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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, Department of Homeland Security, et al.,

Defendants.

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

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1) & 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Proposed] Order filed concurrently

Hearing Date: February 7, 2022
Hearing Time: 9:00 a.m.
Ctrm: Riverside, Courtroom 1
Hon. Jesus G. Bernal

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NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT

PLEASE TAKE NOTICE that, on February 7, 2022 at 9:00 am, or as soon thereafter as they may be heard, Defendants will, and hereby do, move this Court for an order dismissing the First Amended Complaint ("FAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This motion will be made in the George E. Brown, Jr. Federal Building and Courthouse before the Honorable Jesus G. Bernal, United States District Judge, located at 3470 Twelfth Street, Riverside, CA 92501.

Defendants bring the motion on the following grounds[1]: (1) the relief Plaintiffs seek conflicts with a mandatory nationwide injunction entered by the District Court for the Northern District of Texas; (2) Plaintiffs' claims are moot and/or unripe; (3) the Court lacks jurisdiction over Plaintiffs' claims pursuant to 8 U.S.C. § 1252(b)(9); (4) the Court lacks jurisdiction over Plaintiffs' claims pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii); (5) the Court lacks jurisdiction over Plaintiffs' claims pursuant to 8 U.S.C. § 1252(f)(1); (6) Organizational Plaintiffs lack standing to pursue any of their claims because they are outside of the cited statutes' zones of interest and they have not sufficiently alleged organizational harm; (7) Individual Plaintiffs' First Claim fails because the contiguous-return provision under the INA permitted their return for Mexico, and they have no right to seek to return to the United States to pursue asylum claims there; (8) Individual Plaintiffs' Second Claim fails because the INA permits the individual Plaintiffs to pursue reopening of their immigration proceedings from abroad, and they have no right to return to the United States to do so; (9) Organizational Plaintiffs' Third Claim fails because they do not allege they represent the Individual Plaintiffs or proposed class, or even that they have any specific plans to do so; (10) Individual Plaintiffs' Fourth Claim fails

[1] As explained in the accompanying Memorandum of Points and Authorities (*see* page 3), the Secretary of Homeland Security issued a new memorandum terminating MPP, based on a determination that "the benefits of MPP are far outweighed by the costs of continuing to use the program on a programmatic basis, in whatever form." *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.

because the contiguous-return provision under the INA permitted their return to Mexico, and Plaintiffs have not alleged any resultant denial of counsel or their right to counsel under the INA; (11) Organizational Plaintiffs' Fifth Claim fails because they do not allege that they seek to represent the Individual Plaintiffs or proposed class, or even have any specific plans to do so; (12) Individual Plaintiffs' Sixth Claim fails because constitutional rights do not extend extraterritorially, Individual Plaintiffs do not allege any denial of their right to counsel under the INA, and Individual Plaintiffs may challenge whether they had a full and fair hearing and were able to present evidence in support of their claims through the petition for review process; (13) Individual Plaintiffs' Seventh Claim fails because constitutional rights do not extend extraterritorially, and Individual Plaintiffs have not alleged any government restrictions on speech or their access to immigration court; and (14) Organizational Plaintiffs' Eighth Claim fails because they do not allege any government restrictions on speech and do not allege that they seek to represent the Individual Plaintiffs or proposed class, or even have any specific plans to do so.

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, and all pleadings, records, and other documents on file with the Court in this action, and upon such oral argument as may be presented at the hearing of this motion.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which was held on November 3, 2021.

