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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

This Court should reverse the flawed class-wide mandatory preliminary injunction the district court imposed holding that the right-to-counsel provision in the Administrative Procedure Act (APA), 5 U.S.C. § 555, applies in non-refoulement interviews conducted as part of the Migrant Protection Protocols (MPP). Appellees' arguments to the contrary are unavailing.

First, appellees contend that there is no right to counsel in non-refoulement interviews conducted under MPP because of the Immigration and Nationality Act's (INA) "silence on whether individuals are entitled to counsel in MPP non-refoulement interviews." *See* Resp. Br. 26-39. Appellees emphasize (*see id.* at 26-30), that a "[s]ubsequent statute may not be held to supersede or modify" the APA "except to the extent that it does so expressly." 5 U.S.C. § 559. According to appellees, this "express statement" rule "prohibits another statute from superseding the APA's right to counsel by implication." Resp. Br. 29-30; *id.* at 25-27, 29-31. Appellees' assertion that an "express[]" statement, 5 U.S.C. § 559, is always necessary to displace the APA would render multiple provisions of the INA that provide a right to counsel superfluous because none of those provisions even mention, let alone expressly disavow, the APA. *See* 8 U.S.C. § 1362; *id.* § 1228(b)(4)(B); *id.* § 1225(b)(1)(B)(iv). Appellees' argument also conflicts with *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955), which recognized that Congress

need not provide a "magical password[ ]" to comply with section 559's requirement "that modifications must be express."

Finally, appellees' argument that "silence" in the INA "is not express" and thus cannot displace the APA, Resp. Br. 26-30, is wrong and is inconsistent with the decision below holding that provisions of the INA supplant the APA in the absence of an express statement. Specifically, even though the expedited removal provision, 8 U.S.C. § 1225(b)(1)(A), does not even mention, let alone expressly repudiate the APA, the district court held that the APA does not apply to expedited removal proceedings because the "INA provision concerning expedited removal proceedings is complex, specialized, and specific to expedited removal proceedings." ER9. *See* Opening Br. 37-38. Appellees assert that this holding "is not relevant" because "the question of whether the right to counsel applies in expedited removal proceedings was simply not before the district court" and because "expedited removal proceedings are entirely distinct from non-refoulement interviews." Resp. Br. 36-39. Those arguments ignore that the reasoning the district court employed in holding that the APA is supplanted in expedited removal proceedings is squarely before this Court. Application of that same reasoning requires the conclusion that the APA's right to counsel does not apply to the non-refoulement interviews at issue here.

Second, appellees do not dispute that non-refoulement interviews only occur if class members affirmatively state, without any prompting, that they fear returning

to Mexico. Appellees nonetheless insist that class members' "detention" along with other "crucial context" implicitly "compel[s]" class members to appear for their MPP non-refoulement interviews such that 5 U.S.C. § 555(b) applies. Resp. Br. 18-23. But the detention and context appellees highlight is not a byproduct of MPP, and so cannot amount to specific action taken to compel class members' appearance at non-refoulement interviews under MPP. Instead, class members are in custody because they are aliens seeking admission into the United States. Appellees argue "[a]lternatively" that "even if class members are not compelled to appear" the "APA right to counsel still applies" because non-refoulement interviews are "agency proceeding[s]" to which 5 U.S.C. § 555(b) applies. Resp. Br. 23; *see also id.* at 23-26. But "the district court did not reach this issue," *id.* at 23, even though it was fully briefed below, so the district court should "decide the issue in the first instance." *Developmental Servs. Network v. Douglas*, 666 F.3d 540, 548 n.29 (9th Cir. 2011). If this Court reaches this issue, it should hold that non-refoulement interviews are not "agency proceeding[s]," 5 U.S.C. § 555(b), because the outcomes of non-refoulement interviews under MPP do not result in a final disposition.

Third, appellees argue that the holding in *Ardestani v. INS*, 502 U.S. 129, 133 (1991) that the INA "supplant[s] the APA in immigration proceedings," *id.*, is limited to "proceedings that determine the deportability of an alien." Resp. Br. 32; ER9. That ignores: (1) *Ardestani*'s explicit holding that the APA is supplanted in

"immigration proceedings," even though the decision separately discusses deportation proceedings, *see* Opening Br. 33-34; and (2) precedent from this Court holding that the rule announced in *Ardestani* applies even when "the alien concedes deportability." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1025-26 (9th Cir. 1992).

