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16 *Attorneys for Plaintiffs and putative class members (continued on next page)*

17  
18 **UNITED STATES DISTRICT COURT**  
19 **CENTRAL DISTRICT OF CALIFORNIA**  
20 **EASTERN DIVISION**

21 IMMIGRANT DEFENDERS LAW  
22 CENTER, *et al.*,

23 Plaintiffs,

24 v.

25 CHAD WOLF, *et al.*,

26 Defendants.

Case No. 2:20-cv-09893-JGB-SHK

**PLAINTIFFS' NOTICE OF  
MOTION AND EMERGENCY  
MOTION FOR PRELIMINARY  
INJUNCTION**

Judge: Honorable Jesus G. Bernal  
Date: December 14, 2020  
Time: 9:00 a.m.  
Crtrm: 1

Action Filed: October 28, 2020

1 [Caption Page Continued - Additional Attorneys for Plaintiffs and putative class  
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1 Dated: November 9, 2020

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IMMIGRANT DEFENDERS LAW  
CENTER, *et al.*,

Plaintiffs,

v.

CHAD WOLF, *et al.*,

Defendants.

Case No. 2:20-cv-09893-JGB-SHK

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF PLAINTIFFS'  
EMERGENCY MOTION FOR  
PRELIMINARY INJUNCTION**

**ORAL ARGUMENT REQUESTED**

Judge: Honorable Jesus G. Bernal  
Date: December 14, 2020  
Time: 9:00 a.m.  
Crtrm: 1

1 [Caption Page Continued - Additional Attorneys for Plaintiffs and putative class  
2 members]

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1 Plaintiffs respectfully move this Court for an order (1) enjoining the Return  
2 Policy under the Migrant Protection Protocols (“the Protocols” or “MPP”) until  
3 hearings safely resume and Individual Plaintiffs have meaningful access to legal  
4 services; (2) allowing Individual Plaintiffs to return to the United States, with  
5 appropriate precautionary public health measures, to pursue their asylum claims; and  
6 (3) requiring Defendants to provide meaningful access to legal services for all  
7 Individual Plaintiffs.<sup>1</sup>

8 **INTRODUCTION**

9 Since January 2019, the government has trapped over 60,000 individuals  
10 seeking asylum, including the Individual Plaintiffs in this case, in life-threatening  
11 conditions in Mexico under the Protocols. These individuals suffered harm in their  
12 home countries, survived harrowing journeys, and sought protection in the United  
13 States, only to be sent back to dangerous conditions in Mexico to await immigration  
14 court hearings that may never happen. On October 28, 2020, Individual Plaintiffs, on  
15 behalf of themselves and a class of similarly situated individuals, along with two  
16 Organizational Plaintiffs, sued on nine claims. They move for a preliminary injunction  
17 on four of these claims.

18 First, Plaintiffs allege that Defendants’ decision to implement the Return Policy  
19 after their adoption of the Hearing Suspension Directive is not in accordance with law  
20 or is in excess of Defendants’ statutory authority because Individual Plaintiffs’  
21 proceedings are no longer “pending,” but rather indefinitely suspended. *See* 8 U.S.C.  
22 § 1225(b)(2)(C). Plaintiffs allege further that this decision was arbitrary and  
23 capricious because Defendants failed to consider Individual Plaintiffs’ inability to  
24 meaningfully access legal representation for the purpose of applying for asylum, or  
25 the consequences of requiring asylum seekers to languish indefinitely in life-  
26 threatening conditions in Mexico.

27 \_\_\_\_\_  
28 <sup>1</sup> For purposes of this motion, unless indicated otherwise, “Individual Plaintiffs”  
includes both the named Individual Plaintiffs and other members of the putative class.

1           Second, Plaintiffs allege that Defendants’ Return Policy subverts and violates  
2 Individual Plaintiffs’ right to apply for asylum by trapping them in a foreign country  
3 under dangerous conditions that obstruct access to all the components of the U.S.  
4 asylum system, by treating them in an arbitrary and non-uniform way, and by  
5 interfering with the Organizational Plaintiffs’ ability to deliver meaningful legal  
6 assistance to class members. *See* 8 U.S.C. § 1158(a)(1). Third, Plaintiffs allege that  
7 Defendants’ Return Policy and Deprivation of Counsel Policy are arbitrary and  
8 capricious or an abuse of discretion because, in adopting these policies, Defendants  
9 failed to consider the obstacles that Individual Plaintiffs would face in accessing food,  
10 shelter, health care, and other basic needs; and the effect those obstacles would have  
11 in exacerbating such individuals’ inability to meaningfully access legal representation.  
12 Plaintiffs allege that these policies are not in accordance with law because they impose  
13 systemic obstacles to Individual Plaintiffs’ ability to access legal representation, the  
14 cumulative effect of which is tantamount to a denial of counsel. *See* 8 U.S.C. §§ 1158,  
15 1229a(b)(4)(A), 1362.

16           Finally, Plaintiffs allege that Defendants’ Return Policy and Deprivation of  
17 Counsel Policy are arbitrary and capricious because, in adopting these policies,  
18 Defendants failed to consider the obstacles that Organizational Plaintiffs would face  
19 in safely meeting and meaningfully communicating with clients and potential clients  
20 who are placed into MPP. Plaintiffs allege that these policies are not in accordance  
21 with law or are in excess of Defendants’ statutory authority because they interfere with  
22 Organizational Plaintiffs’ ability to deliver meaningful pro bono legal assistance to  
23 Individual Plaintiffs.

24           Defendants have irreparably harmed Individual Plaintiffs by denying their right  
25 to apply for asylum, forcing them to remain in Mexico indefinitely under dangerous  
26 conditions, depriving them of access to basic needs, obstructing their access to legal  
27 representation, and preventing Organizational Plaintiffs from providing meaningful  
28 pro bono legal assistance to them. Plaintiffs seek to prevent the irreparable harm

1 Individual Plaintiffs are suffering and will continue to suffer unless the Defendants’  
2 actions are enjoined.

3 **STATUTORY AND FACTUAL BACKGROUND**

4 **I. The U.S. Asylum System**

5 The Refugee Act of 1980 (“the Refugee Act”) broadly affords the right to apply  
6 for asylum to any noncitizen “physically present in the United States or who arrives in  
7 the United States . . . irrespective of such alien’s status.” 8 U.S.C. § 1158(a)(1).<sup>2</sup>  
8 Individuals generally are eligible for a discretionary grant of asylum if they have  
9 experienced past persecution or have a well-founded fear of future persecution on  
10 account of race, religion, nationality, membership in a particular social group, or  
11 political opinion, and if they are unable or unwilling to return to and avail themselves  
12 of the protection of their country of origin because of that persecution or fear. 8 U.S.C.  
13 § 1101(a)(42)(A). Although a grant of asylum may be discretionary, the right to apply  
14 for asylum is not.<sup>3</sup>

15 Because of the high stakes, the right to apply for asylum is robust. The right  
16 necessarily includes the right to counsel, at no expense to the government, *see* 8 U.S.C.  
17 § 1158(d)(4), the right to notice of the right to counsel, *see id.*, and the right to access  
18 information in support of an application, *see* § 1158(b)(1)(B) (placing the burden on  
19 the applicant to present evidence to establish eligibility). The right also includes the  
20 right to uniform treatment by the U.S. government. Thus, under the Refugee Act, the  
21 Attorney General must “establish a uniform procedure for passing upon an asylum  
22 application.” S. Rep. No. 256 (96th Cong. 1980), *reprinted in* 1980 U.S.C.C.A.N.

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24 <sup>2</sup> *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified  
25 under the Immigration and Nationality Act (INA)).

26 <sup>3</sup> The INA further provides that noncitizens who are not eligible for asylum are  
27 protected from return to a country where it is more likely than not that their “life or  
28 freedom would be threatened . . . because of [their] race, religion, nationality,  
membership in a particular social group, or political opinion.” 8 U.S.C.  
§ 1231(b)(3)(A). Noncitizens likewise may not be returned to a country where they  
are more likely than not to be tortured. 8 C.F.R. §§ 1208.16–1208.18.

