ANGEL TANG NAKAMURA (SBN 205396)
Angel.Nakamura@arnoldporter.com
MATTHEW T. HEARTNEY (SBN 123516)
Matthew.Heartney@arnoldporter.com
HANNAH R. COLEMAN (SBN 327875)
Hannah.Coleman@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel: (213) 243-4000 / Fax: (213) 243-4199

MELISSA CROW*
Melissa.Crow@splcenter.org
SOUTHERN POVERTY LAW CENTER
1101 17th Street, NW, Suite 705
Washington, D.C. 20036
Tel: (202) 355-4471
Fax: (404) 221-5857

SIRINE SHEBAYA*
sirine@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
2201 Wisconsin Avenue NW, Suite 200
Washington, D.C. 20007
Tel: (617) 227-9727 / Fax: (617) 227-5495

STEPHEN W. MANNING*
stephen@innovationlawlab.org
INNOVATION LAW LAB
333 SW 5th Ave, Suite 200
Portland, OR 97204
Tel: (503) 241-0035

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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

Judge: Honorable Jesus G. Bernal
Crtrm: 1

Action Filed: October 28, 2020

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

FELIX MONTANEZ*
Felix.Montanez@splcenter.org
SOUTHERN POVERTY LAW CENTER
P.O. Box 12463
Miami, FL 33101
Tel: (561) 590-1646

MATTHEW VOGEL*†
matt@nipnlg.org
AMBER QURESHI*‡
amber@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
2201 Wisconsin Ave. NW, Suite 200
Washington, D.C. 20007
Tel: (617) 227-9727
Fax: (617) 227-5495

JORDAN CUNNINGS*
jordan@innovationlawlab.org
KELSEY PROVO*
kelsey@innovationlawlab.org
TESS HELLGREN*
tess@innovationlawlab.org
INNOVATION LAW LAB
333 SW 5th Avenue, Suite 200
Portland, OR 97204
Tel: (503) 241-0035

JOHN A. FREEDMAN*
John.Freedman@arnoldporter.com
CAROLINE D. KELLY*
Caroline.Kelly@arnoldporter.com
EMILY REEDER-RICCHETTI*
Emily.Reeder-Ricchetti@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 942-5000
Fax: (202) 942-5999

* *Admitted Pro Hac Vice*
† *not admitted in DC; working remotely from and admitted in Louisiana only*
‡ *admitted in Maryland; DC bar admission pending*

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INTRODUCTION

Plaintiffs Ariana Doe, Francisco Doe, and Chepo Doe ("Plaintiffs") seek an emergency order requiring Defendants to process them into the U.S. to avert imminent safety risks and ensure meaningful access to the asylum process. Defendants do not dispute that Plaintiffs have shown that (1) they face irreparable harm, and that (2) Defendants' implementation of the Migrant Protection Protocols ("MPP") has obstructed their access to the U.S. asylum process. Indeed, Defendants admit that a "key reason[] for [Secretary Mayorkas'] decision to terminate [MPP]" was his "concerns about the safety and security of those who were returned to Mexico" and that the Secretary himself "has expressed concerns that MPP, as implemented, hindered access to counsel." ECF No. 163 ("Opp.") at 15, 18. Because Defendants' arguments are otherwise unpersuasive, this Court should grant a temporary restraining order ("TRO").

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. 8 U.S.C. § 1252(b)(9) does not preclude jurisdiction.

8 U.S.C. § 1252(b)(9) does not divest this Court of jurisdiction over Plaintiffs' claims that MPP has unlawfully impeded Plaintiffs' access to counsel, deprived them of full and fair hearings, and prevented them from filing petitions for review ("PFRs") or motions to reopen ("MTRs"). Defendants mischaracterize the TRO as seeking review of Plaintiffs' underlying removal orders. Opp. at 11, 12. But Plaintiffs seek return to the U.S. to enable them to move to reopen their removal proceedings so they can vindicate their right to seek asylum, including, if necessary, by appealing procedural rights violations through the PFR process. *See* ECF No. 157-1 ("Mot.") at 2. Section 1252(b)(9) bars neither their claims nor the relief they seek.

