No. 26-239

In the Supreme Court of the United States

MARKWAYNE MULLIN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This Court's review is urgently warranted. The panel below invalidated the President's main tool for stemming an unprecedented crisis of uncontrolled illegal entry. The President lawfully exercised his authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to suspend the entry of aliens who illegally cross the southern border and to "categorically pre-deny" any asylum applications they might file, Pet. App. 167a (Millett, J., concurring in partial stay). Yet the court of appeals wrongly elevated meaningless process over substance in holding that the government must accept those aliens' futile asylum applications. Respondents do not dispute that the government need not accept futile applications; they just insist that the executive may not deny asylum on a categorical rather than individualized basis. That contention lacks any ba-

sis in the INA's text. Respondents also contend that any categorical pre-denial of asylum requires notice-and-comment rulemaking, but that confuses asylum eligibility with the discretionary decision to deny asylum regardless of eligibility. And respondents embrace a universal class that includes members who concededly lack Article III injuries, as well as a classwide injunction that effectively (even if not formally) compels the government to remove class members using provisions covered by the INA's ban on classwide relief in 8 U.S.C. 1252(f)(1). Those sweeping and unprecedented remedial holdings easily warrant this Court's review.

Finally, respondents dispute the importance of the case because border encounters were already falling when President Trump took office. But the data belie that claim. And as several high-ranking government officials have explained, if allowed to take effect, the order below threatens to open the floodgates to illegal entry, once again overwhelming the system and rendering the southern border vulnerable to the trafficking of drugs, weapons, and other contraband and enabling cartels to re-establish control. See C.A. Doc. 2177587, at 180-285 (June 8, 2026). This Court should grant certiorari and reverse.

A. The Decision Below Is Wrong

1. a. The court of appeals erred in holding that the INA's directive that "[a]ny alien" in the country "may apply for asylum," 8 U.S.C. 1158(a)(1), requires the government to accept futile asylum applications from aliens covered by the proclamation. Pet. 16-23. "Process is not an end in itself," and a plaintiff has no "'right to demand needless formality.'" *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983) (citation omitted).

Rather than contesting that point, respondents contend (Br. in Opp. 19) that the proclamation unlawfully rendered those asylum applications futile because the executive's discretion to deny asylum to otherwise eligible aliens may be exercised only "in individual cases." But no statutory provision imposes such a limitation. The INA provides that the executive "may grant asylum to an alien," without further limitation, making clear that a grant (and, concomitantly, a denial) of asylum is completely discretionary. 8 U.S.C. 1158(b)(1)(A); see *DHS* v. *Thuraissigiam*, 591 U.S. 103, 110 n.4 (2020); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). Respondents rightly do not defend the court of appeals' reliance on Section 1158(d) for the "individual cases" limitation—for good reason, since the INA expressly states that "[n]othing in [Section 1158(d)] shall be construed to create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. 1158(d)(7).

In any event, the First Circuit has rejected a contention similar to respondents' in reversing a preliminary injunction in *Doe* v. *Noem*, 152 F.4th 272 (2025), after this Court had already stayed that injunction, *Noem* v. *Doe*, 145 S. Ct. 1524 (2025). There, the district court had reasoned that the executive's discretion to terminate parole under the INA may be exercised only in individual cases. But, consistent with the government's stay application in *Doe* in this Court, the First Circuit reasoned that such a limitation on that exercise of discretion likely does not apply because no statutory text expressly imposes it. *Doe*, 152 F.4th at 286. This Court's other precedents reinforce that even where Congress expressly "requires individualized determinations," agencies still may employ categorical criteria, *Ameri-*

can Hospital Association v. *NLRB*, 499 U.S. 606, 612 (1991).

Respondents' reliance on the INA requirement that changes to asylum *eligibility* must proceed through rulemaking is misplaced. The proclamation and implementing guidance here do not purport to affect asylum eligibility; they provide that even aliens who are otherwise eligible for asylum will be denied asylum as a discretionary matter if they violate the proclamation's entry suspension. See Pet. 20. Respondents call (Br. in Opp. 21) the distinction between eligibility and discretionary denial a "sleight of hand." But the INA itself draws that distinction, see *Thuraissigiam*, 591 U.S. at 110 n.4, and respondents are wrong to consider *any* criterion-based exercise of discretion as in effect an eligibility requirement. Just as the executive may terminate the parole of a category of otherwise eligible aliens, *Doe*, 152 F.4th at 286, so too may it deny asylum to a category of otherwise eligible aliens.