1 141, 149. In that respect, the Refugee Act eliminated the geographical and ideological  
2 preferences that previously had dominated the U.S. asylum system.<sup>4</sup>

## 3 **II. The Migrant Protection Protocols**

4 On December 20, 2018, former Department of Homeland Security (“DHS”)  
5 Secretary Kirstjen Nielsen announced that DHS would implement the Migrant  
6 Protection Protocols. The Protocols serve the Administration’s broader goal of  
7 deterring individuals from seeking asylum in the United States. The Protocols  
8 likewise reflect the Trump administration’s rejection of the fundamental humanitarian  
9 principles that underpin the U.S. asylum system.

10 In January 2019, shortly after Nielsen’s announcement, Defendants began  
11 implementing the Protocols at the San Ysidro port of entry between San Diego,  
12 California, and Tijuana, Mexico.<sup>5</sup> Since their initial implementation, the Protocols  
13 have been expanded and currently are being implemented at all ports of entry along  
14 the U.S.-Mexico border.<sup>6</sup>

15 The Protocols rely on the INA’s detention scheme for their implementation.  
16 Under the INA, individuals subjected to MPP are “detained.” 8 U.S.C.  
17 § 1225(b)(2)(A), (C); 8 C.F.R. § 235.3(d).<sup>7</sup> Thus, from the time individuals are  
18

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19  
20 <sup>4</sup> See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A*  
21 *Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 11 (1981));  
22 *see also Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 375 (C.D. Cal. 1982)  
(acknowledging the emphasis that Congress placed on the “uniform, nondiscriminatory treatment of refugees”).

23 <sup>5</sup> Declaration of Hannah R. Coleman (“Coleman Decl.”), Ex. I (ICE MPP  
Implementation Memorandum).

24 <sup>6</sup> Coleman Decl. (Ex. T) (Press Release on Expansion of MPP)

25 <sup>7</sup> Defendants also consider individuals in MPP to be “detained” for the duration  
26 of their placement in MPP. Senior Official Performing the Duties of the Deputy  
27 Secretary of Homeland Security Ken Cuccinelli has stated that individuals in MPP  
28 “are essentially on what we call a ‘detained docket’—it means they are not going to  
be released until their case is heard. And so they’re waiting in Mexico . . . .” Interview  
with Acting Deputy Secretary of Homeland Security Ken Cuccinelli, “Securing the  
Southern Border,” FOX News at 3:00–3:30 (Nov. 24, 2019), *available at*  
<https://bit.ly/2TF3fPT>.



1 initially processed under the Protocols until they are returned to Mexico, they are  
2 detained by DHS and, therefore, are under DHS’s physical custody and control.  
3 Declaration of Hannah Doe (“Hannah Doe Decl.”) ¶¶ 5-10; Declaration of Nicholas  
4 Doe (“Nicholas Doe Decl.”) ¶¶ 5-6; Declaration of Daniel Doe (“Daniel Doe Decl.”)  
5 ¶ 6; Declaration of Feliza Doe (“Feliza Doe Decl.”) ¶ 6; Declaration of Benjamin Doe  
6 (“Benjamin Doe Decl.”) ¶ 6; Declaration of Jessica Doe (“Jessica Doe Decl.”) ¶ 4;  
7 Declaration of Anthony Doe (“Anthony Doe Decl.”) ¶ 5; *see also* Declaration of  
8 Michael Bochenek (“Bochenek Decl.”) ¶¶ 24-26.<sup>8</sup> When they are returned to Mexico,  
9 DHS keeps them in statutory detention, retaining custody and control over them. *See*  
10 8 U.S.C. § 1225(b)(2)(A), (C); 8 C.F.R. § 235.3(d).

11 Each time individuals present themselves at a port of entry, they are briefly  
12 “paroled into the United States by CBP for purposes of their hearing” under 8 U.S.C.  
13 § 1182(d)(5)(A).<sup>9</sup> As a “condition” of their parole, they “remain detained in  
14 Department of Homeland Security (DHS) custody” for the period that they are in the  
15 United States for their hearing.<sup>10</sup> During that period, “DHS is ultimately responsible  
16 for maintaining custody of the [noncitizen],”<sup>11</sup> and individuals are functionally treated  
17 the same as those detained in the United States. Declaration of Joyce Noche (“Noche  
18 Decl.”) ¶¶ 4-6.<sup>12</sup> At the conclusion of their hearing—except in cases where there is a  
19 decision on the merits or the case is terminated—the individual is transported by DHS

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20  
21 <sup>8</sup> *See also Doe v. McAleenan*, 415 F. Supp. 3d 971, 976 (S.D. Cal. 2019) (holding  
22 that individuals who are subjected to MPP and held in CBP custody “are subject to  
23 conditions that significantly confine and restrain their freedom” and are therefore “in  
24 custody” for habeas purposes).

25 <sup>9</sup> *See Coleman Decl., Ex. J (ICE ERO MPP Guidance)* at 2.

26 <sup>10</sup> *Coleman Decl., Ex. K (DHS “Notice to Alien Arriving from Mexico for  
27 Removal Proceedings Under Section 235(b)(2)) (“You are being paroled pursuant to  
28 section 212(d)(5) of the Act and, as a condition of your parole, you will remain  
detained in Department of Homeland Security (DHS) custody for the period that you  
are in the United States for your hearing.”).*

<sup>11</sup> *Coleman Decl., Ex. J (ICE ERO MPP Guidance)* at 3.

<sup>12</sup> In at least one case, DHS conceded that an MPP respondent was in the custody  
of DHS for the purposes of a custody redetermination request. *Noche Decl.* ¶ 6(e).

1 back to the port of entry and “returned to the custody from which he was paroled” in  
2 Mexico.<sup>13</sup>

3 Through a series of independent but related memoranda, statements of guiding  
4 principles, and other announcements that collectively comprise the Protocols,  
5 Defendants are authorized to exercise pervasive control over individuals from the  
6 moment Defendants discretionarily decide to impose the Protocols upon them until  
7 they are ordered deported or granted relief. These policies include the Return Policy,  
8 the Deprivation of Counsel Policy, the Presentation Requirement, and the Hearing  
9 Suspension Directive.

#### 10 **A. The Return Policy**

11 The Protocols’ Return Policy forces certain asylum-seeking individuals and  
12 families from non-contiguous foreign countries who present themselves at or near the  
13 southern U.S. border to return to Mexico for the duration of their immigration  
14 proceedings.<sup>14</sup> The Return Policy provides that individuals subject to the Protocols  
15 “receive a specific immigration court hearing date and time” and must wait in Mexico  
16 until then.<sup>15</sup> On the date of their scheduled immigration court hearing, individuals  
17 must present themselves at a designated port of entry hours before their hearing time  
18 so that DHS may transport them to immigration court. *See, e.g., Hannah Doe Decl.*  
19 ¶ 15.

20 In early February 2019, U.S. Immigration and Customs Enforcement (ICE)  
21 issued a policy memorandum (“the ICE Policy Memorandum”) providing “operational  
22 guidance” on how the Return Policy would be implemented and the manner in which  
23 decisions to return individuals to Mexico would be made. It provides, specifically,  
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25 <sup>13</sup> 8 U.S.C. § 1182(d)(5)(A); *see also* Coleman Decl., Ex. K (DHS “Notice to  
26 Alien Arriving from Mexico for Removal Proceedings Under Section 235(b)(2))  
27 (“DHS will transport you to and from your hearing.”).

27 <sup>14</sup> Coleman Decl., Ex. A (MPP Implementation Memorandum from Former  
28 Secretary Kirstjen Nielsen).

<sup>15</sup> *See* Coleman Decl., Ex. F (ICE ERO MPP Guiding Principles).

