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

19 IMMIGRANT DEFENDERS LAW
20 CENTER, a California corporation; JEWISH
21 FAMILY SERVICE OF SAN DIEGO, a
22 California corporation; JAQUELINE DOE,
23 VICTORIA DOE, CHEPO DOE, FREDY
DOE, ARIANA DOE, and FRANCISCO
DOE, individually and on behalf of all others
similarly situated,

24 Plaintiffs,

25 v.

26 ALEJANDRO MAYORKAS, Secretary,
27 Department of Homeland Security, in his
28 official capacity; U.S. DEPARTMENT OF
HOMELAND SECURITY; TROY A.
MILLER, Acting Commissioner, U.S.
Customs and Border Protection, in his

Case No. 2:20-cv-09893-JGB-SHK
**FIRST AMENDED COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY RELIEF**
CLASS ACTION

1 official capacity; WILLIAM A. FERRARA,
2 Executive Assistant Commissioner, Office of
3 Field Operations, U.S. Customs and Border
4 Protection, in his official capacity; RAUL
5 ORTIZ, Chief of U.S. Border Patrol, U.S.
6 Customs and Border Protection, in his
7 official capacity; U.S. CUSTOMS AND
8 BORDER PROTECTION; TAE D.
9 JOHNSON, Acting Director, U.S.
10 Immigration and Customs Enforcement, in
11 his official capacity; U.S. IMMIGRATION
12 AND CUSTOMS ENFORCEMENT,

Defendants.

9 *[Caption Page Continued - Additional Attorneys for Plaintiffs]*

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1 **INTRODUCTION**

2 1. Between January 2019 and February 2021, the U.S. government trapped at
3 least 70,000 individuals seeking asylum, including Individual Plaintiffs, in life-
4 threatening conditions in Mexico under a set of interlocking policies called the Migrant
5 Protection Protocols (“MPP” or “Protocols”). The Protocols functioned to deny
6 protection to nearly every individual subjected to them. Their ruthless effectiveness in
7 this regard—as evidenced by the 98 percent deportation rate for affected individuals
8 over fourteen months—is consistent with their Orwellian name.

9 2. By forcing Individual Plaintiffs and others similarly situated to return to
10 Mexico to await their immigration proceedings, the Protocols functionally denied them
11 access to the U.S. asylum system and left them to contend with assault, robbery, rape,
12 kidnapping, and other harm at the hands of cartels, gang members, and Mexican
13 officials. The Protocols simultaneously deprived these individuals of access to their
14 basic needs and obstructed their efforts to seek legal representation. Moreover,
15 Defendants continually thwarted the efforts of the few legal service providers who
16 represent individuals subject to the Protocols—including Organizational Plaintiffs
17 Immigrant Defenders Law Center and Jewish Family Service of San Diego—to screen,
18 advise, represent, or otherwise assist such individuals.

19 3. At the outset of his administration, President Biden promised that the
20 United States would “restore and strengthen our own asylum system, which has been
21 badly damaged by policies enacted over the last 4 years that contravened our values and
22 caused needless human suffering.”¹ To this end, Defendants suspended new enrollments
23 into MPP in February 2021 and then terminated the Protocols in June 2021. Citing
24 official data, Department of Homeland Security (“DHS”) Secretary Alejandro
25 Mayorkas conceded that the high percentage of completed MPP cases resulting in *in*

26
27 ¹ Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021),
28 <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>.

1 *absentia* removal orders raised serious concerns about the implementation of the
2 program, including whether individuals subjected to MPP had had an adequate
3 opportunity to seek relief and whether conditions in Mexico had led individuals to
4 abandon meritorious claims for protection.²

5 4. Defendants are now using a different set of interlocking policies to wind
6 down MPP. However, their attempted wind-down fails to rectify much of the harm
7 caused by the Protocols. Thousands of individuals subjected to MPP, including
8 Individual Plaintiffs, remain stranded outside the United States and continue to be
9 deprived of security, stability, and access to legal representation, making it virtually
10 impossible for them to pursue their asylum claims. Despite diligent efforts,
11 Organizational Plaintiffs remain unable to meaningfully assist such individuals.

12 5. In late February 2021, DHS began processing individuals in Mexico with
13 “active” MPP cases for return to the United States.³ This initial phase of the wind-
14 down was chaotic, with the result that DHS had processed less than 40 percent of
15 eligible individuals as of May 25, 2021. Moreover, under the Reopened Case Policy,
16 Defendants required the majority of individuals subjected to MPP, who had received
17

18 ² Memorandum from Secretary Alejandro N. Mayorkas to Acting Heads of CBP, ICE,
19 and USCIS, Termination of the Migrant Protection Protocols Program, at 7 (June 1,
20 2021),

21 [https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf)
22 [program.pdf](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf).

23 ³ In February 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed a
24 preliminary injunction setting aside the Protocols because they are statutorily
25 unauthorized. *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1084 (9th Cir. 2020). The
26 U.S. Supreme Court initially stayed the injunction pending the disposition of a
27 petition for a writ of certiorari, 140 S. Ct. 1564 (2020), which was later granted, – S.
28 Ct. – (Oct. 19, 2020). On February 3, 2021, the Court granted the government’s
motion to hold further briefing in abeyance and remove the case from the February
2021 argument calendar. On June 21, 2021, the Court granted the government’s
motion to vacate the judgment. The case was remanded to the Ninth Circuit with
instructions to direct the district court to vacate as moot its prior order granting a
preliminary injunction. The district court vacated the preliminary injunction on
August 6, 2021. *Innovation Law Lab v. Mayorkas*, Case No. 3:19-cv-00807-RS, ECF
131 “Order Vacating Preliminary Injunction; Order to Show Cause” (N.D. Cal. Aug.
6, 2021).

1 *in absentia* or other final removal orders,⁴ to have their cases reopened in order to
2 become eligible for processing into the United States.

3 6. On June 23, 2021, DHS announced that it would be expanding processing
4 of individuals subjected to MPP for return, to include individuals outside the United
5 States whose cases had been terminated by immigration judges and to provide a
6 streamlined method for individuals outside the United States with *in absentia* removal
7 orders to seek reopening of their cases. As of the date of this filing, DHS has not
8 announced any dedicated process for individuals with removal orders issued for
9 reasons other than failure to appear, who remain in limbo outside the United States.
10 Defendants’ Reopened Case Policy has persisted through this expanded processing,
11 as individuals who have received final removal orders remain ineligible for
12 processing into the United States unless and until their case is successfully reopened
13 and once again considered “active.”

14 **JURISDICTION AND VENUE**

15 7. This case arises under the First and Fifth Amendments to the U.S.
16 Constitution; the Immigration and Nationality Act of 1952 (“INA”), 8 U.S.C. § 1101
17 *et seq.*; and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*

18 8. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal
19 question) and § 1346 (United States as defendant). Defendants have waived sovereign
20 immunity with respect to the claims alleged in this case. 5 U.S.C. § 702. This Court
21 has jurisdiction to enter declaratory and injunctive relief under 28 U.S.C. §§ 2201 and
22 2202.

23
24 _____
25 ⁴ An order of removal is considered “final” after an individual has either (1) failed to
26 attend their hearing (an “*in absentia*” removal order); (2) waived appeal; (3) reserved
27 but failed to file an appeal within 30 days of the removal order; (4) appealed the
28 removal order but subsequently withdrawn their appeal; or (5) had their appeal denied
by the Board of Immigration Appeals (“BIA”) or Attorney General. 8 C.F.R.
§ 1241.1. While an individual whose appeal is denied by the BIA may file a petition
for review in the relevant federal circuit court of appeals, that individual is considered
to have a final order of removal unless and until such order is vacated by the federal
circuit.

1 gunpoint. Victoria missed the deadline to file an appeal of the immigration judge’s
2 decision in her case. Her removal order became final as a result. Her case has not been
3 reopened, and no appeal is pending. Victoria is currently stranded, has experienced
4 harm, and is living in fear in Mexico. She is not eligible for processing into the United
5 States under the MPP wind-down. If returned to the United States, Victoria would
6 reside in Tennessee with her aunt.

7 12. **Plaintiff Chepo Doe**, a citizen of El Salvador, suffered harm and fled to
8 the United States to seek asylum. He and his teenage daughter presented themselves
9 at the U.S.-Mexico border on February 26, 2019 and were returned to Mexico under
10 the Protocols approximately two days later. Chepo had legal representation in his
11 removal proceedings but has faced significant obstacles to finding and/or
12 confidentially communicating with counsel. While in Mexico, Chepo’s daughter
13 became severely ill and required emergency medical attention. As a result, they
14 missed their fourth immigration hearing on February 25, 2020. Chepo received an *in*
15 *absentia* removal order as a result. His case has not been reopened, and no appeal is
16 pending. Chepo is currently stranded, has experienced harm, and is living in fear in
17 El Salvador. He is eligible and has registered to apply to reopen his case under
18 expanded MPP processing, but whether and when he will be processed for return to
19 the United States remains unclear. If returned to the United States, Chepo would
20 reside in Alabama with his brother.

21 13. **Plaintiff Fredy Doe**, a citizen of Guatemala, suffered harm and fled to
22 the United States to seek asylum. He and his family crossed the U.S.-Mexico border
23 on August 6, 2019, were apprehended, and were returned to Mexico under the
24 Protocols approximately eight days later. Fredy does not have legal representation in
25 his removal proceedings and has faced significant obstacles to finding and/or
26 confidentially communicating with counsel. The immigration judge denied Fredy’s
27 application for asylum. He received a final order of removal as a result. His case has
28 not been reopened, and no appeal is pending. Fredy is currently stranded, has

1 experienced harm, and is living in fear in Mexico. He is not eligible for processing
2 into the United States under the MPP wind-down. If returned to the United States,
3 Fredy would reside in New Jersey with his mother.

4 14. **Plaintiff Ariana Doe**, a citizen of Guatemala, suffered harm and fled to
5 the United States to seek asylum. She and her young daughter crossed the U.S.-
6 Mexico border on September 2, 2019, were apprehended, and were returned to
7 Mexico under the Protocols approximately ten days later. Ariana does not have legal
8 representation in her removal proceedings and has faced significant obstacles to
9 finding and/or confidentially communicating with counsel. The immigration judge
10 denied her asylum application, and she was unable to find an attorney to assist with
11 an appeal. She received a final order of removal as a result. Her case has not been
12 reopened, and no appeal is pending. Ariana is currently stranded, has experienced
13 harm, and is living in fear in Mexico. She is not eligible for processing into the United
14 States under the MPP wind-down. If returned to the United States, Ariana would
15 reside in Massachusetts with her family.

16 15. **Plaintiff Francisco Doe**, a citizen of El Salvador, suffered harm and fled
17 to the United States to seek asylum. He crossed the U.S.-Mexico border on July 25,
18 2019, was apprehended, and was returned to Mexico under the Protocols
19 approximately a week later. Francisco does not have legal representation in his
20 removal proceedings and has faced significant obstacles to finding and/or
21 confidentially communicating with counsel. The immigration judge denied his
22 application for asylum, and the Mexican attorney he hired for his appeal misfiled the
23 required documents. He received a final order of removal as a result. His case has not
24 been reopened, and no appeal is pending. Francisco is currently stranded, has
25 experienced harm, and is living in fear in Mexico. He is not eligible for processing
26 into the United States under the MPP wind-down. If returned to the United States,
27 Francisco would reside in Florida with his mother's partner.

1 **16. Plaintiff Immigrant Defenders Law Center** (“ImmDef”) is a nonprofit
2 organization incorporated in California and based in Los Angeles, with additional
3 offices in Riverside, San Diego, and Santa Ana, California, that serves immigrants
4 and refugees throughout Southern California. ImmDef’s mission is to provide
5 universal representation so that no immigrant is forced to face removal proceedings
6 without an attorney or accredited representative. To achieve its mission, ImmDef
7 manages several programs, including the Children’s Representation Program; the
8 National Qualified Representative Program; the Family Unity Project; Local Funding
9 Initiatives to provide removal defense in Los Angeles, Santa Ana, Long Beach, and
10 the Inland Empire; and the Cross-Border Initiative. The Cross-Border Initiative,
11 which was established in response to MPP, provides direct representation, *pro se*
12 assistance, Know Your Rights presentations, and other support to individuals
13 subjected to MPP whose cases are pending before the San Diego immigration court
14 or who have received removal orders in MPP proceedings. ImmDef also plays a core
15 role in the California Welcoming Task Force, a coalition of organizations seeking to
16 provide legal services, humanitarian and health services, advocacy, and
17 communications assistance to individuals seeking asylum in the United States.

18 **17. Plaintiff Jewish Family Service of San Diego** (“Jewish Family
19 Service”) is a nonprofit organization incorporated in California and based in San
20 Diego. The mission of Jewish Family Service’s Immigration Services Department is
21 to provide holistic, culturally competent, trauma-informed, quality legal and other
22 supportive services to the immigrant community in San Diego and Imperial Counties.
23 Since early 2019, Jewish Family Service has provided legal and other services to
24 individuals subjected to MPP. To achieve its mission, Jewish Family Service manages
25 several programs, including a Removal Defense Program, an Affirmative Services
26 Program, and a Higher Education and Legal Services Program. Jewish Family Service
27 also participates in and manages the San Diego Rapid Response Network (“Rapid
28 Response Network”), which was formed in December 2017 to ensure that all detained

1 noncitizens within San Diego County have access to legal consultations. Through the
2 Rapid Response Network, Jewish Family Service operates the Migrant Shelter
3 Services—which provides critical humanitarian assistance to asylum-seeking
4 individuals and families released from CBP detention including those processed into
5 the United States after being subjected to MPP—and provides transportation from the
6 San Ysidro port of entry to the Shelter. Since February 19, 2021, members of Jewish
7 Family Service’s Removal Defense Program have traveled regularly to the San Ysidro
8 port of entry to assist in welcoming and processing individuals and families subjected
9 to the Protocols who have been permitted to return to the United States to pursue their
10 immigration cases. Jewish Family Service also runs a hotline through which they have
11 advised hundreds of individuals subjected to MPP who have called to ask questions.
12 Jewish Family Service also plays a core role in the CAWTF.

13 **B. Defendants**

14 18. Defendant Alejandro Mayorkas is the Secretary of Homeland Security.
15 He directs each of the components within DHS, including those responsible for
16 enforcing U.S. immigration laws, and bears ultimate responsibility for administering
17 the immigration laws pursuant to 8 U.S.C. § 1103. Secretary Mayorkas oversaw MPP,
18 directed its termination on June 1, 2021, and is ultimately responsible for the
19 processing into the United States of individuals who had been returned to Mexico
20 under the MPP program. He is sued in his official capacity.

21 19. Defendant DHS is a cabinet-level department of the U.S. government. Its
22 components include U.S. Citizenship and Immigration Services (“USCIS”), U.S.
23 Customs and Border Protection (“CBP”), and U.S. Immigration and Customs
24 Enforcement (“ICE”).

25 20. Defendant Troy A. Miller is the Acting Commissioner of CBP. CBP is
26 responsible for the apprehension, detention, and processing of individuals seeking
27 asylum at or near the border, including individuals subjected to MPP. He has been
28

1 integrally involved in overseeing the processing of eligible individuals subjected to
2 MPP for return to the United States. He is sued in his official capacity.

3 21. Defendant William A. Ferrara is the Executive Assistant Commissioner
4 of CBP's Office of Field Operations ("OFO"). OFO is the largest component of CBP
5 and is responsible for border security, including immigration and travel through U.S.
6 ports of entry. Defendant Ferrara had responsibility for implementing MPP from
7 August 30, 2020 through June 1, 2021, and is integrally involved in overseeing the
8 processing of eligible individuals subjected to MPP for return to the United States.
9 He is sued in his official capacity.

10 22. Defendant Raul Ortiz is the Chief of U.S. Border Patrol. Border Patrol is
11 responsible for enforcing immigration laws between ports of entry. Since February 2,
12 2020, the Chief of U.S. Border Patrol has had responsibility for detecting, interdicting,
13 and apprehending individuals who attempt to enter the United States between ports
14 of entry, including those who are or were subjected to the Protocols. Defendant Ortiz
15 is sued in his official capacity.

16 23. Defendant CBP is the component of DHS that is responsible for the initial
17 processing and detention of noncitizens who are apprehended at or, in the border
18 region, between U.S. land ports of entry.

19 24. Defendant Tae D. Johnson is the Acting Director of ICE. After
20 individuals subjected to MPP were processed by CBP on the day of their hearings,
21 they were transferred to ICE custody for transport to and from immigration court.
22 Acting Director Johnson is sued in his official capacity.

23 25. Defendant ICE is the component of DHS that is responsible for
24 overseeing immigration detention and carrying out removal orders.

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27
28

FACTUAL ALLEGATIONS

I. THE U.S. ASYLUM SYSTEM BEFORE THE PROTOCOLS

A. The Right to Apply for Asylum and Nondiscriminatory Treatment

26. The Refugee Act of 1980, the cornerstone of the U.S. asylum system, provides a right to apply for asylum to individuals seeking safe haven in the United States. The purpose of the Refugee Act is to enforce the “historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.” Refugee Act of 1980, § 101(a), Pub. L. No. 96-212, 94 Stat. 102 (1980). It is codified in various sections of the INA.