Respondents again conflate procedure and substance in asserting that "[w]hen Congress has provided that noncitizens may *apply* for asylum regardless of status and manner of entry, the Executive cannot simply decree that noncitizens who cross the southern border without lawful status cannot *receive* asylum." Br. in Opp. 20 (emphases added). Although the INA purports to allow any alien to *apply* for asylum, it guarantees nothing about whether asylum will be granted, and instead commits that to the executive's sole discretion. 8 U.S.C. 1158(a)(1) and (b)(1)(A). Respondents' objections to that policy choice should be addressed to Congress.

Respondents assert that "it is the hollowest of rights that a noncitizen must be allowed to apply for asylum if

another rule makes her categorically ineligible for asylum." Br. in Opp. 20-21 (brackets, citation, and ellipsis omitted). But it is precisely because the law does not demand empty procedures that the government need not accept futile asylum applications. See Pet. App. 80a-87a (Walker, J., dissenting in part); *id.* at 166a-167a (Millett, J., concurring in partial stay); *id.* at 185a (Katsas, J., dissenting in part from partial stay). Substance drives procedure, not the other way around. Respondents' contrary position—that the procedures are mandatory, and *therefore* the President must lack the substantive authority the INA grants him—gets things backward.

Respondents' reliance (Br. in Opp. 23) on *Learning Resources, Inc.* v. *Trump*, 607 U.S. 229 (2026), and *West Virginia* v. *EPA*, 597 U.S. 697 (2022), is misplaced. This case does not involve a "major question" in which an agency claims that Congress "delegated 'highly consequential power' through ambiguous language," *Learning Resources*, 607 U.S. at 243 (citation omitted). The language here is unambiguous: the INA clearly grants the executive discretion to deny asylum applications from eligible aliens, see 8 U.S.C. 1158(b)(1)(A), and it just as clearly states that such aliens "may apply" for asylum, 8 U.S.C. 1158(a)(1). The question is how to reconcile those two provisions—specifically, whether the procedural requirement must be reflexively followed where the underlying substantive decision has already been made. That inquiry has nothing to do with the major-questions or non-delegation doctrines.

Respondents add (Br. in Opp. 18) that because the proclamation does not expressly spell out that asylum applications are precluded as futile, that rationale is "*Chenery*-barred" under *SEC* v. *Chenery Corp.*, 332

U.S. 194 (1947). That argument lacks merit. The *Chenery* doctrine, which provides that "a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record" when reviewing agency action, *Department of Commerce* v. *New York*, 588 U.S. 752, 780 (2019), does not apply to evaluating the lawfulness of presidential proclamations. The President is not an agency, his actions are not subject to review under the Administrative Procedure Act, and (like Congress) he has no legal obligation to explain his policy choices. Even for agency actions, the *Chenery* doctrine has no place when evaluating purely legal questions regarding whether agency action is contrary to law, which is for courts to decide. Cf. *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 398-399 (2024).

b. Sections 1182(f) and 1185(a)(1) reinforce the executive's authority to repatriate aliens who violate an entry suspension without permitting them to bog down the process by filing futile asylum applications. See Pet. 20-23. Respondents object that Section 1182(f) "only provides authority to 'suspend entry'; nowhere to be found is the word 'removal,' or any variant." Br. in Opp. 24 (citation and ellipsis omitted). But that ignores Section 1185(a)(1), which expressly authorizes the President to prescribe "limitations" on the "depart[ure]" of aliens, 8 U.S.C. 1185(a)(1)—including therefore a limitation that covered aliens must depart without being permitted to file futile asylum applications. Respondents have no answer to that express text, other than to bemoan the consequences of obeying it. Br. in Opp. 27.

Anyway, respondents are wrong about Section 1182(f). The authority to exclude necessarily includes the authority to expel those who circumvent the exclu-

sion: "The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). Respondents say that *Fong Yue Ting* "was referring to 'the power of Congress' over immigration." Br. in Opp. 25 n.4 (brackets and citation omitted). But that is the point: because Congress's power to exclude necessarily includes a power to expel, Congress's delegation of its power to exclude in Section 1182(f) is necessarily also a delegation of its power to expel, for exclusion and expulsion are "one and the same power," *Fong Yue Ting*, 149 U.S. at 713.