1 that “[p]rocessing determinations . . . will be made by U.S. Customs and Border  
2 Protection (CBP), in CBP’s enforcement discretion.”<sup>16</sup>

3 **B. The Deprivation of Counsel Policy**

4 A memorandum issued by ICE Enforcement and Removal Operations (ERO)  
5 (“the ERO Memorandum”) on February 12, 2019, describes the Protocols’ mechanism  
6 for providing individuals with access to counsel.<sup>17</sup> That policy (the “Deprivation of  
7 Counsel Policy”) is intended to deny access to counsel, and it successfully does so:  
8 93 percent of individuals subjected to the Protocols are not represented by counsel.<sup>18</sup>  
9 The ERO Memorandum provides that, to “facilitate” access to legal representation for  
10 individuals subjected to the Protocols, “ERO will depart from the [port of entry] with  
11 the alien at a time sufficient to ensure arrival at the immigration court not later than  
12 one hour before his or her scheduled hearing time in order to afford the alien the  
13 opportunity to meet in-person with his or her legal representative.”<sup>19</sup> In other words,  
14 through the ERO Memorandum, individuals subjected to the Protocols are supposed  
15 to be provided a minimum of one hour to consult with their legal representatives before  
16 appearing in court.

17 For individuals who do not have legal representation, the Protocols do not  
18 provide any period of time to meet with legal service providers before their scheduled  
19 hearings. Compl. ¶¶ 75-76; Declaration of Luis Gonzalez (“Gonzalez Decl.”) ¶¶ 23-  
20 24; Declaration of Margaret Cargioli (“Cargioli Decl.”) ¶ 34; Declaration of Kennji

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21  
22 <sup>16</sup> Coleman Decl., Ex. I (ICE MPP Implementation Memorandum).

23 <sup>17</sup> Coleman Decl., Ex. J (ICE ERO MPP Guidance).

24 <sup>18</sup> Transactional Records Access Clearinghouse (TRAC), Details on MPP  
25 (Remain in Mexico) Deportation Proceedings by Hearing Location & Attendance,  
26 Representation, Nationality, Month & Year of NTA, Outcome, & Current Status  
27 (Sept. 2020), available at <https://bit.ly/31JJXgz> (filter set to “Represented”). By  
28 contrast, in the fiscal year prior to the implementation of MPP, over 90% of  
individuals whose asylum cases were decided by the San Diego Immigration Court  
were represented. Declaration of Amber N. Qureshi (“Qureshi Decl.”) ¶¶ 3-7.

<sup>19</sup> Coleman Decl., Ex. J (ICE ERO MPP Guidance) at 3.

1 Kizuka (“Kizuka Decl.”) ¶¶ 20-22. The Protocols also do not guarantee any  
2 opportunity to contact or otherwise seek out counsel. Compl. ¶¶ 75-76. For  
3 unrepresented individuals, the Protocols provide only a tear sheet containing  
4 information about the MPP process and a list of free or low-cost legal service  
5 providers. *Id.* ¶ 75; Coleman Decl., Ex. S (MPP “Tear Sheet”); Bochenek Decl. ¶ 23.  
6 According to DHS, the tear sheets are available only in English, Spanish and  
7 Portuguese.<sup>20</sup>

8 Through the Deprivation of Counsel Policy, Defendants have achieved a  
9 seven percent representation rate for individuals who have been returned to Mexico  
10 pursuant to the Protocols. That one-hour period, even if it were afforded to the seven  
11 percent of individuals in MPP who are represented, fails to provide any meaningful  
12 opportunity to access counsel. Gonzalez Decl. ¶¶ 40-44; Cargioli Decl. ¶¶ 27-32.

### 13 C. The Presentation Requirement

14 The Presentation Requirement directs individuals to present themselves at a  
15 designated port of entry to gain access to the U.S. asylum system, to attend their  
16 asylum hearings, and to maintain their tenuous status in Mexico.

17 Defendants have implemented the Presentation Requirement through the ERO  
18 Memorandum. The ERO Memorandum sets forth certain procedures for notifying  
19 individuals subjected to the Protocols of their next hearing, and the manner in which  
20 they will be transported to and from that hearing. The ERO Memorandum explains  
21 that, “[o]n the day of [their] hearing, an [individual subjected to the Protocols] will  
22 arrive at the [port of entry] at the time designated—generally, a time sufficient to allow  
23 for CBP processing, prehearing consultation with counsel (if applicable), and timely  
24 appearance at hearings.”<sup>21</sup> Individuals subject to the Protocols are not provided with  
25 any means to, options for, or information about how to travel to the port of entry at  
26

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27 <sup>20</sup> Coleman Decl., Ex. U (DHS MPP Questions and Answers (under *How does the*  
*MPP process work?*)).

28 <sup>21</sup> Coleman Decl., Ex. J (ICE ERO MPP Guidance) at 2.

1 which they are required to appear. Bochenek Decl. ¶¶ 16-18, 34; *see, e.g.*, Feliza Doe  
2 Decl. ¶¶ 11, 16; Anthony Doe Decl. ¶ 5-6; Daniel Doe Decl. ¶ 7.

3 In other words, the Presentation Requirement controls all aspects of how, when,  
4 and where individuals must present themselves at a port of entry for their hearings, and  
5 individuals face significant penalties—including an *in absentia* order of removal—if  
6 they violate or fail to comply with the Requirement. Bochenek Decl. ¶¶ 16-23. The  
7 Requirement functionally traps individuals in dangerous zones and transit corridors  
8 around the port of entry, and individuals risk losing their temporary visas and any hope  
9 of access to legal assistance if they relocate. Declaration of Daniel Berlin (“Berlin  
10 Decl.”) ¶¶ 15-28.

#### 11 **D. The Hearing Suspension Directive**

12 Since late March 2020, Defendants have postponed MPP hearings six times,  
13 leaving Plaintiffs and thousands of others waiting indefinitely for their day in court.  
14 The first five times that Defendants postponed MPP hearings, they provided a specific  
15 date for the resumption of hearings. Compl. ¶ 89 & n.21. They also declared that  
16 “[n]either the MPP program nor any hearings will be canceled.”<sup>22</sup> But on July 17,  
17 2020, in the sixth postponement of MPP hearings, Defendants announced the “Hearing  
18 Suspension Directive” and provided no date for the resumption of hearings.<sup>23</sup>  
19 Defendants instead announced that MPP hearings would resume only after certain  
20 “threshold criteria” have been met:

21 (a) “When California, Arizona, and Texas progress to Stage 3 of their reopening  
22 plans”;

23  
24  
25 <sup>22</sup> Coleman Decl., Ex. L (March 23, 2020 Joint DHS/ EOIR MPP Hearing Rescheduling Press Release).

26 <sup>23</sup> Coleman Decl., Ex. M (July 17, 2020 Joint DHS/ DOJ Announcement of Plan  
27 to Restart MPP Hearings) (“The U.S. Department of Homeland Security (DHS) and  
28 the U.S. Department of Justice (DOJ) remain committed to resuming removal hearings for aliens subject to the Migrant Protection Protocols (MPP) as expeditiously as possible.”).

1 (b) “When [the Department of State] and [Centers for Disease Control and  
2 Prevention (CDC)] lower their global health advisories to Level 2 and/or a  
3 comparable change in health advisories, regarding Mexico in particular”;  
4 and

5 (c) “When [the Government of Mexico’s] ‘stoplight’ system categorizes all  
6 Mexican border states (i.e. Tamaulipas, Nuevo Leon, Coahuila, Chihuahua,  
7 Sonora, and Baja California) as ‘yellow.’”<sup>24</sup>

8 Defendants have not stated whether additional requirements, beyond the above  
9 criteria, would or could be imposed before hearings resume.<sup>25</sup> The “threshold criteria”  
10 set forth in the Hearing Suspension Directive “are highly unlikely to be met for at least  
11 the next six to nine months.” Declaration of Arthur L. Reingold (“Reingold Decl.”)  
12 ¶ 16.