Fourth, appellees also ask this Court to hold that they are likely to succeed on the merits of claims they brought under the Due Process Clause. Resp. Br. 39-52. The district court declined to address these claims in granting the preliminary injunction motion, however, *see* ER15 n.6, and appellees do not explain why this Court should reach this issue. In any event, appellees' procedural-due-process claims are foreclosed by recent Supreme Court precedent holding that aliens who have not been admitted and who have no meaningful connections with the United States have "no entitlement to procedural rights other than those afforded by statute," *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020), and appellees identify no liberty or property interest that would support a substantive due process claim here.

Finally, appellees argue that the balance of harms favors them because the named Plaintiffs' fear assessments "turned out differently when they were provided access to counsel." Resp. Br. 53. That argument fails to account for the distinction between retrospective injunctive relief and the prospective class-wide preliminary injunction the district court entered below. Because the named Plaintiffs were no longer in MPP at the time the class members sought injunctive relief, the district

court needed to make concrete findings that class members would suffer imminent future harm in the absence of preliminary injunctive relief. It did not do that here.

ARGUMENT

This Court should reverse the district court's injunction.

I. The District Court Erred in Holding that Class Members Established a Likelihood of Success on the Merits.

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

As the government has explained, section 1225(b)(2)(C), unlike multiple other provisions of the INA, does not provide a right to counsel, and section 1225(b)(2)(C) is the only statute governing MPP, including non-refoulement interviews that occur under MPP. *See* Opening Br. 17-25. So based on the plain text of section 1225(b)(2)(C), there is no right to counsel in non-refoulement interviews conducted under MPP. Appellees make several arguments to the contrary. *See* Resp. Br. 26-39. None has merit.

Appellees primarily argue that section 1225(b)(2)(C) does not supersede the right to counsel provided by the APA because 5 U.S.C. § 559 states that a "[s]ubsequent statute may not be held to supersede or modify [the APA] … except to the extent that it does so expressly." *See* Resp. Br. 26-31. Appellees contend that because section 1225(b)(2)(C) "says nothing about the right to counsel," section 559's express-statement requirement has not been satisfied and thus the APA's right-

to-counsel provision applies in non-refoulement interviews under MPP. Resp. Br. 28; *see also id.* at 29-31. Appellees are wrong. When Congress wished to provide a right to counsel in an immigration proceeding, Congress said so expressly in the INA. *See* 8 U.S.C. § 1225(b)(1)(B)(iv) (providing a right for aliens to consult with an attorney prior to their credible fear interviews); *id.* § 1228(b)(4)(B) (providing a right to counsel for aliens convicted of an aggravated felony and placed in expedited removal proceedings); *id.* § 1362 (providing a right to counsel for aliens in full removal proceedings before an immigration judge). Congress was thus clear that a right to counsel applies in an immigration proceeding only to the extent that Congress provided for one in the INA. *See* Opening Br. 17-25.

Appellees' position, if adopted, would render superfluous the provisions just cited providing a right to counsel in those proceedings. *See* Opening Br. 39-40; *Stand Up for California! v. U.S. Dep't of Interior*, 959 F.3d 1154, 1159 (9th Cir. 2020) (a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"; "when two statutes are capable of co-existence, it is the duty of the courts … to regard each as effective"). Here, 5 U.S.C. § 559 and the various INA provisions furnishing a right to counsel are "capable of co-existence," *id.*, by rejecting appellees' argument and concluding that, in crafting the comprehensive INA, including the various procedures available in immigration proceedings, Congress intended to "preempt

application of some or all of the APA." *Allen v. Milas*, 896 F.3d 1094, 1102-03 (9th Cir. 2018); *see also Ardestani v. INS*, 502 U.S. 129, 133-34 (1991) ("[T]he INA expressly supersedes … the APA in light of … [Congress's] laborious adaptation of the [APA] to the deportation process [and] the specific points at which deviations from the [APA] were made.").

Notably, the Supreme Court rejected appellees' view of 5 U.S.C. § 559 in *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). While recognizing that under § 559 "[e]xemptions from the terms of the [APA] are not lightly to be presumed in view of the statement . . . that modifications must be express" *id.*, the Court held that the APA did not apply to deportation proceedings even though the deportation statute lacked a statement explicitly disavowing the APA. "Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the [APA], we must hold that the present statute expressly supersedes the hearing provisions of" the APA in view of the "background of the 1952 immigration legislation, its laborious adaptation 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.*; *see also Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[T]he Court has emphasized that the [APA's] use

of the word 'expressly' does not require Congress to use any 'magical passwords' to exempt a later statute from the provision."). Appellees are therefore wrong that the absence of an "express statement" superseding the APA in section 1225(b)(2)(C) means that the APA's right to counsel applies. Resp. Br. 29. Instead, because the INA reflects Congress's "laborious adaptation of the" procedures contemplated by the APA and also, in some instances, "deviat[es] from the APA," *Ardestani*, 502 U.S. at 133-34, by specifically providing a right to counsel in some circumstances but not others, the numerous statutes that make up the INA evince a "clear implication" that the provisions that comprise the INA, including section 1225(b)(2)(C), displace the APA. *Dorsey*, 567 U.S. at 274.

