No. 21A-_____

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

STATE OF TEXAS, ET AL.

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APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AND FOR AN ADMINISTRATIVE STAY

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## PARTIES TO THE PROCEEDING

Applicants were defendants-appellants below. They are Joseph R. Biden, Jr., in his official capacity as President of the United States; the United States of America; Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; the United States Department of Homeland Security (DHS); Robert Silvers, in his official capacity as Under Secretary for the Office of Strategy, Policy, and Plans at DHS; Troy A. Miller, in his official capacity as Acting Commissioner of United States Customs and Border Protection, an agency within DHS; United States Customs and Border Protection; Tae D. Johnson, in his official capacity as Acting Director of United States Immigration and Customs Enforcement, an agency within DHS; United States Immigration and Customs Enforcement; Ur M. Jaddou in her official capacity as Director of United States Citizenship and Immigration Services, an agency within DHS; and United States Citizenship and Immigration Services (USCIS).*

Respondents were plaintiffs-appellees below. They are the States of Texas and Missouri.

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* The operative complaint named Tracy L. Renaud, then the Acting Director of USCIS, as a defendant in her official capacity. Ms. Jaddou has since assumed the role of Director, and has therefore been automatically substituted as a party. See Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d). Similarly, the complaint named Kelli Ann Burriesci, then Acting Under Secretary for the Office of Strategy, Policy, and Plans at DHS, as a defendant in her official capacity. Mr. Silvers has since assumed the role of Under Secretary, and has been automatically substituted.

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants President Joseph R. Biden, Jr., et al., respectfully applies for a stay of the permanent injunction issued on August 13, 2021, by the United States District Court for the Northern District of Texas (App., infra, 35a-87a), pending the consideration and disposition of the government's appeal to the United States Court of Appeals for the Fifth Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

The government also respectfully requests an immediate administrative stay to preserve the status quo and avoid severe harms while the Court considers this application. The injunction

is otherwise set to take effect at 12:01 a.m. on Saturday, August 21. It requires the government to abruptly reinstate a broad and controversial immigration enforcement program that has been formally suspended for seven months and largely dormant for nearly nine months before that. An Assistant Secretary at the Department of Homeland Security has attested that complying with that mandate would be "near-impossible." App., infra, 98a. And a senior State Department official warned that the injunction threatens to create "a humanitarian and diplomatic emergency." Id. at 123a. Despite all that, the courts below denied a stay pending appeal and refused even to grant a brief reprieve to allow this Court to consider this application in an orderly fashion. The government is thus forced to seek an immediate administrative stay from this Court.

This application concerns the Secretary of Homeland Security's decision to stop using a discretionary immigration-enforcement tool in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. The INA provides that, "[i]n the case of" a noncitizen arriving on land from Mexico or Canada without entitlement to be admitted to the United States, the Secretary "may return the alien to that territory pending a [removal] proceeding under section 1229a of this title." 8 U.S.C. 1225(b)(2)(A) and (C). Until recently, that authority was used only on an "ad hoc basis." App., infra, 90a. In 2019, however, the Department of Homeland Security (DHS) implemented a "novel

program" known as the Migrant Protection Protocols (MPP) to implement that authority across the Southern border. Ibid. Over the next year, DHS returned tens of thousands of migrants to Mexico to await their removal proceedings. But with the emergence of the COVID-19 pandemic in March 2020, immigration courts shuttered, id. at 91a, and the government dramatically reduced its reliance on MPP to return arriving noncitizens to Mexico, relying instead on an order by the Centers for Disease Control and Prevention, which is still in effect.

In January 2021, following the change in administrations, DHS temporarily suspended new enrollments in MPP, and President Biden ordered a review of MPP as part of his broader strategy for border control and regional migration. After that review, the Secretary made the judgment to terminate MPP. As the Secretary explained in a seven-page memorandum detailing the reasons for his decision, he determined that the program was unjustified by the resources required to implement it and incompatible with the administration's border strategy and foreign-policy objectives. See App., infra, 89a-95a.

On the evening of Friday, August 13, 2021, the district court vacated the Secretary's decision and issued a nationwide, permanent injunction -- to take effect in 7 days -- requiring DHS "to enforce and implement MPP in good faith" until the Secretary provides additional explanation for his rescission decision, and

until DHS has "sufficient detention capacity to detain all aliens" arriving at the border without permission to enter -- a condition that has never been satisfied. App., infra, 86a (emphasis in original). The government appealed the next business day and sought a stay pending appeal. The district court denied the stay on Tuesday, August 17, id. at 88a, and the government moved for a stay from the court of appeals within two hours. The court of appeals then denied the motion shortly after 11:00 p.m. Eastern time on Thursday, August 19 -- fewer than 26 hours before the injunction is set to take effect. Id. at 1a-34a.

Relief from this Court is both urgently needed and amply justified. In deciding whether to grant a stay in this posture, the Court considers whether an eventual petition for a writ of certiorari would likely be granted, whether there is a fair prospect that the Court would rule for the moving party, and whether irreparable harm is likely to occur if a stay is not granted. That standard is readily met here.

First, this Court's review would plainly be warranted if the court of appeals affirmed the district court's nationwide injunction. That injunction imposes a severe and unwarranted burden on Executive authority over immigration policy and foreign affairs by ordering the government to precipitously re-implement a discretionary program that the Secretary has determined was critically flawed. There can be no doubt that the issues in this

case are sufficiently important to warrant this Court's attention: The Court previously stayed an injunction preventing DHS from implementing MPP, see Wolf v. Innovation Law Lab, 140 S. Ct. 1564 (2020), and an injunction compelling DHS to reinstate and maintain a specific enforcement policy is an even greater intrusion.