Dated: December 1, 2021

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 13, 2021, Plaintiffs (six Individual Plaintiffs and two Organizational Plaintiffs) filed their First Amended Complaint, challenging what they describe as a "Reopened Case Policy" associated with the wind down of the Migrant Protection Protocols ("MPP"). ECF No. 143 ("FAC"). The alleged Reopened Case Policy, as defined by Plaintiffs, "required the majority of individuals subjected to MPP who had received *in absentia* or other final removal orders to have their cases reopened in order to become eligible for processing into the United States." FAC ¶ 5. The FAC alleges the "attempted wind-down fails to rectify much of the harm caused by the protocols" because the Reopened Case Policy creates difficulties for the Individual Plaintiffs and proposed class because they have to apply to reopen their cases from outside the United States, where they "lack access to legal representation and resources to communicate with DHS or brief [their] legal arguments." FAC ¶¶ 4, 5, 72.

Plaintiffs assert the following claims for relief: (1) violation of the APA premised on the violation of the right to apply for asylum (all Plaintiffs); (2) violation of the APA premised on the violation of the right to seek reopening of asylum proceedings (all Plaintiffs); (3) violation of the APA premised on the violation of the right to seek reopening of asylum proceedings closed *in absentia* (Jaqueline Doe, Chepo Doe, and the Organizational Plaintiffs); (4) violation of the APA premised on access to counsel (Individual Plaintiffs); (5) violation of the APA premised on access to counsel (Organizational Plaintiffs); (6) violation of the Fifth Amendment Due Process Clause Right to Full and Fair Hearing (Individual Plaintiffs); (7) violation of the First Amendment (Individual Plaintiffs); and (8) violation of the First Amendment (Organizational Plaintiffs). *Id.* at 61-75.

Plaintiffs' FAC, which challenges an MPP wind-down process that no longer exists, is subject to dismissal for the reasons set forth herein.

II. BACKGROUND

On January 20, 2021, Defendant Department of Homeland Security ("DHS") announced the suspension of new enrollments in MPP, effective January 21, 2021.[2] On February 11, 2021, DHS announced that, "[b]eginning on February 19, [DHS] will begin phase one of a program to restore safe and orderly processing at the southwest border. DHS will begin processing people who had been forced to 'remain in Mexico' under the [MPP]."[3] On June 1, 2021, DHS Secretary Alejandro Mayorkas issued a memorandum terminating MPP effective immediately.[4]

On August 13, 2021, the District Court for the Northern District of Texas issued a nationwide, permanent injunction, enjoining the Government from "implementing or enforcing the June 1 Memorandum" and ordering it to "enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 12[2]5 without releasing any aliens because of a lack of detention resources." *State v. Biden*, ___ F. Supp. 3d ___, 2021 WL 3603341, at *26 (N.D. Tex. Aug. 13, 2021). On August 19, 2021, the United States Court of Appeals for the Fifth Circuit denied the Government's request for a stay of the August 13, 2021 injunction pending appeal. *State v. Biden*, 10 F.4th 538 (5th Cir. 2021). On August 24, 2021, the United States Supreme Court similarly denied the Government's request for a stay of the August 13, 2021 injunction pending appeal. *Biden v. Texas*, ___ S. Ct. ___, 2021 WL 3732667 (2021). On October 29, 2021, DHS

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[2] Press Release, U.S. Dep't of Homeland Security, DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), available at https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program .

[3] Press Release, U.S. Dep't of Homeland Security, DHS Announces Process to Address Individuals in Mexico with Active MPP Cases (Feb. 11, 2021), available at https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases .

[4] DHS Secretary Alejandro N. Mayorkas, Termination of the Migrant Protection Protocols Program (June 1, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

Secretary Alejandro Mayorkas issued a new memorandum terminating MPP, along with an explanation of the new decision to terminate MPP.[5] As a matter of policy, Defendants do not defend MPP or its prior implementation.