Finally, appellees' position is inconsistent with the district court's holding that the "INA's expedited removal proceeding provision supersedes the APA," ER9, even though the expedited removal provision contains no explicit statement superseding the APA. *See* Opening Br. 37-38. The district court's conclusion was based on its observation that the "INA provision concerning expedited removal proceedings is complex, specialized, and specific to expedited removal proceedings," ER9, but appellees do not dispute that this provision, section 1225(b)(1)(A), does not expressly mention the APA. Apart from parroting the district court's conclusion that the "INA's expedited removal proceeding provision supersedes the APA," Resp. Br. 39, appellees never explain how the district court's

holding can be reconciled with their position that the APA can only be displaced by an "express statement," *id.* at 29, nor do they identify any "express statement" in section 1225(b)(1) superseding the APA. *Id.* And critically, neither appellees nor the district court explain why an express statement repudiating the APA is necessary when assessing whether the contiguous-return provision supplants the APA, yet no such statement is necessary to conclude that the INA, and only the INA, governs the expedited removal provision. ER9; Resp. Br. 29. If, as appellees argue, the plain text of § 559 applies in every instance whenever there is not an "express statement" superseding the INA and whenever there is "silence" in the INA, Resp. Br. 28-29, there is no textual basis to distinguish between § 1225(b)(1)(A) and § 1225(b)(2)(C) because both are equally silent on whether there is a right to counsel. Moreover, appellees do not dispute that the contiguous-return provision is just as "specialized" and "specific" as the expedited removal provision, Opening Br. 37, a fact that underscores that the district court erred.

Appellees attempt to sidestep this flaw by arguing that "the question of whether the right to counsel applies in expedited removal proceedings was simply not before the district court" and "expedited removal proceedings are entirely distinct from non-refoulement interviews." Resp. Br. 36. Both arguments are beside the point because the reasoning the district court employed to hold that the APA's right-to-counsel provision does not apply in expedited removal proceedings, even

though section 1225(b)(1)(A) is silent on this issue, is squarely before this Court, since that same reasoning compels the conclusion that the APA's right to counsel also does not apply in non-refoulement interviews conducted under MPP. In effect, the district court attempted to reconcile its reasoning with this Court's decision in *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011), which held that aliens in expedited removal proceedings past the credible-fear stage have no right to counsel because "no applicable statute" "indica[tes] that such aliens have any such right," but failed to harmonize its analysis with the teaching in *Barajas-Alvarado* that the absence of a statutory right to counsel in the INA means that no such right exists. *See* Opening Br. 22.

Appellees contend that the government "vastly overstate[s] the holding in *Barajas-Alvarado*" because there is no evidence that this Court analyzed "whether" § 555(b), which sets out the APA's right to counsel, "applies to expedited removal proceedings." Resp. Br. 37; *see also id.* at 37-39. But the lack of consideration this Court gave to § 555(b) in *Barajas-Alvarado* bolsters the government's position, because it buttresses the conclusion that the INA, in its entirety, preempts the APA, and so in assessing whether a right to counsel exists, the text of the applicable INA provision is dispositive. And appellees do not refute that if they were correct that § 555(b) applies in every instance where there is no express statement superseding the APA, then § 555(b) would have been an "applicable statute" providing a right to

counsel in expedited removal proceedings. *Barajas-Alvarado*, 655 F.3d at 1088; Opening Br. 36-37. Yet this Court unequivocally held that no "applicable statute" provides a "right to counsel." *Barajas-Alvarado*, 655 F.3d at 1088. Appellees also claim that the holding in *Barajas-Alvarado* stemmed from "implementing regulations" stating that "there is no right to counsel" in expedited removal proceedings. Resp. Br. 37. But the relevant regulation, 8 C.F.R. § 287.3(c), simply states that "[e]xcept" for aliens placed in expedited removal, "an alien arrested without [a] warrant and placed in formal [removal] proceedings … will be advised of the reasons for his or her arrest and the right to be represented." The regulation, like the expedited removal statute, does not address whether there is a right to counsel in expedited removal proceedings outside of the credible-fear process and the necessary implication of that silence is that there is no right to counsel. *See Barajas-Alvarado*, 655 F.3d at 1088. That same principle requires reversing the preliminary injunction here.