The Ninth Circuit has construed § 1252(b)(9) to encompass only the review of final removal orders and those issues that "are bound up in and an inextricable part of" the removal process. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032–33 (9th Cir. 2016). A plurality of the Supreme Court has warned of the "staggering results" of broadly

interpreting § 1252(b)(9) and explained that it precludes district court review only of challenges to removal orders, decisions to detain or seek removal, or other "part[s] of the process by which . . . removability will be determined." *Jennings v. Rodriguez*, 138 S. Ct. 830, 840–41 (2018). Thus, "claims that are independent of or collateral to the removal process" fall outside the scope of § 1252(b)(9). *J.E.F.M.*, 837 F.3d at 1032; *see also Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007). And Ninth Circuit courts have repeatedly affirmed that § 1252(b)(9) does not preclude jurisdiction "where a claim could not have been litigated in removal proceedings and the noncitizen would otherwise 'have had no legal avenue to obtain judicial review of [the] claim.'" *Inland Empire - Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048 PSG (SHKx), 2018 WL 4998230, at *14 (C.D. Cal. Apr. 19, 2018) (quoting *J.E.F.M.*, 837 F.3d at 1032). Because Plaintiffs' claims are collateral to the removal process and cannot be litigated therein, this Court has jurisdiction to review them.

In this Circuit, it is well-established that § 1252(b)(9) permits review of government interference with noncitizens' access to the PFR and MTR processes. In *Singh*, the Ninth Circuit held that ineffective assistance of counsel claims based on counsel's failure to timely file a PFR were not barred by § 1252(b)(9) because they were time-barred and could no longer be raised through a PFR. 499 F.3d at 979. This was the case "notwithstanding [Singh's] ultimate goal or desire to overturn [his] final order of removal," because his claim, if successful, would "lead to nothing more than a day in court . . . which is consistent with Congressional intent underlying the REAL ID Act." *Id.* (internal quotations omitted).[1]

[1] In *Tapia-Fierro v. Mukasey*, the Ninth Circuit applied *Singh* in holding that a habeas claim challenging the failure of an immigration judge to adequately inform the petitioner of his right to appeal was not barred by § 1252(b)(9) because that failure had led to a "deprivation of an opportunity for direct review in the court of appeals." 305 F. App'x 361, 363 (9th Cir. 2008) (unpub.).

Relying on *Singh*, Ninth Circuit district courts have held that claims challenging government obstruction of the ability to file MTRs are also not barred by § 1252(b)(9). In *Chhoeun v. Marin*, a district court stayed the removal of noncitizens to enable them to file MTRs, because the petitioners did not directly challenge removal proceedings but sought only to "avail themselves of the administrative system that exists to litigate meritorious" MTRs. 306 F. Supp. 3d 1147, 1158–59 (C.D. Cal. 2018); *see also Poghosyan v. Wolf*, No. 5:20-CV-02295-ODW (AFM), 2020 WL 7347858, at *3 (C.D. Cal. Nov. 6, 2020) (applying *Singh* in granting a stay of removal to allow petitioner to file a MTR); *Sied v. Nielsen*, No. 17-CV-06785-LB, 2018 WL 1142202, at *14–15 (N.D. Cal. Mar. 2, 2018) (§ 1252(b)(9) did not preclude issuing a stay of removal to give petitioners the opportunity to file motions to reopen).

Here, Plaintiffs challenge government policies that have impeded their access to the administrative system created to litigate asylum claims. By obstructing Plaintiffs' ability to access counsel and prepare for their hearings, the Protocols have precluded Plaintiffs not only from fairly presenting their claims, but also from challenging their removal orders through the PFR process and moving to reopen their cases to pursue direct appeals. Mot. at 14–18. Plaintiffs seek *access* to their normal procedural rights and administrative channels; they do not seek review of their individual removal orders or this Court's intervention in their underlying removal proceedings. Because Plaintiffs' claims regarding their statutory and due process rights can be established "without reference to the effect on their underlying removal proceedings," they are not barred by § 1252(b)(9). *See Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019) (Bernal, J.); *see also Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *13 (C.D. Cal. June 20, 2019) (Bernal, J.); *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 187 (3d Cir. 2020) (holding that § 1252(b)(9) does not preclude due process claims arising from return to Mexico that "could not be remedied after a final order of removal").