13 First, it is highly unlikely that California, Arizona, and Texas will progress to—  
14 or remain in—Stage 3 of their reopening plans in the near future. As of October 20,  
15 2020, less than half the counties in California were classified as Tier 3 or Tier 4, and  
16 none of the six counties closest to the southern border had progressed to Tier 3 or Tier  
17 4. Reingold Decl. ¶ 18. Given the projected surge in COVID-19 cases over the next  
18 few months, it is “highly unlikely that all 58 counties in California will move to Tier  
19 3 . . . in the foreseeable future.” *Id.* Texas and Arizona have both experienced drastic  
20 increases in COVID-19 cases and hospitalizations in recent weeks. *Id.* ¶¶ 19-21.  
21 Although Texas currently appears to be in Phase 3 of its reopening phases, “the surge  
22 of infection and hospitalization rates is likely to result in regression from Phase III to  
23 Phase II.” *Id.* ¶ 19. Similarly, in Arizona, “the rising infection rates and the potential  
24 of a catastrophic winter is likely to have an impact on Arizona’s phases of reopening.”

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25  
26 <sup>24</sup> *Id.*

27 <sup>25</sup> The Hearing Suspension Directive also contains a list of “safeguards” for DHS  
28 employees and noncitizens that will apply when hearings resume. These safeguards  
include further postponements and rescheduling of individual hearings if “a [DHS]  
facility’s capacity is reached.” *Id.*



1 *Id.* ¶ 21.

2 Second, “Mexico is nowhere near meeting [the criterion 2] standard.” *Id.* ¶ 23.  
3 The CDC’s health advisory for Mexico is currently at Level 3 “High Risk,” which is  
4 the highest possible level. *Id.* ¶ 22. For the CDC to lower its advisory to Level 2,  
5 Mexico must have under 500 new COVID-19 cases per day. *Id.* The World Health  
6 Organization reported that Mexico had over 5,700 new COVID-19 cases on October  
7 22, 2020 alone. *Id.*

8 Finally, as of October 2020, “[b]ased on projections of COVID-19 cases and  
9 death rates in the United States and Mexico, it is highly unlikely that the six Mexican  
10 border states—referenced in criterion 3—will uniformly reach yellow anytime in the  
11 foreseeable future.” *Id.* ¶ 27. As of October 12, three of the Mexican border states  
12 were classified by the Mexican Government as “orange,” and three were classified as  
13 “yellow.” *Id.* ¶ 26. Given the projected surge in COVID-19 cases in the coming  
14 months, this criterion will not be met anytime soon.

15 Thus, through the Hearing Suspension Directive, Defendants have effectively  
16 postponed MPP hearings indefinitely. Yet, even though Plaintiffs’ immigration court  
17 proceedings are no longer “pending,” Defendants have maintained their Return Policy,  
18 leaving Individual Plaintiffs stranded in Mexico with no end in sight and no access to  
19 legal assistance or representation. Bochenek Decl. ¶¶ 28-36 (describing impediments  
20 to legal assistance or representation); *e.g.*, Decl. Daniel Doe ¶¶ 19-20 (describing  
21 impact of suspended hearings); Decl. Nicholas Doe ¶ 12 (same); Decl. Jessica Doe  
22 ¶ 14 (same). Defendants have thereby deprived Individual Plaintiffs of a meaningful  
23 right to apply for asylum. By obstructing access to counsel, Defendants have also  
24 undermined Organizational Plaintiffs’ missions and statutorily protected role of  
25 providing pro bono representation to asylum seekers.

26 **LEGAL STANDARD**

27 Plaintiffs seeking a preliminary injunction generally must show that: (1) they  
28 are likely to succeed on the merits; (2) they are likely to suffer irreparable harm absent

1 preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction  
2 is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).  
3 In the Ninth Circuit, “‘serious questions going to the merits’ and a hardship balance  
4 that tips sharply toward the plaintiff can support issuance of an injunction, assuming  
5 the other two elements of the *Winter* test are also met.” *Aliance for the Wild Rockies*  
6 *v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). For the reasons discussed below,  
7 Plaintiffs meet all these requirements.

## 8 ARGUMENT

### 9 **I. INDIVIDUAL AND ORGANIZATIONAL PLAINTIFFS ARE LIKELY** 10 **TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF** 11 **IMMEDIATE INJUNCTIVE RELIEF.**

12 Individual Plaintiffs will likely suffer irreparable harm if Defendants are not  
13 prohibited from implementing the Return Policy while the Hearing Suspension  
14 Directive is in effect, and from obstructing Individual Plaintiffs’ access to legal  
15 services.

#### 16 **A. Harm to Individual Plaintiffs**

17 Individual Plaintiffs are “non-Mexicans returned to Mexico under the MPP”  
18 who “risk substantial harm, even death, while they await adjudication of their  
19 applications for asylum” and thus have a “significant likelihood” of suffering  
20 irreparable harm. *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1093 (9th Cir. 2020),  
21 *judgment stayed*, 140 S. Ct. 1564, *cert. granted*, — S. Ct. — (2020). In Mexico,  
22 Individual Plaintiffs and others similarly situated are trapped in dangerous zones and  
23 transit corridors in Mexico, where they have endured physical attacks and grave threats  
24 at the hands of Mexican police and organized criminal groups, have been denied their  
25 basic human needs, and have been deprived of access to legal assistance. The State  
26 Department has reported for three consecutive years that the dangers that forced  
27 Central American migrants to flee their homes also exist in Mexico, as Central  
28 American gangs have “spread farther into the country and threatened migrants who



1 had fled the same gangs in their home countries.”<sup>26</sup> Tijuana is among the deadliest  
2 cities in the world.<sup>27</sup> In 2018, Tijuana was described as “the most violent city in the  
3 world,” and Baja California, where Tijuana is located, had the most reported murders  
4 of any state in Mexico.<sup>28</sup> Indeed, President Trump has acknowledged that Mexico is  
5 not a safe place for migrants, tweeting on January 31, 2019: “Very sadly, Murder cases  
6 in Mexico in 2018 rose 33% from 2017, to 33,341.”<sup>29</sup>

7 Individual Plaintiffs have experienced these dangers, all of which constitute  
8 irreparable harm, firsthand.

- 9 • Plaintiff Daniel Doe has been the victim of attempted robbery, and he and  
10 his daughter routinely hear gunfire near where they are staying. Daniel  
11 Doe Decl. ¶¶ 23-24, 27.
- 12 • Plaintiff Hannah Doe has been the victim of assault and attempted rape.  
13 Hannah Doe Decl. ¶ 13.
- 14 • Plaintiffs Benjamin and Jessica Doe’s son has repeatedly been threatened  
15 by cartel members; their children cannot attend school due to the threat  
16 of kidnapping and robbery. Jessica Doe Decl. ¶¶ 10-11; Benjamin Doe  
17 Decl. ¶ 21.
- 18 • Plaintiff Anthony Doe has been robbed and assaulted multiple times, and  
19 numerous shootings have occurred near the church where he lives. Decl.  
20 Anthony Doe ¶¶ 9, 11-12. He lives every day not knowing if he will  
21 survive to the next. Anthony Doe Decl. ¶ 12.

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23 <sup>26</sup> Coleman Decl., Ex. N (2019 Dep’t of State Human Rights Report: Mexico) at  
24 18; *accord* Coleman Decl., Ex. O (2018 Dep’t of State Human Rights Report: Mexico)  
25 at 19; Coleman Decl., Ex. P (2017 Dep’t of State Human Rights Report: Mexico) at  
26 21.

27 <sup>27</sup> Coleman Decl., Ex. Q (OSAC 2020 Mexico Crime & Safety Report).

28 <sup>28</sup> Coleman Decl., Ex. R (San Diego Union-Tribune, Drug violence continues to  
grip Tijuana, Jan. 6, 2020).

<sup>29</sup> President Donald J. Trump (@realDonaldTrump), Twitter (Jan. 31, 2019, 9:43  
AM), <https://twitter.com/realDonaldTrump/status/1091029180521897984>.