27. The INA gives the Attorney General or the Secretary of Homeland Security discretion to grant asylum to noncitizens who satisfy the definition of “refugee.” Under that definition, individuals generally are eligible for asylum if they have experienced past persecution or have a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion and if they are unable or unwilling to return to and avail themselves of the protection of their country of origin because of that persecution or fear. 8 U.S.C. § 1101(a)(42)(A).

28. The right to apply for asylum is nondiscretionary. Subject to limited exceptions, the Refugee Act affords a right to apply for asylum to any noncitizen “who is physically present in the United States or who arrives in the United States[,] whether or not at a designated port of arrival. . . , irrespective of such [noncitizen]’s status.” 8 U.S.C. § 1158(a)(1).

29. Because of the life-or-death stakes, the statutory right to apply for asylum is robust. It includes the right to legal representation,⁵ at no expense to the government, *see* 8 U.S.C. §§ 1229a(b)(4)(A), 1362; the right to notice of the right to

⁵ Plaintiffs use “legal representation” interchangeably with “counsel” given that the regulations promulgated by the Department of Justice allow for representation by non-attorney accredited representatives, law students, and other reputable individuals. 8 C.F.R. § 1292.1(a).

1 legal representation, *see* 8 U.S.C. § 1158(d)(4); the right to access information in
2 support of an application, *see* 8 U.S.C. § 1158(b)(1)(B) (placing the burden on the
3 applicant to present evidence to establish eligibility); the right to appeal a
4 determination by an immigration judge, *see* 8 U.S.C. § 1229a(c)(5) (referencing the
5 right to appeal); the right to petition federal circuit courts for judicial review of a final
6 order of removal, *see* 8 U.S.C. § 1252(b); and the right to move to reopen proceedings
7 or reconsider a decision regarding removability, *see* 8 U.S.C. § 1229a(c)(6)-(7).

8 30. The right to seek asylum also includes the right to uniform treatment by
9 the U.S. government. Through the Refugee Act, the U.S. government must “establish
10 a uniform procedure for passing upon an asylum application.” S. Rep. No. 256, 96th
11 Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 149; *see also Orantes-*
12 *Hernandez v. Smith*, 541 F. Supp. 351, 375 (C.D. Cal. 1982) (acknowledging the
13 emphasis that Congress placed on the uniform, nondiscriminatory treatment of
14 refugees).

15 31. Consistent with the principle of nonrefoulement at the heart of the
16 Refugee Act, the INA further provides that noncitizens who are not eligible for
17 asylum are nonetheless protected from return to a country where it is more likely than
18 not that their “life or freedom would be threatened . . . because of [their] race, religion,
19 nationality, membership in a particular social group, or political opinion.” 8 U.S.C.
20 § 1231(b)(3)(A). Noncitizens also may not be returned to a country where they are
21 more likely than not to be tortured. 8 C.F.R. §§ 1208.16–1208.19.

22 **B. The Right to Access Legal Representation for the Purpose of**
23 **Applying for Asylum**

24 32. Both the INA and the Fifth Amendment guarantee noncitizens seeking
25 asylum the right to meaningfully access legal representation at no expense to the
26 government. *See supra* ¶ 29; *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).

27 33. Asylum law is complex, and the stakes involve life or death. Legal
28 services organizations, including Organizational Plaintiffs, therefore play a

1 particularly important role in assisting persons fleeing persecution who are seeking
2 asylum.

3 34. The burden of proof on applicants is high in asylum proceedings. Asylum
4 applications require detailed, fact-specific submissions containing evidence related to
5 a noncitizen's fear of persecution and evidence showing the noncitizen's fear is
6 objectively reasonable. Legal service providers, including Organizational Plaintiffs,
7 must allow time for relationship-building so that their clients trust them enough to
8 share sensitive, often traumatic, past experiences. For clients suffering the effects of
9 severe trauma, Organizational Plaintiffs must provide additional time and resources
10 to build these relationships. Organizational Plaintiffs often must engage experts to
11 provide testimony on country conditions or to corroborate the injuries of clients who
12 have survived past persecution. In each case, Organizational Plaintiffs must
13 coordinate all these pieces while also ensuring that they are zealously representing
14 their clients by developing rigorous legal arguments, submitting legal briefs, and
15 complying with complex procedures.

16 35. Legal representation strongly affects the outcome of asylum applications.
17 Represented noncitizens detained in the United States are over ten times more likely
18 to succeed in their immigration cases than those who appear *pro se*. Non-detained
19 noncitizens in the United States who have legal representation are over five times
20 more likely to succeed in their cases than those who appear *pro se*.⁶

21 36. Before the Protocols, the right to apply for asylum, which necessarily
22 includes the right to access legal representation for this purpose, was effectuated by
23 providing affected noncitizens with certain other rights and access to certain benefits.
24 Those rights and benefits included:

- 25 (a) Access to immigration attorneys, accredited
26 representatives, and nongovernmental organizations (NGOs)

27
28 ⁶ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 9, 49 (2015), <https://bit.ly/3osTJgL>.

1 registered to provide asylum support in the United States. *See*
2 8 C.F.R. § 1292.11 (recognizing over 750 NGOs providing asylum
3 support in the United States).

4 (b) Access to a List of Pro Bono Legal Service Providers
5 maintained by the Executive Office for Immigration Review
6 (EOIR). *See* 8 U.S.C. § 1158(d)(4)(B); 8 C.F.R. § 1003.61(b); *see*
7 *also* 8 C.F.R. § 1240.10(a)(2) (noting obligation of immigration
8 judges to advise individuals of availability of pro bono legal service
9 providers).

10 (c) Access to law libraries, legal materials, and legal
11 reference materials. *See, e.g.*, Performance-Based National
12 Detention Standards (“PBNDS”) (rev. 2016), at 6.3,
13 <https://bit.ly/2HBW2gG> (providing regular access for noncitizens in
14 detention to law libraries and legal materials).

15 (d) Access to legal presentations and individual counseling
16 about their cases. *See, e.g.*, PBNDS, at 6.4 (providing noncitizens in
17 detention with access to presentations on U.S. immigration law and
18 procedures as well as individual counseling after a group
19 presentation to discuss cases).

20 (e) The right to make free local calls to pro bono legal
21 service providers on EOIR’s list. *See, e.g.*, PBNDS, at 5.6(II)(7),
22 (V)(E) (referring to detained individuals’ right to make unlimited
23 free calls to pro bono legal service providers on EOIR list).

24 37. With access to the above-described statutory and regulatory rights and
25 benefits, EOIR records reflect that over 80 percent of all asylum seekers appearing in
26 immigration court are represented.⁷

27 ⁷ TRAC, *Asylum Decisions by Custody, Representation, Nationality, Location, Month*
28 *and Year, Outcome and more* (June 2021), <https://bit.ly/2G4neEk> (filters set to
“Immigration Court” and “Represented”).

1 **C. The Right to File a Motion to Reopen Immigration Proceedings**

2 38. “The motion to reopen is an ‘important safeguard’ intended ‘to ensure a
3 proper and lawful disposition’ of immigration proceedings.” *See Kucana v. Holder*,
4 558 U.S. 233, 242 (2010) (quoting *Dada v. Mukasey*, 554 U.S. 1, 18 (2008)). An
5 immigration court’s ultimate decision whether to grant a motion to reopen, including
6 one joined by DHS, is discretionary.

7 39. Individuals with final orders of removal have the right to file a motion to
8 reopen their immigration proceedings in order to present new evidence. 8 U.S.C.
9 § 1229a(c)(7).⁸

10 40. Individuals with *in absentia* removal orders may file a motion to reopen
11 if they can prove deficiencies with notice, exceptional circumstances, and/or that they
12 were in custody and the failure to appear was through no fault of their own. *See*
13 8 U.S.C. § 1229a(b)(5)(C). Under this statutory provision, an individual’s removal is
14 automatically stayed pending the disposition of a motion to reopen by an immigration
15 judge. *Id.*

16 41. Motions to reopen *in absentia* removal orders based on lack of notice or
17 custody may be filed at any time, 8 U.S.C. § 1229a(b)(5)(C)(ii), as may asylum-based
18 motions to reopen involving changed country conditions, § 1229a(c)(7)(C)(ii). All
19 other motions to reopen are generally subject to both time and numerical limitations,
20 unless they are filed jointly with DHS. *See* 8 U.S.C. §§ 1229a(b)(5), (c)(6), (c)(7);
21 8 C.F.R. §§ 1003.23(b)(4)(iv), 1003.2(c)(3)(iii).

22 42. Preparing a motion to reopen is generally a difficult and time-consuming
23 task. All motions to reopen must “state the new facts that will be proven at a hearing
24 to be held if the motion is granted, and shall be supported by affidavits or other
25 evidentiary material.” *See* 8 U.S.C. § 1229a(c)(7)(B). Regulations require that a
26 motion to reopen “for the purpose of submitting an application for relief must be
27

28 ⁸ Individuals with final orders of removal also have the right to file a motion to
reconsider a removal decision based on errors of fact or law. 8 U.S.C. § 1229a(c)(6).

1 accompanied by the appropriate application for relief and all supporting
2 documentation.” 8 C.F.R. § 1003.2(c)(1).

3 43. Thorough preparation is particularly crucial because individuals are
4 typically limited to a single motion to reopen. An individual or their attorney must
5 obtain the underlying A-file, the government file documenting the noncitizen’s
6 immigration history; the Record of Proceedings, a court file that contains hearing
7 recordings and all documents filed with the immigration court; and new and
8 previously unavailable evidence supporting the facts on which the motion is based.
9 Throughout this process, attorneys must meet repeatedly with their clients to build
10 trust and to gather the necessary facts.

11 **II. CONDITIONS IN MEXICO BEFORE IMPLEMENTATION OF THE**
12 **PROTOCOLS**

13 44. When Defendants implemented the Protocols in January 2019, they were
14 aware of the harms that asylum seekers subjected to the Protocols would face.
15 According to recent U.S. Department of State Country Reports on Human Rights
16 Practices, “violence against migrants by government officers and organized criminal
17 groups” was one of “[t]he most significant human rights issues” in Mexico.⁹ The State
18 Department likewise has repeatedly reported that the dangers that forced many
19

20 ⁹ U.S. Dep’t of State, *2017 Country Reports on Human Rights Practices: Mexico* at 1
21 (Apr. 20, 2018) (hereafter “2017 State Dep’t Mexico Human Rights Report”),
22 <https://bit.ly/31HD27G>; *see also* U.S. Dep’t of State, *2018 Country Reports on*
23 *Human Rights Practices: Mexico* at 19–20 (Mar. 13, 2019) (hereafter “2018 State
24 Dep’t Mexico Human Rights Report”), <https://bit.ly/3jwz9Z5> (both reports noting
25 “victimization of migrants by criminal groups and in some cases by police,
26 immigration officers, and customs officials” and reported kidnappings and extortion
27 of migrants); U.S. Dep’t of State, *2019 Country Reports on Human Rights Practices:*
28 *Mexico* at 18 (Mar. 11, 2020) (hereafter “2019 State Dep’t Mexico Human Rights
Report”), <https://bit.ly/35FfmSB>; *see also* U.S. Dep’t of State, *2020 Country Reports*
on Human Rights Practices: Mexico (Mar. 30, 2021) (hereafter “2020 State Dep’t
Mexico Human Rights Report”), [https://www.state.gov/reports/2020-country-](https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/)
[reports-on-human-rights-practices/mexico/](https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/) (reporting “numerous instances of armed
groups limiting the movements of asylum seekers and other migrants, including by
threats and acts of kidnapping, extortion, and homicide,” often with the complicity of
local government or police).

1 Central American migrants to flee their homes were also present in Mexico, as the
2 presence of Central American gangs has “spread farther into the country and
3 threatened migrants who had fled the same gangs in their home countries.”¹⁰ Human
4 rights groups have similarly reported the escalation of these dangers since 2017,
5 noting that Mexican police and armed forces were often complicit in crimes against
6 migrants.¹¹

7 45. At the time the Protocols were implemented, then-President Trump
8 himself acknowledged that Mexico was not a safe place, tweeting on January 31,
9 2019: “Very sadly, Murder cases in Mexico in 2018 rose 33% from 2017, to 33,341.”
10 He stated further that the situation in Mexico is “[w]orse even than Afghanistan.”¹²

11 46. Since at least 2017, migrants in Mexico’s northern border states have been
12 subject to disappearances, kidnappings, rape, trafficking, extortion, execution, and
13 sexual and labor exploitation by state and non-state actors. Migrants in the immediate
14 vicinity of a port of entry were—and still are—at particular risk of violence and
15 exploitation. Those who seek refuge in shelters may be in particular danger. Some
16 shelters are infiltrated by organized crime; others are sites of vandalism, burglary,
17 threats, and kidnapping.

18 47. The Mexican border cities where Individual Plaintiffs were returned after
19 being subjected to MPP, including Tijuana, Nogales, Ciudad Juarez, Nuevo Laredo,
20 and Matamoros, are among the most violent in Mexico.¹³

21 _____
22 ¹⁰ See 2019 State Dep’t Mexico Human Rights Report at 18; 2018 State Dep’t Mexico
Human Rights Report, at 19; 2017 State Dep’t Human Rights Report, at 21.

23 ¹¹ See, e.g., Human Rights First, *Mexico: Still Not Safe for Refugees & Migrants* (Mar.
24 23, 2018), <https://bit.ly/3jwxMtw>; Alberto Díaz-Cayeros, Beatriz Magatoni, and
25 Vidal Romero, *Caught in the Crossfire: The Geography of Extortion and Police
Corruption in Mexico*, Stanford Center for International Development, at 3–4 (Feb.
2015), <https://stanford.io/3mo863X>.

26 ¹² Donald Trump (@realdonaldtrump), Twitter (Jan. 31, 2019, 12:43 PM),
<https://bit.ly/2IYyJOz>.

27 ¹³ See e.g., Overseas Security Advisory Council, *Mexico 2020 Crime & Safety*
28 *Report: Tijuana* (July 29, 2020), <https://bit.ly/31LWIXP>; Wendy Fry, *Drug violence
continues to grip Tijuana, with most homicides of any city in Mexico*, *The San*
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1 48. Had Defendants properly considered these conditions, of which they were
2 well aware, before implementing the Protocols, they would necessarily have
3 concluded that the Protocols would jeopardize Individual Plaintiffs' safety and
4 security, obstruct their access to legal representation, interfere with their ability to
5 gather and present evidence, and thereby prevent asylum seekers from meaningfully
6 exercising their right to apply for asylum.

7 **III. THE IMMEDIATE AND SEVERE REPERCUSSIONS OF THE**
8 **PROTOCOLS**

9 49. The Protocols were comprised of several independent but related policies
10 that operated to trap individuals in Mexico under conditions so perilous that they
11 replicated many of the dangers that had prompted these individuals to flee their home
12 countries, obstructed their access to legal representation, and thereby denied them
13 access to the U.S. asylum system.

14 50. Under the Protocols' interlocking policies, Defendants forcibly returned
15 asylum seekers to border zones in Mexico for the duration of their immigration court
16 proceedings.¹⁴

17
18 Diego Union-Tribune (Jan. 6, 2020), <https://bit.ly/3owrG03>; Nick Pearson, The
19 Deadliest Cities in the World Revealed, [https://www.9news.com.au/world/deadliest-](https://www.9news.com.au/world/deadliest-cities-in-the-world-revealed-most-murders-homicides-tijuana-juarez-mexico/3ad6492c-8fee-49de-bc0e-3edfec6ff642)
20 [cities-in-the-world-revealed-most-murders-homicides-tijuana-juarez-](https://www.9news.com.au/world/deadliest-cities-in-the-world-revealed-most-murders-homicides-tijuana-juarez-mexico/3ad6492c-8fee-49de-bc0e-3edfec6ff642)
21 [mexico/3ad6492c-8fee-49de-bc0e-3edfec6ff642](https://www.9news.com.au/world/deadliest-cities-in-the-world-revealed-most-murders-homicides-tijuana-juarez-mexico/3ad6492c-8fee-49de-bc0e-3edfec6ff642) (listing Tijuana and Juarez as the
22 first and fifth deadliest cities in the world in 2019);
23 <https://www.osac.gov/Content/Report/ee12ce10-1ee1-4fb5-a7b6-1902856858b5>
24 (Matamoros); [https://www.osac.gov/Content/Report/7e7f075c-4642-42e7-b1ed-](https://www.osac.gov/Content/Report/7e7f075c-4642-42e7-b1ed-1902835361b9)
25 [1902835361b9](https://www.osac.gov/Content/Report/7e7f075c-4642-42e7-b1ed-1902835361b9) (Nuevo Laredo); [https://www.osac.gov/Content/Report/3308cb54-](https://www.osac.gov/Content/Report/3308cb54-2343-4177-8a0b-190281ef31c2)
26 [2343-4177-8a0b-190281ef31c2](https://www.osac.gov/Content/Report/3308cb54-2343-4177-8a0b-190281ef31c2) (Nogales); El Paso Times, Juárez murders top 1,000
27 as violence continues despite COVID-19 pandemic,
28 [https://www.elpasotimes.com/story/news/local/juarez/2020/07/30/juarez-mexico-](https://www.elpasotimes.com/story/news/local/juarez/2020/07/30/juarez-mexico-murders-top-1000-drug-violence-despite-covid-19-pandemic/5535755002/)
[murders-top-1000-drug-violence-despite-covid-19-pandemic/5535755002/;](https://www.elpasotimes.com/story/news/local/juarez/2020/07/30/juarez-mexico-murders-top-1000-drug-violence-despite-covid-19-pandemic/5535755002/)
[https://www.theguardian.com/world/2021/jun/21/mexico-reynosa-gang-violence;](https://www.theguardian.com/world/2021/jun/21/mexico-reynosa-gang-violence)
Global Response Management, "Migration in 2021: Has Anything Really
Changed?" (June 2021), <https://www.global-response.org/tamaulipas-investigation>.

