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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

IMMIGRANT DEFENDERS LAW CENTER, a California corporation, et al,

Plaintiff,

v.

ALEJANDRO MAYORKAS, Secretary, et al.,

Defendants.

Case No. 2:20-cv-09893 JGB (SHKx)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Hon. Jesus G. Bernal

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

On November 2, 2021, Plaintiffs Jaqueline Doe, Victoria Doe, Chepo Doe, Fredy Doe, Ariana Doe, and Francisco Doe, who were previously enrolled in the Migrant Protection Protocols ("MPP") adopted in 2019,[1] filed an ex parte application seeking a mandatory injunction from this Court in the form of a temporary restraining order paroling them into the United States so they can pursue their claims for asylum. (*See generally* Dkt. 157.)[2] Plaintiffs base their application on the following claims for relief in their First Amended Complaint ("FAC") (Dkt. 143): (1) first claim, under the Administrative Procedure Act ("APA"), alleging a violation of their right to apply for asylum; (2) fourth claim, under the APA, alleging a violation of their right to access counsel; and (3) sixth claim, under the Fifth Amendment Due Process Clause, alleging a violation of their right to a full and fair hearing in their removal cases. Plaintiffs all have final orders of removal, with Chepo Doe having been issued an *in absentia* removal order, and Ariana Doe and Francisco Doe having been ordered removed through in-

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[1] The Department of Homeland Security ("DHS") suspended new enrollments in MPP on January 20, 2021, and on June 1, 2021, the Secretary of Homeland Security issued a memorandum terminating MPP. On August 13, 2021, a federal district court vacated the June 1 termination and ordered DHS to re-implement MPP in good faith. DHS is appealing that order while also beginning the process necessary to re-implement MPP in good faith, as required by the court. On October 29, 2021, after an extensive review of the program, the Secretary of Homeland Security issued a new memorandum terminating MPP, to take effect if and when the district court's August 13, 2021 order is vacated or otherwise no longer compels DHS to re-implement MPP in good faith. As described in the Secretary's October 29, 2021, termination memorandum, the Secretary concluded that the program, as previously implemented, imposed "substantial and unjustifiable costs" on individuals returned to Mexico to await their court hearing, and that "the benefits of MPP are far outweighed by the costs of continuing to use the program on a programmatic basis, in whatever form." The relevant history and a fuller explanation of the basis for the Secretary's determination is set forth in DHS's October 29, 2021 termination memo ("Termination Memo") and accompanying explanation memo ("Explanation Memo"). *See* https://www.dhs.gov/publication/migrant-protection-protocols-termination-memo. As a matter of policy, Defendants do not defend MPP or its prior implementation.

[2] Since the filing of the TRO application, all of the Plaintiffs have filed humanitarian parole applications with DHS. The applications of Victoria Doe, Fredy Doe, and Jaqueline Doe have been granted, and therefore their request for a TRO is now moot. The parole applications of Ariana Doe and Francisco Doe were denied. The parole application of Chepo Doe is still pending. For purposes of the remainder of this opposition, Defendants will refer to Ariana Doe, Francisco Doe, and Chepo Doe as the "Plaintiffs" who continue to seek relief from the Court.

person removal proceedings. (Dkt. 157-1 at 21.)

Plaintiffs' application for a TRO must be denied because they have failed to establish that the law and facts "clearly favor" their positions, which is what is required for them to be entitled to a mandatory injunction. Plaintiffs are raising challenges related to their completed removal proceedings. However, none of them have properly exhausted the administrative remedies available to them to challenge any deficiencies that arose from their removal proceedings. Rather than proceeding in this Court alleging APA claims and constitutional claims, Plaintiffs must file motions to reopen with the Board of Immigration Appeals ("Board") or petitions for review with the Ninth Circuit. Those venues are the proper locations to raise the issues that are ultimately specific to each plaintiff and which deserve individualized review.

Even if Plaintiffs could establish that the law and facts clearly favor their positions, this Court lacks the authority to grant the TRO that Plaintiffs request. The decision whether to parole any particular noncitizen into the United States is a matter exclusively delegated to the Executive Branch. As inadmissible noncitizens who have been returned to Mexico, their sole basis for reentry into the United States is through parole under 8 U.S.C. § 1182(d)(5)(A), which grants the discretionary parole authority to the Secretary of DHS and not the federal courts.

Therefore, Plaintiffs have failed to meet standard required for the issuance of a mandatory injunction, and as a result, their TRO application should be denied.

II. LEGAL BACKGROUND

A. Relevant Statutes

The contiguous return authority in 8 U.S.C. § 1225(b)(2)(C) authorizes DHS to temporarily return certain applicants for admission arriving on land (whether or not at a designated port of entry) from Mexico or Canada to those countries "during the pendency of section 1229a removal proceedings."[3]

[3] In their TRO application, Plaintiffs improperly characterize their return to Mexico as "detention." (Dkt. 157-1 at 9.) The now-terminated MPP directed the

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In 1952, Congress enacted 8 U.S.C. § 1362 as part of the Immigration and Nationality Act ("INA"), which provides that in removal proceedings[4] and appeals therefrom, noncitizens have the privilege of being represented, at no expense to the Government, by counsel. *See* P.L. 82-414, 66 Stat. 163, 235.

