer that they are more likely than not to face persecution on account of a protected ground without any opportunity to present witnesses, gather documentary evidence, or, until very recently, even the possibility of counsel's aid.[11] Pet. App. 185a–189a. The asylum officer's determination is reviewed by a supervisor only, and no other administrative or judicial review is permitted. Pet. App. 189a. Since the 1980 Refugee Act, the agency has consistently imposed the ultimate more-likely-than-not standard *only in regular removal proceedings before an Immigration Judge*, where individuals have an opportunity to present witnesses, marshal evidence, and confront adverse witnesses or evidence. *See* 8 C.F.R. 208.1, 208.3(b), 208.10(e)–(f) (1980); 208.2(b), 208.3(b) (1990); 208.2(b), 208.3(b) (1994); 208.2(b)(1), 208.3(b) (1997); 208.2(b)(1), 208.3(b) (1999). This unbroken regulatory implementation is "persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v.*

[11] Until December 7, 2020, the day DHS filed its Opening Brief, individuals were not permitted access even to retained counsel during their nonrefoulement interviews. *Compare* App. 188a *with* Pet. Br. 10 n.4. In practice, the vast majority of would-be entrants are unrepresented. *See* TRAC Immigration, *Details on MPP*, *supra* n.4 (approximately 7% of noncitizens are represented).

Schor, 478 U.S. 833, 846 (1986); *see also Andrus v. Shell Oil Co.*, 446 U.S. 657, 667–68 (1980) (interpreting statute consistent with "administrative practice, begun immediately upon the passage [of the act]").

Although Congress created summary removal processes in various circumstances, *see* 8 U.S.C. 1225(b)(1) (expedited removal); *id.* 1231(a)(5) (reinstatement of removal); *id.* 1228(b) (administrative removal), the reduced procedural rights in summary proceedings have always been offset by a lower threshold burden of proof. Individuals in expedited removal must show only a "credible fear," or a "significant possibility" that they can meet the ultimate more-likely-than-not standard in regular removal proceedings. *Id.* 1225(b)(1)(A)(ii), (B)(v); 8 C.F.R. 208.30(e)(3), 235.3(b)(4). Administrative removal or reinstatement of removal requires a "reasonable fear," *id.* 208.31(c), which is satisfied by a "ten percent chance" of persecution, *see Bartolme v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018). Yet in MPP, individuals must satisfy the full burden without any meaningful procedures to do so.

DHS contends that MPP cannot violate the withholding statute because the statute "does not mandate any particular procedures." Pet. Br. 35. But DHS cannot nullify a statutory "entitlement" to withholding, *Stevic*, 467 U.S. at 426, by denying asylum seekers the most basic rights necessary to obtaining it: notice of their right to apply and a meaningful opportunity to be heard. *See Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) (assuming "a congressional solicitude for fair procedure, absent explicit statutory language to the contrary"); *see also Meachum v. Fano*, 427 U.S. 215, 226 (1976) (minimum

due process rights attach to statutory rights). If DHS determined that it would assess credibility only in English for non-English speakers, surely that would violate the statute, even though the statute, in DHS's words, "does not mandate any particular procedure." Pet. Br. 35. When an agency adopts procedures that effectively nullify a statutory right, it has violated the statute.

DHS does not even *attempt* to justify its imposition of a demanding more-likely-than-not burden without the minimal procedures necessary to meet it. Instead, it defends only its decision not to inform individuals of their right to seek protection. None of its justifications is persuasive.

First, it speculates that "the temporary return of third-country nationals to the contiguous country through which they just traveled implicates appreciably less risk of torture or persecution." Pet. Br. 35. But DHS cites *no evidence whatsoever* for this supposition, instead relying only a conclusory statement in an unrelated rulemaking. *See* Pet. Br. 35 (citing J.A. 129 ("third-country aliens . . . appear highly unlikely to be persecuted on account of a protected ground or tortured in Mexico")). The court of appeals correctly rejected such conclusory statements. Pet. App. 30a–31a.