Second, there is more than a fair prospect that this Court would vacate the injunction. At the outset, respondents' claims are not subject to judicial review. States lack standing to object to the Secretary's decision terminating MPP, and that decision is otherwise not reviewable because nothing in the INA supplies standards that a court could use to determine how he should have weighed the competing costs and benefits of MPP. Even if respondents could clear those hurdles, their claims would fail on the merits. The district court found that the Secretary's decision violated Section 1225 only by giving that provision an unprecedented interpretation that would mean that every Presidential administration -- including the one that adopted MPP -- has been in continuous and systematic violation of Section 1225 since it was enacted in 1996. Even the court of appeals was unwilling to endorse that reading. And the courts below deemed the Secretary's explanations for his decision arbitrary and capricious only by disregarding the Secretary's stated reasoning and substituting their policy judgment for his.

Finally, allowing the district court's erroneous and extraordinary injunction to take effect before this Court has been able to undertake plenary review would result in irreparable harm to the government that far outweighs any harm to respondents from a stay. MPP has been rescinded for 2.5 months, suspended for 8 months, and largely dormant for nearly 16 months. The district court's mandate to abruptly re-impose and maintain that program under judicial supervision would prejudice the United States' relations with vital regional partners, severely disrupt its operations at the southern border, and threaten to create a diplomatic and humanitarian crisis. On the other side of the ledger, respondents' principal claimed injury from the maintenance of the status quo that has prevailed for months -- and for decades before the brief period when MPP was in force -- is that they may be required to expend additional funds on drivers' licenses and other benefits they have chosen to provide to noncitizens within their borders. That lopsided balance of the equities plainly warrants a stay.

## STATEMENT

1. The Executive Branch has broad constitutional and statutory power over the administration and enforcement of the Nation's immigration laws. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); see, e.g., 6 U.S.C. 202(5); 8 U.S.C. 1103(a)(3). For decades, the Executive has exercised

that authority through prosecutorial discretion to prioritize which noncitizens to remove and through what type of proceedings. See In re E-R-M- & L-R-M-, 25 I. & N. Dec. 520, 523 (B.I.A. 2011).

When DHS encounters a noncitizen seeking to enter the country -- either at a port of entry or crossing unlawfully -- who lacks entitlement to be admitted to the United States, the INA affords DHS several options to process that person, whom the statute deems an "applicant for admission," 8 U.S.C. 1225(a)(1). In some cases, DHS can initiate expedited removal proceedings. See Department of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964-1965 (2020). Alternatively, DHS may place an applicant for admission into a full removal proceeding before an immigration judge with a potential appeal to the Board of Immigration Appeals, see 8 U.S.C. 1229a. DHS has discretion to choose between expedited removal and full removal proceedings for persons who are eligible for both. See E-R-M-, 25 I. & N. Dec. at 523. And when DHS places an applicant for admission into full removal proceedings, Congress has provided that, if the person is "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." 8 U.S.C. 1225(b)(2)(C).

2. Then-Secretary Nielsen instituted MPP in January 2019, authorizing immigration officers to "exercis[e] their

prosecutorial discretion regarding whether" to return to Mexico certain classes of noncitizens arriving on land from Mexico, and providing guidance for making that determination. A.R. 153. Implementing MPP required extensive coordination with and assistance from Mexico, which took a variety of steps to assist the United States and the migrants who were returned. See A.R. 152-153. On the same day that DHS announced MPP, for example, Mexico issued a companion statement affirming that it would "authorize the temporary entrance" of individuals returned under MPP and provide other support while they remained in Mexico. Ibid.

Over the next year, DHS returned tens of thousands of noncitizens to Mexico under MPP. App., infra, 43a. In March 2020, however, removal proceedings were suspended in light of the COVID-19 pandemic (including for noncitizens waiting in Mexico under MPP, see id. at 91a), and DHS's use of MPP subsequently decreased dramatically as many noncitizens encountered seeking to enter the country were instead expelled from the United States based on an order of the Centers for Disease Control and Prevention (CDC) under 42 U.S.C. 265, 268. See App., infra, 91a, 94a; A.R. 660; see also U.S. Customs and Border Protection, Migrant Protection Protocols FY 2020, https://go.usa.gov/xFA4X.

On January 20, 2021, the acting Secretary "suspend[ed] new enrollments in [MPP], pending further review of the program." A.R. 581. President Biden directed DHS "to promptly review and

determine whether to terminate or modify [MPP]." Exec. Order No. 14,010, 86 Fed. Reg. 8267 (Feb. 5, 2021). At the conclusion of that review, on June 1, 2021, the Secretary announced that he was terminating MPP and explained his decision in a comprehensive memorandum. App., infra, 89a-95a. The Secretary determined that MPP's effectiveness at achieving its goals had been "mixed," and he assessed that the program's benefits were outweighed by the agency resources required to implement it. See id. at 91a-93a. He also explained why he believed that redirecting those resources to other strategies for managing regional migration would better serve the United States' interests and improve our bilateral relationship with Mexico. See id. at 93a-94a.

After the Secretary terminated MPP, this Court vacated as moot a preliminary injunction that had been entered against the program but that this Court had stayed pending disposition of the government's petition for a writ of certiorari. See Mayorkas v. Innovation Law Lab, No. 19-1212, 2021 WL 2520313 (June 21, 2021), vacating Innovation Law Lab v. Wolf, 951 F.3d 1073 (9th Cir. 2020).

3. On April 13, 2021, respondents, the States of Texas and Missouri, brought this suit in the Northern District of Texas, seeking to enjoin the January 20 temporary suspension of new MPP enrollments. After the Secretary terminated MPP on June 1, respondents amended their complaint to claim, inter alia, that the Secretary's decision violated Section 1225 and the Administrative

Procedure Act (APA). Respondents also renewed their request for a preliminary injunction, and the district court consolidated the hearing on that motion with a trial on the merits under Federal Rule of Civil Procedure 65(a)(2). See App., infra, 4a.