- 1 • After bullets penetrated the walls of the shelter where Plaintiff Nicholas  
2 Doe lived in Tijuana, he moved south to Rosarito, where he has been  
3 robbed and continues to be threatened with physical violence. Nicholas  
4 Doe Decl. ¶¶ 13-14.
- 5 • Plaintiff Feliza Doe was threatened and chased by a taxi driver, and she  
6 fears for the safety of her three young daughters at a shelter in Mexicali  
7 where a man has tried to rape another child. Feliza Doe Decl. ¶¶ 39-40.
- 8 • Plaintiff Jaqueline Doe has been robbed, threatened with robbery and  
9 physical violence, verbally abused, and physically assaulted because of  
10 her gender identity. Declaration of Jaqueline Doe (“Jaqueline Doe  
11 Decl.”) ¶¶ 49-54.
- 12 • Individual Plaintiffs have also faced unwarranted arrests, extortion and  
13 threats from the police in Mexico. Daniel Doe Decl. ¶ 22 (Mexican police  
14 stopped and extorted him, threatening to hand him over to Mexican  
15 immigration authorities if he did not pay them); Nicholas Doe Decl. ¶ 16  
16 (Mexican police arrested him despite his humanitarian visa and  
17 threatened to hold him until after his immigration hearing if he did not  
18 pay them).

19 Much of the violence Individual Plaintiffs have experienced can be attributed to  
20 Defendants’ Return Policy, which forces non-Mexican asylum seekers to await their  
21 hearings in Mexico.<sup>30</sup> For example, Daniel Doe has been targeted for mugging  
22 because the assailants could tell that he “was not from their country.” Daniel Doe  
23

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24 <sup>30</sup> Individual Plaintiffs are largely unable to relocate from border towns because  
25 they must arrive at the port of entry on the day of their hearing as early as 3 am; living  
26 far from the border is not a viable option given the dangers of traveling in the dark and  
27 the pervasive violence targeted towards migrants. *See* Daniel Doe Decl. ¶¶ 14, 28;  
28 Nicholas Doe Decl. ¶¶ 10-11; Feliza Doe Decl. ¶ 47. Moreover, Individual Plaintiffs  
generally do not have sufficient financial resources to relocate or to travel back and  
forth to the port of entry. Daniel Doe Decl. ¶ 28; Feliza Doe Decl. ¶¶ 36-39; Nicholas  
Doe Decl. ¶ 14.

1 Decl. ¶ 23. The shelter where Feliza Doe lives with her children has instructed them  
2 not to go out at night because of the number of targeted attacks against migrants. Decl.  
3 of Feliza Doe ¶¶ 39-40. Apart from targeted physical violence, Individual Plaintiffs  
4 and their families must engage in a daily struggle for survival while trapped in Mexico  
5 and have found it difficult to meet their most basic needs. *See, e.g.*, Daniel Doe Decl.  
6 ¶¶ 7, 9-11, 21, 29, 31 (describing inability to cover basic expenses, including inability  
7 to pay for a medical exam to treat his daughter’s chronic condition); Benjamin Doe  
8 Decl. ¶¶ 15-18, 20-21 (describing unfit living conditions, including two months  
9 without reliable running water); Feliza Doe Decl. ¶¶ 11-13, 36-38 (describing inability  
10 to pay for sufficient food, water, clothing, and medicine for her young daughters);  
11 Jaqueline Doe Decl. ¶¶ 7-9, 19, 20, 22, 25, 26, 33, 46, 55, 57 (describing sleeping on  
12 the street for days at a time and ongoing inability to consistently afford medicine, food,  
13 water, electricity, and housing). Given their precarious legal status in Mexico and the  
14 dangers that surround them, Individual Plaintiffs also have limited options to work and  
15 are vulnerable to exploitation by their employers. *See, e.g.*, Benjamin Doe Decl. ¶ 17  
16 (works a cleaning job without authorization); Jessica Doe Decl. ¶ 11 (had to stop  
17 working in order to protect her children after a cartel threatened to kidnap her son);  
18 Anthony Doe Decl. ¶¶ 7-8, 10 (unable to find steady work because employers refuse  
19 to accept his documents as work authorization).<sup>31</sup>

20 **B. Harm to Organizational Plaintiffs**

21 Defendants’ Return Policy and Deprivation of Counsel Policy also cause  
22 substantial harm to Organizational Plaintiffs Immigrant Defenders Law Center  
23 (“ImmDef”) and Jewish Family Service of San Diego (“Jewish Family Service”). The  
24

25 <sup>31</sup> *See, e.g.*, Feliza Doe Decl. ¶ 21 (employer at cleaning job stopped paying her  
26 after two weeks); Nicholas Doe Decl. ¶ 15 (unable to find steady work because he  
27 does not have authorization and Mexican police confiscated the produce he tried to  
28 sell); Daniel Doe Decl. ¶ 11-12 (must leave his teenage daughter home alone six days  
a week in order to work); Jaqueline Doe Decl. ¶ 25 (does not earn enough money to  
support herself); Hannah Doe Decl. ¶ 27 (unable to find work since August 2020, when  
she was terminated due to COVID-19 pandemic).

1 policies have required ImmDef and Jewish Family Service to divert significant  
2 resources from other programs to assist individuals subject to the Protocols and have  
3 hindered their ability to deliver meaningful pro bono legal assistance.<sup>32</sup>

4 Plaintiff Jewish Family Service has been forced to divert significant resources  
5 from existing programs in the San Diego area to the detriment of its mission and its  
6 overall programming. Gonzalez Decl. ¶¶ 12-14, 17-19. To address the needs of  
7 Individual Plaintiffs, Jewish Family Service was forced to overhaul its programming  
8 and reallocate resources to provide cross-border legal services for individuals trapped  
9 in Mexico. *Id.* It repurposed significant portions of its staff members' time and added  
10 three full-time-equivalent employees. *Id.* ¶ 15. It also created a hotline through which  
11 staff provide legal consultations, screenings, and an overview of MPP proceedings.  
12 *Id.* ¶¶ 18-22. The consultations tend to last at least one hour, and the hotline has  
13 required an adjustment of staffing to fully manage the number of calls. *Id.* ¶¶ 19-20.  
14 As of September 30, 2020, Jewish Family Service had provided over 573 legal  
15 consultations through the hotline. *Id.* ¶ 17. Due to dangerous conditions in Mexico,  
16 Jewish Family Service also had to purchase additional insurance to protect itself and  
17 its staff. *Id.* ¶ 27.

18 Plaintiff ImmDef likewise has had to aggressively reallocate resources to  
19 provide a new form of representation as a result of MPP. Because individuals subject  
20 to MPP must appear in the San Diego immigration court, ImmDef had to open an  
21 office in San Diego, which necessitated shifting significant funding and staffing  
22 resources and setting aside previously-planned work in other existing programs in and  
23 around Los Angeles, where ImmDef is based. Declaration of Lindsay Toczowski  
24 (“Toczowski Decl.”) ¶¶ 13-23. ImmDef’s staff now undertakes cross-border  
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26 <sup>32</sup> See generally *Innovation Law Lab*, 951 F.3d at 1093 (affirming finding of  
27 irreparable harm where “organizational plaintiffs are hindered in their ability to carry  
28 out their missions”); *East Bay Sanctuary Covenant*, 950 F.3d at 1280 (finding legal  
service organizations would face irreparable harm based on diversion of resources as  
a result of the challenged policy).

1 representation, which its attorneys had not previously handled. *Id.* ¶¶ 13-18. Because  
2 of the complex and exhausting nature of representing clients in Mexico, ImmDef’s  
3 San Diego office faces high turnover, requiring the organization to expend additional  
4 resources to recruit, interview, and train new staff. *Id.* ¶ 24.