III. ARGUMENT

A. The Complaint Must be Dismissed Because it Seeks Relief that Conflicts with the *Texas* Injunction

The FAC and each of its eight claims challenge a purported "Reopened Case Policy" that they allege was part of the MPP wind-down process. However, that process is not currently operative following the issuance of the *Texas* injunction mandating implementation of MPP. *State*, 2021 WL 3603341, *26. To comply with the *Texas* injunction, Defendants have ceased taking any action to formally and systematically wind down MPP, including (a) processing into the United States those individuals currently enrolled in MPP who were eligible (*i.e.*, individuals with active immigration court cases) and (b) systematically processing into the United States those individuals who were previously enrolled in MPP who could become eligible by successfully moving to reopen their immigration court cases (*i.e.*, the process through which the Individual Plaintiffs and proposed class could reenter the United States through the so-called "Reopened Case Policy"). Defendants agree that the Texas court's nationwide preliminary injunction is improper on its merits and its nationwide scope. To that end, Defendants explicitly challenged the nationwide scope of the injunction, both in the district court and subsequently before the Fifth Circuit Court of Appeals, but to no avail. Neither the Fifth Circuit nor the Supreme Court granted the government motion to stay that injunction. *State*, 10 F.4th at 560-61; *Biden*, 2021 WL 3732667, at *1. And while Defendants' appeal remains pending before the Fifth Circuit, Defendants remain bound

[5] DHS Secretary Alejandro N. Mayorkas: Termination of the Migrant Protection Protocols (Oct. 29, 2021) ("Termination Memo"), available at: https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf; U.S. Dep't of Homeland Security, Explanation of the Decision to Terminate the Migrant Protection Protocols (Oct. 29, 2021) ("Explanation Memo"), available at: https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf.

by the injunction as left in place by the Supreme Court.

Determinative of the issues before this Court, the Supreme Court has articulated an "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980) (citations omitted). The Supreme Court has found that the remedy for an injunction deemed improper is direct appeal, rather than collateral attack. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (decisions of federal courts are "subject to review only by superior courts in the Article III hierarchy"); *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well-settled."). "When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases." *Bergh v. State of Wash.*, 535 F.2d 505, 507 (9th Cir. 1976). And more generally "principles of comity and judicial economy make courts reluctant to exercise jurisdiction over claims involving the orders of coordinate courts." *Zambrana v. Califano*, 651 F.2d 842, 844 (2d Cir. 1981).

Here, Plaintiffs seek the same declaratory and injunctive relief for all eight of their claims. *See* FAC at 73-74. Other than seeking an order requiring "Defendants to facilitate the provision of legal services by Organizational Plaintiffs to individuals . . . still outside the United States . . . for the purpose of informing them of . . . U.S. immigration law and procedures," FAC, Prayer for Relief, ¶ (g), the injunctive and declaratory relief Plaintiffs seek would fundamentally conflict with the nationwide injunction entered by the Northern District of Texas requiring MPP's reimplementation. *State*, 2021 WL 3603341, *26. A declaration that MPP and the "Reopened Case Policy" violate the law would fundamentally conflict with the injunction that requires MPP's reimplementation and thus prohibits its wind-down, including the aspect of the wind-

down Plaintiffs challenge here as insufficient. FAC, Prayer for Relief, ¶ (c). So too would an order (a) enjoining Defendants from applying the "Reopened Case Policy" that requires the proposed class to seek reopening of their immigration cases from abroad, (b) requiring the proposed classes' return to the United States, (c) requiring notice of a now-defunct and prohibited wind-down process, and/or (d) requiring Defendants to "facilitate the provision of legal services" for the purpose of informing the proposed class of the now-defunct and prohibited wind-down process. *Id.*, ¶¶ (d)-(g). Because the Government has been ordered to reimplement MPP and is prohibited from terminating it, declaratory relief finding that its efforts to wind down MPP are insufficient and injunctive relief requiring further wind down of MPP and return of individuals in MPP to the United States would potentially contradict that order and likely make it impossible for Defendants to comply with both orders. On this basis alone, all of Plaintiffs' claims seeking declaratory or injunctive relief seeking a wind-down of MPP should be dismissed except insofar as they seek Defendants' facilitation of legal services for the purpose of informing the proposed class of "U.S. Immigration law and procedures."