Following a one-day bench trial, on August 13, the district court entered judgment in favor of respondents. App., infra, 35a-87a. The court concluded that respondents' claims are justiciable (id. at 55a-68a); that Section 1225(b)(2)(C) mandates returning noncitizens to Mexico whenever DHS lacks the resources to detain them (id. at 66a, 75a-77a); and that the Secretary's decision terminating MPP violated the APA because he did not consider relevant factors and he gave reasons for the decision that the court deemed inadequate (id. at 65a-76a). The court rejected the government's argument that the only appropriate remedy in this circumstance would be remand without vacatur in light of the significant foreign-policy consequences attending the decision to reinitiate MPP. Instead, the court concluded that the appropriate remedy was a nationwide injunction, with monthly reporting requirements, ordering the government to reinstate MPP "until such time as it has been lawfully rescinded in compliance with the APA **and** until such time as the federal government has sufficient detention capacity to detain all" applicants for admission under Section 1225 "without releasing any aliens because of lack of detention resources." Id. at 86a. The court delayed the effective

date of its ruling for seven days, until August 21, 2021. Id. at 87a. The government promptly noticed its appeal, and the district court denied the government's motion to stay the injunction pending appeal. Id. at 88a.

The court of appeals denied the government's motion for a stay pending the appeal and (if necessary) proceedings in this Court, and expedited the appeal. App., infra, 1a-34a. Although the court of appeals reiterated much of the district court's reasoning, it declined to embrace the district court's blinkered view of whom DHS may release within the United States, suggesting instead that the district court had held only that DHS cannot "simply release every alien described in § 1225 en masse into the United States." Id. at 29a. The court of appeals also asserted that the substantial practical difficulties that the government would have in restarting the long-dormant MPP program in a matter of days -- including securing cooperation from the Government of Mexico -- should be tolerated because the injunction requires DHS merely to "enforce and implement MPP in good faith." Id. at 28a, 31a. The court declined the government's request for a seven-day administrative stay so that this Court might consider whether to issue emergency relief.

## ARGUMENT

The government respectfully requests that this Court grant a stay of the district court's permanent injunction pending

completion of further proceedings in the court of appeals and, if necessary, this Court. A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (brackets, citation, and internal quotation marks omitted). All of those requirements are met here. The government also requests an administrative stay while this Court considers this application, to preserve the status quo that has existed for months and prevent the irreparable harm that will occur if the government is required to reinstate MPP within hours.

## I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI IF THE COURT OF APPEALS AFFIRMS THE DISTRICT COURT'S NATIONWIDE INJUNCTION

If the court of appeals ultimately upholds the district court's nationwide permanent injunction blocking the Secretary's termination decision, then there is at least a "reasonable probability" that this Court will grant a writ of certiorari, Conkright, 556 U.S. at 1402 (citation omitted), just as the Court previously granted a writ of certiorari to consider the legality of then-Secretary Nielsen's order instituting MPP. See 141 S. Ct.

617 (2020). An affirmance would raise numerous issues of exceptional importance. See Sup. Ct. R. 10(a).

First, an affirmance would constitute a major and "unwarranted judicial interference in the conduct of foreign policy." Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013). As high-ranking federal officials have explained, the injunction implicates extremely sensitive issues of foreign relations, because MPP "cannot" operate without "significant coordination with, and cooperation from, the Government of Mexico," concerning such issues as "personnel and infrastructure to receive individuals returned to Mexico," "work authorization" for migrants in Mexico, and the provision of "social services" for migrants in Mexico. App., infra, 102a (Decl. of David Shahoulian, Assistant Sec'y for Border Sec. and Immig., DHS); see id. at 122a (Decl. of Ricardo Zúniga, Senior Bureau Official, Bureau of W. Hemisphere Affairs, U.S. Department of State); see also A.R. 152-153 (then-Secretary Nielsen's memorandum describing the Government of Mexico's commitments to MPP migrants).

A central aspect of the Secretary's decision was his determination that ending MPP would "help to broaden" the United States' "engagement with the Government of Mexico" to effectively "address broader issues related to migration." App., infra, 94a. The district court's attempt to conduct foreign policy by injunction would warrant this Court's review if affirmed. And

that would remain true under the court of appeals' gloss that the district court required only "good faith" attempts to secure the cooperation of the Government of Mexico. Id. at 31a. Even assuming that term of the injunction comports with the fundamental requirement that parties subject to an injunction must "receive explicit notice of precisely what conduct is outlawed," Schmidt v. Lessard, 414 U.S. 473, 476 (1974), the courts do not thus supervise the Executive's conduct of international negotiations.

Review would also be warranted because the injunction dramatically interferes in Executive management of border operations, requiring the Secretary to reimplement a particular discretionary program that he has found inconsistent with this Administration's priorities and immigration-enforcement strategies. And the injunction does not merely restore MPP; it orders the government to continue using MPP "until such a time as the federal government has sufficient detention capacity to detain all" applicants for admission under Section 1225. App., infra, 86a (emphasis added). That is tantamount to an order to maintain MPP in perpetuity, because Congress has "never" provided DHS "under any prior administration" with appropriations that would support "sufficient detention capacity to maintain in custody every single person described in" Section 1225. Id. at 97a-98a (Shahoulian Decl.).

Worse yet, the court's injunction derived from its extraordinary conclusion that Section 1225 leaves the government with only "two options" for "aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory." App., infra, 77a. That view of Section 1225 has never been accepted by any presidential administration since the statute's enactment in 1996, including while MPP was operational. See id. at 97a-101a (Shahoulian Decl.). In light of the salience of the program at issue and the far-reaching legal questions presented, there is at least a reasonable probability that this Court would grant review.