¹⁴ See Dep't of Homeland Security, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), <https://bit.ly/3kyjny7>; see also Memorandum from Kevin K. McAleenan, Commissioner of U.S. Customs and Border Protection, Implementation of the Migrant Protection Protocols (Jan. 28, 2019), <https://bit.ly/3e10Nws> ("Section 235(b)(2)(C) of the INA provides that the

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1 51. Starting in January 2019, Defendants rapidly rolled out the Protocols’
2 new asylum regime at ports of entry across the U.S.-Mexico border, with full
3 knowledge of the devastating effects they would have on the lives of Individual
4 Plaintiffs.¹⁵

5 52. The repercussions of the Protocols on the Plaintiffs were immediate and
6 have been long-lasting.

7 53. Individuals subjected to MPP were in the custody of DHS for the duration
8 of their removal proceedings.¹⁶ By trapping individuals under dangerous conditions
9 in Mexico, the Protocols jeopardized Individual Plaintiffs’ personal safety, prevented
10 them from being able to fulfill basic human needs, and deprived them of the
11 information and tools necessary to present their asylum claims. Because individuals
12 subjected to the Protocols were required to present at a port of entry on each of their

13
14 Secretary of Homeland Security may return certain applicants for admission to the
15 contiguous country from which they are arriving on land (whether or not at a
16 designated port of entry) pending removal proceedings under Section 240 of the
17 INA.”); Memorandum from Todd A. Hoffman, Executive Director of the
18 Admissibility and Passenger Programs of the Office of Field Operations of U.S.
19 Customs and Border Protection, Guidance on Migrant Protection Protocols (Jan. 28,
20 2019), <https://bit.ly/3mpLOPv> (“Under this implementation of section 235(b)(2)(C),
21 referenced as the Migrant Protection Protocols (MPP), DHS is authorized to return
22 certain applicants for admission who arrive via land at the San Ysidro port of entry,
23 and who are subject to removal proceedings under Section 240 of the INA, to Mexico
24 pending removal proceedings.”); Enforcement Programs Division, Guiding
25 Principles for Migrant Protection Protocols (Jan. 28, 2019), <https://bit.ly/3jyIYHb>
26 (“To implement the MPP, aliens arriving from Mexico who are amenable to the
27 process ... and who in an exercise of discretion the officer determines should be
28 subject to the MPP process, will be issued an [sic] Notice to Appear (NTA) and placed
into Section 240 removal proceedings. They will then be transferred to await
proceedings in Mexico.”).

¹⁵ See Dep’t of Homeland Security, ICE Policy Guidance for Implementation of the Migrant Protection Protocols (Feb. 12, 2019), <https://bit.ly/3e1uM76> (implementing at San Ysidro, California). By January 2, 2020, DHS had implemented the Protocols at all ports of entry along the United States–Mexico border, including for persons apprehended between those ports.

¹⁶ DHS regulations provide that individuals returned to Mexico under INA § 235(b)(2)(C) “shall be considered detained for a proceeding within the meaning of section 235(b) of the [Immigration and Nationality] Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.” 8 C.F.R. § 235.3(d).

1 scheduled immigration court hearing dates, they were effectively confined to the
2 extreme danger zones near the border. Most lived in crowded shelters, tent
3 encampments, or other makeshift arrangements.

4 54. The Protocols also obstructed legal representation for all individuals
5 subjected to the Protocols, blocking it entirely for over 90 percent of impacted
6 individuals.¹⁷ Although Defendants provided individuals in MPP proceedings with a
7 list of free or low-cost legal service providers in the United States, most of those
8 providers did not offer legal services to people in MPP. Thus, most individuals were
9 left to navigate the complexities of U.S. asylum law on their own. Ill-equipped to do
10 so, particularly without reliable communication mechanisms, more than 32,400
11 individuals failed to establish their eligibility for asylum and were ordered removed.¹⁸

12 55. Defendants also thwarted the efforts of the few legal service providers
13 who did represent individuals subjected to the Protocols—including Plaintiffs
14 ImmDef and Jewish Family Service—to screen, advise, represent or otherwise assist
15 individuals subjected to the Protocols. In-person attorney-client consultations were
16 limited to an illusory one-hour window before a scheduled hearing.¹⁹ Legal
17 representatives were forced to meet with their clients in a public setting, where they
18 could not speak confidentially, no childcare was available, and tools necessary to
19 provide meaningful legal services were unavailable. Unrepresented individuals were
20 prohibited even from approaching legal representatives present in the immigration
21 court to discuss possible representation.

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24 ¹⁷ As of June 2021, only 6,402 of the 71,034 individuals subjected to MPP had legal
25 representation. See TRAC Immigration, *Details on MPP (Remain in Mexico)*
26 *Deportation Proceedings by Hearing Location and Attendance, Representation,*
27 *Nationality, Month and Year of NTA, Outcome, and Current Status* (June 2021),
28 <https://trac.syr.edu/phptools/immigration/mpp/> (filter set to “Hearing Location: All”
and “Represented: Represented”).

¹⁸ See *id.* (filter set to “Hearing Location: All” and “Outcome: Removal Order”).

¹⁹ See ERO Memorandum, “Migrant Protection Protocols Guidance,” (Feb. 12, 2019),
<https://bit.ly/3ms8Vc5>.

1 **IV. THE ATTEMPTED MPP WIND-DOWN**

2 56. On January 20, 2021, DHS announced the suspension of new enrollments
3 into MPP.²⁰ On February 2, 2021, President Joseph R. Biden issued an executive order
4 directing the Secretary of Homeland Security to “promptly review and determine
5 whether to terminate or modify” MPP.²¹ The executive order directed that “the
6 Secretary of Homeland Security shall promptly consider a phased strategy for the safe
7 and orderly entry into the United States, consistent with public health and safety and
8 capacity constraints, of those individuals who have been subjected to MPP for further
9 processing of their asylum claims.”²²

10 **A. The Chaotic Processing of Individuals Subjected to MPP**

11 57. Following President Biden’s directive, DHS implemented a process
12 “meant to provide an opportunity to individuals who were returned to Mexico under
13 MPP to proceed with their immigration proceedings from within the United States.”²³

14 58. On February 11, 2021, DHS announced that on February 19, it would
15 implement a process for individuals returned to Mexico under MPP whose cases were
16 “pending” before EOIR, explaining that the process would exempt those “who do not
17 have active immigration court cases.”²⁴ DHS Secretary Mayorkas later reiterated the
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20 ²⁰ DHS Statement on the Suspension of New Enrollments in the Migrant Protection
21 Protocols Program (Jan. 20, 2021), <https://www.aila.org/infonet/dhs-suspends-new-enrollments-mpp>.

22 ²¹ Exec. Order No. 14010, 86 Fed. Reg. 8267 (Feb. 2, 2021),
23 <https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration>.

24 ²² *Id.*

25 ²³ DHS, Migrant Protection Protocols, <https://www.dhs.gov/migrant-protection-protocols> (accessed July 26, 2021).

26 ²⁴ DHS, Press Release, Announces Process to Address Individuals in Mexico with
27 Active MPP Cases (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>; DHS, Press
28 Release, DHS Statement on First Step in Process to Address Individuals in Mexico
with Active MPP Cases (Feb. 19, 2021),
<https://www.aila.org/File/Related/21021230d.pdf>.

1 importance of the wind-down because those in MPP had been “denied a chance to
2 seek protection.”²⁵

3 59. In order to return to the United States, DHS requires individuals who
4 qualify to register with UNHCR (or “ACNUR” in Spanish) through a website called
5 Conecta (conecta.acnur.org). UNHCR then contacts those individuals, processes their
6 cases, and directs eligible individuals to report to a specified location for COVID-19
7 testing and transport to the port of entry for processing into the United States.

8 60. The roll-out of the MPP wind-down has been poorly communicated and
9 implemented, resulting in widespread confusion, pervasive misinformation, and
10 frequent missteps that further endangered the safety of tens of thousands of affected
11 asylum seekers. The online registration process failed, and continues to fail, to
12 account for accessibility barriers for individuals who do not have an internet
13 connection, who speak indigenous languages, or who do not have certain information
14 required for registration. The government has also provided inaccurate or confusing
15 information about issues such as changing the venue of immigration proceedings,
16 checking in with ICE, and obtaining work authorization.

17 61. Further, the government has provided materially inaccurate or incomplete
18 information about the process for return to the United States and eligibility
19 requirements, leading many migrants in Mexico to remain in dangerous border areas
20 for fear of missing their opportunity to be processed. Various encampments have
21 grown in some border towns despite extreme weather patterns and the COVID-19
22 pandemic.

23 62. As of June 30, 2021, CBP had processed fewer than half of the individuals
24 subjected to MPP who were eligible based on their “pending” immigration
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27 ²⁵ DHS, Statement by Homeland Security Secretary Alejandro N. Mayorkas
28 Regarding the Situation at the Southwest Border (Mar. 16, 2021),
<https://www.dhs.gov/news/2021/03/16/statement-homeland-security-secretary-alejandro-n-mayorkas-regarding-situation>.

1 proceedings.²⁶ Upon information and belief, individuals subjected to MPP are
2 arbitrarily excluded from hardship exemptions to the Centers for Disease Control and
3 Prevention (“CDC”) Title 42 travel restrictions, which prevent certain individuals in
4 Mexico, including asylum seekers, from entering the United States.²⁷ The exemption
5 processes have collectively processed over 7,000 migrants into the United States.²⁸
6 Based solely on their prior placement in MPP, Individual Plaintiffs and those similarly
7 situated are categorically excluded from benefitting from these exemptions. Upon
8 information and belief, these individuals also have no access to the nonrefoulement
9 interview process, which had been available in the initial months of MPP but has since
10 ceased without explanation from the U.S. government.

11 **B. The Termination Directive**

12 63. On June 1, 2021, DHS Secretary Mayorkas announced the termination of
13 MPP. His memorandum directed DHS personnel to immediately “take all appropriate
14 actions to terminate MPP, including taking all steps necessary to rescind
15 implementing guidance and other directives issued to carry out MPP” and to
16 “continue to participate in the ongoing phased strategy for the safe and orderly entry
17 into the United States of individuals enrolled in MPP.”²⁹

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20 ²⁶ See U.S. Customs and Border Protection, “CBP Announces June 2021 Operational
21 Update” (July 16, 2021), [https://www.cbp.gov/newsroom/national-media-
22 release/cbp-announces-june-2021-operational-update](https://www.cbp.gov/newsroom/national-media-release/cbp-announces-june-2021-operational-update) (reporting that CBP had
23 processed “more than 12,00 individuals who had been returned to Mexico under
MPP” through June 30, 2021); TRAC, *supra* note 17 (filter set to “Hearing Location:
All” and “Outcome: Pending”) (noting 27,663 individuals subjected to MPP with
“pending” immigration proceedings).

24 ²⁷ See *Huisha-Huisha v. Mayorkas*, No. 21-cv-00100 (D.D.C.); Elliot Spagat & Julie
25 Watson, “Biden taps groups to help pick asylum-seekers to come to US,” *Associated
Press* (June 4, 2021).

26 ²⁸ Elliot Spagat & Julie Watson, “Advocates end work with US to pick asylum-seekers
in Mexico,” *Associated Press* (July 30, 2021).

27 ²⁹ Memorandum from Secretary Alejandro N. Mayorkas to Acting Heads of CBP,
28 ICE, and USCIS, Termination of the Migrant Protection Protocols Program, 7 (June
1, 2021), [https://www.aila.org/infonet/dhs-terminates-the-migrant-protection-
protocols](https://www.aila.org/infonet/dhs-terminates-the-migrant-protection-protocols).

1 64. The Termination Directive acknowledges that “the high percentage of
2 cases completed through the entry of in absentia removal orders (approximately 44
3 percent, based on DHS data) raises questions . . . about the design and operation of
4 the program, whether the process provided enrollees an adequate opportunity to
5 appear for proceedings to present their claims for relief,” and whether “conditions
6 faced by some MPP enrollees in Mexico, including the lack of stable access to
7 housing, income, and safety, resulted in the abandonment of potentially meritorious
8 protection claims.”³⁰

9 65. The Termination Directive clarifies that “[t]he termination of MPP does
10 not impact the status of individuals who were enrolled in MPP at any stage of their
11 proceedings before EOIR or the phased entry process.”³¹

12 **C. The Reopened Case Policy**

13 66. A core component of Defendants’ MPP wind-down is the Reopened Case
14 Policy. Pursuant to this policy, individuals subjected to MPP who received final
15 orders of removal are eligible to be processed into the United States only if their cases
16 have been reopened and are thus “pending” or “active.” Upon information and belief,
17 Defendants define “pending” or “active” cases as cases that are currently pending
18 adjudication by an immigration court or the Board of Immigration Appeals (“BIA”).

19 67. Any individual who has received a final order of removal, including an *in*
20 *absentia* removal order, is eligible for processing into the United States if and only if
21 their case has been reopened.

22 68. As of June 2021, approximately 32,481 individuals subjected to MPP
23 remain ineligible for processing into the United States unless and until their cases
24 were reopened through the standard process for motions to reopen.³²

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27 ³⁰ *Id.* at 4.

28 ³¹ *Id.* at 7.

³² TRAC, *supra* note 18.

1 69. On June 23, 2021, DHS announced that it was expanding processing of
2 individuals subjected to MPP into the United States to include a joint motion to reopen
3 process for those individuals who had been ordered removed *in absentia*. Unlike the
4 February 11 announcement, the June 23 announcement did not instruct those
5 individuals who did not meet the eligibility criteria to “await further instructions”³³ or
6 otherwise indicate that Defendants had any plans to expand eligibility for
7 processing.³⁴

8 70. Defendants’ latest announcement of expanded processing establishes a
9 route for individuals with *in absentia* removal orders to seek reopening of their cases.
10 However, these individuals have no guarantee that their cases will be reopened, and
11 they will not be eligible for processing into the United States unless and until that
12 happens.

13 71. Upon information and belief, individuals with *in absentia* orders may
14 register with Conecta and will subsequently be contacted by the UNHCR team
15 regarding next steps in the motion to reopen process. Individuals with *in absentia*
16 orders who registered on Conecta before the announcement of expanded MPP
17 processing are required to register again. Ultimately, DHS will determine whether to
18 join a motion to reopen the individual’s case and, if so, file a joint motion with the
19 immigration court. Although DHS *may* join such motions, nothing compels them to
20 do so. DHS has not announced how they will determine which motions to join. If and
21 only if their motion to reopen is granted will an individual who received an *in absentia*
22 order of removal be considered to have a “pending” case and thus become eligible to
23 return to the United States.

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25 ³³ DHS, Press Release, DHS Announces Process to Address Individuals in Mexico
26 with Active MPP Cases (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>.

27 ³⁴ DHS, Press Release, DHS Announces Expanded Criteria for MPP-Enrolled
28 Individuals Who Are Eligible for Processing into the United States (June 23, 2021),
<https://www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing>.

1 72. For individuals subjected to MPP who have received a final order of
2 removal on grounds other than failure to appear, the only process available to seek
3 reopening, as described in Section I(C), *supra*, is nearly impossible to navigate from
4 a country where one has no security, stability, or access to legal representation.
5 Defendants have directed that individuals subjected to MPP “who may be eligible for
6 processing should stay where they are currently located” while seeking to reopen their
7 cases.³⁵ Because these motions to reopen are likely time-barred, individuals must
8 ensure that DHS joins the motion, make complex legal arguments for equitable
9 tolling, or request that the immigration judge reopen the case *sua sponte*. Individuals
10 outside of the United States lack access to legal representation and resources to
11 communicate with DHS or brief these legal arguments. Moreover, individuals are
12 required to include with their motion to reopen an application for the relief they seek.
13 This requirement is almost insurmountable for individuals stranded in Mexico, who
14 have been cut off from the U.S. asylum system and typically lack the resources and
15 expertise to accurately fill out an English-only asylum application.³⁶ Even if the
16 individual stranded in Mexico is able to find legal representation, the legal
17 representative faces serious obstacles not only to obtain the necessary signatures to
18 review their client’s A-file (a file containing paperwork documenting the individual’s
19 immigration history) and record of proceedings (the trial court record), but also to
20 meet confidentially with their client to review these documents and discuss the facts
21 and circumstance that will inform the motion. For individuals subjected to MPP and
22 still stranded outside the United States, each of the typical steps to filing a motion to
23 reopen is thus fraught with barriers.