J.E.F.M. is not to the contrary. Petitioners in that case did not contend government policies interfered with their ability to pursue their claims via direct appeal or to file MTRs.[2] 837 F.3d 1026. Rather, *J.E.F.M.* recognized the continued validity of *Singh*'s holding that § 1252(b)(9) does not preclude review of a claim that "could not have been raised before the agency because it arose after a final order of removal was entered." *Id.* at 1032. As in *Singh*, Plaintiffs only seek relief that would enable them to raise their claims on direct appeal.[3] While Defendants argue that Plaintiffs may still seek to reopen their cases from outside the U.S., Opp. at 12, they fail to address Plaintiffs' extensive evidence detailing how the government's policies created material barriers to doing so.[4] *See infra*, Section II; Mot. at 15–17, 20. Accordingly, § 1252(b)(9) does not bar review of Plaintiffs' claims.

B. 8 U.S.C. § 1252(d) does not preclude jurisdiction.

Defendants are also mistaken that 8 U.S.C. § 1252(d) divests this Court of jurisdiction for the same reason that their § 1252(b)(9) arguments fail: Plaintiffs do not seek this Court's review of their final orders of removal. *See supra*, Section I.A; Mot. at 2, 14–18. By its terms, § 1252(d) applies only to review of "a final order of removal." Thus, the key question is not whether Plaintiffs administratively exhausted their claims prior to seeking judicial review of their removal orders, but rather whether Plaintiffs are seeking judicial review of their removal orders at all. Because they are not, § 1252(d) is inapplicable. Defendants cite no cases suggesting otherwise.

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[2] Defendants incorrectly state that Plaintiffs challenge only their inability to retain counsel. Opp. at 11–12. That is not accurate with regard to Chepo Doe, who challenges interference with an existing attorney-client relationship.

[3] *Zamorano v. Garland*, *see* Opp. at 12, addressed only district court review of an immigration judge's failure to advise a petitioner of his right to asylum, not direct government interference with the Petitioner's ability to present his asylum claim and later to challenge the denial of asylum on appeal. 2 F.4th 1213, 1223 (9th Cir. 2021).

[4] *Toor v. Lynch*, *see* Opp. at 12, does not discuss challenges to material barriers to pursuing the PFR process or filing MTRs. 789 F.3d 1055, 1060 (9th Cir. 2015).

By its terms, § 1252(d) requires only exhaustion of administrative remedies "available . . . as of right" to Plaintiffs. *See Barron v. Ashcroft*, 358 F.3d 674, 678 n.5 (9th Cir. 2004). Because MTRs are not available as of right, Plaintiffs were not required to file them to exhaust their claims. *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003).[5] Further, Plaintiffs' core argument is that Defendants' unconstitutional and unlawful policies have rendered administrative remedies effectively *unavailable* to them. Because Plaintiffs' claims are independent of their individual removal proceedings, § 1252(d)'s exhaustion requirement is inapposite.

The relief Plaintiffs seek bears this out. Plaintiffs seek an order removing unlawful impediments that interfere with their ability to pursue administrative review of their removal orders. This is not relief that the Board of Immigration Appeals can grant; only this Court can remove these obstacles.

C. 8 U.S.C. § 1252(a)(2)(B)(ii) does not preclude jurisdiction.

Although 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of purely discretionary decisions specified in part of the statute, federal courts retain jurisdiction to decide questions of law. *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017). And "[e]ven if a statute gives the [executive] discretion, . . . the courts retain jurisdiction to review whether a particular decision is *ultra vires* the statute in question." *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003). The Ninth Circuit has cautioned that § 1252(a)(2)(B) "is not to be expanded beyond its precise language." *Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004).

Whatever Defendants' authority to apply 8 U.S.C. § 1225(b)(2)(C), Plaintiffs' rights to access counsel and to a full and fair hearing are not within the agency's discretion. They are legal questions bearing upon the scope of Defendants' authority under § 1225(b)(2)(C). As in *Zadvydas v. Davis*, Plaintiffs "do not seek review of the

[5] Defendants cite several cases in which courts required *prudential* exhaustion, which is discretionary. *See* Opp. at 4–5; *Gonzales v. U.S. Dep't of Homeland Sec.*, 508 F.3d 1227, 1234 (9th Cir. 2007). The government does not explain why the prudential exhaustion factors should apply here, and indeed they should not.