Finally, respondents repeatedly claim that "the Executive Branch's 'consistent position' for 'four decades' has been that neither Section 1182(f) nor Section 1185(a)(1) confers authority to deny noncitizens the right to apply for asylum." Br. in Opp. 27 (citation omitted); see *id.* at 1, 10-11, 20. But none of the cited instances involved a situation where a Section 1182(f) proclamation "categorically pre-den[ied] asylum" to aliens who violated the entry suspension. Pet. App. 167a (Millett, J., concurring in partial stay). The very source that respondents rely on for their historical claim makes clear that "nothing in the proclamations or the INA has precluded the [executive] from considering as an adverse discretionary criterion that a noncitizen is described in a section [1182(f)] proclamation." 89 Fed. Reg. 81,156, 81,163 n.53 (Oct. 7, 2024). What distinguishes this case from prior proclamations is that the President pre-announced a discretionary criterion.

Respondents' reliance (Br. in Opp. 20) on the government's stay application in *Trump* v. *East Bay Sanctu-*

ary Covenant, 586 U.S. 1062 (2018), misleadingly truncates and elides the quotation from the application. According to respondents, the government stated that "Section 1158(a)(1) by its plain terms requires … that [a noncitizen] be permitted to 'apply' for asylum, regardless of the [noncitizen's] manner of entry." Br. in Opp. 20 (brackets and ellipsis in original). The application actually said: "Section 1158(a)(1) by its plain terms requires **only** that an alien be permitted to '*apply*' for asylum, regardless of the alien's manner of entry. It does not require that an alien be eligible to *be granted* asylum, regardless of the alien's manner of entry." Stay Appl. at 29, *East Bay*, *supra* (No. 18A615) (boldface added). Nowhere does the *East Bay* application (which, incidentally, was denied) assert that the government must accept futile asylum applications. That issue was not raised or litigated there.

2. The court of appeals further erred in affirming classwide injunctive relief notwithstanding the INA's prohibition on classwide orders that "enjoin or restrain the operation of" certain INA provisions, 8 U.S.C. 1252(f)(1), including the provisions governing removal (Sections 1225(b) and 1229a). See Pet. 23-25. Respondents argue that the "injunction here does not run against enforcement of any" covered provision, but instead "runs only against the Proclamation and the extra-statutory removal processes the Executive created to implement it." Br. in Opp. 28. But an injunction prohibiting the government from repatriating aliens without permitting them to file futile asylum applications is in substance identical to an injunction requiring the government to remove those aliens under Sections 1225(b) or 1229a. Indeed, the court's rationale for the injunction was that those procedures are the exclusive

means for removing an alien—and the INA is clear that aliens who violate an entry suspension must be removed one way or the other, cf. 8 U.S.C. 1225(b)(1)(A)(i).

Respondents brush that aside as "irrelevant," arguing that the government itself "told the Court just last year: 'Section 1252(f)(1) does not address *why* an injunction may issue' but merely asks whether the injunction 'restrain[s]' or 'run[s] against' a covered provision." Br. in Opp. 29, 30 n.6 (brackets in original) (quoting Stay Reply at 4, *DHS* v. *D.V.D.*, 145 S. Ct. 2153 (2025) (No. 24A1153)). Once again, respondents have pulled the government's statement out of context. That sentence was responding to the argument that a classwide injunction restraining the operation of covered provisions was nevertheless permissible because the injunction sought to enforce a different statute not covered by Section 1252(f)(1). The reply brief simply observed that Section 1252(f)(1) applies wherever an injunction "orders 'federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions.'" Stay Reply at 4, *D.V.D.*, *supra* (No. 24A1153) (quoting *Garland* v. *Aleman Gonzalez*, 596 U.S. 543, 550 (2022)). As the government explained, "the contrary view—that Section 1252(f)(1) does not apply to an injunction that restrains the operation of a specified provision in order to enforce a non-specified provision—was rejected by every Justice in *Aleman Gonzalez*." *Id.* at 4-5. The district court in this case did the converse: it purported to enjoin the operation of the proclamation in order to enforce the removal provisions that are covered by Section 1252(f)(1). That is no less forbidden.