In 1996, Congress enacted the following three statutes:

- 8 U.S.C. § 1158(d)(4), which provides that when noncitizens file applications for asylum, they are to be advised of the privilege of being represented by counsel and provided a list of persons who have indicated their availability to represent noncitizens in asylum proceedings on a pro bono basis;
- 8 U.S.C. § 1229a(b)(4), which provides noncitizens in removal proceedings with (A) the privilege of being represented, at no expense to the Government, by counsel of their choosing, (B) a reasonable opportunity to examine evidence, present evidence, and cross-examine witnesses, and (C) a complete record of the testimony and evidence; and
- 8 U.S.C. § 1225(b)(2)(C), which permits the return of certain noncitizens who arrive on land (whether or not at a designated port of entry) from a contiguous foreign territory to that territory pending their removal proceedings.

See P.L. 104-208, 110 Stat. 3009.

B. Procedure for Challenging Issues Arising from Removal Proceedings

Generally, when noncitizens are ordered removed from the United States, they

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"return" of certain applicants for admission who arrive on land from Mexico. *See Innovation L. Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019). Under MPP, individuals awaited their removal proceedings in Mexico, and were not detained. Plaintiffs' citation to *Doe v. McAleenan*, 415 F. Supp. 3d 971, 976 (S.D. Cal. 2019) is therefore inapposite because in that case, the habeas petitioners were "being held in CBP detention facilities." *See also K.M.H.C. v. Barr*, 437 F. Supp. 3d 786, 791–92 (S.D. Cal. 2020) ("The Court concludes that Petitioner has failed to establish that she is in custody for habeas purposes while waiting in Mexico pursuant to the MPP.")

[4] As originally enacted, the statute referred to "exclusion or deportation proceedings." When Congress replaced such proceedings with removal proceedings in 1996, it amended the language of Section 1362.

may challenge their removal orders by filing a petition for review in the relevant circuit court of appeals within 30 days of the issuance of the final order of removal. 8 U.S.C. § 1252(b). Noncitizens may also move to reopen their removal proceedings within 90 days of entry of the final removal order based on new, material facts that could not have been discovered or presented at the original removal hearing. *Cuenca v. Barr*, 956 F.3d 1079, 1082 (9th Cir. 2020) (citing 8 U.S.C. § 1229a(c)(7)). Noncitizens ordered removed *in absentia* may file a motion to reopen "within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances." *Cui v. Garland*, 13 F. 4th 991, 996 (9th Cir. 2021) (citing 8 U.S.C. § 1229a(b)(5)(C)(i)). Noncitizens who can show that they never received notice of their hearings, may seek to rescind a removal order entered *in absentia* by filing a motion to reopen "at any time." *Miller v. Sessions*, 889 F.3d 998, 999 (9th Cir. 2018) (citing 8 U.S.C. § 1229a(b)(5)(C)(ii)).

The INA requires that noncitizens raise challenges to their removal orders to the Board before filing any challenge in federal court. 8 U.S.C. § 1252(d). Accordingly, federal courts lack jurisdiction to review any issue not first presented to the Board. *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 893 (9th Cir. 2021); *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (citing *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004)). In addition, where a claim could have been raised to the Board through a motion to reopen but was not, that claims is not exhausted and may not be raised in any court. *See, e.g.*, *Singh v. Holder*, 538 F. App'x 784 (9th Cir. 2013) (citing *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010)); *accord Singh v. Napolitano*, 649 F.3d 899, 903 (9th Cir. 2011) ("Singh did not exhaust his available administrative remedies because he did not first file a motion to reopen with the Board before bringing his habeas petition in district court");[5] *Mencia-Medina v. Garland*, 6 F.4th 846, 849 (8th Cir. 2021) ("[W]e

[5] In 2007, the Ninth Circuit held that a noncitizen need not file a motion to reopen with the Board to raise an ineffective assistance claim if that claim arose after issuance of a final order of removal. *See Singh v. Gonzales*, 499 F.3d 969, 975–76 (9th Cir. 2007). However, that decision was premised on the conclusion that a motion to reopen

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conclude that [Petitioner] did not exhaust his claim that the Board engaged in improper fact-finding. He did not move to reopen or reconsider on that basis, so the issue was never presented to the Board."); *Cruz Rodriguez v. Garland*, 993 F.3d 340, 345 (5th Cir. 2021) ("If an issue stems from the B[oard's] act of decision-making, a petitioner must first raise it in a motion to reopen or reconsider. And the goals of the exhaustion requirement would certainly be frustrated if the B[oard] was not given the opportunity to address immigration issues in the first instance.").

In general, courts recognize that noncitizens can pursue immigration cases, such as a petition for review or a motion to reopen, from abroad, ever after the noncitizens have been ordered removed. *See Nken v. Holder*, 556 U.S. 418, 435, (2009); *see also Toor v. Lynch*, 789 F.3d 1055, 1060 (9th Cir. 2015) ("statutory right to file a motion to reopen and a motion to reconsider is *not* limited by whether the individual has departed the United States") (emphasis in original); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) ("[T]he physical removal of a petitioner by the United States does not preclude the petitioner from pursuing a motion to reopen.") (quoting *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010)).