## II. THERE IS AT LEAST A FAIR PROSPECT THAT THE COURT WOULD VACATE THE INJUNCTION

There is also at least a "fair prospect" that if this Court granted a writ of certiorari, it would vacate the injunction. Conkright, 556 U.S. at 1402. Respondents' challenges to the Secretary's discretionary decision to terminate MPP are not subject to judicial review. And even if they were, respondents have not shown any legal defect in the Secretary's decision.

### A. Respondents' claims are not reviewable

Respondents' claims are unreviewable for three independent reasons: the States lack standing under Article III; review of the Secretary's termination decision was barred as a statutory matter; and 8 U.S.C. 1252(f) barred the district court's entry of classwide relief in this context.

1. First, respondents lack standing because their asserted injuries are purely "'conjectural' or 'hypothetical,'" and therefore insufficient to meet the constitutional minimum. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998) (citation omitted). In the proceedings below, respondents submitted no evidence that they incurred any additional costs after MPP enrollments dramatically declined in April 2020 or after new enrollments were suspended in January 2021, much less since the Secretary terminated MPP in June.

The district court concluded that an increase in noncitizens present in the respondent States would increase the cost of services, most notably "the cost of providing driver's licenses to aliens released and paroled into the United States." App., infra, 56a. But rather than citing any evidence, the court simply reasoned that "the termination of MPP necessarily increases the number of aliens released and paroled into the United States and the Plaintiff States specifically." Ibid. The court then speculated that "[t]here is little doubt that many aliens would apply for driver's licenses because driving is a practical necessity in most of the state." Id. at 57a (brackets and citation omitted). Again, the court cited no record evidence for that proposition. See id. at 8a-11a (court of appeals endorsing the district court's speculation).

Even if respondents could show that additional expenditures under state benefit programs were likely or had occurred in the past, those expenditures would not qualify as an injury cognizable under Article III. When a State pays money pursuant to a benefits or public-service program that it has voluntarily adopted, the State does not suffer an injury. See Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (per curiam) (rejecting standing where "[t]he injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures"). The lower courts' theory of standing would also suggest that the States have standing to object anytime the government exercises its discretion not to remove a noncitizen. That is not the law.

2. Second, the Secretary's decision was unreviewable as a statutory matter. The APA precludes review of decisions "committed to agency discretion," Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (citation omitted); 5 U.S.C. 701(a)(2), and the INA prohibits review of any "decision or action" of the Secretary "the authority for which is specified under this subchapter to be in [his] discretion," 8 U.S.C. 1252(a)(2)(B)(ii). Each of those provisions independently shields from judicial intrusion the Secretary's decision whether to use the contiguous-territory-return authority.

The Secretary's return authority is entirely discretionary: he "may return" certain noncitizens to a contiguous territory. 8 U.S.C. 1225(b)(2)(C) (emphasis added). Congress's use of the

term "may" "connotes discretion," Jama v. ICE, 543 U.S. 335, 346 (2005), and "the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion,'" Lincoln, 508 U.S. at 191 (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)). The Secretary's decision to exercise (or not to exercise) his return authority also resembles classic exercises of prosecutorial discretion insofar as it involves a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," including how to best expend limited "agency resources" and whether a "particular enforcement action * * * fits the agency's overall policies." Heckler, 470 U.S. at 831.

The district court purported to find a relevant standard to cabin the Secretary's return discretion in Section 1225, which the court read to impose a near-universal detention mandate. See App., infra, 66a. As explained below, the district court fundamentally misunderstood Section 1225. And in light of that error, the court's reviewability holding collapses. The court of appeals, for its part, found standards cabining DHS's discretion not only in Section 1225, but also in the APA's mandate that agency action shall be set aside if it is "arbitrary, capricious, [or] contrary to law." Id. at 16a-17a. But the APA itself cannot supply the requisite "meaningful standard," Lincoln, 508 U.S. at 191 (citation omitted), because Section 701 is a gateway requirement

that precedes APA review. See 5 U.S.C. 701(a) ("This chapter applies, according to the provisions thereof, except to the extent that * * * agency action is committed to agency discretion by law.") (emphasis added).

3. Third, Section 1252(f) barred the district court's entry of nationwide relief purporting to enforce Section 1225. That provision states that:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. 1252(f).

Section 1252(f) applies in this case by its plain terms. The district court "enjoin[ed]," in a mandatory injunction, the "operation" of a covered provision, namely, Section 1225. Ibid. And there is no dispute that the court's relief did not pertain to "an individual alien against whom proceedings * * * have been initiated." Ibid. In these circumstances, only this Court -- not the Northern District of Texas -- is competent to enter such relief. Ibid.; see Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 481 (1999).

The district court found Section 1252(f) inapplicable because "Plaintiffs are not seeking to restrain Defendants from enforcing

Section 1225," but rather "attempting to make Defendants comply with Section 1225." App., infra, 63a. As two Justices have explained, that reasoning "is circular and unpersuasive." Nielsen v. Preap, 139 S. Ct. 954, 975 (2019) (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment). "Many claims seeking to enjoin or restrain the operation of the relevant statutes will allege that the Executive's action does not comply with the statutory grant of authority, but the text clearly bars jurisdiction to enter an injunction '[r]egardless of the nature of the action or claim.'" Ibid.

B. The Secretary's decision was lawful

The district court found that the Secretary's decision was unlawful on two grounds: it violated Section 1225 and was arbitrary and capricious. Neither conclusion withstands scrutiny.

1. The Secretary's decision does not violate 8 U.S.C. 1225

Section 1225 establishes procedures for processing certain applicants for admission. Section 1225(b)(1) provides that an applicant for admission who is placed in expedited removal and demonstrates a credible fear of return to his home county "shall be detained for further consideration of the application for asylum," 8 U.S.C. 1225(b)(1)(B)(ii), and Section 1225(b)(2) provides that noncitizens seeking admission and placed in full removal proceedings "shall be detained" for those proceedings, 8 U.S.C. 1225(b)(2)(A).