Appellees also argue that because "[n]on-refoulement interviews under the novel MPP program did not exist when Congress enacted § 1225(b)(2)(C)," it is impossible to infer "congressional intent" to deny a right to counsel in non-refoulement interviews conducted under MPP. Resp. Br. 28-29. That argument ignores that non-refoulement interviews conducted under MPP only occur as part of an exercise of the contiguous-return authority, *see* ER78:18-19, and Congress's

intent in enacting the contiguous-return authority can be readily inferred. It did not intend for aliens temporarily returned under section 1225(b)(2)(C) to have a right to counsel irrespective of the specific procedures used to implement that contiguous-return authority. *See* Opening Br. 21-22.

Moreover, appellees offer no explanation for how this Court could conclude that Congress did not consider this issue when, in a "neighboring subsection" of the same statutory provision, Congress included a right to counsel. *Padilla v. ICE*, 953 F.3d 1134, 1149 (9th Cir. 2020) (holding that statute's "silence" was "especially significant because its neighboring subsection" specifically addressed the issue). Indeed, as the government has demonstrated, in enacting the INA, Congress considered whether and when in the various proceedings contemplated by the INA aliens have a right to counsel and when they do not. *See* Opening Br. 18-20. Consistent with that congressional consideration and treatment, this Court has held that when an applicable provision of the INA provides a right to counsel, then a right to counsel exists; when no such right is provided, then there is no right to counsel. *Compare Zuniga v. Barr*, 946 F.3d 464, 469 (9th Cir. 2019) (holding that aliens convicted of an aggravated felony and placed in expedited removal proceedings have a right to counsel because the operative statute, 8 U.S.C. § 1228(b)(4)(B), provides such a right) *with Barajas-Alvarado*, 655 F.3d at 1088 (holding that aliens in

expedited removal proceedings past the credible-fear stage have no right to counsel because "no applicable statute" "indica[tes] that such aliens have any such right").

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).

As the government has explained, because class members undergo non-refoulement interviews only if they affirmatively articulate a fear of returning to Mexico, without any prompting from the agency, they are not "compelled" to appear as is required for the right to counsel to apply under 5 U.S.C. § 555(b). *See* Opening Br. 25-31. Appellees' contrary arguments, *see* Resp. Br. 21-26, are incorrect.

Appellees acknowledge that class members "set the non-refoulement process in motion," Resp. Br. 20, but contend that section 555(b) still applies because it is not "limited to proceedings involving subpoenaed witnesses." *Id.*; *see also id.* at 20-21. But the government's point is not that section 555(b) is limited to subpoenas. Rather, its point is that the cases applying the right to counsel in section 555(b) have done so in the context of summonses and subpoenas, because, unlike non-refoulement interviews under MPP, both involve compelled appearances. Opening Br. 25. This is why this Court has described the right to counsel in section 555(b) as "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* Opening Br. 25; *Salem v. Pompeo*, 432 F. Supp. 3d 222, 231 (E.D.N.Y. 2020) ("Plaintiffs cite no case

in which the term 'compelled' … is understood outside of the context of a summons or subpoena."). Appellees assert that "[e]ven if" the decision in *Salem*—which held that the term "compelled" is a "term of art connoting an obligatory, involuntary action"—is correct, *Salem* is distinguishable because "[t]here, plaintiffs were appearing for a passport appointment" while here, class members are "seeking protection from persecution or torture." Resp. Br. 22. But the consequences flowing from the outcome of non-refoulement interviews under MPP have no bearing on whether class members are "compelled" to appear at non-refoulement interviews prior to the interviews' occurrence. Appellees cite no cases applying the right to counsel in section 555(b) where the individual controls his or her appearance at an agency proceeding.

Like the district court, appellees also contend that "crucial context" supports the application of section 555(b) because class members are in detention, are subject to "the MPP program" and are "seeking asylum or other protection from persecution or torture." Resp. Br. 20-22; ER15. None of the contextual features that appellees allude to, however, establish that class members are compelled to appear for non-refoulement interviews under MPP. Class members are temporarily in custody because of their status as aliens who have not been admitted and are seeking admission to the United States. *See DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1970 (2020) ("Without a change in status, [respondent] would remain subject to …

detention and removal."). So class members' detention occurs irrespective of their placement in MPP. Their detention therefore cannot amount to specific action taken to compel their appearance at non-refoulement interviews that occur under MPP. *See* Opening Br. 30. And appellees' attack on the "government's choice to force [class members] into MPP," Resp. Br. 22, *see also id.* at 7, 9, 21-24, is irrelevant, since this case "assumes" "the legality of MPP," *id.* at 6 n.1, and exclusively concerns non-refoulement interviews that occur under MPP.