3. Finally, the court of appeals improperly affirmed an overbroad class that includes members who are cur-

rently uninjured and face no imminent prospect of injury. Pet. 25-30. Respondents contend that a "person does not become a class member until" he enters the country illegally in violation of the proclamation and satisfies other criteria. Br. in Opp. 32. That contention cannot be squared with the class definition (as "clarified" by the court of appeals), which includes as a *current* member of the class any alien who might meet those criteria at any time "while [the proclamation] is in effect," including in the future. Pet. App. 129a. That is entirely improper; aliens who are currently overseas and for whom there is no imminent risk of injury from the proclamation cannot be included in a class with aliens who are currently here and subject to the proclamation's restrictions. Pet. 25-30.

Respondents assert that courts routinely certify classes that include individuals who might become members in the future. See Br. in Opp. 33. But the propriety of that practice has not been squarely presented to or resolved by this Court. And in none of the cited cases was a challenge raised to the class certification. Indeed, *Trump* v. *Barbara*, 146 S. Ct. 2438 (2026), involved a "provisionally certified" class for purposes of entering a *preliminary* injunction, *id.* at 2445.

B. The Decision Below Warrants Review

1. The decision below curtails one of the most important and effective tools for controlling the flood of aliens into the country. This Court has not hesitated to intervene when lower courts block a President's signature and nationwide immigration policy, *e.g.*, *Biden* v. *Texas*, 597 U.S. 785 (2022); *Trump* v. *Hawaii*, 585 U.S. 667 (2018); *Trump* v. *IRAP*, 582 U.S. 571 (2017) (per curiam). See Pet. 30-32.

Respondents contest the proclamation's transformative effect, arguing that there was no "border crisis" in January 2025 because border encounters had already begun to fall. Br. in Opp. 37. But the government backed its assertions with sworn declarations from Cabinet-level officials, who presumably are well aware of the effect of various immigration policies on illegal migration. See Pet. 31-32. The data also belie respondents' account. Border encounters fell dramatically from 106,316, 94,183, and 96,033 in October, November, and December 2024, respectively, to 61,445, 11,710, and 11,011 in January (the proclamation took effect on January 20), February, and March 2025, respectively. See U.S. Customs and Border Protection, *Southwest Land Border Encounters*, www.cbp.gov/newsroom/stats/southwest-land-border-encounters. The decline in January and thereafter thus hardly "reflects a continuation of [a preexisting] trend," contra Br. in Opp. 37-38.

2. Respondents also contend (Br. in Opp. 30-31, 35-36) that the Section 1252(f)(1) and class-certification issues would not warrant review if the government does not prevail on the merits. But that is always true of a decision from this Court addressing both the merits and remedial issues, given that a merits decision from this Court would be conclusive precedent in all future cases. Cf. *Trump* v. *CASA, Inc.*, 606 U.S. 831, 859 n.18 (2025). Indeed, that is particularly true for Section 1252(f)(1), which by its terms constrains only lower courts, not this Court. 8 U.S.C. 1252(f)(1) (providing that "no court (other than the Supreme Court)" may enter the prohibited relief). That does not diminish the importance of addressing those issues, which are jurisdictionally before the Court and properly presented.

This Court recently granted certiorari in *DHS* v. *D.V.D.*, No. 26-426 (oral argument scheduled for Dec. 9, 2026), where one of the questions presented involves the scope of Section 1252(f)(1), as that case also involves a broad class. See *D.V.D.* v. *DHS*, No. 26-1212, 2026 WL 2797801, at *4-*6, *18-*19 (1st Cir. Sept. 18, 2026), cert. granted, No. 26-426 (oral argument scheduled for Dec. 9, 2026). The grant of certiorari in *D.V.D.* demonstrates the certworthiness of the remedial issues in this case. At a minimum, this Court could hold this case pending resolution of *D.V.D.*, and then grant this petition so that briefing on the remedial issues could be informed by the Court's decision in *D.V.D.* In all events, the legality of the proclamation and its preclusion of asylum manifestly warrant this Court's review.

Respectfully submitted.

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OCTOBER 2026