III. STANDARD OF REVIEW

A temporary restraining order, as a form of preliminary injunctive relief, "is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The moving party has the burden of persuasion. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). To obtain injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving

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could not be used to raise an ineffective assistance claim based on the law as it existed at the time. *See Singh*, 649 F.3d at 900. In 2011, the Ninth Circuit noted that the Attorney General had subsequently decided that the Board "has jurisdiction to consider deficient performance claims even where they are predicated on lawyer conduct that occurred after a final order of removal has been entered." *Id.* (citing *Matter of Compean*, 24 I. & N. Dec. 710 (2009)). As a result, in 2011, the Ninth Circuit held that to properly exhaust their administrative remedies before proceeding to court, noncitizens were required to file motions to reopen with the Board. *Singh*, 649 F.3d at 901.

party; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20; *see also Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 (9th Cir. 2001) (in general, the showing required for a temporary restraining order and a preliminary injunction are the same).

Under the Ninth Circuit's "sliding scale" approach to preliminary injunctions, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In all cases, a preliminary injunction can issue only if the plaintiff "establish[es] that irreparable harm is likely, not just possible." *Id.* (citing *Winter*, 555 U.S. at 22).

However, a plaintiff who seeks a mandatory injunction ordering the defendant to take action "must establish that the law and facts clearly favor [its] position, not simply that [it] is likely to succeed." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (when a party requests a "mandatory injunction" the standard is "doubly demanding"); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014). A mandatory injunction goes beyond simply maintaining the status quo and is particularly disfavored. *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). Mandatory preliminary injunctive relief should not be issued unless the facts and law clearly favor the moving party. *Id.*; *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) (mandatory injunctions should not issue in "doubtful cases"). In general, mandatory injunctions "are not granted unless extreme or very serious damage will result." *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (citation omitted).

IV. ARGUMENT

A. Plaintiffs Have Not Established That the Law and Facts Clearly Favor the Relief They Have Requested in Their TRO Application

1. Plaintiffs have not exhausted their claims, and so 8 U.S.C. § 1252(d) bars jurisdiction in any Court

The INA forecloses jurisdiction in any federal court of any claim challenging a noncitizen's removal order or issues relating to that order if the noncitizen does not first raise those claims to the Board. 8 U.S.C. § 1252(d). In this Circuit, this exhaustion requirement is jurisdictional. *Vasquez-Rodriguez*, 7 F.4th at 893; *Barron*, 358 F.3d at 678.

Here, Plaintiffs have not filed motions to reopen or petitions for review after receiving their final orders of removal. (Baptista Decl. at ¶¶ 2, 4, 6, 7.) Ariana Doe and Francisco Doe have final orders of removal after appearing in-person at their removal proceedings. (Dkts. 157-8 at 4; 157-9 at 4.) To the extent they have not raised the claims they raised in this TRO application to the Board, those claims are barred under Section 1252(d). Even if they had raised those claims and timely filed a petition for review, those claims must be raised exclusively in the court of appeals. *See infra*. Chepo Doe received an order of removal *in absentia*. (Dkt. 157-1 at 21.) The INA provides an express means of challenging orders of removal issued in absentia: by filing a motion to reopen with the Board challenging the underlying order. 8 U.S.C. § 1229a(c)(7); *see Cuenca*, 956 F.3d at 1082.

As the Ninth Circuit has held, even where the alleged injuries complained of arise *after* issuance of a final order of removal, because the motion to reopen process is available, failure to file a motion to reopen means an individual has not exhausted his claims. *Singh*, 649 F.3d at 903. ("Singh did not exhaust his available administrative remedies because he did not first file a motion to reopen with the Board before bringing his habeas petition in district court"). Accordingly, Plaintiffs have either failed to exhaust their claims in the correct forum or have failed to file an appeal in the correct

forum, and so this Court lacks jurisdiction over those claims.

To the extent Plaintiffs might suggest they need not exhaust their remedies based on some exception to exhaustion, they are mistaken, for the reasons given below. But more importantly, such an argument is not relevant. Even if some exception to exhaustion applied, it would not permit suit in *this* Court. Instead, it would excuse Plaintiffs' failure to raise their claims before the Board only in the relevant *court of appeals* to which their claims must be raised on a petition for review. *See, e.g.*, *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) (describing narrow exception to exhaustion for "constitutional challenges that are not within the competence of administrative agencies to decide" and for arguments that are "so entirely foreclosed . . . that no remedies [are] available as of right" from the agency"). If any exception were to apply, it would only mean Plaintiffs can raise their claims in the court of appeals, not that they may file suit in this Court and circumvent the exhaustion requirement entirely.

2. <u>Pursuant to 8 U.S.C. § 1252(b)(9), this Court lacks jurisdiction over Plaintiffs' claims that arise from their removal proceedings</u>

Even if Plaintiffs have exhausted their remedies or some exception to exhaustion might apply, other provisions of the INA bar jurisdiction in this Court and channel review into the courts of appeals. Fundamentally, Plaintiffs are claiming that their removal orders were defective because the orders were entered without proper observance of their statutory rights of access to counsel and to apply for asylum, and in violation of their constitutional right to due process. This Court lacks authority to grant relief on those claims because all of those claims could have been, and must be, pursued through a petition for review of a removal order filed in the court of appeals.

8 U.S.C. § 1252(b)(9) states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove [a noncitizen] from the

> United States under this subchapter shall be available only in judicial review of a final order under this section.