[DHS's] exercise of discretion; rather, they challenge the extent of [DHS's] authority under the . . . statute." 533 U.S. 678, 688 (2001). Since Defendants have no discretion to violate these laws, § 1252(a)(2)(B)(ii) does not bar judicial review.[6]

Contrary to Defendants' arguments, *Nora v. Wolf* and *Cruz v. United States Department of Homeland Security* did not "appl[y] Section 1252(a)(2)(B)(ii) to analogous claims." Opp. at 14. Both courts found that § 1252(a)(2)(B)(ii) did not bar claims concerning "whether the government complied with its legal obligations in promulgating the MPP rather than the substantive exercise of the Attorney General's discretion." *Cruz*, No. 19-CV-2727, 2019 WL 8139805, at *4 (D.D.C. Nov. 21, 2019); *see Nora*, No. CV 20-0993 (ABJ), 2020 WL 3469670, at *7 (D.D.C. June 25, 2020). Here, Plaintiffs are challenging the implementation of MPP in a way that conflicts with the Immigration and Nationality Act ("INA"), the Administrative Procedure Act ("APA"), and the Constitution.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. Plaintiffs are likely to succeed on their claim that Defendants' implementation of the Protocols violates their right to apply for asylum under 8 U.S.C. § 1158(a)(1).

Plaintiffs agree with Defendants that any authority granted by § 1225(b)(2)(C) "must be read to cohere with, not conflict with, the general right to apply for asylum." *See* Opp. at 17 (internal quotations omitted). Nothing in the INA suggests that Congress, through § 1225(b)(2)(C), intended to authorize violations of the right to apply for asylum under § 1158 or to undermine the principle of uniform treatment of asylum

[6] Defendants cite *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018), and various out-of-circuit cases to argue that § 1252(a)(2)(B)(ii) precludes "any challenge to the procedures or process by which the agencies choose to implement their unreviewable authority under § 1158(a)(2)(A) [sic]." Opp. at 14. But most of those cases concern a separate jurisdictional provision related to immigrant visa petitions that uses distinct language of "sole and unreviewable discretion." 8 U.S.C. § 1154(a)(1)(A)(viii)(I). And, as the Ninth Circuit has noted, "the Supreme Court has cautioned us to hesitate before interpreting a statutory scheme that's taking the extraordinary step of barring review of constitutional claims." *Gebhardt*, 879 F.3d at 988 (internal quotations omitted).

applications. But Defendants' implementation of the Protocols does both. *See, e.g.*, FAC ¶¶ 85–93, 240–43; Mot. at 14–18.

Defendants also misconstrue the uniformity principle. The Refugee Act requires that the U.S. government "establish a uniform procedure for passing upon an asylum application." S. Rep. No. 96-256, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 141, 149. But Defendants implemented the Protocols in a manner that has deprived Plaintiffs of the uniform, nondiscriminatory access to the asylum system that Congress intended. *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 375 (C.D. Cal. 1982). Plaintiffs were subjected to conditions that prevented them from understanding, preparing for, and, in Plaintiff Chepo Doe's case, even attending their asylum proceedings. *See* Mot. at 15–17. These conditions have also deprived Plaintiffs of meaningful access to counsel and the motion to reopen process. As a result, no Plaintiffs have been able to submit motions to reopen their proceedings despite their desire to do so.[7] *See* Mot. at 15–16.

Finally, Defendants' argument that other noncitizens were able to pursue their immigration cases from abroad is inapposite. The cases they cite establish that certain noncitizens are *entitled*, not "required," to pursue their cases from outside the U.S. *See* Opp. at 18.[8] Additionally, all three cases involve noncitizens who were able to access the asylum process inside the U.S. throughout their immigration court proceedings. Here, by contrast, Defendants' unlawful implementation of the Protocols has subjected Plaintiffs to conditions that jeopardize their safety and security, undermine their ability to collect and present evidence, and obstruct their access to legal representation. *See*

[7] Ariana and Francisco Doe were also unable to successfully appeal their removal orders. *See* Ariana Doe Decl., ECF No. 157-8, ¶ 17; Francisco Doe Decl., ECF No. 157-9, ¶ 15; *accord.* Decl. of Senior Counsel Christina Baptista, ECF 163-1 ¶¶ 4, 6, 7.