The district court accepted respondents' argument that those provisions establish that "Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory," so that "[f]ailing to detain or return aliens pending their immigration proceedings violates Section 1225." App., infra, 77a. In a footnote, the court noted DHS's discretion to release applicants for admission on parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit," 8 U.S.C. 1182(d)(5)(A), but the court stated that DHS may not grant parole "simply because DHS does not have the detention capacity," App., infra, 77a n.11. Therefore, the district court found, whenever DHS "cannot meet [its] detention obligations" due to lack of capacity, "terminating MPP necessarily leads to the systemic violation of Section 1225." Id. at 78a.

That conclusion was egregiously mistaken. At the outset, the operative complaint challenges the Secretary's June 1 memorandum terminating MPP, not any DHS policies regarding release from detention on parole. See D. Ct. Doc. 48, at ¶¶ 95-141 (June 3, 2021). Even if the district court were correct that Section 1225 bars DHS from releasing on parole applicants for admission that the agency physically lacks capacity to detain, a violation of the detention mandate would be just that -- a violation of the detention mandate. Nothing in the statute suggests a direct

relationship between that purported detention mandate and the return authority, such that the Secretary is required to return any noncitizen he fails to detain. Respondents cannot use their objection to DHS's parole practices as a wedge to invalidate the Secretary's separate decision regarding whether to continue using the discretionary return authority. The district court effectively acknowledged that problem by conceding that "[t]he termination of MPP causes Defendants to violate Section 1225." App., infra, 76a (emphasis modified).

In any event, Section 1225 does not mandate universal or near-universal detention. The INA provides DHS with various discretionary options for processing noncitizens beyond contiguous-territory-return or detention, including by providing that DHS "may * * * in [its] discretion" release noncitizens on "parole" "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A) (emphasis added); see 8 C.F.R. 1.2, 235.3(c). In certain circumstances, DHS also "may release" noncitizens present in the United States on "bond" or "conditional parole." 8 U.S.C. 1226(a)(2). The determinations whether to use bond or parole are discretionary and not subject to judicial review. See, e.g., Loa-Herrera v. Trominski, 231 F.3d 984, 990-991 & n.12 (5th Cir. 2000). The district court's core legal analysis is therefore categorically mistaken: the statute does not preclude DHS from determining that the public interest is

served by releasing on parole certain noncitizens that it physically lacks capacity or congressional appropriations to detain, see 8 C.F.R. 212.5(b)(5), and it does not otherwise impose on DHS a binary choice between detention or else returning to Mexico applicants for admission arriving on land from Mexico.

The implications of the district court's interpretation of Section 1225 are staggering. As a senior DHS official has explained, since Section 1225 was enacted in 1996, DHS and its predecessor agency have never received adequate resources from Congress to detain all applicants for admission pending removal proceedings, and DHS's current appropriations can support detaining only a small fraction of the noncitizens arriving each month at the border. See App., infra, 98a-101a (Shahoulian Decl.) (explaining that DHS is appropriated funds for a total of 34,000 detention beds nationwide, but border patrol encountered approximately 200,000 noncitizens at the Southern border in July 2021). The district court's injunction is thus effectively an order to leave MPP in place in perpetuity.

Moreover, no presidential administration since 1996 -- including the Trump Administration that implemented MPP -- has accepted the district court's conclusions that Section 1225 does not permit release on parole due to lack of capacity or that the only alternative to detention for applicants for admission arriving on land from Mexico is to return them there. See App.,

infra, 98a, 100a-101a (Shahoulian Decl.); see also Padilla v. Immigration & Customs Enforcement, 953 F.3d 1134, 1145 (9th Cir. 2020) (describing DHS policy allowing parole "in light of available detention resources"), vacated on other grounds, 141 S. Ct. 1041 (2021); A.R. 161 (DHS memorandum on MPP directing that immigration officers "retain discretion" to decline to process aliens eligible for return under MPP through MPP); id. at 153. It is utterly implausible that every presidential administration for the last 25 years has been "systemic[ally] violat[ing]" Section 1225 in the manner that the district court found. App., infra, 98a.

The court of appeals conspicuously declined to endorse the district court's reading of Section 1225. The court acknowledged DHS's discretion to parole or otherwise release certain noncitizens, and it did not question DHS's longstanding practice of considering detention capacity when making parole and other discretionary enforcement decisions. App., infra, 29a. The court instead stated only that the INA does not permit DHS to "release every alien described in § 1225 en masse into the United States." Ibid. That misses the point entirely. The district court's reasoning depends on treating contiguous-territory return as the only available mechanism for processing non-detained applicants for admission arriving on land from Mexico. The statute does not support that reading, which is why the government has never implemented Section 1225 that way. And without that critical

premise -- which, again, the court of appeals declined to adopt -- a central basis for the district court's conclusions regarding reviewability and the appropriate remedy dissolves. See C.A. Amicus Br. of ACLU, et al. 3.

2. The Secretary's decision was not arbitrary and capricious

The APA authorizes courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). "The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies," FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1160 (2021), and "[i]t is not infrequent that the available data do not settle a regulatory issue," State Farm, 463 U.S. at 52. In assessing agency action, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." FERC v. Electric Power Supply Ass'n, 577 U.S. 260, 292 (2016). Instead, to satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" State Farm, 463 U.S. at 43 (citation omitted).

a. In this case, the Secretary's rescission memorandum easily satisfies the APA's deferential standard. At the President's direction, the Secretary reviewed "MPP's performance against the anticipated benefits and goals articulated at the outset of the program and over" its course; "prior DHS assessments of the program"; and "the personnel and resource investments required of DHS to implement the program." App., infra, 91a. The Secretary also considered "whether and to what extent MPP is consistent with the Administration's broader strategy and policy objectives for creating a comprehensive regional framework to address the root causes of migration" and "processing asylum seekers at the United States border in a safe and orderly manner consistent with the Nation's highest values." Ibid.