In fact, the administrative record includes ample evidence detailing the grave risks that migrants face in Mexico. *See* J.A. 404 (of 429 Central American migrants surveyed, "31.4 percent of women and 17.2 percent of men had been sexually abused during their transit through Mexico"); J.A. 378 (Central American migrants in Mexico "are prime targets for kidnapping" and "cartel lookouts ply the

Mexican side of the bridge, watching for Central Americans"). The record also demonstrates that Mexico is unable to protect individuals from, and is often complicit in, the persecution of migrants. *See* J.A. 373 (report concluding that there is a "significant likelihood that Mexico would send . . . asylum seekers [returned to Mexico] back to their countries of origin," and explaining that "crime against migrants (including human trafficking, kidnapping, and rape) is widespread and largely goes unprosecuted"); J.A. 393 (migrants "are preyed upon by criminal organizations, sometimes with the tacit approval or complicity of national authorities"); J.A. 396 (reports of violence perpetrated by "members of the Mexican security forces" against Central American migrants); J.A. 417 ("[c]orrupt Mexican officials have been found to be complicit in activities such as robbery and abuse of authority"); *see also* J.A. 423 (letter from members of Congress noting "dangerous conditions" for asylum seekers in Mexico); J.A. 544 (2017 State Department report stating that "violence against migrants by government officers and organized criminal groups" was among "[t]he most significant human rights issues" in Mexico).[12]

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[12] DHS faults the court of appeals for relying on "extra-record" declarations by individual plaintiffs "that . . . evidenced persecution within the meaning of Section 1231(b)(3)." Pet. Br. 37. But given the administrative record evidence cited in the text above, plaintiffs' declarations were not even necessary. In any event, the court relied on these declarations only to underscore *DHS's failure* to offer any evidence of a difference in risk resulting from returns rather than removals.

DHS also asserts in passing that the declarations do not demonstrate eligibility for withholding, but "involve harassment and speculative fears of future harm that likely do not rise to the level of persecution" because they are not based on a protected

DHS next speculates that individuals have every incentive to raise spontaneously a fear of return, and faults plaintiffs for "fail[ing] to support the counterintuitive conclusion that eligible aliens systematically fail to take advantage of that opportunity." Pet. Br. 36. But DHS provides no support for its speculation. Pet. App. 30a. DHS requires affirmative notice in the expedited and other removal contexts, yet does not explain why an individual who faces removal to their country of origin is *less* likely to spontaneously express a fear of removal than an individual who faces return to a country through which they transited.

DHS claims that the lack of notice is justified by an interest in avoiding "a substantial number of false positives without meaningfully contributing to identifying those likely to be persecuted on a protected ground in Mexico." Pet. Br. 36. But when the INS began requiring immigration officers to ask about fear in the expedited removal context, it did so after having "very carefully considered how best to ensure that bona fide asylum claimants are given every opportunity to assert their claim, while at the same time not unnecessarily burdening the inspections process or encouraging spurious asylum claims." 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997). Fear of "false

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ground. Pet. Br. 35. But the declarations—consistent with the administrative record—demonstrate that the declarants were persecuted in Mexico because they were Central American migrants. *See* Pet. App. 31a–37a (summarizing declarations); *see also* Supp. App. 31a–32a (describing tear gas thrown into shelters holding asylum seekers and threats directed to Hondurans); *id.* at 55a (describing threats and harassment by Mexican police and citizens because of Honduran nationality); *id.* at 55a–56a (similar).

positives" has not led DHS to abandon asking about fear in that or any other context, and DHS offers no good reason why the balance should be different for MPP.[13]

In sum, keeping individuals in the dark about their rights and imposing an onerous burden of proof in a summary interview with no procedural safeguards effectively nullifies the right to withholding, and therefore violates 1231(b)(3).