[8] *See Toor*, 789 F.3d at 1057 (invalidating departure bar on MTRs regardless of whether a noncitizen has voluntarily left the U.S.); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011) (same); *Nken v. Holder*, 556 U.S. 418, 435 (2009) (noncitizens who are removed "may continue to pursue their [PFRs]" outside the U.S.).

Mot. at 15–17. Plaintiffs continue to suffer harm as they remain stranded in dangerous circumstances outside the U.S. *See id.* at 12–13.

B. Plaintiffs are likely to succeed on their claim that Defendants' implementation of the Protocols violates their right to counsel under the INA.

Defendants have acknowledged that the government's past implementation of the Protocols violated the INA's right to access counsel. *See* Opp. at 18 (*citing* Explanation Memo at 16–18). Importantly, while contiguous territory return is specified under § 1225(b)(2)(C), the terms of the Protocols are not.

The statutory right to counsel is far broader than "merely" advising individuals of the possibility of representation and supplying a list of pro bono legal services. *See id.* The INA mandates that asylum seekers have meaningful access to counsel, including the right to contact counsel and the time, space, and ability to consult with counsel safely and confidentially. *See, e.g.*, FAC ¶¶ 32–37; *Torres*, 411 F. Supp. 3d at 1063–65; *see also Lin v. Ashcroft*, 377 F.3d 1014, 1025 (9th Cir. 2004); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) (affirming right to meet counsel in a manner that does not put client or attorney in danger and enables trust-building).

Defendants' past implementation of the Protocols unlawfully deprived Plaintiffs of counsel at critical stages in their asylum proceedings. Plaintiffs have amply alleged the ways in which Defendants have actively obstructed their access to counsel, even limiting access to attorneys present in immigration court. *See* Margaret Cargioli 2d Suppl. Decl., ECF No. 157-11 ¶¶ 18–19, 23; Ariana Doe Decl. ¶ 14; Francisco Doe Decl. ¶ 14; Chepo Doe Decl. ¶ 30.[9] While Plaintiff Chepo Doe managed to retain counsel against the odds, he was obstructed from safely meeting and confidentially

[9] Defendants also fail to acknowledge that they have an even greater obligation to facilitate access to counsel to detained individuals, as all persons subject to MPP are considered to be. *See* FAC ¶ 53; Order Denying Emergency Motions and Stay, ECF No. 135 at 10 (describing individuals subjected to MPP as "legally in the custody of the U.S. while in Mexico").

communicating with his attorney. *See* Chepo Doe Decl. ¶ 32. And because they were subjected to the Protocols, Plaintiffs Ariana Doe and Francisco Doe were unable to obtain legal representation for their immigration court proceedings, despite zealous efforts, and remain unable to find counsel to assist with their motions to reopen. *See* Mot. at 20.[10]

C. Plaintiffs are likely to succeed on their claim that Defendants' implementation of the Protocols violates their right to a full and fair hearing under the Due Process Clause.

Defendants' argument that constitutional rights do not extend to Plaintiffs is wrong for two reasons. First, Defendants suggest that Plaintiffs are not entitled to constitutional protections because they are currently outside the U.S. Opp. at 19–20. Not so. "[T]he Fifth Amendment applies to conduct that occurs on American soil and therefore applies here," where Defendants' return of Plaintiffs from the U.S. to Mexico has violated Plaintiffs' due process rights. *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-02366-BAS-KSC, 2021 WL 3931890, at *20 (S.D. Cal. Sept. 2, 2021). Moreover, many of the violations that Plaintiffs experienced after being returned to Mexico, including of their right to apply for asylum and their right to access counsel, occurred in the U.S. *See* Mot. at 14–22.