5 Defendants’ Return Policy and Deprivation of Counsel Policy significantly  
6 impact Organizational Plaintiffs’ abilities to conduct consultations, meet with clients,  
7 and prepare cases, which the pandemic has only exacerbated. Toczowski Decl. ¶ 26;  
8 Cargioli Decl. ¶¶ 27-30, 36-42; Gonzalez Decl. ¶ 32. Because travel to Mexico largely  
9 has been suspended, communication with clients must happen over the phone or  
10 WhatsApp, which is not as effective as in-person communication. Cargioli Decl. ¶ 24;  
11 Gonzalez Decl. ¶ 33. Calls take longer because of bad reception, poor Internet quality,  
12 and other technological difficulties. Cargioli Decl. ¶ 22; Gonzalez Decl. ¶ 33.  
13 Because clients often do not have access to spaces where they can speak confidentially,  
14 they are less able to discuss the traumatizing facts of their cases. Cargioli Decl. ¶¶ 22,  
15 31; Gonzalez Decl. ¶¶ 33, 38. Challenges with Internet and mobile access in Mexico  
16 also complicate the sharing of documents, compromise the quality of the documents  
17 transmitted, and raise confidentiality concerns. Gonzalez Decl. ¶ 34. Several of  
18 Jewish Family Service’s clients have been forced to change their phone numbers due  
19 to threats of violence, making communication even more difficult and raising concerns  
20 about loss of data. *Id.* ¶ 35.

21 **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF**  
22 **THEIR APA CLAIMS**

23 **A. Defendants’ continued implementation of the Return Policy in the**  
24 **absence of any pending MPP proceedings violates the INA and is not**  
**in accordance with law.**

25 This Court should set aside Defendants’ decision to continue to implement the  
26 Return Policy despite the Hearing Suspension Directive because that decision is “not  
27 in accordance with law.” 5 U.S.C. § 706(2)(A); *see East Bay Sanctuary Covenant v.*  
28 *Trump*, 950 F.3d 1242, 1271 (9th Cir. 2020). In implementing the Protocols,

1 Defendants rely on 8 U.S.C. § 235(b)(2)(C).<sup>33</sup> But as the Ninth Circuit already has  
2 held, that provision limits the return to “a foreign territory contiguous to the United  
3 States” of certain noncitizens who are “arriving on land” from that territory only  
4 “pending a proceeding under [8 U.S.C. § 1229a].” *Innovation Law Lab*, 951 F.3d at  
5 1083 (quoting 8 U.S.C. § 1225(b)(2)(C) (emphasis added)); *see also* 8 C.F.R.  
6 §235.3(d) (permitting return of certain noncitizens to contiguous territory only “while  
7 awaiting a removal hearing”). Because MPP hearings have been indefinitely  
8 suspended, the proceedings for individuals who have been returned to Mexico no  
9 longer are “pending” within the meaning of § 1225(b)(2)(C) and, therefore, the  
10 Individual Plaintiffs should not be subjected to the Return Policy. Unlike Defendants’  
11 earlier postponements of hearings for individuals in MPP—which merely deferred  
12 hearings to a specified date (*see supra* Section II(D))—the Hearing Suspension  
13 Directive suspends hearings indefinitely and “does not make sufficiently certain what  
14 is otherwise an unacceptably uncertain end-date.” *United States v. Olsen*, — F. Supp.  
15 3d —, 2020 WL 5542862, at \*4 (C.D. Cal. Sept. 2, 2020) (so describing similar criteria  
16 used to determine COVID-19 exposure risks). Defendants’ decision to continue  
17 implementing the Protocols in the absence of any “pending” proceedings violates the  
18 plain text of the INA, exceeds Defendants’ authority, and is blatantly unlawful.

19 **B. As applied, the Protocols violate the Refugee Act.**

20 “It is undisputed that all [noncitizens] possess [the right to apply for asylum]  
21 under the [Refugee] Act.” *Orantes-Hernandez v. Thornburg*, 919 F.2d 549, 553 (9th  
22 Cir. 1990).<sup>34</sup> That substantive right includes not only the right to apply for asylum,  
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24 \_\_\_\_\_  
25 <sup>33</sup> *See* Coleman Decl., Ex. I (ICE MPP Implementation Memorandum); Coleman  
26 Decl., Ex. A (DHS MPP Implementation Memorandum); *cf. Innovation Law Lab*, 951  
F.3d at 1084–85 (description of procedure under 8 U.S.C. § 235).

27 <sup>34</sup> *See also Jean v. Nelson*, 711 F.2d 1455, 1507 (11th Cir. 1983), *affirmed as*  
28 *modified*, 472 U.S. 846 (1985) (Refugee Act confers protected right to apply for  
asylum); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1038–39 (5th Cir. 1982)  
(same).



1 but also the right to “substantiate [a] claim for asylum,” *Augustin v. Sava*, 735 F.2d  
2 32, 36 (2nd Cir. 1984) (citations omitted); the right to counsel at no expense to the  
3 government, *see* 8 U.S.C. § 1158(d)(4) (providing notice of the right to counsel for an  
4 asylum application); and the right to access information to support an application, *see*  
5 8 U.S.C. § 1158(b)(1)(B) (placing the burden on the applicant to present evidence to  
6 establish eligibility). The independent statutory right to asylum counsel under  
7 8 U.S.C. § 1158(d)(4) serves several purposes, including helping the individual  
8 seeking asylum present evidence to satisfy the burden of proving their asylum claim.  
9 As DHS has recognized, this right to counsel attaches even before the asylum  
10 application is filed.<sup>35</sup> Although a grant of asylum is discretionary, the right to seek  
11 such relief is not.

12 The substantive right to apply for asylum further includes the right to uniform  
13 treatment by the government. By its text, the INA requires the government to  
14 provide a uniform method to apply for asylum under 8 U.S.C. § 1158(a)(1).<sup>36</sup>  
15 Through the Refugee Act, Congress also intended to provide for uniform treatment  
16 of those asylum applications. *See Orantes-Hernandez*, 541 F. Supp. at 375  
17 (acknowledging Congress’s focus on the “uniform, nondiscriminatory treatment of  
18 refugees” when it passed the Refugee Act). Thus, the geographic location where an  
19 individual applies for asylum should have no bearing under federal law on the merits  
20 of his or her application.

21 Plaintiffs are likely to succeed on the merits of their claim that DHS, by  
22 implementing the Return Policy and the Deprivation of Counsel Policy, has obstructed  
23 Individual Plaintiffs’ substantive right to apply for asylum by effectively nullifying all  
24

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25 <sup>35</sup> *See* Coleman Decl., Ex. V (I-589, Application for Asylum and for Withholding  
26 of Removal, Instructions) at 4 (explaining that asylum applicants have the right to  
obtain and provide counsel at their initial asylum interview as well as in immigration  
proceedings).

27 <sup>36</sup> *See* § 1158(a)(1) (“Any alien who is physically present in the United States or  
28 who arrives in the United States . . . irrespective of such alien’s status, may apply for  
asylum . . .”).

1 of the protections that the INA and the Refugee Act afford. First, the Return Policy  
2 obstructs Individual Plaintiffs’ ability to seek legal services for the purpose of  
3 preparing their applications. *See* Cargioli Decl. ¶ 19-32; Gonzalez Decl. ¶ 32-39;  
4 Kizuka Decl. ¶¶ 22; 26; Declaration of Adam Isacson (“Isacson Decl.”) ¶¶ 28-29;  
5 Berlin Decl. ¶¶ 26-27; Declaration of Steve Schulman (“Schulman Decl.”) ¶¶ 8-15;  
6 Bochenek Decl. ¶¶ 28-36. While they are trapped in Mexico, Individual Plaintiffs  
7 cannot communicate meaningfully with legal service providers who work and practice  
8 in the United States, and therefore cannot meaningfully prepare their asylum  
9 applications. *See* Cargioli Decl. ¶¶ 21-26; Gonzalez Decl. ¶¶ 20, 33-39. Without  
10 meaningful access to legal assistance, Individual Plaintiffs also cannot fully  
11 understand and exercise their statutory right to access information to support an  
12 application. *See* 8 U.S.C. § 1158(b)(1)(B). Such information is necessary to allow  
13 individuals seeking asylum to fully “substantiate their claim[s].” *Augustin*, 735 F.2d  
14 at 36.