The Secretary concluded that "MPP had mixed effectiveness in achieving several of its central goals and that the program experienced significant challenges." App., infra, 91a. "[B]order encounters increased during certain periods and decreased during others," and the program "imposed additional responsibilities" on border personnel "that detracted from the Department's critically important mission sets." Id. at 91a-92a. The Secretary found that many "of the challenges faced by MPP have been compounded by the COVID-19 pandemic," id. at 92a, and that MPP had constrained the United States' ability to engage more broadly with its neighbor Mexico on issues of regional migration, id. at 94a.

The Secretary also "carefully considered and weighed the possible impacts of [his] decision to terminate MPP as well as steps that are underway to mitigate any potential negative consequences." App., infra, 93a. He discussed "reforms" to asylum processing that he believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP." Ibid.; see id. at 94a (discussing "other tools the Department may utilize to address future migration flows"). He also "considered whether the program could be modified in some fashion," but concluded that "addressing the deficiencies identified in [his] review would require a total redesign that would involve significant additional investments in personnel and resources." Id. at 93a.

Ultimately, the Secretary "determined that, on balance, any benefits of maintaining or now modifying MPP are far outweighed by the benefits of terminating the program." App., infra, 94a. The Secretary also deemed termination "most consistent with the Administration's policy objectives and the Department's operational needs." Ibid.

b. In enjoining the Secretary's memorandum, the district court (echoed by the court of appeals) concluded that the Secretary ignored relevant factors and reached arbitrary conclusions. Those criticisms lack merit.

The district court principally reasoned that the Secretary failed to consider the fact that MPP deterred non-meritorious asylum claims by forcing noncitizens to wait in Mexico rather than permitting them to "remain in the country for lengthy periods of time." App., infra, 70a (citation omitted); see id. at 22a (same). But that finding simply displaced the Secretary's policy judgment that the same problem would be better addressed by using a different mix of policy tools. The Secretary explicitly discussed reforms that he believed would "improve border management and reduce migration surges more effectively and more sustainably than MPP," including a "Dedicated Docket" for certain asylum applicants encountered at the Southwest border. Id. at 92a-93a. He also described DHS's plan to enroll noncitizens placed in the Dedicated Docket in "Alternatives to Detention programs" to "promote compliance and increase appearances throughout proceedings." Ibid. Just today, DHS published a proposed rule that would make reforms to the asylum system aimed at speeding the adjudication of asylum claims at the border and thereby deterring "unauthorized border crossings" by individuals "who lack a meritorious protection claim." 86 Fed. Reg. 46,906, 46,909 (Aug. 20, 2021).

The Secretary never denied that MPP had some benefits, but he did conclude that MPP had not deterred non-meritorious asylum claims or reduced border surges with sufficient efficacy to justify its enormous opportunity and operational costs. He noted that,

over the course of the program, "border encounters increased during certain periods and decreased during others," and that "rather than helping to clear asylum backlogs," "backlogs increased before both the USCIS Asylum Offices and EOIR." App., infra, 91a-92a.

The Secretary further noted that MPP's "focus on speed" in adjudicating asylum claims "was not always matched with sufficient efforts to ensure that conditions in Mexico enabled migrants to attend their immigration proceedings." App., infra, 92a. And he found that "the high percentage of cases completed through the entry of in absentia removal orders (approximately 44 percent, based on DHS data) raise[d] questions * * * about the design and operation of the program." Ibid.

The district court criticized that particular line of reasoning, arguing that a 44 percent in absentia rate was not exceptionally high and that the Secretary's conclusion that the rate "raises questions" was insufficiently definitive. App., infra, 73a-75a; id. at 73a ("[I]t is the Secretary's job to answer such questions."); see id. at 26a-27a. That criticism was misplaced. The rate cited by the Secretary was merely one data point in his assessment of whether MPP afforded noncitizens a meaningful opportunity to seek asylum. He also considered the "conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety." App., infra, 92a. The court's suggestion that the Secretary's concerns

about the program's effectiveness and fairness were not a legitimate basis for decision unless the Secretary achieved complete certainty is just the sort of demand for "empirical or statistical studies" that is not required to satisfy APA review. Prometheus Radio, 141 S. Ct. at 1160. The Secretary's caution and refusal to assume a posture of artificial certainty in the face of empirical doubt is a strength of the memorandum, not a weakness.[1]

The district court also argued that "the Secretary failed to consider the costs to Plaintiffs and Plaintiffs' reliance interests in the proper enforcement of federal immigration law." App., infra, 71a; see id. at 20a-22a. But the Secretary expressly considered the effect of rescission "on border management and border communities, among other potential stakeholders." Id. at 93a. And regardless, respondents have not shown that they took any actions in reliance on MPP.

The court of appeals nevertheless found that the States had cognizable reliance interests, relying on DHS v. Regents, 140 S. Ct. 1891 (2020). According to the court of appeals, Regents

[1] Relatedly, the district court stated that the Secretary "failed to consider the warnings by career DHS personnel that 'the suspension of the MPP, along with other policies, would lead to a resurgence of illegal aliens attempting to illegally' cross the border." App., infra, 71a (citation omitted). That criticism ignores the Secretary's express judgment that alternative policies provided superior tools for addressing border surges. See id. at 93a. In any event, the district court's conclusion (which the court of appeals did not endorse) was improperly based on non-record evidence, see id. at 71a n.10.