Indeed, if appellees were correct that aliens' "detention," Resp. Br. 20-21, by itself, amounted to being "compelled" to appear under section 555(b), then the APA's right to counsel would apply in both full and expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("An alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); *id.* § 1225(b)(2)(A) ("[T]he alien shall be detained for a [full removal] proceeding under section 1229a of this title."). But appellees themselves concede that the APA's right to counsel does not apply in full removal proceedings "before an immigration judge," Resp. Br. 32, while the text of section 1225(b)(1) and this Court's holding in *Barajas-Alvarado* foreclose the conclusion that the APA's right to counsel applies in expedited removal proceedings past the credible-fear stage. *See* Opening Br. 21-22; *Barajas-Alvarado*, 655 F.3d at 1088.

Appellees argue that "[a]lternatively, even if class members are not compelled to appear" "the APA right to counsel still applies" based on the second component of section 555(b), which states that individuals "in an agency proceeding" have a right to counsel. Resp. Br. 23. Appellees acknowledge, however, that "the district court did not reach this issue," even though it was fully briefed. Resp. Br. 23, ER15 ("Because the Court finds the first provision of § 555(b) applies, it will not address the applicability of the second provision."). Since the district court "expressly refused" to decide "whether the injunction can be upheld" based on this alternative ground, "it should decide the issue in the first instance." *Developmental Servs. Network v. Douglas*, 666 F.3d 540, 548 n.29 (9th Cir. 2011) ("[P]rudence suggests that consideration of the issue should be put off for another day. After all, the preliminary injunction order did not even touch on that issue."). For that reason, appellees' assertion that it is "irrelevant" that this Court in *Smiley v. Dir., Office of Workers Compensation Programs*, 984 F.2d 278, 282 (9th Cir. 1993) "did not specify which sentence of § 555(b) attaches the right to counsel," Resp. Br. 25, is wrong. The district court specifically, and improperly, relied on *Smiley*—which held that a litigant had a "statutory right to be advised and represented by counsel" based on statutes and regulations specific to the Longshore Act, *see* Opening Br. 28-29—to hold that the "first provision of § 555(b) applies," ER15, and declined to address the applicability of the "second sentence of § 555(b)." Resp. Br. 25.

If this Court elects to reach the issue of whether non-refoulement interviews are "agency proceeding[s]" under section 555(b), it should hold that they are not. The APA defines an "agency proceeding" as a "rule making," an "adjudication," or a "licensing proceeding." 5 U.S.C. § 551(12); *id.* § 551(5), (7), (9). A non-refoulement interview is neither a "rule making" nor a "licensing proceeding," so appellees must demonstrate that a non-refoulement interview is an "adjudication," as they appear to acknowledge. *See* Resp. Br. 24 (arguing that "[n]on-refoulement interviews … adjudicate whether a class member will be forced to return to Mexico"). But appellees cannot make that showing because an "adjudication" under the APA is defined as an "agency process for the formulation of an order; order is in turn defined as the 'whole or a part of a final disposition.'" *Int'l Tel. & Tel. Co., Commc'ns Equipment & Sys. Div. v. Local 134, Int'l Brotherhood of Electrical Workers, AFL-CIO, et al.,*, 419 U.S. 428, 443 (1975) (quoting 5 U.S.C. § 551(6)); *Foley-Wismer & Becker v. NLRB*, 682 F.2d 770, 774 (9th Cir. 1982) (noting that in order for something to qualify as an "adjudication" under the APA, it must result in a "final disposition" that has "determinate consequences for the party to the proceeding").

Non-refoulement interviews do not result in a final disposition because, as the district court observed, non-refoulement interviews are "the next step in a long, multi-stage immigration process," ER15, and as appellees themselves note, non-

refoulement interviews "are collateral to the merits of removability." Resp. Br. 24. Moreover, returns under MPP are temporary, and aliens returned under MPP come back to the United States for their removal proceedings, and may then request subsequent non-refoulement interviews, which underscores that the results of non-refoulement interviews do not effectuate any *final* disposition. *See* ER136-37. Indeed, that is precisely what happened to the named Plaintiffs in this case. *See* Resp. Br. 12-13. By contrast, the passport appointments at issue in *Salem* resulted in final dispositions, a fact confirmed by specific "language in regulations" and "official policy," 432 F. Supp. 3d at 232, so appellees' reliance on *Salem* to argue that non-refoulement interviews "plainly qualify under" the second sentence of section 555(b) is misplaced. Resp. Br. 24. In sum, if this Court reaches the issue, it should hold that non-refoulement interviews under MPP are not "agency proceeding[s]" as defined in section 551, and thus, the second component of section 555(b) is also inapplicable.