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27 ³⁵ *Id.*

28 ³⁶ *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485 (2021) (“Asylum applicants must use a 12-page form and comply with 14 single-spaced pages of instructions.”).

1 73. Defendants have not indicated any intention to provide a pathway for such
2 individuals to be processed into the United States that accounts for these barriers to
3 applying from abroad.³⁷

4 74. The Reopened Case Policy arbitrarily limited those individuals subjected
5 to MPP who can return to the United States. For example, between February 23, 2021,
6 and March 16, 2021, DHS processed into the United States approximately 1,000
7 residents of an encampment in Matamoros regardless of whether the individuals had
8 “active” cases or were subject to final orders of removal.³⁸

9 75. On information and belief, in adopting the Reopened Case Policy,
10 Defendants failed to properly consider the fact that many legal service providers are
11 unable to represent individuals outside the United States.

12 76. On information and belief, in adopting the Reopened Case Policy,
13 Defendants failed to properly consider the obstacles that individuals subjected to the
14 Protocols and stranded outside of the United States face in meaningfully accessing
15 legal representation.

16 **V. DEFENDANTS’ POLICIES HAVE HARMED INDIVIDUAL AND**
17 **ORGANIZATIONAL PLAINTIFFS**

18 77. The Protocols trapped Individual Plaintiffs and others similarly situated
19 in dangerous zones and transit corridors in Mexico, jeopardizing their safety, denying
20 them basic human needs, and preventing them from accessing legal assistance. These
21 conditions deprived individuals subjected to MPP of a meaningful opportunity to
22

23 ³⁷ The Conecta website states: “People whose cases were analyzed and denied by an
24 immigration judge, according to the criteria of the United States Government, are not
25 eligible.” (“Las personas cuyos casos fueron analizados y negados por un juez de
inmigración, de acuerdo a los criterios del Gobierno de Estados Unidos no son
elegibles.”) <https://conecta.acnur.org/registro/> (accessed July 13, 2021).

26 ³⁸ DHS Press Release, DHS Statement on Processing Current Residents of the
27 Matamoros Camp Into the U.S. (Feb. 23, 2021),
<https://www.aila.org/File/Related/21021230e.pdf>; *see also* Yami Virgin, “Asylum
28 camp known worldwide at Texas-Mexico border shut down,” Fox29 (Mar. 8, 2021),
[https://foxsanantonio.com/news/yami-investigates/exclusive-asylum-camp-known-
world-wide-at-texas-mexico-border-shut-down](https://foxsanantonio.com/news/yami-investigates/exclusive-asylum-camp-known-world-wide-at-texas-mexico-border-shut-down).

1 present their claims for asylum and other relief, resulting in thousands of removal
2 orders.

3 78. Individual Plaintiffs and others similarly situated remain stranded outside
4 the United States with insufficient access to legal representation and the U.S. asylum
5 system. Pursuant to Defendants' Reopened Case Policy, individuals with *in absentia*
6 orders can return to the United States to pursue their claims only if they succeed in
7 navigating the case-reopening process. Individuals with final removal orders issued
8 for reasons other than failure to appear are left only with only the process described
9 in Section I(C), *supra*, which is nearly impossible to navigate from a country where
10 one has no security, stability, or access to legal representation.

11 **1. Through the Protocols, Defendants Have Threatened**
12 **Individuals' Safety and Survival**

13 79. In order to access their asylum hearings, individuals subjected to MPP
14 regularly had to move from a precarious place of shelter, through zones controlled by
15 violent forces, to present themselves at designated ports of entry in the middle of the
16 night before their hearing dates. After their hearings, they were generally returned to
17 the danger zone to start the process again, in what became a repeated, dangerous cycle
18 imposed by Defendants on asylum seekers for the duration of their immigration
19 proceedings. Forced to focus on daily survival in an environment of uncertainty and
20 fear, these individuals were practically unable to contact legal representatives, obtain
21 evidence, contact witnesses, or take other steps necessary to effectively present their
22 cases.

23 80. Defendants have been aware that these dangerous conditions persisted
24 while the Protocols were in effect and continue to deteriorate. The 2019, 2020, and
25 2021 editions of the State Department's Trafficking in Persons Report warn that
26 migrants in Mexico are vulnerable to human rights abuses and human trafficking, and
27 that migrants from Central and South America are particularly vulnerable to forced
28 labor and sex trafficking. Since the Protocols were suspended in January 2021, the
State Department has issued seven separate security alerts for Mexican border states

1 warning of ongoing and increasing violence.³⁹ The State Department has reported
2 continued victimization of migrants by criminal groups, police, immigration officers,
3 and customs officials.⁴⁰ The Overseas Security Advisory Council (OSAC) of the U.S.
4 Department of State’s Bureau of Diplomatic Security has classified multiple border
5 cities (including Tijuana, Nogales, Ciudad Juarez, Nuevo Laredo, and Matamoros) as
6 “CRITICAL-threat locations.”⁴¹

7 81. Documentation by nongovernmental organizations and the media
8 confirms the continued dangers faced by asylum seekers.⁴² In June 2021, for example,
9 Human Rights First identified 3,250 public reports of murder, rape, torture,
10 kidnapping, and other violent assaults against asylum seekers subjected to the
11 Protocols since President Biden took office.⁴³ A number of these attacks were

13 ³⁹ U.S. Dept. of State, OSAC, Resources (filter set to “Mexico,” then filter to
14 “Travel Advisories and Alerts”)
[https://www.osac.gov/Country/Mexico/Content/Search?contentType=Report&sub
15 ContentType=Travel%20Advisories%20Alerts](https://www.osac.gov/Country/Mexico/Content/Search?contentType=Report&subContentType=Travel%20Advisories%20Alerts).

16 ⁴⁰ U.S. Dep’t of State, *2020 Country Reports on Human Rights Practices: Mexico* at
17 1 (Mar. 30, 2021) (hereafter “2020 State Dep’t Mexico Human Rights Report”),
[https://www.state.gov/wp-content/uploads/2021/03/MEXICO-2020-HUMAN-
18 RIGHTS-REPORT.pdf](https://www.state.gov/wp-content/uploads/2021/03/MEXICO-2020-HUMAN-RIGHTS-REPORT.pdf).

19 ⁴¹ U.S. Dep’t of State, OSAC, Country Security Report, Tijuana (July 29, 2020),
20 <https://www.osac.gov/Content/Report/6da3d429-8e47-4cf5-b483-1949341e677f>;
21 same, Nogales (June 24, 2020), [https://www.osac.gov/Content/Report/3308cb54-
22 2343-4177-8a0b-190281ef31c2](https://www.osac.gov/Content/Report/3308cb54-2343-4177-8a0b-190281ef31c2); same, Ciudad Juarez (June 24, 2020),
<https://www.osac.gov/Content/Report/24a57125-75ad-473b-b1bc-190280d20573>;
23 same, Nuevo Laredo (June 24, 2020),
<https://www.osac.gov/Content/Report/7e7f075c-4642-42e7-b1ed-1902835361b9>;
24 same, Matamoros (June 24, 2020), [https://www.osac.gov/Content/Report/ee12ce10-
25 1ee1-4fb5-a7b6-1902856858b5](https://www.osac.gov/Content/Report/ee12ce10-1ee1-4fb5-a7b6-1902856858b5).

26 ⁴² *See e.g.*, Human Rights First, *Failure to Protect: Biden Administration Continues
27 Illegal Trump Policy to Block and Expel Asylum Seekers to Danger* (April 2021),
<https://www.humanrightsfirst.org/sites/default/files/FailuretoProtect.4.20.21.pdf>;
28 U.S. Dep’t of State, *2021 Trafficking in Persons Report: Mexico* (July 2021),
<https://www.state.gov/reports/2021-trafficking-in-persons-report/mexico/>.

⁴³ Human Rights First, *Update: Grave Dangers Continue for Asylum Seekers Blocked
In, Expelled to Mexico by Biden Administration* (June 22, 2021),
[https://www.humanrightsfirst.org/resource/update-grave-dangers-continue-asylum-
29 seekers-blocked-expelled-mexico-biden-administration](https://www.humanrightsfirst.org/resource/update-grave-dangers-continue-asylum-seekers-blocked-expelled-mexico-biden-administration). *See also* Elliot Spagat,
Migrants live in fear at Mexico-US border as violence flares, Associated Press (Nov.
30 6, 2019), <https://bit.ly/3e2fjDX>.

1 reportedly committed by, or with the acquiescence of, Mexican local and federal
2 police. As has been reported, “[a]reas in the north of [Mexico] have transformed into
3 hunting grounds for criminal groups and security elements that prey on recent
4 deportees and migrants.”⁴⁴

5 82. People who are still stranded in Mexico are often deprived of access to
6 basic needs, including housing, food, clean water, and medical care.⁴⁵ Finding work
7 is difficult, in large part due to discrimination. Individuals who are lucky enough to
8 find work are frequently relegated to low-paying jobs in the informal economy.

9 83. Asylum-seeking individuals who remain in Mexico must maintain a
10 temporary legal status in order to avoid detention or deportation. If an individual
11 leaves Mexico, Mexican authorities confiscate the document conferring that status at
12 the time of their departure. Should such an individual need to reenter Mexico to access
13 a port of entry, there is no guarantee that the Mexican government would grant them
14 temporary legal status, without which the individual would risk detention or
15 deportation while transiting through Mexico. Consequently, many individuals
16 subjected to MPP feel compelled to stay in Mexico to preserve their chance of
17 returning to the United States to pursue their asylum claims.

18 84. Dangerous and unstable conditions persist for many individuals subjected
19 to the Protocols who remain stranded outside the United States, including Individual
20 Plaintiffs and similarly situated individuals. Many of these individuals are still

21
22 ⁴⁴ Ryan Devereaux, *Biden’s Border Agenda Collides With the Realities Of Mexico’s*
23 *Violence*, The Intercept (June 7, 2020), <https://theintercept.com/2021/06/07/biden-harris-mexico-border-violence/>.

24 ⁴⁵ Tom K. Wong, Ph.D., *Seeking Asylum: Part 2*, at 4, U.S. Immigration Policy Center
25 (Oct. 29, 2019), <https://bit.ly/31NbfCu>; see also Sumiko Keil, *Migrant shelter in*
26 *Mexicali desperate for help amid the pandemic*, KYMA (Aug. 6, 2020),
27 <https://bit.ly/3mtKMC1>; John Holman, *Mexico fails to provide promised jobs to*
28 *migrants*, Al Jazeera (Aug. 28, 2019), <https://bit.ly/2HEovlQ>; Julia Ainsley, *As*
COVID-19 looms, conditions for migrants stalled at U.S. border are a ‘disaster in the
making’, NBC News (May 12, 2020), <https://nbcnews.to/34ylKvy> (reporting that
although Mexican law purports to guarantee access to health care, many low-income
people are turned away from hospitals, and public health workers were blocked from
visiting migrant shelters under COVID-19 stay-at-home orders).

1 stranded in Mexico. Some have sought safety in third countries, while others have
2 been forced to return to their home countries, where they risk the very persecution
3 that caused them to flee in the first place.

4 **2. Through the Protocols, Defendants Have Obstructed**
5 **Individuals' Access to the U.S. Asylum System**

6 85. Individuals subjected to the Protocols who remain stranded outside the
7 United States continue to face daunting barriers to vindicating their statutory and
8 constitutional rights, including obstructions to accessing legal representatives who
9 can assist them in navigating the MPP wind-down process.

10 86. Being stranded outside the United States obstructs Individual Plaintiffs'
11 ability to identify, retain, and consult with legal representatives familiar with U.S.
12 immigration law.

13 87. For individuals subjected to MPP, communication with legal service
14 providers in the United States was, and remains, extremely challenging. Many such
15 individuals did not, and still do not, have consistent access to phone or internet
16 communication. Lack of access to technology has also prevented individuals in MPP
17 from gathering required documentation and other evidence to support their asylum
18 claims.

19 88. Given the critical nature of in-person meetings when representing asylum
20 seekers, many qualified legal service providers have been reluctant to accept cases of
21 people subjected to MPP due to the risks of traveling to dangerous border towns, as
22 well as the time and expense involved.

23 89. Rates of legal representation of asylum seekers were substantially higher
24 for detained and non-detained individuals inside the United States than those
25 subjected to MPP. According to EOIR records, from fiscal year 2001 through June
26 2021, over 80 percent of individuals seeking asylum were represented in their
27 immigration proceedings (50 percent of detained asylum seekers, 86 percent of
28 asylum seekers who had never been detained, and 88 percent of asylum seekers who

1 had been released from detention).⁴⁶ On the other hand, over 90 percent of individuals
2 subjected to the Protocols are unrepresented.⁴⁷

3 90. Even asylum seekers who have been able to secure legal representation
4 often lack access to private spaces where they can have confidential conversations
5 with attorneys or accredited representatives, either in person or by phone. A lack of
6 confidentiality leads individuals to withhold information that they are afraid to share
7 within earshot of others and impedes trust-building between legal representatives and
8 clients.

9 91. Although Defendants' latest expansion of processing provides a pathway
10 for individuals with *in absentia* removal orders to submit motions to reopen, there is
11 no guarantee that motions submitted through this process will be granted. Because
12 immigration judges have discretion to grant or deny a motion to reopen, *see supra* at
13 ¶ 38, it is imperative that individuals have legal assistance to ensure that such motions
14 comply with applicable requirements and present their claims as completely as
15 possible. However, by forcing individuals subjected to MPP to seek reopening of their
16 cases from outside the United States, Defendants have effectively deprived them of
17 access to legal representation.⁴⁸

18 92. Individuals with final removal orders issued on grounds other than failure
19 to appear are in an even more precarious situation with only the standard process
20 described in section I.C., *supra*. They thus remain in limbo, without clarity on when
21 or whether they will ever be permitted to return to the United States to pursue their
22 asylum claims.

23

24

25 ⁴⁶ TRAC, *supra* note 7.

26 ⁴⁷ TRAC, *supra* note 17.

27 ⁴⁸ Instead, individuals seeking legal assistance are merely directed to the EOIR's
28 court-specific lists of pro bono service providers or to generic immigration court self-
help materials that are not tailored to MPP. *See* DHS, Migrant Protection Protocols,
<https://www.dhs.gov/migrant-protection-protocols> (accessed July 26, 2021).

1 find an attorney to take her case. The judge also gave Jaqueline some paperwork in
2 English, which Jaqueline did not understand. After her hearing, Defendants returned
3 Jaqueline to Mexico with instructions to appear for her next hearing on December 11,
4 2019.

5 98. Upon returning to Mexico, Jaqueline purchased a cell phone plan to call
6 the attorneys on the list. Despite repeated attempts to reach them, some never
7 responded. A few answered her calls only to tell her they could not take her case.

8 99. On December 11, 2019, Jaqueline again made the dangerous journey to
9 the San Ysidro port of entry. When she explained at her hearing that she had been
10 unable to find representation, the immigration judge gave her another copy of the
11 same list of free legal service providers. Although Jaqueline told both the immigration
12 judge and U.S. immigration officers that she was afraid to return to Mexico because
13 she had been assaulted in Tijuana, she did not receive a nonrefoulement interview.
14 After the hearing, Defendants again returned Jaqueline to Mexico under the
15 Protocols' Return Policy, with instructions to appear on February 6, 2020.

16 100. In January 2020, Jaqueline's employer fired her after she revealed that
17 she was going to start taking hormones as part of her gender transition. She eventually
18 found work at a restaurant. However, she was still unable to afford her basic
19 necessities, including medication necessary for her transition.

20 101. On February 6, 2020, Jaqueline again made the dangerous journey to the
21 San Ysidro port of entry. However, U.S. immigration officers would not allow her
22 into the port of entry, telling her that her case was "closed." The officers did not
23 answer her questions or tell her why her case had been "closed."

24 102. When Jaqueline returned home, she again attempted to contact attorneys
25 on the list she had received, but to no avail.

26 103. Jaqueline later learned that she had been ordered removed *in absentia*.

27 104. Jaqueline has continued to search for an attorney to assist with her case.
28 She has been on a legal service waitlist for months but has not received a call back.

1 Even if she had an attorney, she knows it would be difficult to communicate with
2 them because she cannot always afford internet or a cell phone plan.

3 105. Jaqueline has faced violence or threats of imminent violence throughout
4 her time in Mexico. As a transgender woman living in Tijuana, she has been
5 threatened, verbally abused, and physically assaulted on account of her gender
6 identity. Jaqueline has also received threats to her life through text and audio
7 messages from people she believes to be associated with cartels. She has reported
8 incidents to the police, who made a report but took no action.

9 106. In April 2021, four men entered Jaqueline's workplace, tied her up, beat
10 her, and robbed her of her money and her phone. Jaqueline later learned that one of
11 the men is a coworker and fears that he has access to pictures of her dressed as a
12 woman. Fearing for her life, she stopped going to work after this incident, and
13 currently lives in hiding.