Section 1252(b)(9) is an "unmistakable zipper clause" that channels judicial review of "all questions of law and fact," including both "constitutional and statutory" challenges of "decisions and actions leading up to or consequent upon final orders of deportation," and "non-final order[s]" into one proceeding exclusively before a court of appeals through a petition for review, following exhaustion of administrative remedies. *Reno v. Am.-Arab Anti Discrim. Comm.*, 525 U.S. 471, 482–83 (1999); *see J.E.F.M.*, 837 F.3d at 1031; *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (citing 8 U.S.C. § 1252(b)(9)); *see also E.O.H.C. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020) (barring statutory right-to-counsel claim); *Carranza v. U.S. Imm. & Customs Enforcement*, 2021 WL 1840418, at *3–7 (D.N.M. May 7, 2021) (Section 1252(b)(9) barred plaintiffs' claims related to right to counsel and for a full and fair hearing because those claims were tied to their removal proceedings).

Review of a final order of removal "includes all matters on which the validity of the final order is contingent." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 938 (1983)). "The rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review." *Id.* Accordingly, Section 1252(b)(9) means that "a noncitizen's various challenges arising from the removal proceeding must be consolidated in a petition for review and considered by the courts of appeals. By consolidating the issues arising from a final order of removal, eliminating review in the district courts, and supplying direct review in the courts of appeals, the Act expedites judicial review of final orders of removal." *Nasrallah*, 140 S. Ct. at 1690; *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020) ("Congress intended the zipper clause to consolidate judicial review of immigration proceedings into one action in the court of appeals.").

The reach of this provision is capacious. *See J.E.F.M.*, 837 F.3d at 1031 ("Section 1252(b)(9) is . . . breathtaking in scope and vise-like in grip and therefore swallows up

virtually all claims that are tied to removal proceedings."); *see also Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) ("By its terms, the provision aims to consolidate *all* questions of law and fact that arise from either an action or a proceeding brought in connection with the removal of [a noncitizen]." (internal quotations omitted)).

The broad reach of Section 1252(b)(9) is consistent with the Congressional purpose underpinning its enactment, namely to "streamline immigration proceedings" and "eliminate[] the previous initial step in obtaining judicial review—a suit in a District Court," so that "'review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding.'" *Singh*, 499 F.3d at 975–76 (quoting H.R. Rep. No. 109-72 at 173 (May 3, 2005)); *Aguilar*, 510 F.3d at 9 ("In enacting section 1252(b)(9), Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings.").

When claims by noncitizens, however framed, challenge the procedure and substance of an agency determination that is "inextricably linked" to the order of removal, those claims must be brought through petitions for review, which represent the sole avenue for review of removal orders. *Martinez*, 704 F.3d at 623 (citing 8 U.S.C. § 1252(a)(5)). Section 1252(b)(9) therefore consolidates review of "all questions of law" arising from removal proceedings into a petition for review, and does so "[n]otwithstanding any other provision of law." *See* 8 U.S.C. § 1252(a)(5) ("petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter"). Accordingly, "[t]aken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue – *whether legal or factual* – arising from any removal-related activity can be reviewed only through the [petition for review] process." *J.E.F.M.*, 837 F.3d at 1031 (emphasis added).

The Ninth Circuit has held that right to "counsel claims are not independent or ancillary to the removal proceedings. Rather these claims are bound up in and an

inextricable part of the administrative process." *J.E.F.M.*, 837 F.3d at 1033; *see also Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1048–49 (N.D. Cal. 2018) (noting that it does not require "an expansive interpretation of § 1252(b)(9)'s 'arising from' language to find that" "issues related to legal representation during removal proceedings" "fall squarely within the purview of the provision"). Other courts of appeals addressing the specific context of removal orders issued to individuals subject to MPP, including those issued *in absentia*, have reviewed similar claims in the petition for review context without issue. *See, e.g.*, *Luna-Garcia v. Barr*, 932 F.3d 285, 287 (5th Cir. 2019) (reviewing whether the plaintiff was entitled to reopen her removal proceedings based on claims that MPP impeded her ability to participate in her removal proceedings);

Right-to-counsel claims are "routinely" raised in petitions for review. *J.E.F.M.*, 837 F.3d at 1033; *see Mevlyudov v. Barr*, 821 F. App'x 737, 739 (9th Cir. 2020) (addressing claims related to asylum applications and fundamental fairness of a proceeding in a petition for review); *Zetino v. Holder*, 622 F.3d 1007, 1009 (9th Cir. 2010); *Larita-Martinez v. I.N.S.*, 220 F.3d 1092, 1095 (9th Cir. 2000) (reviewing whether hearing was fundamentally fair). The statutory provisions on which Plaintiffs base their claims explicitly tie the right to counsel to removal proceedings and claims for relief from removal. *See, e.g.*, 8 U.S.C § 1362 ("In any removal proceedings before an [IJ] . . . the person concerned shall have the privilege of being represented . . . by such counsel . . . as he shall choose.").