15 Second, the Return Policy obstructs access to other components of the asylum  
16 system. For instance, because they are trapped in Mexico, Individual Plaintiffs cannot  
17 access local libraries, legal materials, or other reference materials to assist them as  
18 they prepare for and gather evidence to support their cases. And for those who seek  
19 to reside in California, because they are trapped in Mexico, they cannot access any of  
20 the California-funded nonprofits or community-based organizations that offer social  
21 services—including food, housing, and other essential social and humanitarian  
22 services—to individuals seeking asylum in the San Diego and Los Angeles  
23 immigration courts. *See, e.g.*, Daniel Doe Decl. ¶ 33.

24 Third, the Return Policy violates the Refugee Act’s requirement of uniform  
25 treatment of asylum claims. *See Orantes-Hernandez*, 541 F. Supp. at 375. By design,  
26 the Return Policy arbitrarily treats asylum applicants at the southern border differently  
27 from those who apply for asylum elsewhere. In other words, through the Return  
28 Policy, DHS has created arbitrary and systematic restrictions that apply only to asylum



1 seekers at the U.S.-Mexican border. Indeed, the Return Policy appears to be designed  
2 to coerce individuals to abandon their asylum claims altogether. *Cf. Orantes-*  
3 *Hernandez*, 919 F.2d at 557 (pattern of coercion and interference with right to apply  
4 for asylum violates the INA). Thus, by its design, the Return Policy effectively denies  
5 individuals—upwards of 60,000 to date—the right to apply for asylum in the United  
6 States.<sup>37</sup>

7 **C. As applied, the Return Policy and Deprivation of Counsel Policy**  
8 **systemically obstruct the INA’s right-to-counsel provisions.**

9 Organizational Plaintiffs are likely to succeed in their claim that the Return  
10 Policy and Deprivation of Counsel Policy violate 8 U.S.C. §§ 1158, 1229a(b)(4), and  
11 1362 and are arbitrary and capricious in violation of the APA. These policies  
12 systemically obstruct the INA’s right to counsel and prevent Organizational Plaintiffs  
13 from meaningfully fulfilling their statutorily protected function of providing pro bono  
14 legal services to individuals seeking asylum or other humanitarian relief. The policies  
15 are also arbitrary and capricious because Defendants failed to consider the ways in  
16 which they would obstruct access to counsel, including the obstacles that they would  
17 create to Organizational Plaintiffs’ ability to meaningfully communicate with and  
18 represent clients and potential clients.

19 **1. The Return Policy and Deprivation of Counsel Policy violate**  
20 **the statutory right to counsel.**

21 The INA codifies a right to counsel that is rooted in the Due Process Clause.  
22 *See* 8 U.S.C. §§ 1158(d)(4), 1229a(b)(4)(A), 1362; *see also Biwot v. Gonzales*, 403  
23 F.3d 1094, 1098 (9th Cir. 2005); *Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp.  
24 3d 1036, 1061 (C.D. Cal. 2019). This statutory right mandates that asylum seekers  
25 have meaningful access to counsel, including the ability to seek legal representation at  
26  
27

28 <sup>37</sup> TRAC, *supra* note 18 (filter set to “Hearing Location”).

1 no cost to the government, to consult with legal service providers, and to safely and  
2 confidentially communicate with retained counsel. *See, e.g.*, Compl. ¶¶ 41-47.

3 By trapping asylum seekers in Mexico—across an international border from  
4 immigration attorneys and other legal resources intended to assist them—the Return  
5 Policy violates the INA’s clear mandate that individuals fleeing persecution have  
6 access to legal counsel. Individuals subject to the Return Policy are unable to access  
7 legal representation throughout the asylum process, including for the purposes of  
8 seeking humanitarian parole, participating in non-refoulement interviews, completing  
9 affirmative applications such as for victims of human trafficking, and pursuing other  
10 avenues for relief from removal. *See supra* section II(B) (on asylum system).

11 Even for the seven percent of individuals subject to MPP who have secured  
12 legal representation, the Return Policy obstructs their ability to meaningfully access  
13 their representatives by preventing them from safely meeting with those  
14 representatives, confidentially communicating with them, and meeting the basic needs  
15 of themselves and their families. *See, e.g.*, Daniel Doe Decl. ¶ 29 (explaining that he  
16 cannot always afford the phone minutes or Internet credits required to speak with his  
17 attorney); Nicholas Doe Decl. ¶ 9 (describing losing cell phone connection during calls  
18 with his attorney); Feliza Doe Decl. ¶¶ 30-33 (explaining that poor cell phone  
19 connection means that calls with her attorney often drop and she must repeat traumatic  
20 details of her story, and that the lack of private space to speak with her attorney hinders  
21 her ability to speak freely); Jessica Doe Decl. ¶ 15 (stating that she does not want to  
22 discuss sensitive topics in front of her children); *see also supra* Section I(A)  
23 (addressing Individual Plaintiffs’ inability to meet basic needs). The Deprivation of  
24 Counsel Policy further obstructs access to counsel by limiting legal consultations  
25 before a hearing to a single hour for represented individuals only, and by failing to  
26 provide confidential meeting space or the legal resources necessary during that time.  
27 The Return Policy and Deprivation of Counsel Policy therefore make meaningful  
28 access to counsel functionally impossible and are not in accordance with law.

1                   **2. The Return Policy and Deprivation of Counsel Policy obstruct**  
2                   **Organizational Plaintiffs’ statutorily protected role of**  
3                   **providing legal services to asylum seekers.**

4                   By systemically violating the INA’s right-to-counsel provisions, the Return  
5 Policy and the Deprivation of Counsel Policy are also not in accordance with law  
6 because they interfere with the Organizational Plaintiffs’ statutorily contemplated role  
7 of delivering meaningful pro bono legal assistance to asylum seekers. Under the INA,  
8 ImmDef and Jewish Family Service fulfill a statutorily protected purpose of  
9 “ensur[ing] that pro bono legal services of the type that [they] provide are available to  
10 asylum seekers.” *See East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768 (9th  
11 Cir. 2018) (citing 8 U.S.C. § 1158(d)(4)(A)–(B)). Indeed, the Ninth Circuit has found  
12 that the asylum statutes “directly rely on institutions like [ImmDef and Jewish Family  
13 Service] to aid immigrants.” *Id.* at 769.

14                   ImmDef and Jewish Family Service cannot meaningfully fulfill their statutorily  
15 protected roles in the asylum system for Individual Plaintiffs because the Return Policy  
16 and the Deprivation of Counsel Policy systemically obstruct the INA’s right to  
17 counsel. Organizational Plaintiffs are unable to make contact with potential clients  
18 due to the obstacles posed by the Return Policy and the restrictions of the Deprivation  
19 of Counsel Policy. *See, e.g.*, Cargioli Decl. ¶¶ 19, 22-25; Gonzalez Decl. ¶¶ 23-24,  
20 32-39, 41-42, 45.

21                   Even for Individual Plaintiffs who make contact with ImmDef and Jewish  
22 Family Service, the Return Policy and Deprivation of Counsel Policy make  
23 meaningful communication exceedingly difficult. Organizational Plaintiffs cannot  
24 meet in person with their clients, complicating the trust-building that is necessary to  
25 develop an asylum claim. *See* Gonzalez Decl. ¶ 26; Cargioli Decl. ¶¶ 17,19. Their  
26 clients often cannot find confidential places to speak over the phone.<sup>38</sup> Gonzalez Decl.

27  
28                   <sup>38</sup> *See also* Benjamin Doe Decl. ¶ 25; Daniel Doe Decl. ¶ 30.