14 107. Even though Jaqueline is at risk of serious harm or death in Mexico, she
15 has stayed there to ensure that she does not lose the chance to pursue her asylum case.

16 108. Jaqueline registered for expanded MPP processing with UNHCR in or
17 around late June 2021 but has received no further information.

18 109. Without legal assistance, Jaqueline has faced significant challenges in
19 navigating the U.S. asylum system. As a result, she fears that she will not be able to
20 reopen her case on her own.

21 110. If permitted to return to the United States, Jaqueline would live with her
22 mother in New Jersey.

23 ***ii) Plaintiff Victoria Doe***

24 111. On August 29, 2019, Plaintiff Victoria Doe, her husband, and her son
25 crossed the U.S.-Mexico border and turned themselves in to CBP officers to seek
26 asylum in the United States.

27
28

1 112. Defendants separated the family, detaining Victoria and her son apart
2 from her husband for several days. Her son became ill during their detention and had
3 to be hospitalized.

4 113. After several days, Defendants returned Victoria and her husband and son
5 to Nuevo Laredo, Mexico pursuant to the Protocols. Defendants provided Victoria
6 with paperwork but did not explain to the family that they had a future court date,
7 how they would be transported to the court on that date, or how to seek legal
8 representation.

9 114. At the Laredo port of entry, Victoria asked an immigration officer to
10 explain the paperwork to her. The officer told her they would have to present for court
11 but did not provide any other information. The officer told her that the United States
12 was not granting asylum to anyone and advised that they should return to their home
13 country to avoid wasting their time.

14 115. Victoria's son was still sick when they were returned to Mexico.
15 Defendants did not provide them with any resources or support for survival, safety,
16 or general well-being. Victoria and her family slept at the Mexican immigration office
17 at the border for several nights.

18 116. Victoria and her husband did not know anyone in Mexico and did not
19 have any money to pay for shelter or to meet their basic needs. They struggled to find
20 work because they lacked immigration status in Mexico.

21 117. On November 13, 2019, Victoria and her family made the dangerous
22 journey to the Nuevo Laredo port of entry for their first hearing, which was scheduled
23 for the following day. The family arrived at the Mexican immigration office at 4 pm
24 the day before the hearing because it was unsafe to be on the street early in the
25 morning. At the hearing, the family was given an asylum application to complete and
26 a list of attorneys. Victoria tried to talk to an attorney who was present in court, but
27 he said representation would cost \$7,000, which they could not afford.
28

1 118. Victoria and her husband called every attorney on the list provided by the
2 court. Only one answered the phone. This attorney said he could not represent them
3 because MPP cases were too complicated.

4 119. A local migrant aid organization helped Victoria complete her asylum
5 application in English. However, the person who assisted Victoria did not review the
6 form with her.

7 120. Victoria and her family again made the dangerous journey to the Nuevo
8 Laredo port of entry for their second hearing, which was held on December 9, 2019.
9 Victoria submitted her asylum application to the immigration judge, who indicated
10 that the family would have a difficult time winning their case without an attorney.
11 The immigration judge did not explain that they could submit additional evidence in
12 support of their case or what would happen at their next hearing.

13 121. The family's third and final hearing occurred on February 7, 2020. Once
14 again, Victoria and her family made the dangerous journey to the Nuevo Laredo port
15 of entry the day before the hearing and spent the night at the Mexican immigration
16 office.

17 122. At the hearing, Victoria and her husband both testified in support of their
18 claims. The immigration judge then denied their case. Victoria did not fully
19 understand the reason for the judge's decision, but she believes it was because they
20 did not present enough evidence and because the people who harmed them were not
21 police.

22 123. When they indicated that they wanted to appeal, the immigration judge
23 provided them with documents explaining their right to do so.

24 124. After Victoria and her family were returned to Mexico following the
25 hearing, the family got in a taxi. Instead of driving them to their destination, the driver
26 took the family to a different location where two other men got in the car. The driver
27 then took the family to a remote location where Victoria and her husband were both
28

1 beaten. Her husband and son were then held at gunpoint while Victoria was brutally
2 raped.

3 125. After the attack, a woman helped the family escape to a shelter. Victoria
4 remains physically and psychologically scarred by her rape. Victoria's son is
5 traumatized and too scared to leave the house.

6 126. Victoria tried to read the documents she had received from the court but
7 did not understand them because they were in English. The family was unable to
8 submit a notice of appeal before the deadline and thus became subject to a final
9 removal order.

10 127. Victoria has continued to look for an attorney to assist her and her family
11 with their immigration case but has not succeeded. Victoria does not know how to
12 seek reopening of her case or what evidence she would need to do so.

13 128. If permitted to return to the United States, Victoria and her husband and
14 son would live with family members in Tennessee.

15 *iii) Plaintiff Chepo Doe*

16 129. On February 26, 2019, Plaintiff Chepo Doe and his daughter presented
17 themselves at the San Ysidro port of entry to seek asylum.

18 130. Defendants detained Chepo and his daughter for two days. During that
19 time, an asylum officer interviewed Chepo about his fear of returning to El Salvador.
20 The asylum officer told Chepo that the laws had changed under President Trump, so
21 Chepo and his daughter would have to defend their cases from Mexico. The asylum
22 officer served Chepo with a Notice to Appear and instructed him to present with his
23 daughter at the San Ysidro port of entry on April 4, 2019, for his first immigration
24 hearing. The asylum officer also gave Chepo a list of attorneys to call. On February
25 28, 2019, Defendants returned Chepo and his daughter to Mexico pursuant to the
26 Protocols. Defendants did not provide them with any resources or support for
27 survival, safety, or general well-being.

28

1 131. Following their return to Mexico, Chepo called all the attorneys on the
2 list he had received, as well as attorneys he found online. Few picked up, and those
3 who did said either that they did not travel to Mexico or that Chepo would be
4 responsible for covering the cost of their airline tickets, an expense he could not
5 afford. As a result, Chepo was unable to find representation before his first
6 immigration hearing.

7 132. On April 4, 2019, Chepo and his daughter made the dangerous journey to
8 the San Ysidro port of entry. At the hearing, Chepo requested additional time to
9 prepare their immigration case. The immigration judge scheduled his next hearing for
10 May 13, 2019.

11 133. On May 13, 2019, Chepo and his daughter again made the dangerous
12 journey to the San Ysidro port of entry. The ICE officers who transported Chepo and
13 his daughter to the immigration court told Chepo not to speak to any attorneys in the
14 courtroom. At the hearing, the immigration judge gave Chepo an asylum application
15 and instructed him to complete it before his next hearing on or around July 25, 2019.

16 134. On or around July 25, 2019, Chepo and his daughter again made the
17 dangerous journey to the San Ysidro port of entry for their next hearing. The ICE
18 officer who transported Chepo and his daughter to the immigration court again
19 instructed him not to speak to any attorneys in the courtroom. However, when the
20 officer briefly left the courtroom, Chepo approached an attorney from Organizational
21 Plaintiff ImmDef to ask for her help. Chepo spoke to the attorney for only a few
22 minutes but gave her his contact information.

23 135. At the hearing, Chepo submitted his asylum application. Although Chepo
24 informed the immigration judge and an asylum officer that he and his daughter did
25 not feel safe in Mexico, they were returned anyway.

26 136. After Chepo and his daughter were returned to Mexico, the ImmDef
27 attorney called Chepo to inform him that she could represent him.

28

1 137. Around this time, Chepo's daughter started experiencing stomach pain
2 and fevers. They sought medical care from a doctor at a local pharmacy, who advised
3 that Chepo's daughter needed a CT scan or an ultrasound, which were only available
4 at the hospital. They went to the hospital but were refused services because they were
5 not Mexican citizens or residents.

6 138. During the last week of November 2019, Chepo's daughter's condition
7 worsened. Her stomach pain was so severe that she cried for two or three days straight
8 and began vomiting. Chepo and his daughter returned to the hospital but were again
9 refused services.

10 139. On December 3, 2019, Chepo and his daughter once again made the
11 dangerous journey to the port of entry and presented themselves for their third
12 immigration hearing. They were represented by the attorney from Plaintiff ImmDef.
13 At the hearing, Chepo answered questions about his identity, country of origin, and
14 reasons for seeking asylum. He also presented evidence in support of his asylum
15 claim, including written declarations from members of his church, his mother, and his
16 wife. The immigration judge scheduled another hearing for February 25, 2020.

17 140. Following their return to Mexico that evening, Chepo's daughter began
18 experiencing severe pain. Fearing that his daughter might die if she did not get
19 medical care, Chepo made a desperate decision to take her back to El Salvador for
20 treatment.

21 141. When they arrived in El Salvador, Chepo immediately sought medical
22 care for his daughter. Following emergency surgery, which lasted several hours, the
23 doctor told Chepo that it was a miracle that his daughter had survived. She was
24 released from the hospital on January 2, 2020.

25 142. Chepo and his daughter could not return to Mexico to attend their
26 February 25, 2020, hearing because of his daughter's ongoing need for medical care.
27 Their attorney attended the hearing on their behalf, explained the circumstances, and
28

1 asked the immigration judge to allow them to withdraw their asylum application.
2 Instead, the immigration judge ordered Chepo and his daughter removed *in absentia*.

3 143. Chepo and his family are currently living in a church out of concern for
4 their safety. Since returning to El Salvador, Chepo has received additional threats
5 from gangs.

6 144. If permitted to return to the United States, Chepo and his daughter would
7 live with Chepo's brother in Alabama.

8 ***iv) Plaintiff Fredy Doe***

9 145. Around August 6, 2019, Plaintiff Fredy Doe, his wife, and his son
10 crossed the U.S.-Mexico border in Texas, and were processed near McAllen, Texas
11 after indicating that they wanted to seek asylum in the United States.

12 146. Defendants detained Fredy and his family for about eight days.
13 Defendants served Fredy and his wife with a Notice to Appear and ordered them to
14 present themselves at the Brownsville port of entry on September 16, 2019, for their
15 first immigration hearing. Defendants also provided Fredy with a list of attorneys to
16 call. Around August 14, 2019, Defendants returned Fredy and his family to Mexico
17 pursuant to the Protocols. Defendants did not provide them with any resources or
18 support for survival, safety, or general well-being.

19 147. Following their return to Mexico, Fredy attempted to call the attorneys on
20 the list, but they either did not answer his calls or told him that they could not take his
21 case. Because Fredy and his family did not have the resources to hire a private
22 attorney, they remained unrepresented for the duration of their immigration
23 proceedings.

24 148. On September 16, 2019, Fredy and his family made the dangerous
25 journey to the Brownsville port of entry for their first hearing. At the hearing, the
26 immigration judge gave Fredy an asylum application and told him to complete it
27 before his next hearing on October 16, 2019. Fredy did not understand the application
28 because it was in English.

1 149. Shortly before his next hearing, Fredy obtained a Spanish version of the
2 form from a staff member of a Catholic organization that works with migrants at the
3 border. Although Fredy still did not understand all the questions, a legal worker with
4 the Catholic organization assisted him in filling out the form over the phone. She
5 instructed him to pick up a completed copy of the form at a local migrant camp the
6 next day. Fredy picked up the form but had no way to verify the accuracy of the
7 responses, which were in English, prior to submitting his application to the
8 immigration judge on October 16, 2019.

9 150. Fredy and his family do not feel safe in Matamoros. In November 2019,
10 a car approached Fredy's wife as she was walking on the street in Matamoros. A man
11 opened the car door and ordered her to get in, but she escaped into a nearby store.
12 Similarly, in January 2020, Fredy's wife was waiting outside a laundromat when a
13 man ordered her to get inside his car. The man drove away when Fredy exited the
14 laundromat.

15 151. On January 28, 2020, Fredy and his family made the dangerous journey
16 to the Brownsville port of entry for their final immigration court hearing.

17 152. An officer directed Fredy and his wife to take their son to a nursery during
18 the hearing. Throughout their hearing, Fredy and his wife were concerned for their
19 son's well-being and safety.

20 153. At the end of the hearing, the immigration judge denied Fredy's asylum
21 application.

22 154. Following the hearing, Fredy and his family relocated to central Mexico
23 to work on a farm as they were unable to support themselves in Matamoros.

24 155. Fredy and his wife did not submit an appeal because they did not
25 understand how to do so and thus became subject to a final removal order.

26 156. Fredy and his family live in constant fear in Mexico. They frequently hear
27 gunshots and have heard of cartel kidnappings.

28

1 Mexico but did not provide him with information on how to find legal representation.
2 Defendants also did not provide him with any resources or support for survival, safety,
3 or general well-being.

4 170. During his first three months in Matamoros, Francisco was homeless and
5 unemployed. Fortunately, he met people who were able to understand the documents
6 that Defendants had given him and explained when and where he had to go for his
7 immigration hearing.

8 171. In October 2019, Francisco made the dangerous journey to the
9 Brownsville port of entry on the date of his hearing. The immigration judge gave him
10 an asylum application and told him to complete it before his next hearing on
11 November 7, 2019. The immigration judge also gave Francisco a list of lawyers to
12 contact regarding possible representation.

13 172. Upon returning to Mexico, Francisco called the attorneys on the list, but
14 many did not answer or return his calls. The few who responded said they could only
15 help if Francisco was in the United States.

16 173. After being homeless for three months, Francisco eventually found work
17 in Matamoros and rented a room with some coworkers.

18 174. In November 2019, Francisco again made the dangerous journey to the
19 Brownsville port of entry for his next hearing. At the hearing, Francisco was unable
20 to submit a completed asylum application because he could not find anyone in
21 Matamoros to translate the application form into Spanish. The immigration judge
22 instructed him to bring the completed application form to his next hearing in February
23 2020.

24 175. Francisco eventually found a Mexican attorney in Matamoros who helped
25 him prepare his asylum application.

26 176. Francisco once again made the journey to the Brownsville port of entry
27 for his final hearing in February 2020. The attorney who prepared his asylum
28 application did not appear at the hearing.

1 177. After Francisco had testified about his experiences in El Salvador and
2 Mexico, the immigration judge denied his asylum application. She ordered him to
3 return to Matamoros and told him he could appeal the decision.

4 178. Following his return to Matamoros, Francisco asked the same attorney to
5 file an appeal. Although the attorney told Francisco he had submitted the necessary
6 documents, Francisco's appeal was rejected because there was no proof of service on
7 the government. Francisco has had no further contact with the attorney, who never
8 told him that his appeal had been rejected nor did the attorney file a corrected appeal.

9 179. Francisco no longer has any means to support himself or his mother and
10 sister, who fled El Salvador after he did and have serious medical conditions that
11 prevent them from working. Francisco was recently fired from his job because his
12 temporary legal status expired. Although he has found another job, he does not earn
13 enough to pay for the medications his mother and sister need.

14 180. If allowed to return to the United States, Francisco would live with his
15 mother's partner in Miami.

16 **C. Defendants' Policies Harm Organizational Plaintiffs**

17 181. Plaintiffs ImmDef and Jewish Family Service are nonprofit organizations
18 that were established to provide legal and other services to detained and non-detained
19 immigrants in California. Before the Protocols were implemented, Organizational
20 Plaintiffs focused on representing and advising detained individuals in custody
21 proceedings; representing, advising and otherwise supporting detained and non-
22 detained individuals seeking asylum and other relief; explaining the legal process to
23 individuals in removal proceedings; conducting factual investigations; researching
24 and articulating potential forms of relief; preparing clients and witnesses to testify;
25 and filling out English-language court forms for non-English-speaking clients in a
26 clear and legible manner.

27 182. As discussed more fully below, the manner in which Defendants
28 implemented the Protocols, their policy that certain individuals with final MPP

1 removal orders must successfully reopen those orders to be eligible for processing
2 into the United States, their continuing deprivation of legal representation to
3 individuals subjected to MPP who remain outside the United States, and their failure
4 to ensure that all individuals eligible for processing know about and can actually
5 access those processes frustrate both Organizational Plaintiffs' missions and require
6 them to expend resources they otherwise would invest in other programs.

7 **1. ImmDef**

8 183. Plaintiff ImmDef is a nonprofit organization committed to creating a
9 public defender system for immigrants facing deportation.

10 184. Prior to the start of MPP, ImmDef provided limited or full-scope
11 representation in immigration court proceedings and other services to unaccompanied
12 minor children, indigent detained adults, individuals deemed mentally incompetent to
13 represent themselves, and families separated at the border. ImmDef's primary focus
14 was on detained and non-detained individuals in immigration court proceedings in the
15 Greater Los Angeles and Orange County areas (including the Inland Empire), but not
16 generally focused on the San Diego border area.

17 185. In response to Defendants' implementation of the Protocols in January
18 2019, ImmDef established its Cross Border Initiative ("CBI"), which focuses on
19 providing direct representation, *pro se* assistance, and advocacy to individuals
20 subjected to MPP. Specifically, ImmDef has represented individuals and families
21 subjected to MPP in applications for immigration relief and bond requests before the
22 San Diego immigration court, as well as BIA appeals, nonrefoulement interviews,
23 parole requests, and motions to reopen before immigration court. ImmDef also has
24 provided Know Your Rights presentations, conducted asylum clinics, and undertaken
25 advocacy to assist MPP clients whom they do not have capacity to represent. As of
26 October 26, 2020, ImmDef had represented approximately 86 individuals in MPP.