Given the foregoing, Plaintiffs' contention that their claims are not subject to Section 1252(b)(9) is untenable. Plaintiffs' claims in the FAC alleging a purported interference with their right to access counsel, ability to apply for asylum, and right to a full and fair hearing during their removal proceedings are "part and parcel," *J.E.F.M.*, 837 F.3d at 1033, "of the process by which their removability will be determined," *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018), and can accordingly only be raised in a petition for review. As in *J.E.F.M.*, Plaintiffs here are not alleging that they were denied access to their own counsel. Instead, as did the plaintiffs in *J.E.F.M.*, Plaintiffs

here allege claims related to their inability to retain counsel. (TRO at 15.) Therefore, Plaintiffs' allegation that their right to counsel is being infringed because they are not permitted to return to the United States to move to reopen their cases to then pursue their claims for asylum "possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned." *Aguilar*, 510 F.3d at 13; *see also Arroyo v. U.S. Dep't of Homeland Security*, 2019 WL 2912848, at *13 (C.D. Cal. 2019) (finding that claims of denial of access to counsel by unrepresented noncitizen plaintiffs were inextricably intertwined with the administrative process).

Contrary to Plaintiffs' contention, the INA provides an explicit and mandatory mechanism for moving to reopen cases. *See* 8 U.S.C. § 1229a(c)(7) And as the Ninth Circuit has held, the "statutory right to file a motion to reopen and a motion to reconsider is not limited by whether the individual has departed the United States." *Toor*, 789 F.3d at 1060. Put differently, the fact that Plaintiffs are not in the United States does not excuse them from filing a motion to reopen and to seek review of their claims in the appropriate court of appeals. Indeed, the Ninth Circuit has described a right to counsel claim as one that is "teed up for appellate review." *J.E.F.M.*, 837 F.3d at 1038. Such an issue may be pursued in the courts of appeal, even if it was not raised administratively, because the courts of appeals have the authority to consider issues that fall within a narrow exception for "constitutional challenges that are not within the competence of administrative agencies to decide" and for arguments that are "so entirely foreclosed ... that no remedies [are] available as of right" from the agency. *See J.E.F.M.*, 837 F.3d at 1038 (quoting *Barron*, 358 F.3d at 678; *Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014)).

Similarly, Plaintiffs' claims of infringement of their ability to apply for asylum directly affect the outcome of their removal proceedings and must also be raised in a petition for review. *See, e.g.*, *Zamorano v. Garland*, 2 F.4th 1213, 1223 (9th Cir. 2021) (addressing in a petition for review whether an IJ erred in failing to advise the petitioner of the right to apply for asylum).

Therefore, this Court lacks jurisdiction over these claims pursuant to 8 U.S.C. § 1252(b)(9). *See J.E.F.M.*, 837 F.3d at 1033–34; *E.O.H.C.*, 950 F.3d at 187–88; *Aguilar*, 510 F.3d at 13; *Skurtu v. Mukasey*, 552 F.3d 651, 658 (8th Cir. 2008) ("Skurtu's claims that he was denied his right to counsel and a fair hearing are a direct result of the removal proceedings before the IJ.").

3. Pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii), this Court lacks jurisdiction to review the Secretary's discretionary determinations

Under 8 U.S.C. § 1252(a)(2)(B)(ii), this Court lacks jurisdiction to review Plaintiffs' underlying challenge of the former Secretary of Homeland Security's discretionary decision to have returned them to Mexico pursuant to MPP. Section 1252(a)(2)(B)(ii) provides that notwithstanding any other provision of law, statutory or nonstatutory, no court shall have jurisdiction to review "any decision or action of the . . . Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the . . . Secretary of Homeland Security . . . ." 8 U.S.C. § 1252(a)(2)(B)(ii).

Plaintiffs' TRO application is based on claims that ultimately challenge the discretionary decisions made by the prior DHS Secretary to return Plaintiffs to Mexico pursuant to 8 U.S.C. § 1225(b)(2)(C). Plaintiffs allege that the former Secretary's return decisions frustrated their ability to apply for asylum, access counsel, and have a full and fair hearing. (*See generally* TRO.) Plaintiffs argue that even though they have received final orders of removal, they are entitled to an order from this Court paroling them into the United States where they can then pursue motions to reopen, which if successful, will allow them to pursue asylum claims.

However, Section 701 of the APA excludes from judicial review agency actions to the extent there are statutes that "preclude judicial review" or are "committed to agency discretion by law." 5 U.S.C. § 701(a)(1, 2). Here, Section 1225(b)(2)(C) provides that DHS "*may* return" a noncitizen to a contiguous country. 8 U.S.C. § 1225(b)(2)(C)

(emphasis added). "The word 'may' clearly connotes discretion." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016); *see also Poursina v. United States Citizenship & Immigr. Servs.*, 936 F.3d 868, 871 (9th Cir. 2019). Therefore, return decisions pursuant to Section 1225(b)(2)(C) are squarely in the discretion of the Secretary and therefore unreviewable. *See Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018). Additionally, as noted above, 8 U.S.C. § 1252(b)(9) precludes judicial review in this Court, serving as another bar to APA review in this Court. *See* 5 U.S.C. § 701(a)(1).

Indeed, the return authority does not provide any statutory standard to apply to return decisions or MPP amenability determinations. It instead calls for the exercise of "expertise and judgment unfettered by any statutory standard whatsoever." *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005). It follows that the decision to return a specific noncitizen under § 1225(b)(2)(C), and the procedures used to effect that decision, are "entirely discretionary." *Id.* The judicial-review bar in § 1252(a)(2)(B)(ii) thus precludes any challenge to the procedures or process by which the agencies choose to implement their unreviewable authority under § 1158(a)(2)(A). *See, e.g.*, *Bourdon v. U.S. Dep't of Homeland Sec.*, 940 F.3d 537, 542 (11th Cir. 2019) (collecting cases); *Gebhardt*, 879 F.3d at 987; *Bremer v. Johnson*, 834 F.3d 925, 930 (8th Cir. 2016); *Lee v. U.S. Citizenship & Immigr. Servs.*, 592 F.3d 612, 620 (4th Cir. 2010); *Am. Soc'y of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 452 (7th Cir. 2002); *cf. Struniak v. Lynch*, 159 F. Supp. 3d 643, 654 (E.D. Va. 2016) (holding that provision precluding "jurisdiction to review [] the ultimate decision" also bars review of "the steps that are a necessary and ancillary part of reaching the ultimate decision").