Defendants' reliance on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and its progeny is inapposite. Opp. at 19–20. Because these decisions concern the admission or exclusion of noncitizens, they do not affect Plaintiffs' procedural due process claims arising from MPP. *See Lucas R. v. Azar*, No. CV 18-5741 (DMG)(PLAx), 2018 WL 7200716, at *10 (C.D. Cal. Dec. 27, 2018); *see also Hernandez*, 872 F.3d at 990 n.17 ("[I]t is well-established that the Due Process Clause

[10] Defendants argue that § 1158 does not create a private right of action. Opp. at 18. But Plaintiffs raise an APA claim, alleging that the Protocols are unlawful based on their violation of the right to apply for asylum codified in § 1158. FAC ¶¶ 237–42; *see, e.g.*, *East Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 980–84 (9th Cir. 2020) (holding that the third-country transit ban violates the APA in reference to the rule's unreasonable limitations of asylum eligibility under § 1158).

stands as a significant constraint on the manner in which the political branches may exercise their plenary authority." (internal citation omitted)). The applicable rule is the functional approach to due process established in *Boumediene v. Bush*, under which a court considering whether the Fifth Amendment applies must consider the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it and, in particular, whether judicial enforcement of the provision would be impracticable and anomalous." 553 U.S. 723, 759 (2008) (citation and internal quotation omitted). Courts applying *Boumediene* have held that the Fifth Amendment applies to conduct that occurs on U.S. soil. *See, e.g.*, *Al Otro Lado*, 2021 WL 3931890, at *20. Because Defendants' decision to return Plaintiffs to Mexico was made after they were processed into the U.S., Mot. at 3, the repercussions of this decision must accord with Plaintiffs' due process rights.

DHS v. Thuraissigiam is inapplicable for multiple reasons. First, the plaintiff in that case sought habeas review of a credible fear determination, and the Supreme Court held that the Fifth Amendment's Due Process Clause did not require judicial review where Congress expressly precluded courts from reviewing "'the determination' that [a noncitizen] lacks a credible fear of persecution." 140 S. Ct. 1959, 1966 (2020). Second, *Thuraissigiam* did not raise the issue of what process is due during immigration court proceedings authorized by Congress. Rather, it addressed the expedited removal system, which affects only individuals seeking initial entry. For persons like Plaintiffs who were placed in regular removal proceedings, Congress has conferred statutory rights to apply for asylum and access counsel, 8 U.S.C. §§ 1158(a)(1), 1158(d)(4), 1229a(b)(4)(A), 1362, and additional due process protections apply. *See* FAC ¶¶ 289–93.

Defendants' argument that Plaintiffs' due process claim is duplicative of their access to counsel claim also fails. *See* Opp. at 21. Plaintiffs' constitutional claim is independent of their APA claims. *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir. 2019) (Ninth Circuit law "clearly contemplate[s] that claims challenging agency

actions—particularly constitutional claims—may exist wholly apart from the APA"). This remains true even if Plaintiffs' rights under the Due Process Clause are coextensive with their statutory rights under the INA. *See, e.g.*, *Al Otro Lado*, 2021 WL 3931890, at *20. And for the same reasons discussed in Section II.B., *supra*, Defendants' implementation of the Protocols has violated Plaintiffs' due process rights under the Fifth Amendment.

III. THIS COURT HAS AUTHORITY TO ORDER DEFENDANTS TO PROCESS PLAINTIFFS INTO THE U.S. TO PURSUE THEIR ASYLUM CLAIMS.

Defendants attempt to cabin Plaintiffs' request for relief within the category of unreviewable discretionary *applications* for parole. This mischaracterization fails because Plaintiffs request return to the U.S. on equitable grounds to ensure their safety and vindicate their rights to apply for asylum, access counsel, and obtain full and fair hearings. *See* Mot. at 1, 25. This Court can, and should, afford such relief.[11]