D. Plaintiffs' Arbitrary-and-Capricious Claim Is Distinct from Their Withholding Claim.

DHS asserts in a one-sentence footnote that if MPP complies with Section 1231(b)(3), it is also not "arbitrary and capricious" with respect to "non-refoulement principles." Pet. Br. 35 n.7. But plaintiffs' arbitrary-and-capricious claim does not rise and fall with their withholding claim. Plaintiffs have asserted a distinct claim that MPP's nonrefoulement regime is arbitrary and capricious because, *inter alia*, DHS failed to provide any explanation for its choice of nonrefoulement rules, which deviate dramatically from those previously used; ignored evidence in the administrative record that Mexico routinely violates its obligations to protect migrants; and designed a regime that undermines DHS's stated goal of

[13] DHS misleadingly suggests that asking about fear in the expedited removal context has led to a "dramatic increase" in referrals for credible-fear screenings and a low asylum grant rate, *see* Pet. Br. 36–37 (citing J.A. 67–68), but immigration officers have been required to ask about fear in expedited removal proceedings since 1997. *See* 62 Fed. Reg. at 10,318. Asking about fear thus cannot be the reason that credible-fear referrals have increased in recent years.

complying with the Refugee Convention and CAT. These arguments go to whether DHS engaged in reasoned decisionmaking, a question distinct from whether MPP violates Section 1231(b)(3).

Plaintiffs' arbitrary-and-capricious claim is not before the Court, however. The court of appeals did not address it, and DHS did not include it in the questions presented or petition for certiorari, nor did they present any briefing addressing why MPP is the product of reasoned decisionmaking. *See* S. Ct. Rule 14.1(a). As "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), should this Court reverse the judgment below, it should follow its ordinary practice and remand to the court of appeals to consider the arbitrary-and-capricious claim in the first instance.

III. THE AGENCY UNLAWFULLY SKIPPED NOTICE-AND-COMMENT RULEMAKING.

MPP creates a wholly new, binding regime to meet the government's nonrefoulement obligations. It establishes the substantive standard and criteria by which DHS determines whether a return would violate nonrefoulement; denies DHS officials any discretion to return individuals to Mexico if that standard is met; and creates entitlements to fear interviews and protection from return that can be, and have been, legally enforced. It is therefore a legislative rule, for which notice-and-comment rulemaking was required. DHS's decision to bypass notice-and-comment violates the APA, and affords an independent ground for affirmance.[14]

[14] The district court concluded that plaintiffs were likely to succeed on this claim, Pet. App. 78a, but the court of appeals did

DHS claims that MPP is merely a general statement of policy and thus exempt from this requirement. But MPP is a legislative rule requiring notice-and-comment if it (1) does not "genuinely leave[] the agency and its decisionmakers free to exercise discretion" in a specific case, or (2) "impose[s] any rights and obligations." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (internal quotation marks omitted); *see also, e.g.*, *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), *as revised* (Nov. 25, 2015). MPP's nonrefoulement regime is binding under either test.

First, MPP constrains DHS officers' discretion in individual cases. The nonrefoulement protocol is set out in mandatory terms. If an individual raises a fear of persecution or torture, an immigration official *must* refer them for a fear interview with an asylum officer. Pet. App. 157a ("If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico . . . that alien will be referred to a USCIS asylum officer for screening[.]"); Pet. App. 196a (similar). If the asylum officer determines the noncitizen is more likely than not to be persecuted or tortured in Mexico, the noncitizen "may not be processed for MPP." Pet. App. 157a; Pet. App. 158a ("Such an alien . . . may not be returned to Mexico to await further proceedings."); Pet. App. 196a–197a (same). "This type of mandatory, definitive language"—will, may not, should not—"is a powerful, even potentially dispositive, factor suggesting that" MPP's nonrefoulement regime is a

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not reach it, finding the other bases sufficient to uphold the injunction, Pet. App. 12a.

legislative rule. *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987) (per curiam).

MPP also "establishes 'the substantive standards'" and "'substantive criteria'" that must be used to evaluate fear claims, "a critical fact requiring notice and comment." *Texas*, 809 F.3d at 177 (internal citations omitted); *cf. Lincoln v. Vigil*, 508 U.S. 182, 198 (1993). MPP requires asylum officers to use a more-likely-than-not standard, Pet. App. 187a, and to consider certain factors when assessing the claim, including "[c]ommitments from the Government of Mexico regarding the treatment and protection of aliens returned" and "the expectation of the United States Government that the Government of Mexico will comply with such commitments," and "[w]hether the alien has engaged in criminal, persecutory, or terrorist activity." Pet. App. 188a–189a.