27 186. To represent individuals subjected to the Protocols, ImmDef was required
28 to undertake two new ventures: first, to begin representing individuals in the San

1 Diego immigration court and, second, to engage in cross-border travel and
2 communication. Both required new infrastructure, staff, materials, and funding.

3 187. ImmDef diverted substantial resources from planned projects in Los
4 Angeles, including its Family Unity Project, to support the expansion of MPP-related
5 work. This decision was driven by the urgent needs of MPP families and the relative
6 lack of resources from partner organizations to assist them. As a result, since MPP
7 started, ImmDef has taken on far fewer cases of families at risk of separation in the
8 Los Angeles area, despite the continued need.

9 188. When it became clear that ImmDef staff based in Los Angeles could not
10 travel regularly between Los Angeles and Tijuana, ImmDef diverted funding and
11 fundraising resources to establish an office and the necessary infrastructural support
12 in San Diego.

13 189. By September 2019, ImmDef's Legal Services Director had shifted her
14 focus from representing detained adults in the Greater Los Angeles Area to
15 overseeing the new San Diego office, and ImmDef had dedicated resources to hiring
16 new staff for that office to assist people subjected to the Protocols. Since January
17 2019, ImmDef has spent at least \$400,000 on costs associated with representation of
18 MPP clients.

19 190. The added challenges of representing individuals stranded in Mexico,
20 including the time and expense involved in cross-border travel, safety risks,
21 communication barriers, and the far-reaching needs of most MPP clients, has
22 increased the amount of staff time required for each case and decreased the total
23 number of cases each ImmDef attorney representing clients in Mexico can effectively
24 handle.

25 191. Given the precarious circumstances under which most individuals
26 subjected to MPP live, ImmDef has worked to help them address both their legal and
27 non-legal needs, including housing, food, medical care, and safety. These efforts are
28 essential because individuals subjected to MPP could not otherwise fully engage in

1 discussions about their cases. In this way, representing individuals subjected to MPP
2 is different and much more time- and resource-intensive than providing representation
3 in removal proceedings to detained and non-detained individuals inside the United
4 States, where their lives are not constantly at risk.

5 192. Despite Defendants' stated policy that individuals in MPP should have
6 had an hour to speak to their attorneys before a hearing in immigration court, ImmDef
7 staff were often not allowed to enter the courtroom until a few minutes before the start
8 of court hearings. This lack of access made it extremely difficult and sometimes
9 impossible to review sensitive documents, obtain client signatures, or answer last-
10 minute questions in a way that protected attorney-client confidentiality. ImmDef
11 attorneys were similarly unable to consult privately with clients after their MPP
12 hearings.

13 193. No confidential space was available for client consultation prior to
14 hearings. DHS officers often stood nearby, refusing to move out of hearing distance
15 and preventing confidential communications. Sometimes, DHS officers or agents
16 ended attorney-client conversations prematurely, interfered with those conversations,
17 or prevented lawyers from giving legal documents to their clients. These practices
18 impeded communication, limited what lawyers and clients could and would say to
19 each other, and obstructed ImmDef's representation efforts.

20 194. Defendants also actively impeded ImmDef's efforts to provide legal
21 information to unrepresented individuals subjected to MPP. Although unrepresented
22 individuals sometimes approached ImmDef attorneys in court to seek legal advice or
23 representation, DHS officers prohibited communications with those individuals. This
24 impeded ImmDef's ability not only to fulfill its mission, but also to identify
25 prospective clients.

26 195. Once the COVID-19 pandemic began, in-person meetings and Know
27 Your Rights presentations for MPP clients became impossible due to travel
28 restrictions. Unlike cases of detained and non-detained clients in the United States,

1 ImmDef staff have struggled to set up confidential phone appointments with MPP
2 clients. Even if MPP clients outside the United States can afford cell phone service or
3 internet access, they often lack access to a confidential space for sensitive
4 communications. Moreover, connections are often weak or unreliable, and phone
5 communication is generally less effective than in-person communication for purposes
6 of building trust with clients.

7 196. Despite the termination of MPP, ImmDef continues to divert
8 organizational and staff resources to support individuals who were subjected to the
9 Protocols and remain outside the United States.

10 197. ImmDef's ability to provide representation and other support services to
11 individuals stranded outside the United States remains constrained by security and
12 health concerns that restrict staff members' ability to travel to Mexico,
13 communication barriers, and precarious living situations of those stranded outside the
14 United States.

15 198. Since the wind-down process began, ImmDef staff have spent countless
16 hours responding to telephonic inquiries from individuals subjected to MPP who have
17 questions about their eligibility for processing due to confusion and lack of
18 information about the wind-down process. Since the beginning of the wind-down,
19 ImmDef has been inundated with phone calls from approximately 2,000 families and
20 individuals, most of whom call multiple times. Some have called hundreds of times.
21 Responding to these calls has diverted ImmDef's resources away from its mission of
22 providing universal representation, as staff must spend a significant part of their work
23 day answering calls rather than providing the direct representation the organization is
24 funded to do.

25 199. ImmDef staff have also spent a substantial amount of time trying to
26 trouble-shoot problems with registration through Conecta. ImmDef staff have
27 struggled to communicate with individuals seeking to access this process.

28

1 200. Since January 2021, ImmDef’s role in the California Welcoming Task
2 Force also continues to divert organizational resources. As part of the Legal Subgroup
3 of the Task Force, ImmDef staff spend several hours per week engaging on issues
4 pertaining to the MPP wind-down, which would otherwise have been dedicated to
5 other work.

6 **2. Jewish Family Service**

7 201. Plaintiff Jewish Family Service is a nonprofit organization dedicated to
8 providing holistic, culturally competent, trauma-informed, quality legal and other
9 supportive services to immigrants in San Diego and Imperial Counties.

10 202. Before the implementation of the Protocols, Jewish Family Service
11 provided consultations, limited-scope and full-scope legal representation for both
12 detained and non-detained individuals in immigration court proceedings in the Otay
13 Mesa and San Diego immigration courts, and limited-scope and full-scope legal
14 representation before the BIA and the Ninth Circuit Court of Appeals. From January
15 2018 until MPP started, Jewish Family Service sent a staff member to the Otay Mesa
16 Detention Center for two full days per week to provide free legal consultations, screen
17 potential clients, and meet with existing clients. Jewish Family Service also
18 represented and otherwise assisted non-detained immigrants located in San Diego
19 County in seeking affirmative immigration benefits from USCIS.

20 203. In response to Defendants’ implementation of the Protocols in January
21 2019, Jewish Family Service shifted its focus to respond to the needs of individuals
22 subjected to MPP who had few other legal representation options available. Before
23 this time, Jewish Family Service had rarely engaged in cross-border legal work.

24 204. Since January 2019, Jewish Family Service has repurposed significant
25 portions of six staff members’ time and hired three new full-time employees to
26 provide legal services to individuals subjected to the Protocols and returned to Mexico
27 under the Return Policy. As of August 2021, Jewish Family Service has two staff
28 members devoted to cross-border work.

1 205. Given the logistical, technical, and legal complexity of MPP cases, Jewish
2 Family Service was not able to recruit, train, and mentor volunteer attorneys to assist
3 with these cases as they had previously done for non-MPP cases. Although Jewish
4 Family Service had made a concerted effort to expand its volunteer attorney program
5 since 2017, they had to suspend this program due to their lack of capacity to supervise
6 and oversee it following the implementation of MPP.

7 206. In order to assist individuals subjected to MPP, Jewish Family Service
8 was forced to divert resources away from providing representation and other services
9 to noncitizens in the United States, including individuals detained at the Otay Mesa
10 Detention Center and non-detained individuals in the San Diego area. As a result,
11 Jewish Family Service reduced representation of non-detained immigrants in the
12 United States by approximately 74% and representation of detained immigrants by
13 approximately 27%.

14 207. As of July 30, 2021, Jewish Family Service had provided either full or
15 limited-scope representation to approximately 127 individuals subjected to MPP and
16 over 600 legal consultations to individuals subjected to MPP. In MPP cases where
17 Jewish Family Service was unable to provide full-scope legal representation, they
18 often represented individuals in parole requests, nonrefoulement interviews,
19 affirmative relief, or advocacy with DHS.

20 208. Because many people subjected to the Protocols did not have the ability
21 to contact any of the organizations on EOIR's free-legal-service-provider list, Jewish
22 Family Service expended significant resources to establish cross-border infrastructure
23 to receive calls from individuals subjected to MPP. This infrastructure includes a
24 hotline accessible via cell phone and WhatsApp for individuals waiting in, or near,
25 Tijuana and Mexicali. Before MPP, the staff resources invested in running the MPP
26 hotline would have been dedicated to providing legal services to detained and non-
27 detained individuals in the San Diego area.

28

1 209. Jewish Family Service has invested at least seventy-five hours of staff
2 time in producing English and Spanish “Know Your Rights” videos and other
3 materials about MPP. These materials provide basic information about the MPP
4 process and the rights of affected individuals. The videos are publicly available on
5 the internet, and the other materials are shared with individuals who are being
6 processed under the MPP wind-down.

7 210. Communication with individuals outside the United States via internet
8 and cell phone is often difficult due to bad connections, callers’ limited minutes, lack
9 of access to private spaces where individuals can speak freely, and security concerns.
10 Limitations on internet and mobile access also complicate the sharing of documents,
11 compromise the quality of documents transmitted, and raise concerns about
12 confidentiality. To facilitate document sharing and minimize the risk of
13 confidentiality breaches, Jewish Family Service has invested additional resources in
14 technology.

15 211. In September 2019, Jewish Family Service began an ad hoc program at
16 the San Diego immigration court to provide Know Your Rights presentations and
17 rapid intake screenings for unrepresented individuals on the MPP docket. Until MPP
18 hearings were suspended in March 2020, Jewish Family Service made a concerted
19 effort to conduct these activities inside the courtrooms while MPP-affected
20 individuals and families waited for their hearings to start. These presentations were
21 independent of the attorney-client communications ostensibly permitted during the
22 hour before hearings, were not authorized by Defendants, and were not confidential.

23 212. In an effort to address these problems, Jewish Family Service tried
24 repeatedly to formalize the Know Your Rights program and arrange a confidential
25 space in the immigration court building to meet with individuals in need of immediate
26 legal assistance. Both EOIR and ICE denied these requests, severely impeding Jewish
27 Family Service’s ability to identify and advise potential MPP clients.

28

1 213. Before March 16, 2020, Jewish Family Service expended significant
2 resources for its staff to travel to Tijuana to meet with clients subjected to the
3 Protocols. For each MPP case, Jewish Family Service staff members usually made
4 three to five trips to Mexico for legal visits. Staff members sometimes also traveled
5 to Tijuana to accompany their clients to the San Ysidro port of entry on their hearing
6 dates, sometimes as early as 3 a.m., which increased the length of the workday for
7 staff.

8 214. Jewish Family Service’s staff members did not have consistent access to
9 space in Tijuana where they could meet confidentially with clients. In cases where
10 Jewish Family Service conducted meetings in clients’ living spaces, some clients
11 expressed fear that they would be targeted by organized crime if people from the
12 United States were seen entering or leaving. These circumstances hindered Jewish
13 Family Service’s ability to provide meaningful legal representation. Since June 2021,
14 Jewish Family Service’s staff members have resumed travel to Tijuana to assist
15 individuals subjected to MPP with the motion to reopen process; however, they still
16 do not have access to confidential meeting space.

17 215. The staff time and additional expenditures required for legal visits with
18 clients subjected to MPP have diverted substantial resources from Jewish Family
19 Service’s prior work on behalf of clients in the United States. In addition, due to safety
20 concerns in Mexico, Jewish Family Service purchased additional insurance and
21 adopted the practice of assigning two caseworkers to each case. This practice
22 significantly decreased the total number of clients that Jewish Family Service could
23 represent.

24 216. Jewish Family Service rarely had the opportunity to meet with its clients
25 for a full hour before their immigration court hearings due to a variety of factors,
26 including CBP’s slow processing at the port of entry and ICE’s failure to transport
27 individuals to the immigration court sufficiently in advance of their hearings. Where
28 ICE did permit pre-hearing consultations, they occurred in a crowded, open

1 courtroom with no assurances of confidentiality. Jewish Family Service was similarly
2 prevented from consulting confidentially with MPP clients following their hearings.

3 217. After DHS announced the MPP wind-down, Jewish Family Service began
4 providing legal and humanitarian support to individuals permitted to return to the
5 United States. Since February 19, 2021, members of Jewish Family Service's
6 Removal Defense Program team have traveled regularly to the San Ysidro port of
7 entry to assist in welcoming and processing individuals and families out of MPP. As
8 of July 29, 2021, Jewish Family Service has welcomed 2,675 people with active MPP
9 cases who were processed at the San Ysidro port of entry. Through the Rapid
10 Response Network, Jewish Family Service operates Migrant Shelter Services, which
11 provide critical humanitarian assistance to asylum-seeking individuals and families
12 including many processed into the United States after being subjected to MPP. Jewish
13 Family Service also provides a bus to transport individuals from the San Ysidro port
14 of entry to Jewish Family Service's Migrant Shelter Services. Jewish Family Service
15 continues to divert resources to pay for the bus seven days a week.

16 218. Through its MPP hotline, Jewish Family Service has also advised
17 hundreds of affected individuals who had questions about their eligibility for
18 processing into the United States or who were unaware of the MPP wind-down due
19 to the U.S. government's failure to provide adequate information. Jewish Family
20 Service continues to advise affected individuals who call the hotline with questions
21 about expanded MPP processing.

22 219. In addition to welcoming individuals at the border and advising
23 individuals through the hotline, Jewish Family Service assists individuals subjected
24 to MPP who are eligible for processing but have had difficulty registering through
25 Conecta and individuals who are seeking to reopen their cases. As a result of Jewish
26 Family Service's diversion of resources to assist individuals subjected to MPP, the
27 organization is behind on its deliverables for grants they have received for
28 immigration-related legal representation.

CLASS ACTION ALLEGATIONS

1
2 220. Individual Plaintiffs bring this action pursuant to Federal Rules of Civil
3 Procedure 23(a) and 23(b)(2) on behalf of themselves and all other persons similarly
4 situated.

5 221. Individual Plaintiffs seek to represent a class of individuals who have
6 been subjected to MPP, remain outside the United States, and have received a final
7 order of removal in MPP proceedings that has not yet been reopened and is not
8 currently pending review in a federal circuit court of appeals. Plaintiffs also seek
9 certification of two subclasses of individuals who received *in absentia* removal orders
10 and final removal orders for reasons other than failure to appear.

11 222. All Individual Plaintiffs seek to represent the proposed “Reopened Case
12 Class,” defined as:

13 All individuals subjected to MPP who remain outside the United States,
14 received a final order of removal in MPP proceedings, and whose cases
15 have not been reopened and are not currently pending review before a
federal circuit court of appeals.

16 223. Individual Plaintiffs Jaqueline Doe and Chepo Doe seek to represent the
17 proposed “*In Absentia* Subclass,” defined as:

18 All individuals subjected to MPP who remain outside the United States,
19 received an *in absentia* order of removal in MPP proceedings, and whose
cases have not been reopened and are not currently pending review before
a federal circuit court of appeals.

20 224. Individual Plaintiffs Victoria Doe, Fredy Doe, Ariana Doe, and Francisco
21 Doe seek to represent the proposed “Final Order Subclass,” defined as:

22 All individuals subjected to MPP who remain outside the United States,
23 received a final order of removal for reasons other than failure to appear
24 for an immigration court hearing, and whose cases have not been
reopened and are not currently pending review before a federal circuit
court of appeals.

25 225. The Reopened Case Class, *In Absentia* Subclass, and Final Order
26 Subclass are each so numerous that joinder of all members is impracticable. As of
27 June 2021, at least 28,449 individuals subjected to MPP had received *in absentia*
28

1 removal orders.⁵¹ As of June 2021, at least an additional 4,639 individuals subjected
2 to MPP had received removal orders for reasons other than failure to appear.⁵² Upon
3 information and belief, the vast majority of these individuals are unable to return to
4 the United States pursuant to Defendants’ Reopened Case Policy because their cases
5 have not been reopened. Additionally, upon information and belief, very few such
6 individuals have been able to seek reopening of their immigration proceedings, to
7 appeal to the BIA, or to seek judicial review before a federal circuit court of appeals.
8 Individual Plaintiffs’ precarious living conditions and lack of access to legal
9 representation or resources also make joinder impracticable.

10 226. There are questions of law and fact that are common to all members of
11 the Reopened Case Class, including the *In Absentia* Subclass and the Final Order
12 Subclass, and that predominate over any question affecting only Individual Plaintiffs.
13 Class members allege common harms: violation of the right to apply for asylum by
14 virtue of being stranded outside the United States; denial of the right to gather and
15 present evidence; violation of the right to seek reopening of their immigration
16 proceedings; obstruction of their access to legal representation; and obstruction of
17 their right to hire and consult an attorney and petition the courts.