Courts have applied Section 1252(a)(2)(B)(ii) to analogous claims challenging individual return decisions under MPP. For example, in *Nora v. Wolf*, 2020 WL 3469670, at *7–10 (D.D.C. 2020), the district court analyzed each of Plaintiffs' claims in a case challenging MPP and held that the claims which challenged "individual, discretionary determinations" regarding returning an individual to Mexico were

unreviewable under Section 1252(a)(2)(B)(ii). *See Cruz v. Dep't of Homeland Sec.*, 2019 WL 8139805, at *6 (D.D.C. 2019) (holding that court could not review a specific challenge to the Secretary's discretionary choice to return the plaintiff to Mexico). Here, Plaintiffs' complaint challenges the effect of the discretionary decision to return them to Mexico during their removal proceedings. Section 1252(a)(2)(B)(ii) bars those claims because they challenge the decisions to return Plaintiffs to Mexico despite (a) allegedly "dangerous conditions" in Mexico that "obstruct[] access to all components of the U.S. asylum system," while (b) failing to consider "Plaintiffs' inability to meaningfully access legal representation." (FAC at ¶¶ 240, 256, 257.)

The Secretary of Homeland Security has expressed concerns about the safety and security of those who were returned to Mexico during the prior implementation of MPP and about the challenges faced by individuals returned under the prior implementation of MPP. (Explanation Memo at 16-18.) These are among the key reasons for his decision to terminate. But despite these concerns, Section 1252(a)(2)(B)(ii) does not permit judicial review of the prior Secretary's standards for those return decisions. Section 1252(a)(2)(B)(ii) reaches not just the final "determination," but the "method for reaching that final decision." *Bourdon*, 940 F.3d at 542. In other words, Section 1252(a)(2)(B)(ii) insulates not just the return decisions themselves from judicial review, but also the procedures underpinning those decisions when, as here, challenges to those procedures "simply repackage [the] core grievance" that the ultimate discretionary decision reached was incorrect. *Poursina*, 936 F.3d at 875; *see Bourdon*, 940 F.3d at 545 ("If a court can dictate which arguments the Secretary must entertain or how the Secretary weighs evidence, then the Secretary can hardly be said to have sole and unreviewable discretion.").

Notably, Plaintiffs do not allege that Defendants lacked authority to implement MPP generally pursuant to Section 1225(b)(2)(C). This case is therefore unlike *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), where the court found that the "very point of dispute in this action is whether Section 1225(b)(2)(C)

applies such that DHS has such discretion, or not." *Id.* at 1118. Therefore, this Court should find that Plaintiffs have not established that the law and facts clearly favor the claims they raise in support of their TRO pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii) that arise from their removal proceedings.

Because the statutory source of DHS's parole authority expressly provides for the Secretary to exercise discretion, this Court lacks jurisdiction to review any parole decision by DHS, and therefore the balance of equities weighs against granting Plaintiffs' TRO. *See, e.g.*, *Khan v. Atty. Gen. of U.S.*, 448 F.3d 226, 230–31 (3d Cir. 2006) (citing 8 U.S.C. § 1252(a)(2)(B)(ii)).

4. Plaintiffs have failed to establish that the law and facts clearly favor their claim of denial of the right to apply for asylum

In their TRO, Plaintiffs argue that they are likely to succeed on their claim that their right to apply for asylum has been obstructed in violation of the INA and the Refugee Act. (TRO at 14.) The INA provides that 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 . . .), may apply for asylum." 8 U.S.C. § 1158(a)(1). But Section 1158 does not state or guarantee that any person who indicates an intention to apply for asylum or who applies for asylum *must* be allowed to remain in—or be returned to—the United States pending adjudication of that application.

At issue here is Section 1225(b)(2)(C), which explicitly provides that the Secretary "may return" certain noncitizens to a foreign territory contiguous to the United States "pending a proceeding under section 1229a"—a proceeding in which the noncitizen's application for asylum will be adjudicated. 8 U.S.C. § 1225(b)(2)(C). Plaintiffs cannot demonstrate that their return to a contiguous foreign territory in compliance with Section 1225(b)(2)(C) violated a statutory right to asylum, when it is a *statute* that expressly authorized their return to Mexico. Indeed, Section 1158(a)(1) explicitly provides that noncitizens can apply for asylum either under the procedures laid out in Section 1158 "or, where applicable, section 1225(b)." 8 U.S.C. § 1158(a)(1).

Congress's decision to authorize contiguous-territory-return in the INA cannot "violate" another part of the INA and thereby give rise to a claim for relief under the APA. As a general rule, courts must interpret Congress's statutes as a "harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Id.* (citation omitted). Therefore, the more specific authority to return certain noncitizens to Mexico pending removal proceedings must be read to cohere with, not conflict with, the general right to apply for asylum. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–47 (2012) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)); *see also HCSC–Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (the specific governs the general "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]").