Second, MPP creates legally enforceable rights and obligations. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (a legislative rule "affect[s] individual rights"); *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.) ("The most important factor [in distinguishing a legislative rule from a general statement of policy] concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities."). In arguing otherwise, DHS points to boilerplate language appended to some MPP guidance documents disclaiming the creation of any right or benefit. Pet. Br. 41 (citing Pet. App. 172a). But such formulaic recitations are not determinative; courts must consider agency "document[s] as a whole." *Nat'l Mining Ass'n*, 758 F.3d at 252. Here, the documents creating MPP's nonrefoulement regime are replete with mandatory language imposing obligations on

DHS officials and affording applicants rights. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (EPA guidance document with commanding language was legislative rule despite "boilerplate" caveat denying binding nature).

Moreover, "post-guidance events" demonstrate that DHS "has applied the guidance as if it were binding on regulated parties." *Nat'l Mining Ass'n*, 758 F.3d at 253. DHS conceded in related litigation that MPP creates specific nonrefoulement "entitlement[s]" for noncitizens, and that were it to "violat[e]" its own guidance requiring a nonrefoulement interview upon an affirmative statement of fear, "the remedy for [such] a violation of the agency's guidance" would be "a direction to the agency to conduct a nonrefoulement interview." Memorandum in Support of Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 6, 37–38, *Nora v. Wolf*, No. CV 20-0993 (ABJ) (D.D.C. May 8, 2020).

DHS maintains that MPP is merely a "statement of policy" as to how to exercise the discretionary return authority. Pet. Br. 39. But that argument "misses the mark; the fact that an agency need not employ rulemaking in order to exercise its discretion on a case-by-case basis does not mean it cannot or has not resorted to a rule of general applicability which limits its discretionary function. In the event there is resort to a rule, rulemaking is required." *Jean v. Nelson*, 711 F.2d 1455, 1476 (11th Cir. 1983), *vacated in relevant part and rev'd on other grounds*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985). MPP's "self imposed controls over the manner and circumstances in which the agency will exercise its plenary power . . . are not the kind of action Congress undertook to exempt from statutory

requirements that regulate the rule-making process." *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974).

DHS further contends that "[n]othing in MPP narrows the agency's broad discretion under Section 1225(b)(2)(C) to return any statutorily eligible alien" and "[i]mmigration officers . . . retain broad discretion regarding whether to subject aliens to MPP." Pet. Br. 39. Not so. MPP imposes bright-line rules that determine whether an individual is "amenable to MPP" in the first place, including those who are more likely than not to face persecution or torture in Mexico. Pet. App. 155a–158a.[15]

Finally, DHS observes that it "could modify the approach specified in MPP at any time if it determined that would be appropriate." Pet. Br. 39. But agencies can always modify or discontinue their rules, subject to procedural requirements; that basic feature of agency power has no bearing on whether a rule is a general statement of policy or legislative rule.

DHS next claims that if Section 1231(b)(3) applies to "return[s]," MPP is not a legislative rule

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[15] MPP also forbids officers from returning unaccompanied children, citizens or nationals of Mexico, and noncitizens with an advance parole document, among others. Pet. App. 155a-156a. It is of no moment that immigration officers have discretion not to return an individual who does not fall into one of these categories. It is sufficient that as to these categories, case-by-case discretion is foreclosed, and return is precluded. A rule need not constrain agency discretion as to every aspect of every individual case to be a legislative rule. It is enough that the policy "conclusively dispose[s] of certain issues." *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988); *see also id.* at 1321-22 (a model that "substantially curtail[ed]" agency's discretion was a legislative rule).

because it "tracks" the withholding statute. Pet. Br. 40–41. But MPP's nonrefoulement regime does not "track[]" the withholding statute as it has been implemented. DHS then notes that because the withholding statute "does not specify any particular procedure that must be used in identifying aliens at risk of persecution," MPP's nonrefoulement regime is simply an exercise of the discretion afforded by the statute. Pet. Br. 41. But whether a statute confers discretionary authority is beside the point; the relevant question is whether the agency created a binding protocol restricting officers' discretion in individual cases, and that is exactly what MPP's nonrefoulement regime does. Indeed, when the government previously created rules to implement Section 1231(b)(3)'s nonrefoulement requirement, it did so through notice-and-comment rulemaking. *See, e.g.*, 62 Fed. Reg. 444 (establishing rules for credible fear determinations and withholding of removal applications); 62 Fed. Reg. at 10,337–46 (same); 63 Fed. Reg. 31,945, 31,949–50 (June 11, 1998) (establishing rules concerning withholding determinations).