1 ¶ 33; Cargioli Decl. ¶ 24. And communication from Mexico is often financially and  
2 technologically challenging.<sup>39</sup> *Id.* Moreover, the one-hour period of in-person access  
3 that represented individuals are provided under the Deprivation of Counsel Policy,  
4 now effectively suspended by the Hearing Suspension Directive, not only is grossly  
5 insufficient, Gonzalez Decl. ¶ 20, Cargioli Decl. ¶¶ 27-29, but also does not extend to  
6 the 93 percent of individuals returned to Mexico who remain unrepresented. The  
7 Return Policy and Deprivation of Counsel Policy thus systematically obstruct ImmDef  
8 and Jewish Family Service’s statutorily protected role of providing pro bono legal  
9 services for asylum-seeking individuals and are not in accordance with law.

10 **3. The Return Policy and Deprivation of Counsel Policy are**  
11 **arbitrary and capricious because Defendants failed to consider**  
12 **their impact on the right to access counsel and the role of pro**  
13 **bono legal service providers.**

14 The Return Policy and Deprivation of Counsel Policy are also arbitrary and  
15 capricious because in their implementation and expansion, Defendants failed to  
16 consider how they would impact the INA’s right to counsel provisions and the ability  
17 of Organizational Plaintiffs to fulfill their statutorily contemplated roles in the asylum  
18 system, including by providing legal assistance to Individual Plaintiffs. *See* Compl  
19 ¶¶ 79-83 (describing the 2019 “*Law Lab v. Wolf* Administrative Record” and the  
20 absence of evidence of such consideration). Defendants plainly failed to consider the  
21 manner in which the policies would obstruct individuals subject to the Protocols from  
22 identifying, locating, communicating with, retaining, or consulting with legal  
23 representatives, including those at ImmDef and Jewish Family Service. Moreover,  
24 Defendants failed to consider the fact that many legal service providers are unable to  
25 represent individuals who must remain in Mexico to await their immigration court  
26 hearings. Schulman Decl. ¶ 8 (“The MPP has, in any event, significantly curtailed our

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28 <sup>39</sup> *See also* Nicholas Doe Decl. ¶ 8; Daniel Doe Decl. ¶ 29; Feliza Doe Decl. ¶¶ 30,  
33.

1 ability to provide pro bono representation to asylum-seekers.”); Berlin Decl. ¶ 26  
2 (“Asylum seekers in the MPP program encounter nearly insurmountable barriers in  
3 accessing counsel.”); Kizuka Decl. ¶ 18 (“In my experience, for asylum seekers forced  
4 to remain in Mexico under MPP, merely attempting to meet with an attorney in Mexico  
5 can be dangerous.”).

6 **III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FACTORS**  
7 **TIP SHARPLY IN FAVOR OF PLAINTIFFS.**

8 The balance of equities tips sharply in Plaintiffs’ favor, and an injunction is in  
9 the public interest because of the widespread harm the Protocols will cause if allowed  
10 to remain in effect. When the federal government is a party, the balance of the equities  
11 and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073,  
12 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

13 As the Ninth Circuit has recognized, individuals who are forced to remain in  
14 Mexico “risk substantial harm, even death, while they await adjudication of their  
15 applications for asylum.” *Innovation Law Lab*, 951 F.3d at 1093. Individual Plaintiffs  
16 are at grave risk of these same harms. *See* Kizuka Decl. ¶¶ 9-17; Isacson Decl. ¶¶ 2-  
17 27; Berlin Decl. ¶¶ 13, 18-22; Bochenek Decl. ¶¶ 5-15. These harms have been  
18 exacerbated by the COVID-19 pandemic. *See supra* Section I; *see also* Bochenek  
19 Decl. ¶¶ 9, 12-15; Cargioli Decl. ¶¶ 36-42; *see also* *Castillo v. Barr*, 449 F. Supp. 3d  
20 915, 923 (C.D. Cal. 2020) (finding that “[t]he balance of the equities tip sharply in  
21 favor of the Petitioners” where “Petitioners face[] irreparable harm to their  
22 constitutional rights and health” because the government’s conditions of detention  
23 increased their risk of contracting COVID-19). And the relief that Plaintiffs seek  
24 would return immigration law to the status quo that existed for decades before the  
25 Protocols were implemented.

26 Meanwhile, Defendants have no legitimate or lawful reason to force asylum  
27 seekers to wait in Mexico indefinitely or to further prevent their access to the asylum  
28 system. *See Castillo*, 449 F.Supp.3d at 923 (“[T]here is no harm to the Government

1 when a court prevents the Government from engaging in unlawful practices”). The  
2 Protocols are unlawful and the Government has no legitimate interest in violating the  
3 Constitution, *see United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971)  
4 (Brennan, J., concurring), or federal law, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006,  
5 1029 (9th Cir. 2013).<sup>40</sup>

#### 6 **IV. CLASSWIDE INJUNCTIVE RELIEF IS NECESSARY**

7 This Court has broad discretion to craft the scope of the injunction, “for breadth  
8 and flexibility are inherent in equitable remedies.” *C.F. v. Capistrano Unified School*  
9 *Dist.*, 647 F. Supp. 2d 1187, 1191 (C.D. Cal. 2009) (quoting *Swann v. Charlotte-*  
10 *Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)) (internal quotation marks omitted).  
11 As with any equitable remedy, “the nature of the violation determines the scope of the  
12 remedy.” *Id.* Thus, the scope of the injunctive relief must be “dictated by the extent  
13 of the violation established, not by the geographical extent of the plaintiff class.”  
14 *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also East Bay Sanctuary*  
15 *Covenant v. Barr*, 934 F.3d 1026, 1030 (9th Cir. 2019) (describing the “well-  
16 established rule” that an equitable remedy is only appropriate when it is “tailored to  
17 remedy the specific harm alleged” (quoting *Lamb-Weston, Inc. v. McCain Foods,*  
18 *Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)).

19 Federal courts may issue a classwide preliminary injunction where it is  
20 “necessary to afford the class members the relief to which they are entitled.” *Doe #1*  
21 *v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020) (“[T]here is no bar against class-wide,  
22 and nationwide relief in federal district or circuit court when it is appropriate[.]”  
23 (internal citation omitted)); *see also City & Cty. of San Francisco v. Trump*, 897 F.3d  
24 1225, 1244–45 (9th Cir. 2018) (rejecting blanket restriction on nationwide injunctions  
25 and deferring to the “considerable discretion [of the district court] in ordering an  
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27 <sup>40</sup> *See also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir.  
28 2016) (“[T]here is a substantial public interest in having governmental agencies abide  
by the federal laws that govern their existence and operations.”).



1 appropriate equitable remedy”); *Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1164 (C.D.  
2 Cal. 2018) (granting classwide injunction when “necessary to forestall harm to  
3 putative class members that is likely to transpire before the parties can litigate a motion  
4 for class certification”).

5 Here, Plaintiffs seek a classwide injunction addressing the harms caused by  
6 Defendants’ implementation of the Return Policy, the Deprivation of Counsel Policy,  
7 and the Presentation Requirement. In the absence of classwide injunctive relief,  
8 Individual Plaintiffs will continue to suffer irreparable harm resulting from dangerous  
9 conditions in which they must live in Mexico, their ongoing deprivation of basic needs,  
10 and their continued inability to access the legal resources necessary to protect their  
11 rights to seek relief from removal. Because of the classwide harm that will result, a  
12 classwide injunction is appropriate. *See Coleman v. Schwarzenegger*, 922 F. Supp. 2d  
13 882, 963 (E.D. Cal. 2009) (policies with “systemwide injury and impact” call for a  
14 “systemwide remedy”); *see also Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017),  
15 *rev’d on other grounds by Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (immigration  
16 policies demand uniformity).

17 **CONCLUSION**

18 For the foregoing reasons, Plaintiffs respectfully request that this Court order  
19 immediate preliminary injunctive relief enjoining the Return Policy until hearings can  
20 safely resume and Individual Plaintiffs have meaningful access to legal services;  
21 allowing the Individual Plaintiffs to return to the United States, with appropriate  
22 precautionary public health measures, to pursue their asylum claims; and requiring  
23 Defendants to provide meaningful access to legal services for all Individual Plaintiffs.

24  
25 Dated: November 9, 2020

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