18 227. Class members’ claims are based on a common core of facts. All
19 proposed class members were subjected to MPP, received a final order of removal in
20 MPP proceedings, remain outside the United States, and have cases that have not been
21 reopened and are not pending review before a federal circuit court of appeals.

22 228. All proposed Reopened Case Class and Final Order Subclass members
23 raise the same legal claims under the INA, 8 U.S.C. §§ 1158(a)(1), 1158(d)(4),
24 1229a(b)(4), 1229a(c)(7), 1362; the APA, 5 U.S.C. § 706(2)(A); the Fifth
25 Amendment Due Process Clause; and the First Amendment. All proposed *In Absentia*

26 _____
27 ⁵¹ TRAC, *supra* note (filter set to “Hearing Location: All,” “Hearing Attendance: Not
Present at Last Hearing (Absentia Decision)” and “Outcome: Removal Order”).

28 ⁵² *Id.* (filter set to “Hearing Location: All,” “Hearing Attendance: Always Present at
Hearings” and “Outcome: Removal Order”).

1 Subclass members raise these same legal claims, as well as an additional shared legal
2 claims under the INA, 8 U.S.C. § 1229a(b)(5)(C), and the APA, 5 U.S.C. § 706(2)(A).
3 Class members' shared common facts will ensure that judicial findings regarding the
4 legality of the challenged practices will be the same for all class members.

5 229. Should Plaintiffs prevail, all class members will benefit: each of them will
6 be entitled to return to the United States, with appropriate precautionary public-health
7 measures, in order to seek reopening of their asylum proceedings from inside the
8 country.

9 230. Individual Plaintiffs' claims are typical of the claims of the Reopened
10 Case Class, including the *In Absentia* Subclass and the Final Order Subclass.
11 Individual Plaintiffs and class members raise common legal claims and are united in
12 their interest and injury. All Individual Plaintiffs, like all class members, are asylum
13 seekers whom Defendants unlawfully deprived of the right to apply for asylum by
14 trapping them in Mexico under dangerous conditions in a manner that obstructed their
15 access to legal assistance, reasonable safety, and basic human needs; their right to
16 gather and present evidence; their right to seek reopening of their immigration
17 proceedings; their right to access legal representation; and their right to hire and
18 consult an attorney and petition the courts. Individual Plaintiffs and class members
19 are thus victims of the same, unlawful course of conduct.

20 231. Individual Plaintiffs will fairly and adequately protect the interests of the
21 Reopened Case Class. Individual Plaintiffs Jaqueline Doe and Chepo Doe will fairly
22 and adequately represent the interests of the *In Absentia* Subclass, and Individual
23 Plaintiffs Victoria Doe, Fredy Doe, Ariana Doe, and Francisco Doe will fairly and
24 adequately represent the interests of the Final Order Subclass. Individual Plaintiffs
25 seek relief on behalf of the class as a whole and have no interest antagonistic to other
26 members of the class. Individual Plaintiffs' mutual goal is to declare Defendants'
27 challenged policies unlawful and to obtain declaratory and injunctive relief that would
28 cure this illegality. Individual Plaintiffs seek a remedy for the same injuries as class

1 members, and all share an interest in having a meaningful right to apply for asylum,
2 the right to gather and present evidence, a meaningful right to seek reopening of their
3 asylum proceedings, the right to access legal representation, and the right to hire and
4 consult an attorney and petition the courts. Thus, the interests of Individual Plaintiffs
5 and class members are aligned.

6 232. Plaintiffs are represented by attorneys from the Southern Poverty Law
7 Center, the National Immigration Project of the National Lawyers Guild, Innovation
8 Law Lab, and Arnold & Porter Kaye Scholer LLP. Counsel have demonstrated a
9 commitment to protecting the rights and interests of noncitizens and, together, have
10 considerable experience in handling complex and class action litigation in the
11 immigration field. Counsel have represented numerous classes of immigrants and
12 other victims of systemic government misconduct in actions in which they
13 successfully obtained class relief.

14 233. The members of the proposed class and each proposed subclass are
15 readily ascertainable through Defendants' records.

16 234. Defendants have acted, have threatened to act, and will act on grounds
17 generally applicable to the Reopened Case Class and each Subclass, thereby making
18 final injunctive and declaratory relief appropriate to the Reopened Case Class,
19 including the *In Absentia* Subclass and Final Order Subclass, as a whole.

20 235. Through the Protocols and the Reopened Case Policy, Defendants have
21 denied Individual Plaintiffs and class members a meaningful right to apply for
22 asylum, the right to gather and present evidence, a meaningful right to seek reopening
23 of their immigration proceedings, the right to access legal representation, and the right
24 to hire and consult an attorney and petition the courts. Defendants' actions violate
25 Individual Plaintiffs' and class members' statutory and constitutional rights.

26 236. Declaratory and injunctive relief are appropriate remedies. In the absence
27 of a class action, there is substantial risk that individual actions would be brought in
28

1 different venues, creating a risk of inconsistent adjudications to address Defendants’
2 common conduct.

3 **FIRST CLAIM FOR RELIEF**
4 **ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A)**
5 **VIOLATION OF THE RIGHT TO APPLY FOR**
6 **ASYLUM, 8 U.S.C. § 1158(a)(1)**
7 **(ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

8 237. Plaintiffs reallege and incorporate by reference each and every allegation
9 contained in the preceding paragraphs as if set forth fully herein.

10 238. The APA provides that courts “shall . . . hold unlawful and set aside
11 agency action” that is “arbitrary, capricious, an abuse of discretion, . . . otherwise not
12 in accordance with law: . . . [or] in excess of statutory jurisdiction, authority, or
13 limitations, or short of statutory right.” 5 U.S.C. §§ 706(2)(A)-(C).

14 239. The Refugee Act as codified in the INA provides that the U.S.
15 government must provide a uniform method by which an individual can meaningfully
16 apply for asylum under 8 U.S.C. § 1158(a)(1) (“Any alien who is physically present
17 in the United States or who arrives in the United States . . . irrespective of such alien’s
18 status, may apply for asylum . . .”).

19 240. The Migrant Protection Protocols subverted and violated the right to
20 apply for asylum by trapping applicants in a foreign country under dangerous
21 conditions in a manner that obstructed access to all components of the U.S. asylum
22 system.

23 241. The Protocols subverted and violated the right to apply for asylum by
24 irrationally treating asylum seekers at the southern border in a discriminatory and
25 non-uniform way.

26 242. The Protocols thereby violated Individual Plaintiffs’ right to apply for
27 asylum under the INA and were not in accordance with law or were in excess of
28 statutory authority under 5 U.S.C. § 706(2)(A).

1 243. By trapping Organizational Plaintiffs’ clients and potential clients outside
2 the United States in a manner that obstructed access to all components of the U.S.
3 asylum system, the Protocols also interfered with Organizational Plaintiffs’ ability to
4 deliver meaningful legal assistance to individuals seeking to apply for asylum as
5 required under the INA. Defendants failed to adequately consider that fact when they
6 implemented the Protocols.

7 244. Defendants’ wind-down of the Protocols has not rectified these violations
8 of the rights of Individual and Organizational Plaintiffs. Defendants’ Reopened Case
9 Policy keeps Individual Plaintiffs stranded outside the United States in untenable
10 conditions that obstruct their access to legal representation and deprive them of a
11 meaningful opportunity to apply for asylum. This Policy also continues to frustrate
12 Organizational Plaintiffs’ core missions and to force them to divert substantial
13 resources away from existing programs.

14 245. The Reopened Case Policy violates the right to seek asylum under the
15 INA and is arbitrary and capricious, is not in accordance with law or is in excess of
16 statutory authority under 5 U.S.C. § 706(2)(A).

17 246. Defendants’ Reopened Case Policy is also arbitrary and capricious or an
18 abuse of discretion because Defendants failed to properly consider important aspects
19 of the problem that gave rise to this policy. In particular, by limiting access to
20 processing to individuals with “active” immigration cases, Defendants failed to
21 adequately consider how other individuals subjected to the Protocols were deprived
22 of full and fair hearings and their right to legal representation. Defendants also failed
23 to adequately consider how leaving individuals stranded outside the United States
24 without access to legal representation impedes their ability to seek reopening of their
25 immigration proceedings and obstructs their access to the U.S. asylum system.

26 247. The Reopened Case Policy is a final agency action that is reviewable
27 under 5 U.S.C. §§ 702 and 706.

28

1 248. Defendants' violation of the APA causes ongoing harm to Individual
2 Plaintiffs and Organizational Plaintiffs.

3 249. Plaintiffs do not have an adequate alternative remedy at law and therefore
4 seek immediate review under the APA and injunctive relief.

5 **SECOND CLAIM FOR RELIEF**

6 **ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A)**

7 **VIOLATION OF THE RIGHT TO SEEK REOPENING OF ASYLUM**

8 **PROCEEDINGS, 8 U.S.C. § 1229a(c)(7)**

9 **(ALL PLAINTIFFS AGAINST ALL DEFENDANTS)**

10 250. Plaintiffs reallege and incorporate by reference each and every allegation
11 contained in the preceding paragraphs as if set forth fully herein.

12 251. An agency action is arbitrary and capricious where the agency "relied on
13 factors which Congress has not intended it to consider" or "entirely failed to consider
14 an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*
15 *Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

16 252. Section 240(c) of the INA grants noncitizens the right to file one motion
17 to reopen their proceedings. 8 U.S.C. § 1229a(c)(7). This motion must be filed within
18 90 days of the date of entry of the individual's final removal order unless it relates to
19 a claim for asylum or withholding of removal and is based on evidence of changed
20 country conditions that is material and was not previously available. 8 U.S.C.
21 §§ 1229a(c)(7)(A)-(C). When a motion to reopen is jointly filed by both parties, the
22 time and numerical limitations on the motion do not apply. 8 C.F.R.
23 §§ 1003.23(b)(4)(iv) (addressing joint motions to reopen before the immigration
24 court); 1003.2(c)(3)(iii) (addressing joint motions to reopen before the BIA).

25 253. By implementing the Protocols, Defendants trapped Individual Plaintiffs
26 in life-threatening conditions in Mexico, resulting in the denial of a meaningful
27 opportunity to apply for asylum. Through the Reopened Case Policy, Defendants now
28 prevent Individual Plaintiffs from exercising their statutory right to seek reopening of

1 their asylum proceedings by stranding them outside the United States in untenable
2 conditions that restrict their access to legal representation.

3 254. Under Defendants’ Reopened Case Policy, Individual Plaintiffs may
4 pursue their asylum claims from within the United States only if reopening is granted.
5 By directing that individuals subjected to MPP “who may be eligible for processing
6 should stay where they are currently located” while seeking to reopen their cases,
7 Defendants have stranded these individuals outside the United States and continue to
8 deprive them of access to legal assistance.

9 255. Defendants’ decision to implement the Reopened Case Policy is not in
10 accordance with law or is in excess of Defendants’ statutory authority because it
11 deprives Individual Plaintiffs of their right to seek reopening of their asylum
12 proceedings, as guaranteed by the INA.

13 256. Defendants’ Reopened Case Policy is also arbitrary and capricious or an
14 abuse of discretion because Defendants failed to consider important aspects of the
15 problem that gave rise to this policy. In particular, by limiting access to processing to
16 individuals with “active” immigration cases, Defendants failed to adequately consider
17 how other individuals subjected to the Protocols were deprived of full and fair
18 hearings and their right to legal representation. Defendants also failed to consider
19 Individual Plaintiffs’ inability to meaningfully access legal representation to assist
20 them in seeking to reopen their asylum proceedings, as well as the risks inherent in
21 stranding asylum seekers in untenable conditions outside the United States.

22 257. By stranding Organizational Plaintiffs’ clients and potential clients with
23 final orders of removal outside the United States in a manner that obstructs access to
24 all components of the U.S. immigration court system, the Reopened Case Policy
25 interferes with Organizational Plaintiffs’ ability to deliver meaningful legal assistance
26 to individuals seeking to reopen their cases as provided for under the INA. Defendants
27 failed to adequately consider that fact when they implemented the Reopened Case
28 Policy.

1 258. Defendants’ Reopened Case Policy is a final agency action that is
2 reviewable under 5 U.S.C. §§ 702 and 706.

3 259. Defendants’ violation of the APA causes ongoing harm to Individual
4 Plaintiffs and Organizational Plaintiffs.

5 260. Plaintiffs, who have no adequate alternative remedy at law, seek
6 immediate review under the APA and injunctive relief.

7 **THIRD CLAIM FOR RELIEF**

8 **ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A)**

9 **VIOLATION OF THE RIGHT TO SEEK REOPENING OF**

10 **ASYLUM PROCEEDINGS CLOSED *IN ABSENTIA*,**

11 **8 U.S.C. § 1229a(b)(5)(C)**

12 **(INDIVIDUAL PLAINTIFFS JAQUELINE DOE AND CHEPO DOE, *IN***

13 ***ABSENTIA* SUBCLASS, AND ORGANIZATIONAL PLAINTIFFS AGAINST**

14 **ALL DEFENDANTS)**

15 261. Plaintiffs reallege and incorporate by reference each and every allegation
16 contained in the preceding paragraphs as if set forth fully herein.

17 262. Section 240(b) of the INA grants noncitizens the right to file a motion to
18 reopen proceedings that were closed *in absentia* if the respondent’s failure to appear
19 was due to “exceptional circumstances” or lack of notice. 8 U.S.C. § 1229a(b)(5)(C).
20 A motion based on exceptional circumstances must be filed within 180 days of the
21 removal order; a motion based on lack of notice may be filed at any time. 8 U.S.C. §§
22 1229a(b)(5)(C)(i)-(ii). Where a motion to reopen is jointly filed by both parties, the
23 time and numerical limitations on the motion do not apply. 8 C.F.R. §
24 1003.23(b)(4)(iv) (addressing joint motions to reopen before the immigration court.

25 263. Under the INA, a motion to reopen may also be filed at any time where
26 the noncitizen demonstrates that they were “in Federal or State custody and the failure
27 to appear was through no fault of [their own].” 8 U.S.C. § 1229a(b)(5)(C)(ii).

28

1 264. By implementing the Protocols, Defendants detained Individual Plaintiffs
2 Jaqueline Doe and Chepo Doe and *In Absentia* Subclass members in life-threatening
3 conditions in Mexico, resulting in their failure to appear for their hearings. Through
4 the Reopened Case Policy, Defendants now prevent Individual Plaintiffs Jaqueline
5 Doe and Chepo Doe and *In Absentia* Subclass members from exercising their
6 statutory right to seek reopening of their *in absentia* removal orders by leaving them
7 stranded in untenable conditions outside the United States that limit their access to
8 legal representation and to the legal resources that are necessary to file a motion to
9 reopen.

10 265. Under Defendants’ Reopened Case Policy, Individual Plaintiffs may
11 pursue their asylum claims from within the United States only if reopening is granted.
12 By directing that individuals subjected to MPP “who may be eligible for processing
13 should stay where they are currently located,” Defendants continue to strand these
14 individuals outside the United States and deprive them of access to legal assistance.

15 266. Defendants’ Reopened Case Policy is not in accordance with law or is in
16 excess of Defendants’ statutory authority because it deprives Individual Plaintiffs of
17 their right to seek reopening of their asylum proceedings, as guaranteed by the INA.

18 267. Defendants’ Reopened Case Policy is also arbitrary and capricious or an
19 abuse of discretion because Defendants failed to consider important aspects of the
20 problem that gave rise to this policy. In particular, by limiting access to processing to
21 individuals with “active” immigration cases, Defendants failed to adequately consider
22 how other individuals subjected to the Protocols were deprived of full and fair
23 hearings and their right to legal representation. Defendants also failed to consider
24 Individual Plaintiffs’ inability to meaningfully access legal representation to assist
25 them in seeking to reopen their asylum proceedings, as well as the risks inherent in
26 leaving asylum seekers stranded in untenable conditions outside the United States.

27 268. By stranding Organizational Plaintiffs’ clients and potential clients with
28 final orders of removal outside the United States in a manner that obstructs access to

1 all components of the U.S. immigration court system, the Reopened Case Policy
2 interferes with Organizational Plaintiffs' ability to deliver meaningful legal assistance
3 to individuals seeking to reopen their *in absentia* removal orders as provided for under
4 the INA. Defendants failed to adequately consider that fact when they implemented
5 the Reopened Case Policy.

6 269. Defendants' Reopened Case Policy is a final agency action that is
7 reviewable under 5 U.S.C. §§ 702 and 706.

8 270. Defendants' violation of the APA causes ongoing harm to Individual
9 Plaintiffs and Organizational Plaintiffs.

10 271. Plaintiffs, who have no adequate alternative remedy at law, seek
11 immediate review under the APA and injunctive relief.

12 **FOURTH CLAIM FOR RELIEF**

13 **ADMINISTRATIVE PROCEDURE ACT, § 706(2)(A)**

14 **ACCESS TO COUNSEL FOR INDIVIDUAL PLAINTIFFS**

15 **(INDIVIDUAL PLAINTIFFS AGAINST ALL DEFENDANTS)**

16 272. Plaintiffs reallege and incorporate by reference each and every allegation
17 contained in the preceding paragraphs as if set forth fully herein.