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

Finally, the Supreme Court in *Ardestani v. INS*, 502 U.S. 129, 133-34 (1991) held that the INA "supplant[s] the APA in immigration proceedings," *id.*, based on its previous decision in *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955). Application of that precedent compels the conclusion that the APA does not apply

to the non-refoulement interviews at issue here. *See* Opening Br. 31-41. Appellees' contrary arguments, *see* Resp. Br. 31-32, are unpersuasive.

Appellees argue that "[t]aking the two cases together [*Ardestani* and *Marcello*], the Supreme Court used the phrase 'immigration proceedings' to refer to proceedings that determine 'the deportability of an alien.'" Resp. Br. 32; *see also id.* at 31-32. They offer no response, however, to the fact that in *Ardestani*, the Supreme Court discussed deportation proceedings throughout its opinion, yet unequivocally held that "the provisions of the Immigration and Nationality Act … supplant the APA in *immigration proceedings*." 502 U.S. at 133 (emphasis added); Opening Br. 33-34.

In addition, appellees' cramped interpretation of *Ardestani* is inconsistent with this Court's precedent applying the teachings in *Ardestani* even when the deportability of an alien is not at issue. In *Castillo-Villagra v. INS*, 972 F.2d 1017, 1025-26 (9th Cir. 1992), this Court considered whether the Board of Immigration Appeals (BIA) could take "administrative notice" of intervening events, and specifically held that the "INA displaces the APA on this question." Critically, this Court noted that the alien in *Castillo-Villagra* had "concede[d] deportability, so *Marcello* arguably [wa]s not dispositive." *Id.* Yet, this Court still held that the INA, not the APA, applied even though deportability was not at issue because the "ratio decidendi in *Ardestani*" was that "immigration proceedings … are not governed by

the APA." *Id.* Appellees argue that *Castillo-Villagra* is inapposite because it was decided in the context of an "[a]sylum decision[]" which relates "to issues of ultimate removal and authority to reside in the United States." Resp. Br. 35-36. But appellees gloss over the reasoning in *Castillo-Villagra*—reasoning that decisively undermines their assertion that *Ardestani* is limited to "proceedings that determine the deportability of an alien," Resp. Br. 32.

Appellees also appear to suggest that even if *Ardestani* and *Marcello* apply outside of the context of deportation proceedings, the applicability of both decisions turns on whether the "merits of removability" are at issue. Resp. Br. 33; *id.* at 36 ("[I]ssues of admissibility … [are] explicitly governed by the INA."). There are two problems with this argument. First, that interpretation of *Ardestani* and *Marcello* is inconsistent with appellees' contention, and the district court's holding, that both decisions apply only to "proceedings" that "take place before an immigration judge" and "that determine the deportability of an alien." Resp. Br. 32; *see also* ER8. Removal proceedings before an immigration judge, *i.e.*, full removal proceedings, are not the only proceedings in which aliens are determined to be inadmissible. The same determination is made in expedited removal proceedings, which do not take place before an immigration judge. *See* Opening Br. 36.

Second, appellees' argument is irreconcilable with the rationale articulated in *Ardestani* as to why the INA supplants the APA in immigration proceedings.

Ardestani emphasized "the background" of the INA, "its laborious adaption of the [APA] to the deportation process, and the specific points at which deviations from the [APA] were made." 502 U.S. at 133-34. Each of those attributes applies fully to the present iteration of the INA, as Congress's decision to "laborious[ly]" enact some proceedings that apply most of the APA's procedures, like full removal proceedings, yet "deviat[e]" from the APA in other more streamlined contexts like expedited removal and contiguous-territory return, is readily apparent. *Id.*; Opening Br. 35-36. Appellees never address the reasons the Supreme Court articulated in reaching the result that it did in *Ardestani* and provide no support to substantiate their claim that the logic underpinning *Ardestani* is limited to "decisions to remove an alien." Resp. Br. 33. To the contrary, section 1225(b)(2)(C), like the expedited removal provision, is "specialized and specific," ER9, and concerns immigration proceedings, so the settled holding of *Ardestani* applies here. For that reason, courts have relied on the logic in *Ardestani* to reject procedural challenges in "immigration proceedings" that do not concern removability. *See, e.g.*, *Robert v. Reno*, 25 F. App'x 378, 381 (6th Cir. 2001) (holding that challenge to "denial of a temporary business visa" was not governed by the APA in light of *Ardestani*).