Defendants' analysis of 8 U.S.C. § 1182(d)(5)—the statutory provision regarding parole—is inapposite. Courts have repeatedly ordered the return of individuals to the U.S. to vindicate their rights. *See, e.g.*, *Grace v. Whitaker*, 344 F. Supp. 3d 96, 144–45 (D.D.C. 2018) (ordering government to return removed plaintiffs to the U.S. so they could continue litigating their asylum claims), *aff'd in part, rev'd in part on other grounds sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). In *Walters v. Reno*, 145 F.3d 1032, 1050 (9th Cir. 1998), the government contended—as it does here—that "the district court exceeded its authority in requiring the [Immigration and Naturalization Service] to grant parole." The Ninth Circuit rejected

[11] The government's position would relegate redress of Plaintiffs' claims to an entirely discretionary process. It is thus not a viable alternative to an order compelling Plaintiffs' safe return to the U.S. The parole review process provides no hearing, no record, and no administrative appeal from, or judicial review of, a negative decision, even if based on factual or legal errors, arbitrary or unfounded claims, or false statements. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1081 (9th Cir. 2015), *rev'd on other grounds*, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)).

this argument, concluding that "[p]arole was required in order to permit [each covered plaintiff] 'to pursue any administrative and judicial remedies to which he is lawfully entitled.'" *Id*. at 1051 (quoting *Mendez v. INS*, 563 F.2d 956, 959 (9th Cir. 1977)).[12] As in *Walters*, Plaintiffs here seek processing into the U.S. so they may vindicate their rights and avoid the imminent risk of harm resulting from Defendants' unlawful policy. *See Ms. L. v. ICE*, 403 F. Supp. 3d 853, 860 (S.D. Cal. 2019) (applying *Walters* and *Mendez* to reject a similar argument by the government that courts lack authority to order plaintiffs' return to the U.S.).[13]

Plaintiffs have suffered significant harm and are at imminent risk of further irreparable harm if forced to remain outside the U.S. *See* Mot. at 12–13. Facilitating their return to the U.S., as authorized by directly applicable precedent, is the only way to ensure their physical safety and meaningful access to the asylum process.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' application.

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[12] *Torres v. Barr*, 976 F.3d 918, 931–32 (9th Cir. 2020) (en banc), and *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013), *abrogated by Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)), do not disturb the holding in *Walters*, as both cases discuss a court's power to reexamine discretionary parole decisions in individual cases. Neither case speaks to this Court's ability to order Plaintiffs' return to the U.S. to remedy Defendants' constitutional and statutory violations.

[13] *See also Bollat Vasquez v. Wolf*, 460 F. Supp. 3d 99, 115–16 (D. Mass. 2020) (ordering government to "permit [plaintiffs'] re-entry into the [U.S.] for the pendency of their immigration removal proceedings" due in part to the danger they faced in Mexico under MPP); *Bollat Vasquez v. Mayorkas*, 520 F. Supp. 3d 94 (D. Mass. 2021) (same for additional plaintiffs); *Turcios v. Wolf*, No. 1:20-cv-00093, 2020 WL 10788713, at *4–5 (S.D. Tex. Oct. 16, 2020) (concluding that plaintiffs waiting in Mexico were at serious risk of illness or injury and may "await the adjudication of their asylum claims in the U.S."). Notably, during the MPP wind-down, DHS "processed" approximately 13,000 individuals into the U.S. without individual humanitarian parole applications. *See* DHS, *Explanation of the Decision to Terminate the Migrant Protection Protocols* at 10 (Oct. 29, 2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf.

Dated: November 23, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Matthew T. Heartney
MATTHEW T. HEARTNEY
ANGEL TANG NAKAMURA
HANNAH R. COLEMAN
JOHN A. FREEDMAN
CAROLINE D. KELLY
EMILY REEDER-RICCHETTI

Attorneys for Plaintiffs

Dated: November 23, 2021

SOUTHERN POVERTY LAW CENTER

By: /s/ Melissa Crow
MELISSA CROW
FELIX MONTANEZ

Attorneys for Plaintiffs

Dated: November 23, 2021

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD

By: /s/ Sirine Shebaya
SIRINE SHEBAYA
MATTHEW VOGEL
AMBER QURESHI

Attorneys for Plaintiffs

Dated: November 23, 2021

INNOVATION LAW LAB

By: /s/ Stephen W. Manning
STEPHEN W. MANNING
JORDAN CUNNINGS
KELSEY PROVO
TESS HELLGREN

Attorneys for Plaintiffs