18 273. The Migrant Protection Protocols subverted and violated the right to
19 counsel by trapping individuals in conditions that obstructed their access to legal
20 representation.

21 274. The Protocols thereby violated Individual Plaintiffs' right to counsel
22 under the INA and were not in accordance with law or were in excess of statutory
23 authority under 5 U.S.C. § 706(2)(A).

24 275. The Protocols were also arbitrary and capricious and an abuse of
25 discretion because, in adopting the Protocols, Defendants failed to consider the
26 obstacles that individuals subjected to MPP would face in accessing and
27 communicating with legal representatives in the United States; the obstacles that
28 individuals subjected to MPP would face in accessing food, shelter, health care, and

1 other basic needs; and the effect those obstacles would have in exacerbating such
2 individuals' inability to meaningfully access legal representation.

3 276. Defendants' wind-down of the Protocols has not rectified these violations
4 of the rights of Individual Plaintiffs. Defendants' Reopened Case Policy keeps
5 Individual Plaintiffs stranded outside the United States and continues to obstruct their
6 access to legal representation.

7 277. Defendants' Reopened Case Policy is not in accordance with law because
8 the INA provides noncitizens who are seeking asylum, including noncitizens seeking
9 to reopen their immigration proceedings, with a right to counsel. *See* 8 U.S.C. §§
10 1158(d)(4), 1229a(b)(4)(A), 1362.

11 278. Defendants' Reopened Case Policy imposes systemic obstacles to
12 Individual Plaintiffs' ability to access legal representation, the cumulative effect of
13 which is tantamount to a denial of counsel. *See* 8 U.S.C. §§ 1158, 1229a(b)(4)(A),
14 1362.

15 279. Defendants' Reopened Case Policy is arbitrary and capricious or an abuse
16 of discretion because it arbitrarily limits access to processing to individuals with
17 "active" immigration cases. The Reopened Case Policy fails to adequately consider
18 how ongoing lack of access to legal representation for individuals stranded outside
19 the United States impedes their ability to seek reopening of their cases and obstructs
20 their access to the U.S. asylum system.

21 280. Defendants' Reopened Case Policy is not in accordance with law or is
22 arbitrary and capricious.

23 281. Defendants' Reopened Case Policy constitutes a final agency action that
24 is reviewable under 5 U.S.C. §§ 702 and 706. Defendants' violation of the APA
25 causes ongoing and imminent harm to Individual Plaintiffs.

26 282. Individual Plaintiffs have no adequate alternative remedy at law and
27 therefore seek immediate review under the APA and injunctive relief.
28

FIFTH CLAIM FOR RELIEF

ADMINISTRATIVE PROCEDURE ACT § 706(2)(A)

VIOLATION OF 8 U.S.C. §§ 1158, 1229a(b)(4), 1362

(ORGANIZATIONAL PLAINTIFFS AGAINST ALL DEFENDANTS)

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5 283. Plaintiffs reallege and incorporate by reference each and every allegation
6 contained in the preceding paragraphs as if set forth fully herein.

7 284. Defendants' Reopened Case Policy is arbitrary and capricious because, in
8 adopting it, Defendants failed to consider the obstacles that Organizational Plaintiffs
9 would face in safely meeting and effectively communicating with clients and potential
10 clients who were subjected to MPP and are seeking to reopen their immigration
11 proceedings from outside the United States. Defendants' Reopened Case Policy is not
12 in accordance with law or is in excess of Defendants' statutory authority because it
13 interferes with Organizational Plaintiffs' ability to deliver meaningful pro bono legal
14 assistance, as required under the INA, to individual clients and potential clients who
15 were subjected to MPP.

16 285. By implementing the Reopened Case Policy, Defendants have acted in a
17 manner that is not in accordance with law and is in excess of their statutorily
18 prescribed authority in violation of § 706(2) of the APA. In addition, Defendants have
19 frustrated Organizational Plaintiffs' core missions, impaired their efforts, and forced
20 them to divert substantial resources away from existing programs.

21 286. Defendants' Reopened Case Policy constitutes a final agency action that
22 is reviewable under 5 U.S.C. §§ 702 and 706. Defendants' violation of the APA
23 causes ongoing harm to the Organizational Plaintiffs.

24 287. Organizational Plaintiffs have no adequate alternative remedy at law and
25 therefore seek immediate review under the APA and injunctive relief.
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SIXTH CLAIM FOR RELIEF
VIOLATION OF FIFTH AMENDMENT DUE PROCESS CLAUSE
RIGHT TO FULL AND FAIR HEARING
(INDIVIDUAL PLAINTIFFS AGAINST ALL DEFENDANTS)

288. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

289. The Due Process Clause of the Fifth Amendment guarantees noncitizens the right to a full and fair hearing in their removal cases. *See, e.g., Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000).

290. The Due Process Clause also guarantees noncitizens the right to effective assistance of counsel in their removal proceedings at no cost to the government. *Ray v. Gonzales*, 439 F.3d 582, 587 (9th Cir. 2006) (stating that “this Circuit has long recognized that an alien’s due process right to obtain counsel in immigration matters also includes a right to *competent representation* . . . due process requires more than the formal *availability* of counsel”) (emphasis in original); *Biwot*, 403 F.3d at 1098 (“The right to counsel in immigration proceedings is rooted in the Due Process Clause . . .”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (stating that noncitizens’ “fundamental” right to counsel “must be respected in substance as well as in name”).

291. The Migrant Protection Protocols imposed systemic obstacles to Individual Plaintiffs’ Fifth Amendment rights by obstructing their meaningful access to legal representation.

292. The Protocols also imposed systemic obstacles to Individual Plaintiffs’ Fifth Amendment rights by obstructing their ability to collect evidence and to communicate with potential witnesses and experts, as necessary to meaningfully prepare and present their claims for relief.

293. Defendants’ Reopened Case Policy perpetuates these obstacles by requiring individuals without “active” cases to reopen their cases before being

1 processed into the United States, leaving them stranded outside the United States in
2 untenable conditions. The Reopened Case Policy thus continues to undermine these
3 individuals' Fifth Amendment rights to counsel and to present the evidence necessary
4 to seek reopening of their immigration proceedings and to access the U.S. asylum
5 system.

6 294. Defendants' violations of the Due Process Clause cause ongoing harm to
7 Individual Plaintiffs.

8 **SEVENTH CLAIM FOR RELIEF**

9 **VIOLATION OF THE FIRST AMENDMENT**

10 **(ALL INDIVIDUAL PLAINTIFFS AGAINST ALL DEFENDANTS)**

11 295. Plaintiffs reallege and incorporate by reference each and every allegation
12 contained in the preceding paragraphs as if set forth fully herein.

13 296. Defendants' Reopened Case Policy and its implementation interfere with
14 and obstruct Individual Plaintiffs' and proposed class members' First Amendment
15 rights to hire and consult an attorney and petition the courts.

16 297. "[T]he 'right to hire and consult an attorney is protected by the First
17 Amendment's guarantee of freedom of speech, association and petition.'" *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005), *as*
18 *amended on denial of reh'g* (9th Cir. July 21, 2005) (quoting *Denius v. Dunlap*, 209
19 F.3d 944, 953 (7th Cir. 2000)). The First Amendment protects the efforts of
20 individuals to seek the assistance of attorneys and petition the courts, including with
21 respect to immigration proceedings.
22

23 298. The Protocols and their implementation forced individuals subjected to
24 them, including Individual Plaintiffs and proposed class members, to return to
25 Mexico, and prevented them from returning to the United States except under limited
26 circumstances. Moreover, prior to Defendants' termination of MPP, Individual
27 Plaintiffs and proposed class members were left with, at most, a single hour before
28 court appearances, which often was not available in practice and, in any case, was

1 insufficient to obtain comprehensive advice regarding the legal issues surrounding
2 their asylum claims. *Pro se* Individual Plaintiffs Jaqueline Doe, Victoria Doe, Fredy
3 Doe, Ariana Doe, and Francisco Doe, like many proposed class members, were
4 denied even that single hour to seek legal advice. The Protocols and their
5 implementation thus restricted communication with legal service providers while
6 Individual Plaintiffs and proposed class members were in the United States, with the
7 result that nearly all meaningful legal communication had to occur while they were
8 in Mexico.

9 299. This exclusion from the United States and its accompanying harms have
10 been perpetuated by the Reopened Case Policy, which prevents Individual Plaintiffs
11 and proposed class members from being processed into the United States unless and
12 until their cases have been reopened. Forced to pursue their cases from outside the
13 United States, Individual Plaintiffs and proposed class members have been and
14 continue to be unable to communicate effectively with attorneys in the United States.
15 Due to health, safety, and resource constraints, U.S.-based attorneys cannot meet in
16 person with Individual Plaintiffs and proposed class members on a regular basis.
17 Communication by telephone or internet requires substantial time and funds and is
18 unreliable at best.

19 300. Defendants' Reopened Case Policy and its implementation thus
20 necessitate that nearly all legal communication occur while Individual Plaintiffs and
21 proposed class members are outside the United States, where meaningful legal
22 communication is functionally impossible or possible only at great expense and/or
23 substantial risk. Individual Plaintiffs and proposed class members lack viable
24 meaningful alternative channels, let alone ample alternative channels, for seeking the
25 assistance of counsel and petitioning the courts.

26 301. Accordingly, Defendants' Reopened Case Policy and its implementation
27 restrict the time, place, and manner in which Individual Plaintiffs and proposed class
28 members may exercise their First Amendment rights to hire and consult an attorney

1 and petition the courts. Defendants’ policy therefore places unreasonable restrictions
2 on Individual Plaintiffs’ and proposed class members’ constitutionally protected right
3 to seek the assistance of attorneys and petition the courts and is unconstitutional.

4 302. Individual Plaintiffs and proposed class members have suffered and
5 continue to suffer ongoing injury as a result of Defendants’ violation of their
6 constitutional right to hire and consult an attorney and petition the courts and are thus
7 entitled to declaratory and injunctive relief.

8 **EIGHTH CLAIM FOR RELIEF**

9 **VIOLATION OF FIRST AMENDMENT RIGHTS**

10 **TO ADVISE POTENTIAL AND EXISTING CLIENTS**

11 **(ORGANIZATIONAL PLAINTIFFS AGAINST ALL DEFENDANTS)**

12 303. Plaintiffs reallege and incorporate by reference each and every allegation
13 contained in the preceding paragraphs as if set forth fully herein.

14 304. Defendants’ Reopened Case Policy and its implementation interfere with
15 and obstruct Organizational Plaintiffs’ First Amendment rights to advise potential and
16 existing clients.

17 305. The First Amendment protects legal services providers from government
18 interference when they are “advocating lawful means of vindicating legal rights.”
19 *NAACP v. Button*, 371 U.S. 415, 437 (1963). Pro bono legal assistance to immigrants
20 in removal proceedings falls within this zone of protection. *Nw. Immigrant Rights*
21 *Project v. Sessions*, No. C17-716 RAJ, 2017 WL 3189032 at *3 (W.D. Wash. July
22 27, 2017).

23 306. The protection afforded by the First Amendment extends to advising
24 potential clients of their rights. *See, e.g., In re Primus*, 436 U.S. 412, 431–32 (1978);
25 *Nw. Immigrant Rights Project*, 2017 WL 3189032, at **2–3.

26 307. The protection afforded by the First Amendment also includes providing
27 legal assistance to existing clients. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S.
28

1 533 (2001); *In re Primus*, 436 U.S. 412; *Button*, 371 U.S. 415; *Torres v. DHS*, 411 F.
2 Supp. 3d 1036 (C.D. Cal. 2019).

3 308. By advising, assisting, and consulting with potential and existing clients,
4 attorneys disseminate important legal information, and the “creation and
5 dissemination of information are speech within the meaning of the First Amendment.”
6 *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

7 309. The Migrant Protection Protocols trapped all potential and existing clients
8 in Mexico and prevented them from returning to the United States except under
9 limited circumstances. Prior to the Termination Directive, the Protocols and their
10 implementation limited the time available for legal communication in the United
11 States to communication with already represented individuals; the Protocols and their
12 implementation prohibited legal communication with unrepresented potential clients.
13 For their existing clients, Organizational Plaintiffs were left, at most, with a single
14 hour before court appearances, which often was not available in practice and, in any
15 case, was insufficient to provide comprehensive advice regarding the legal issues
16 surrounding their clients’ asylum claims. At the very least, Organizational Plaintiffs
17 lacked viable alternative channels to advise their existing clients. As a result of these
18 restrictions, nearly all meaningful legal communication between Organizational
19 Plaintiffs and their clients had to occur while the clients were in Mexico.

20 310. The Protocols and their implementation also prevented Organizational
21 Plaintiffs from advising potential clients regarding Organizational Plaintiffs’
22 viewpoints regarding the rights of individuals subjected to MPP.

23 311. Defendants’ Reopened Case Policy and its implementation have
24 continued to restrict Organizational Plaintiffs’ ability to meaningfully communicate
25 with potential and existing clients while those clients are outside the United States.
26 The Protocols’ forced exclusion from the United States and its harms have been
27 perpetuated by the Reopened Case Policy, which prevents individuals subjected to it,
28

1 including Organizational Plaintiffs' potential and existing clients, from being
2 processed into the United States unless and until their cases have been reopened.

3 312. Defendants' Reopened Case Policy and its implementation thus force
4 nearly all legal communication to occur while Organizational Plaintiffs' potential and
5 existing clients are outside the United States, where Organizational Plaintiffs are
6 unable to meaningfully communicate with them or are able to do so only at great
7 expense or at substantial risk.

8 313. Defendants' Reopened Case Policy and its implementation therefore
9 constitute unreasonable restrictions on Organizational Plaintiffs' constitutionally
10 protected right to solicit and advise potential clients. Organizational Plaintiffs lack
11 viable alternative channels to exercise their First Amendment rights to solicit and
12 advise potential clients. Accordingly, Defendants' policies and their implementation
13 violate Organizational Plaintiffs' First Amendment rights to solicit and advise
14 potential clients and are unconstitutional.

15 314. Organizational Plaintiffs have suffered and continue to suffer ongoing
16 injury as a result of Defendants' violation of Organizational Plaintiffs' constitutional
17 rights to advise potential and existing clients and are entitled to declaratory and
18 injunctive relief to avoid any further injury.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiffs request that this Court:

- 21 a) Certify the following classes of noncitizens who were subjected to
22 MPP and remain outside the United States:
- 23 1. Reopened Case Class: All individuals subjected to MPP who remain
24 outside the United States, received a final order of removal in MPP
25 proceedings, and whose cases have not been reopened and are not
26 currently pending review before a federal circuit court of appeals.
 - 27 2. *In Absentia* Subclass: All individuals subjected to MPP who remain
28 outside the United States, received an *in absentia* order of removal in

1 MPP proceedings, and whose cases have not been reopened and are
2 not currently pending review before a federal circuit court of appeals.

3 3. Final Order Subclass: All individuals subjected to MPP who remain
4 outside the United States, received a final order of removal for reasons
5 other than failure to appear for an immigration court hearing, and
6 whose cases have not been reopened and are not currently pending
7 review before a federal circuit court of appeals.

8 b) Name all Individual Plaintiffs as representatives of the Reopened
9 Case Class; Jaqueline Doe and Chepo Doe as representatives of the *In Absentia*
10 Subclass; and Victoria Doe, Fredy Doe, Ariana Doe, and Francisco Doe as
11 representatives of the Final Order Subclass; and appoint Plaintiffs' counsel as
12 class counsel;

13 c) Declare that MPP as implemented and the Reopened Case Policy,
14 individually and collectively, violate federal statutes and the U.S. Constitution;

15 d) Enjoin Defendants, their subordinates, agents, employees, and all
16 others acting in concert with them from subjecting Plaintiffs and class members
17 to the Reopened Case Policy, and issue an injunction sufficient to remedy the
18 violations of the rights of both the Individual and Organizational Plaintiffs and
19 class members;

20 e) Allow each of the Individual Plaintiffs and class members to return
21 to the United States, with appropriate precautionary public health measures, for
22 a period sufficient to enable them to seek legal representation, prepare and file
23 their motions to reopen, and pursue their asylum claims from inside the United
24 States if such motions are granted;

25 f) Order Defendants to give adequate notice of the phased wind-down
26 process to all individuals formerly subjected to MPP;

27 g) Order Defendants to facilitate the provision of legal services by
28 Organizational Plaintiffs to individuals subjected to MPP still outside the United

1 States, including class members, for the purpose of informing them of the wind-
2 down process and U.S. immigration law and procedures;

3 h) Award Plaintiffs all costs incurred in maintaining this action,
4 including reasonable attorneys' fees under the Equal Access to Justice Act, as
5 amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified
6 by law; and

7 i) Grant such further relief as this Court deems just and proper.
8
9

10 Dated: August 13, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

11

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17 Dated: August 13, 2021

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23 Dated: August 13, 2021

NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD

24

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28

1 Dated: August 13, 2021

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