"faulted DHS for not considering reliance interests, including in particular those of the states," given that the Deferred Action for Childhood Arrivals (DACA) program could cause states and local governments to "'lose $1.25 billion in tax revenue each year.'" App., infra, 20a (quoting Regents, 140 S. Ct. at 1914). But the court of appeals' quoted language is from this Court's summary of the respondents' argument. See Regents, 140 S. Ct. at 1914. The Court's own analysis focused principally on the legitimate reliance interests of the DACA recipients themselves, who had structured their lives around the expectation of continued presence in the United States. Ibid. The States here cannot show any remotely similar reliance on MPP.

The court of appeals next invoked an agreement that was signed just before the Presidential transition and purported to require DHS to consult with Texas in advance of changing immigration policy. The court found that the Secretary was required to discuss the agreement. App., infra, 21a. But the Secretary's predecessor sent a letter to Texas on February 2, long before the termination of MPP, repudiating the "purported 'Agreement'" as "void, not binding, and unenforceable." D. Ct. Doc 31-2, at 347 (Feb. 2, 2021). The Secretary was not required to discuss in June an agreement that the agency had dismissed as void months ago.

The district court also found that the Secretary had failed adequately to consider a modified version of MPP. App., infra,

72a; see id. at 23a-24a. That is incorrect. After the Secretary catalogued MPP's shortcomings, he explained that "addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." Id. at 93a. He further noted that, "[p]erhaps more importantly, that approach would come at tremendous opportunity cost, detracting from the work taking place to advance the vision for migration management and humanitarian protection articulated in Executive Order 14010." Ibid.

The district court faulted the Secretary for failing to identify "a single example of what a modified MPP would look like," App., infra, 72a, but the APA does not require a decisionmaker to formulate and discuss alternative policies in the abstract when rescinding an existing policy. The Secretary's consideration of the costs and benefits of MPP, in conjunction with the Administration's broader immigration strategies, fully justified his decision to rescind MPP and adopt a different approach to border management without a granular consideration of potential modified versions of MPP. See Regents, 140 S. Ct. at 1914-1915 (holding that "DHS was not required * * * to 'consider all policy alternatives in reaching [its] decision,'" and instead has "considerable flexibility" when deciding how to "wind-down" a program) (quoting State Farm, 463 U.S. at 51).

Finally, the district court concluded that the Secretary acted arbitrarily in relying on prior closures of MPP courts when terminating MPP prospectively. App., infra, 75a; see id. at 27a. Given that the pandemic is ongoing and COVID-19 could reasonably be expected to continue to complicate the implementation of MPP -- as it had in the past -- the Secretary's discussion of prior closures was entirely sensible. And in any event, the district court did not suggest that vacatur of the entire memorandum was appropriate based on a purported flaw in this isolated rationale.[2]

c. Even assuming the Secretary's reasoning was inadequate, the district court abused its discretion in vacating the rescission rather than merely remanding to the Secretary for additional explanation. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so," and "[o]nly in 'rare circumstances' is remand for agency reconsideration not the appropriate solution." Texas Ass'n of Mfrs. v. United States Consumer Prod. Safety Comm'n, 989 F.3d 368,

[2] The district court also concluded that the Secretary "failed to consider or acknowledge the effect terminating MPP would have on its compliance with Section 1225." App., infra, 75a (emphasis omitted). For the reasons discussed above (pp. 20-25, supra), the district court's understanding of Section 1225 is meritless. Regardless, the Secretary considered "other tools" "at [the agency's] disposal," "including detention, alternatives to detention, and case management programs" that "have been shown to be successful in promoting compliance with immigration requirements." App., infra, 94a.

389 (5th Cir. 2021). Even if this Court were to credit any of the district court's criticisms of the rescission memorandum, there is no question that the Secretary could address those flaws on remand with a new decision and additional explanation. And remand without vacatur is particularly appropriate here, where vacatur would produce "disruptive consequences," including to the United States' foreign policy with other nations. Allied-Signal, Inc. v. United States NRC, 988 F.2d 146, 150 (1993) (citation omitted).

The court of appeals concluded that vacatur was warranted because any further explanation by the Secretary would amount to an impermissible "post hoc rationalization." App., infra, 33a. That reasoning would defeat the very notion of remand without vacatur, contrary to a host of decisions. See Central Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001); Natural Res. Def. Council v. United States EPA, 808 F.3d 556, 584 (2d Cir. 2015); Prometheus Radio Project v. FCC, 824 F.3d 33, 52 (3d Cir. 2016); Texas Ass'n of Mfrs., 989 F.3d at 389; California Communities Against Toxics v. United States EPA, 688 F.3d 989, 992-994 (9th Cir. 2012); Black Warrior Riverkeeper, Inc. v. United States Army Corps of Eng'rs, 781 F.3d 1271, 1289-1290 (11th Cir. 2015); Allied-Signal, 988 F.2d at 150; National Org. of Veterans' Advocs., Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1380 (Fed. Cir. 2001). The APA requires reasoned decisionmaking, not a rule of "one strike and you're out."

III. THE BALANCE OF HARMS OVERHWELMINGLY FAVORS A STAY

"[T]he denial of a stay" "will result" in serious and "irreparable harm" to the government. Conkright, 556 U.S. at 1402 (brackets and citation omitted). On the other side of the balance, respondents' alleged harms are entirely speculative and, in any event, insufficient to overcome the government's interests.

A. The district court's injunction effectively dictates the United States' foreign policy by requiring it to immediately negotiate with Mexico to reinstate MPP as that program existed prior to the Secretary's termination. That relief "deeply intrudes into the core concerns of the executive branch," Adams v. Vance, 570 F.2d 950, 954 (D.C. Cir. 1978) (per curiam), and constitutes a major and "unwarranted judicial interference in the conduct of foreign policy," Kiobel, 569 U.S. at 116; see Arizona v. United States, 567 U.S. 387, 396 (2012) (noting Executive authority to make "discretionary decisions" with respect to "[r]eturning" noncitizens "that bear on this Nation's international relations"). This Court has recognized that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). The relief granted in this case goes beyond simply interfering in the Executive's management of immigration, by effectively dictating the content of the United States' negotiations with foreign sovereigns.