Appellees also cite district court decisions arising in the context of claims seeking to have visa applications adjudicated within a particular period of time to argue that "courts have held the APA applies to immigration matters that are separate

and apart from removal proceedings." Resp. Br. 34; ER10. But those cases do not address the right-to-counsel provision in section 555(b), *see* Opening Br. 38-39, and the reasoning in those cases, namely that a contrary holding could potentially allow agencies to pocket veto visa applications by refusing to adjudicate them for an infinite period of time, *see id.*, does not apply here.

D. This Court Should Not Address Class Members' Due-Process Claims For the First Time on Appeal, and In Any Event, Class Members Have Not Shown They Are Likely to Succeed on These Claims.

Appellees argue that the Due Process Clause "independently guarantees access to counsel before and during non-refoulement interviews." Resp. Br. 39. The district court, however, "declin[ed] to address" this claim, ER 15 n.6, so the district court "should decide the issue in the first instance." *Developmental Servs. Network v. Douglas*, 666 F.3d 540, 548 n.29 (9th Cir. 2011). Appellees offer no reason why this Court should reach claims that did not form the basis for the preliminary injunction below.

In any event, these due-process claims do not provide an alternative ground for affirmance. The procedural-due-process claim that appellees raise, Resp. Br. 40-50, is foreclosed by the Supreme Court's recent decision in *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1963-64 (2020), which held that aliens who have not been unadmitted, like class members, and who lack "established connections" to this country have "no entitlement to procedural rights other than those afforded by

statute" even if they are physically present in the United States. The Supreme Court grounded its holding in "fundamental propositions," namely that the "power to admit or exclude aliens is a sovereign prerogative" and "a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted." *Id.* at 1982. As a result, aliens who have not been admitted and who are stopped at a port of entry, detained "after unlawful entry," or "paroled elsewhere in the country for years pending removal," have only "those rights regarding admission that Congress has provided by statute." *Id.* at 1982-83.

Class members are aliens who have not been admitted and who have no "established connections" with the United States. *Thuraissigiam*, 140 S. Ct. at 1963-64. Since class members have no statutory right to counsel in non-refoulement interviews, and have only those procedural due process rights conferred by statute relating to their admission, class members thus have no independent procedural-due-process right to counsel during non-refoulement interviews. Appellees argue that the principles espoused in *Thuraissigiam* apply only to the "ultimate merits of … asylum claims." Resp. Br. 50. They are wrong. The holding in *Thuraissigiam* follows from the proposition that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application," 140 S. Ct. at 1982, and this Court has applied that very principle to conclude that aliens who have not been admitted do not "have a constitutional right to be free from

detention, even for an extended time" during removal proceedings. *Rodriguez v. Robbins*, 715 F.3d 1127, 1140 (9th Cir. 2013). Such prolonged detention claims have nothing to do with the "process by which … removability will be determined," *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018), yet are covered by *Thuraissigiam* because they involve constitutional challenges by aliens who have not been admitted to a step that is part of the admission process. Likewise, as the district court below held, non-refoulement interviews are the "next step" in a "multi-stage immigration process," ER15, and because there is no statutory right to counsel in non-refoulement interviews that occur under MPP, class members have no procedural-due-process right to counsel as part of that process.

The cases appellees cite for the proposition that there is a due-process right to counsel in "removal proceeding[s]" before an immigration judge, Resp. Br. 40, do not change this conclusion, as both cases: (1) held that the procedural-due-process right to counsel stemmed from the statutory right to counsel in 8 U.S.C. § 1362, which is inapplicable here; and (2) both cases involved aliens with "established connections" with the United States, unlike class members. *Thuraissigiam*, 140 S. Ct. at 1963-64. *See Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (holding that an alien who had been present in the United States for three years on a "non-immigrant visa" had a right to counsel "rooted in the Due Process Clause and codified at 8 U.S.C. § 1362"); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir.

2004) (holding that an alien who received a "six-month authorization" to enter the United States had a right to counsel based on the "Fifth Amendment guarantee of due process" that was "codified at 8 U.S.C. § 1362").

As for class members' substantive-due-process claim, Resp. Br. 50-52, the first step in establishing a substantive-due-process claim requires a "careful description of the asserted fundamental liberty interest." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085 (9th Cir. 2015). Appellees have never identified such a "fundamental liberty interest," *id.*, below or in their appellate brief, and their asserted substantive-due-process claim "runs headlong into Congress' plenary power over immigration … [the] interest cannot be so fundamental that it overrides Congress' plenary power in this domain." *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018) (holding that substantive-due-process right to live with unadmitted "family members" was "not colorable"); *Blanco v. Mukasey*, 518 F.3d 714, 722 (9th Cir. 2008) ("Individuals in immigration proceedings do not have Sixth Amendment rights [to counsel].").