Nor is MPP exempt from notice-and-comment rulemaking as a "rule of agency 'procedure.'" Pet. Br. 41 (quoting 5 U.S.C. 553(b)(A)). Rules of agency procedure are "technical regulation[s]," *Pickus*, 507 F.2d at 1113, that "do not themselves alter the rights or interests of parties," *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980), like a rule that "prescribes a timetable for asserting substantive rights," *Lamoille Valley R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983). But if a rule announces the "substantive standards" or "substantive criteria" by which an application is evaluated, *JEM Broad. Co. v.*

FCC, 22 F.3d 320, 327 (D.C. Cir. 1994), or assigns "decisionmaking authority" to particular officials, *James V. Hurson Assocs, Inc. v. Glickman*, 229 F.3d 277, 282 (D.C. Cir. 2000), it is not procedural. *See, e.g.*, *Batterton*, 648 F.2d at 707–08 (choice of methodology for calculating unemployment rates, which affected federal funding levels, was not procedural); *Pickus*, 507 F.2d at 1113–14 ("formalized criteria adopted by an agency to determine whether claims for relief are meritorious" and rules "likely to have considerable impact on ultimate agency decisions" are not procedural); *id.* at 1114 & n.2 (parole selection guidelines and rule that parole hearings should be closed to the public and prisoners not represented by counsel were not procedural). "[E]xtreme procedural hurdles that foreclose fair consideration of the underlying controversy" are also not procedural rules. *Lamoille Valley*, 711 F.2d at 328.

MPP establishes the substantive standard and criteria for evaluating fear claims and assigns ultimate decisionmaking authority to asylum officers. And MPP's lack of notice and questioning, and absence of meaningful opportunities to meet the burden of proof, are "extreme hurdles" to obtaining protection. MPP's nonrefoulement regime is thus a legislative rule, not a mere rule of agency procedure.

IV. THE SCOPE OF THE INJUNCTION IS PROPER.

The district court enjoined DHS from "continuing to implement or expand" MPP. Pet. App. 83a. That relief was necessary to redress plaintiffs' injuries, and it tracked the federal courts' longstanding practice of vacating unlawful agency action in full—a practice this Court and Congress

have consistently approved. DHS now urges the Court to announce a sweeping new rule that courts can never enjoin a policy in its entirety unless doing so is necessary to protect the particular plaintiffs before it. Pet. Br. 42. This case presents no occasion to consider such a rule because the relief granted was indeed necessary to protect plaintiffs. In any event, DHS's categorical rule would upend long-settled practice and unnecessarily burden the federal courts.

DHS concedes that broad relief is appropriate where "necessary to provide complete relief to the plaintiffs." Pet. Br. 43 (quoting *Califano*, 442 U.S. at 702). Broad relief was necessary here because the plaintiff organizations operate across multiple circuits and serve clients across the entire southern border, J.A. 684, 697–98, 706, 718–19, 737, 751, making a geographically limited injunction untenable. MPP cuts them off from their future client base across the entire border, imperiling their budgets and staffing, and requiring an injunction extending beyond their current clients. J.A. 687–93, 700–05, 711–16, 720–27, 741–48, 753–59. Critically, DHS never explained *how* "the injunction in this case can be limited" while still providing plaintiffs full relief. Pet. App. 81a.

This Court has also recognized that sound "equitable judgment" will sometimes require an injunction that extends to "similarly situated" regulated parties. *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). That is especially true where the government announces a sweeping new rule, without notice, that immediately harms thousands of people who cannot quickly bring their own suits. Here, for instance, DHS's rule would force migrants stranded in dangerous border regions in Mexico to find lawyers and mount a multitude of duplicative lawsuits raising

a broad array of complex claims. Courts should not be powerless to issue broad relief when faced with such a chaotic and unfair alternative, and when such relief is necessary to cure the violations established by plaintiffs.