The court of appeals brushed aside those concerns on the ground that "DHS created MPP unilaterally and without any previous agreement with Mexico." App., infra, 31a. But as explained, that assertion is flatly contradicted by the record, which shows that MPP necessitated "significant coordination with, and cooperation from, the Government of Mexico." App., infra, 102a (Shahoulian Decl.); see id. at 122a (Zuniga Decl.) ("The Mexican government's partnership was essential for implementing MPP when it was operational."). Mexico took "steps critical to [MPP's] functioning," including committing "personnel and infrastructure to receive individuals" and according those individuals various legal entitlements, including the right to "request work authorization." Id. at 102a; see id. at 122a; A.R. 151-154. Mexican cooperation was thus woven into the very fabric of MPP.

The court of appeals' suggestion that, even without Mexico's cooperation, "for least some aliens, MPP would permit DHS to simply refuse admission at ports of entry in the first place," App., infra, 12a, is equally unpersuasive. That would be inconsistent with both Section 1225(b)(2)(C) and MPP, which authorize return only for noncitizens "arriving" in the United States. 8 U.S.C. 1225(b)(2)(C). The court of appeals also did not address noncitizens who cross the border between ports of entry.

The harms wrought by the injunction extend far beyond the intrusion into the Executive's management of foreign policy. The

district court's order requires the United States "to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources." App., infra, 86a (emphasis omitted). As discussed above, that would effectively preclude DHS from rescinding MPP. Moreover, implementing MPP as it previously existed would come at "tremendous opportunity cost" to other programs for managing border security and the processing of asylum seekers. Id. at 93a; see id. at 92a-93a (noting other "reforms" the Administration is pursuing).

All of these harms are exacerbated by the district court's highly compressed timeline -- it granted a stay of seven days from the issuance of its preliminary injunction, see App., infra, 87a. Attempting to precipitously reimplement MPP without sufficient coordination with Mexico or other interested countries "could have a significant adverse impact on U.S. foreign policy, including our relationship with the governments of El Salvador, Guatemala and Honduras," and "Mexico." Id. at 115a (Zuniga Decl.). In particular, "[a]n immediate imposition on Mexico to care for and protect irregular migrants would be extremely problematic for Mexico." Id. at 122a.

An abrupt restart of a short-lived program that has been dormant for nearly 16 months would also threaten chaos at the border. See App., infra, 123a. In April 2020, use of MPP was largely superseded by the CDC's Title 42 order. See id. at 94a. Enrollments in MPP were suspended in January of this year. See pp. 8-9, supra. Restarting it now would "involve significant and complicated burdens on border security personnel and resources," D. Ct. Doc. 64 at 5 (June 25, 2021), and "new staff would need to be recruited and trained to resume hearing MPP dockets," App., infra, 110a; see id. at 102a-105a; id. at 90a-91a, 93a-95a; A.R. 587-588. It would also "require new and costly investments from both" the United States and Mexico "to re-establish the infrastructure that sat dormant for more than a year due to COVID-19," D. Ct. Doc. 64 at 8 (June 25, 2021), and that was eventually "scaled down and repurposed" to, among other things, "address other inadmissible populations," App., infra, 102a. All of these tasks would be complicated by the COVID-19 pandemic and the surging Delta variant. See id. at 103a, 110a-11a. Those undertakings cannot be accomplished in a "safe, orderly, and humane manner" in a matter of days. Id. at 98a.

The court of appeals concluded that the harms to the government "do not count" because they are "self-inflicted." App., infra, 29a. In the court's view, "DHS could have avoided" the problems associated with the injunction by "waiting to unwind MPP

until this litigation was resolved." Id. at 30a. But there is nothing self-inflicted about the fact that the injunction requires DHS to reallocate resources to MPP away from programs that it has made a considered policy judgment to prioritize. In any event, the court of appeals' argument is hard to take seriously, as it would effectively require the government to treat all pending lawsuits as de facto injunctions, thereby severely constricting the Executive's statutory and constitutional authority. Indeed, the court's theory would have prevented MPP itself from ever taking effect, since litigation challenging MPP has still not concluded. See, e.g., Innovation Law Lab v. Nielsen, 19-cv-807 (N.D. Cal.).

B. The extraordinary harms that the district court's injunction inflicts on the United States dwarf any incidental effects on respondents. In the proceedings below, respondents submitted no evidence that they incurred any additional costs after MPP enrollments declined in April 2020 or after new enrollments were suspended in January 2021, much less since the Secretary terminated MPP in June. The district court's finding of irreparable harm rested on entirely on its speculation that the rescission of MPP would increase the number of noncitizens present within the plaintiff States' borders, which would, in turn, impose certain costs on the States. App., infra, 73a.

Respondents' allegations of harm are not even sufficient to satisfy Article III. And the notion that respondents will suffer

sufficient irreparable harm from a temporary stay pending an expedited appeal to overcome the United States' countervailing interests is fanciful. The balance of equities overwhelmingly favors the government and counsels strongly in favor of a stay.

* * *

In recent years, this Court has repeatedly stayed broad lower-court injunctions against Executive Branch policies addressing matters of immigration, foreign policy, and migration management. See, e.g., Wolf v. Innovation Law Lab, No. 19-1212 (Mar. 11, 2020); Department of Homeland Sec. v. New York, No. 19A785 (Jan. 27, 2020); Barr v. East Bay Sanctuary Covenant, No. 19A230 (Sept. 11, 2019); Trump v. Sierra Club, No. 19A60 (July 26, 2019). It should do the same here.

## CONCLUSION

The injunction should be stayed in its entirety pending disposition of the appeal in the Fifth Circuit and, if that court affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. This Court should also grant an administrative stay while it considers this application.

Respectfully submitted.

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