Appellees also claim that "[i]f due process guarantees a right to retain counsel for removal proceedings, it must do the same before and during non-refoulement interviews," and that "the government can and does accommodate the right to access counsel" in credible fear interviews. Resp. Br. 40, 47; *see also id.* at 40-48. But appellees provide no reason why the agency is required to provide the same panoply

of procedures applicable in proceedings used to determine whether individuals should be removed to the entirely different context at issue here where individuals are temporarily returned to Mexico. As the government has demonstrated, Congress specifically distinguished between these two contexts by omitting procedures in section 1225(b)(2)(C) that are applicable in removal proceedings. The agency is entitled to account for that different context in fashioning procedures applicable to non-refoulement interviews governing temporary return to Mexico under MPP. Indeed, the agency has already explained that based on its "experience conducting credible fear screenings for aliens subject to expedited removal," the "fear-assessment protocol" used in MPP is, by design, materially different from the credible fear process,[1] so appellees' reliance on what the government does in "credible fear interviews," Resp. Br. 47-49, is misplaced.

II. The Balance of Harms Favors the Government.

The preliminary injunction places unfounded limits on the government's ability to use a critical immigration tool and creates tangible national security concerns. *See* Opening Br. 41-42. Appellees' contrary arguments should be rejected.

[1] October 2019 Assessment of the Migrant Protection Protocols at 7, *available at* https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf. This Court may take "judicial notice" of "publicly available information displayed on government websites." *King v. Cty. of Los Angeles*, 885 F.3d 548, 555 (9th Cir. 2018).

Appellees argue that the government does not "challenge the district court's finding that Plaintiffs have shown a likelihood of irreparable injury" and that "the fact that Plaintiffs' own fear assessments turned out differently when they were provided access to counsel" supports the district court's irreparable-harm analysis. Resp. Br. 52-53. Appellees are wrong on both scores. The government specifically argued, *see* Opening Br. 42-43, that the district court's irreparable harm holding improperly relied on the named Plaintiffs' aversion of *past* harm, instead of particularized findings that an injunction was necessary to prevent unnamed class members from suffering imminent *future* harm. Injunctive relief sought to remedy a "past" or "ongoing injury" must be analyzed differently from claims, like those that form the basis of the preliminary injunction below, "seek[ing] prospective relief." *Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010); *see also Munns v. Kerry*, 782 F.3d 402, 411-12 (9th Cir. 2015) ("Despite being harmed in the past, the family members must still show that the threat of injury in the future … presents a substantial risk of recurrence for the court to hear their claim for prospective relief."). So the finding that "[t]he presence of counsel was clearly helpful to Petitioner Cristian Doe," ER16, is irrelevant, since named Plaintiff Cristian Doe had already been found to have a fear of returning to Mexico at the time the preliminary injunction motion was filed, and thus could not, unlike the class members, be subject to MPP going forward. *See* Opening Br. 42.

Appellees argue that the class members face a "severe risk of harm" without the preliminary injunction the district court entered, Resp. Br. 53, but they cite no record evidence to support that proposition, and the district court relied exclusively on record evidence relating to the named Plaintiffs' ability to alleviate the past harm they suffered to conclude that different class members showed a "likelihood of irreparable injury" in the future. ER16-17. That was improper; the district court "presume[ed]" that class members would suffer irreparable harm based on the named Plaintiffs' experiences instead of substantiating its holding with "required factual findings" showing that class members other than the named Plaintiffs "demonstrate[ed] a likelihood of irreparable harm." *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011).

Appellees argue that due to the "possible consequences of an error in a non-refoulement interview," the district court correctly concluded that class members were likely to suffer irreparable harm. Resp. Br. 55; *see also id.* at 44-45. That argument is irreconcilable with the Supreme Court's admonition that "[i]ssuing a preliminary injunction based only on a *possibility* of irreparable harm" is improper. *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (emphasis added). Indeed, the record evidence appellees highlight, *see* Resp. Br. 44-45, which consists largely of declarations submitted by attorneys, not class members, confirms that, at most, appellees only demonstrated a possibility of irreparable harm below. *See* SER191

("I believe having an attorney present during the non-refoulement interview is vital to ensure asylum seekers are safe."); SER200 ("Even though I think my client has a strong claim for non-refoulement, I fear that she will once again have difficulty explaining her story.").

CONCLUSION

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

Respectfully submitted,

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Dated: July 30, 2020

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 6839 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on July 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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