DHS does not grapple with how much existing judicial practice its new rule would upend. In APA cases, courts routinely vacate unlawful rules in their entirety, thereby affecting many parties not directly before the court.[16] The Court has long and consistently approved this practice. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (affirming order vacating agency policy); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (same); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (same); *United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 463-65 (1935) (same).

This relief is grounded in the text of the APA, which allows courts to "postpone the effective date of an agency action" pending review, 5 U.S.C. 705, and to "set aside" unlawful agency action, *id.* 706(2)—*i.e.*, "annul or vacate" such action. Set Aside, Black's Law Dictionary (11th ed. 2019). Postponing a rule's effective date necessarily affects non-parties. DHS maintains that the APA's preliminary remedies apply only "to the parties who brought the suit," Pet. Br. 46,

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[16] *See, e.g., Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016, 1024 (2d Cir. 1986); *Mason Gen. Hosp. v. HHS*, 809 F.2d 1220, 1231 (6th Cir. 1987); *H & H Tire Co. v. U.S. Dep't of Trans.*, 471 F.2d 350, 355–56 (7th Cir. 1972); *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 297 (8th Cir. 1985); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Legal Envt'l Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1469 (11th Cir. 1997).

but the text contains no such limitation, 5 U.S.C. 705, and this Court has stayed rules in their entirety as a preliminary matter pending review. *See, e.g.*, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). Congress's choice of these remedies, unchanged after decades of broad-based injunctions, reflects a sensible decision that, in appropriate cases, regulated parties should not have to seek protection against broad agency action in hundreds of individual lawsuits.

The same practice has long governed challenges to state laws. *See* Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 444 n.161 (2017) (listing cases). For at least 100 years, courts have enjoined unlawful state laws in full, rather than force every regulated party to bring its own suit. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 926, 959–961 (2020). The categorical bar DHS proposes would upset all of this. Lawsuits against government action might proliferate dramatically, as would emergency Rule 23 motions. No matter how legally dubious a policy, the government could keep enforcing it against anyone who did not have the resources to find a lawyer and sue.

DHS briefly asserts, but does not seriously pursue, an Article III objection. Pet. Br. 42–43, 44. But plaintiffs here plainly have standing, and established a right to relief against the policy across the entire border. Article III was no barrier to broad relief in the APA and state-law challenges cited above, or in hundreds of others. The injunction in this case "redressed" the plaintiffs' "injur[ies] in fact" that were "caused by the defendant." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). That is all Article III requires. It has never imposed the sort of narrow

tailoring DHS advocates. *Cf. Lewis v. Casey*, 518 U.S. 343, 357–59 (1996) (holding simply that plaintiffs can only challenge policies that injure them). DHS's position would fundamentally change how courts review government action, with unpredictable consequences. And it would prevent Congress from consolidating review of agency action or otherwise choosing broader relief under any circumstance.

In short, DHS's arguments as to the scope of relief are unavailing, both because plaintiffs were entitled to the precise scope of relief afforded, and because DHS's arguments are at odds with more than a century of precedent and practice.

CONCLUSION

The decision of the court of appeals should be affirmed.

Judy Rabinovitz
Counsel of Record
Lee Gelernt
Anand Balakrishnan
Celso J. Perez
David Chen
Michael K.T. Tan
Omar C. Jadwat
Steven Watt
Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
jrabinovitz@aclu.org

Cecillia Wang
Julie Veroff
Spencer Amdur
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

David D. Cole
Carmen G. Iguina Gonzalez
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Melissa Crow
SOUTHERN POVERTY LAW CENTER
1101 17th Street, NW, Suite 705
Washington, D.C. 20036

Gracie Willis
SOUTHERN POVERTY LAW CENTER
150 East Ponce de Leone Avenue, Suite 340
Decatur, GA 30030

Sean Riordan
AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111

Karen Musalo
Blaine Bookey
Sayoni Maitra
Anne Peterson
CENTER FOR GENDER AND REFUGEE STUDIES
UC HASTINGS COLLEGE OF THE LAW
200 McAllister Street
San Francisco, CA 94102

Counsel for Respondents

Date: January 15, 2021