Plaintiffs also cannot establish a likelihood of success as to their claim that Defendants have violated a right to "uniform treatment of asylum claims" under the Refugee Act. (TRO at 17.) Plaintiffs do not challenge the manner in which asylum applications are adjudicated. Those applications are decided by Immigration Judges in immigration courts, applying the substantive law at 8 U.S.C. § 1158 and its implementing regulations. The standards for deciding those asylum applications are the same for all applicants, including those who were enrolled in MPP, and Plaintiffs have not alleged otherwise.

Because it was Congress that authorized contiguous-territory return for certain "applicants for admission" arriving on land from Mexico, DHS's decision to exercise that statutory authorization cannot now be enjoined through the APA on the ground that it conflicts with a requirement to establish "a uniform method" of adjudicating asylum applications. *See Cazun v. Att'y Gen. United States*, 856 F.3d 249, 258 (3d Cir. 2017) (describing statute as requiring "a uniform" procedure for a noncitizen to apply for

asylum "irrespective of such [noncitizen's] status").

Finally, as noted above, Plaintiffs who were returned to Mexico are not the only noncitizens who are required to pursue their immigration cases from abroad. *See Nken*, 556 U.S. at 435; *Toor*, 789 F.3d at 1060; *Reyes-Torres*, 645 F.3d at 1077. Therefore, Plaintiffs cannot succeed on their claim that contiguous-territory return violates their right to apply for asylum.

5. Plaintiffs have failed to establish that the law and facts clearly favor their claim of denial of a right to access counsel

In their TRO application, Plaintiffs argue that they are likely to succeed on their claim that their right to access counsel has been obstructed in violation of 8 U.S.C. §§ 1158(d)(4), 1229a(b)(4)(A), 1362. As stated above, the Secretary of Homeland Security has expressed concerns that MPP, as implemented, hindered access to counsel, given among other considerations, the limited opportunities to meet with counsel. And as a matter of *policy*, he has significant concerns about the practical obstacles to interacting with counsel across an international boundary. (*See* Explanation Memo at 16-18.) Nonetheless, the underlying statutory provision, 8 U.S.C. § 1158(d)(4), merely provides that at the time that noncitizens file applications for asylum, they are to be advised of the privilege of being represented by counsel and provided a list of persons who have indicated their availability to represent noncitizens in asylum proceedings on a pro bono basis. Plaintiffs have not presented any evidence of Defendants' failure to perform the acts required by this statute. Moreover, 8 U.S.C. § 1158(d)(7) provides that Section 1158 does not create a private right of action or enforceable procedural rights that are legally enforceable against the United States, its agencies, or officers. Therefore, Plaintiffs cannot succeed on their claim that they have been denied a right to access counsel under Section 1158(d)(4).

Sections 1229a(b)(4)(A) and 1362 also do not create a right that is violated by Congress's authorization of contiguous-territory return. They simply provide that noncitizens have "the privilege of being represented, at no expense to the Government,

by counsel." Therefore, while there are good reasons to be concerned about the prior implementation of MPP (as laid out by the Secretary of Homeland Security in his Explanation Memo), the Government's decision to exercise that authority cannot give rise to an APA suit for violating a separate statutory right regarding counsel.

Finally, Plaintiffs' citation to *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005), does not support their claim for relief here. In *Biwot*, the Ninth Circuit held that where noncitizens are being diligent in their efforts to obtain counsel, the denial of a *continuance* so that they may secure counsel was an abuse of discretion because it was "tantamount to denial of counsel." *Id.* at 1100 (emphasis added). Here, Plaintiffs have not alleged facts constituting governmental action similar to that in *Biwot* that would constitute a "denial of counsel." Moreover, as noted above, noncitizens in other circumstances are required to pursue their immigration cases from abroad, just as Plaintiffs are required to under MPP. *See Nken*, 556 U.S. at 435; *Toor*, 789 F.3d at 1060; *Reyes-Torres*, 645 F.3d at 1077. Therefore, Plaintiffs cannot succeed on their claim that contiguous-territory return violates their right to access to counsel.

6. Plaintiffs have failed to establish that the law and facts clearly favor their claim of denial of a right to a full and fair hearing because constitutional rights do not extend to them beyond the procedural due process established by the INA

The Supreme Court has recognized that "our immigration laws have long made a distinction between those noncitizens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (quoting *Mezei*, 345 U.S. 206, 212, (1953)); *see also Thuraissigiam*, 140 S. Ct. at 1982 (a "noncitizen who is detained shortly after unlawful entry cannot be said to have 'effected an entry'" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001))). Noncitizens "inside the U.S., regardless

of whether their presence here is temporary or unlawful, are entitled to certain constitutional protections unavailable to those outside our borders." *Kwai Fun Wong v. United States*, 373 F.3d 952, 970 (9th Cir. 2004) (citing *Zadvydas*, 533 U.S. at 693; *Xi v. U.S. I.N.S.*, 298 F.3d 832, 837 (9th Cir. 2002)). But for those noncitizens who have neither acquired domicile or residence in the United States nor been lawfully admitted, "'[w]hatever the procedure authorized by Congress is, it is due process as far as [a noncitizen] denied entry is concerned.'" *Thuraissigiam*, 140 S. Ct. at 1982 (quoting *Mezei*, 345 U.S. at 212) (applying rule to noncitizen who had made it 25 yards onto U.S. soil before being apprehended).

"This principle has given rise to the 'entry fiction,' a legal concept which holds that 'excludable[6] [noncitizens],' '[e]ven if physically in this country, . . . are legally detained at the border' and treated as if they have not entered the country." *Padilla v. U.S. Immigr. & Customs Enf't*, 354 F. Supp. 3d 1218, 1225 (W.D. Wash. 2018) (quoting *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985)). "Applying this legal fiction, *Mezei* held that the procedural due process rights of [a noncitizen] detained on Ellis Island were not violated when he was excluded without a hearing." *Kwai Fun Wong*, 373 F.3d at 971 (citing *Mezei*, 345 U.S. at 214); *see Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015) ("[The noncitizen] has no . . . right [to procedural due process]. He presented himself at the San Ysidro port of entry without valid entry documents and sought asylum . . . . [T]hose, like [the noncitizen], who have never technically 'entered' the United States have no such rights." (emphasis added)).

As with procedural due process, noncitizens who have not entered the United States are afforded limited constitutional protections more generally. "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-*

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[6] In 1996, Congress replaced excludable/exclusion with inadmissible/removal, so that an "excludable alien" is the same as an "inadmissible alien." Substantively, both terms refer to noncitizens within one or more of the categories of noncitizens described in section 1182(a) of the Act

Urquidez, 494 U.S. 259, 275 (1990). And as a corollary to this limitation, constitutional rights do not generally apply extraterritorially. *See id.* at 269, 274–75.

Here, Plaintiffs argue that contiguous-territory return violated their rights under the Due Process Clause of the Fifth Amendment to a full and fair hearing in their removal proceedings. (TRO at 20.) But this claim merely duplicates Plaintiffs' APA claim for denial of access to counsel. *See* TRO at 20 ("As part of this right, the Due Process Clause guarantees noncitizens the right to access counsel in their removal proceedings at no cost to the government."), 21 ("As explained above, Defendants' implementation of the Protocols has denied Individual Plaintiffs a meaningful opportunity to access legal advice and representation."). Moreover, through a petition for review, courts of appeals may consider whether an immigrant with a final order of removal received a full and fair hearing and was able to present evidence in support of his or her claims. *Arroyo*, 2019 WL 2912848, at *16 (citing *Colmenar v. I.N.S.*, 210 F.3d 967, 968 (9th Cir. 2000)). For these reasons, and for the same reasons set forth above as to Plaintiffs' claim for denial of access to counsel, Plaintiffs cannot establish a likelihood of success as to their due process claim.

B. Plaintiffs Are Not Legally Entitled to the Relief They Request from this Court of Being Paroled into the United States

Even if Plaintiffs could establish that the law and facts clearly favor their positions, this Court lacks the authority to grant the TRO that Plaintiffs request. Plaintiffs seek an order from this Court requiring Defendants to allow them and their immediate family members to enter into the United States where they allegedly will be better able to "seek reopening of their cases and, if successful, pursue their claims for asylum and related relief." (Dkt. 157-2 at 3.)

Control of movement across the borders and determinations as to which persons may enter the United States implicate matters of foreign relations, which are "exclusively entrusted to the political branches of government." *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *see also Jean v. Nelson*, 727 F.2d 957, 977

(11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985) ("Congress has delegated remarkably broad discretion to executive officials under the INA, and these grants of statutory authority are particularly sweeping in the context of parole.").

As inadmissible noncitizens who have been returned to Mexico, their sole basis for reentry into the United States is through parole under 8 U.S.C. § 1182(d)(5)(A). The INA provides that the Secretary of DHS "*may* . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any [noncitizen] applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A) (emphasis added). Only the Secretary, and not a federal court, has the authority to exercise that discretionary parole authority. *See Torres v. Barr*, 976 F.3d 918, 931–32 (9th Cir. 2020); ("parole authority . . . is delegated solely to the Secretary of Homeland Security"); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) ("parole process is purely discretionary").

The issuance of an order by this Court paroling Plaintiffs into the United States would contravene the long-standing constitutional principle that the power to admit or exclude noncitizens is a sovereign prerogative vested in the political branches, and "it is not within the province of any court, unless expressly authorized by law, to review [that] determination." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950); *accord Kleindienst v. Mandel*, 408 U.S. 753, 765–66 & n.6 (1972).

Indeed, the Supreme Court "without exception has sustained Congress's 'plenary power to make rules for the admission of [noncitizens] and to exclude those who possess those characteristics which Congress has forbidden.'" *See Mandel*, 408 U.S. at 766 (quoting *Boutilier v. Immigr. & Naturalization Serv.*, 387 U.S. 118, 123 (1967)); *see also Dep't of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020). Accordingly, the authority of the political branches is particularly strong—and countervailing constitutional interests are particularly faint—with respect to control of the Nation's borders as to noncitizens who stand "on the threshold of initial entry,"

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953), and for noncitizens like Plaintiffs who have been returned to Mexico under statutory authority.

Because parole authority is delegated to the Secretary of DHS in his discretion, Plaintiffs are not legally entitled to the relief they seek from this Court of being paroled into the United States.

V. CONCLUSION

For these reasons, the Court should deny Plaintiffs' ex parte application for a temporary restraining order.

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