The threat of conflicting relief is particularly acute in cases in which the Federal Government is the defendant. It would raise significant separation of powers concerns if Article III courts were able to place an Article II Executive Branch agency into a position of peril—*i.e.*, where no matter how the agency acted, it would face a significant risk of contempt proceedings from at least one of the Article III tribunals. *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("[T]he separation-of powers doctrine requires that a branch not impair another in the performance of its constitutional duties."). Indeed, the Government is uniquely susceptible to this danger given its docket: the Government litigates in every District and Circuit in a significant number of cases, many of which raise important public policy issues. *See United States v. Mendoza*, 464 U.S. 154, 159 (1984). The particulars of this case, therefore, further demonstrate why conflicting declaratory and injunctive relief is foreclosed. Therefore, the Court should dismiss this action to the extent it seeks relief that may conflict with the *Texas* injunction.

B. The FAC Fails to Present a Justiciable Claim or Controversy

Because Plaintiffs' FAC challenges aspects of the MPP wind-down process, including the alleged "Reopened Case Policy" that no longer exists, their current claims are moot and the FAC must be dismissed. "A case becomes moot . . . when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019). The Court thus cannot order any relief directed at that process.

Furthermore, despite each of their claims being challenges to the "Reopened Case Policy," Plaintiffs include in their FAC a request for relief that bears little relation to their "Reopened Case Policy" challenge: "Declare that MPP as implemented . . . violate[s] federal statutes and the U.S. Constitution." FAC, Prayer for Relief, ¶ (c). However, Plaintiffs' request for declaratory relief concerning the *prior administration's* past implementation of a now defunct version of MPP is also moot, and any judgment declaring it unlawful "would be an advisory opinion, which the Constitution prohibits." *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004); *see Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (dismissing appeal as moot and remanding with instructions to dismiss complaint seeking declaration that repealed legislation was invalid).[6] Therefore, Plaintiffs are not entitled to the relief requested.

Plaintiffs' claims are also unripe. "[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). Absent a "ripe" claim, a plaintiff fails to satisfy the Article III case or controversy jurisdictional requirement. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010) (affirming dismissal of putative class action where named plaintiff's

[6] The FAC itself acknowledges that MPP's implementation was a thing of the past, FAC ¶ 1 ("Between January 2019 and February 2021, the U.S. government trapped at least 70,000 individuals . . . .").

claims were unripe). Here, the wind-down process does not exist, and any challenge to it depends on contingent future events—namely the resolution of the *Texas v. Biden* case and the government's future actions concerning any wind-down process—so any challenge to the wind-down process is unripe and must be dismissed.

C. Plaintiffs' Claims are Jurisdictionally Barred by 8 U.S.C. § 1252

The INA's carefully circumscribed judicial review scheme bars Plaintiffs' claims in this Court, and requires them to raise their claims, if at all, in the courts of appeal following exhaustion of administrative remedies in a petition for review.

1. Plaintiffs' Claims Are Barred by 8 U.S.C. § 1252(d)

Generally, when noncitizens are ordered removed from the United States, they 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)). Noncitizens can pursue immigration cases, such as a petition for review or a motion to reopen, from abroad, ever after they 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").

The INA requires that noncitizens raise challenges to their removal orders to the

Board of Immigration Appeals ("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, those claims are 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").[7]

Here, the INA forecloses jurisdiction in district court. Each of Plaintiffs' eight claims challenge the effect of their physical location and circumstances in Mexico on their removal orders. Yet they have not alleged they have filed motions to reopen or petitions for review after receiving their final orders of removal. *See* FAC ¶¶ 94-180.[8]

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[7] 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 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.

[8] Ariana Doe and Francisco Doe allege they have final orders of removal after appearing in-person at their removal proceedings. *Id.* ¶¶ 164, 176-77. To the extent they have not raised the claims they raise in their FAC 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* 8 U.S.C. § 1252(d); *Vasquez-Rodriguez*, 7 F.4th at 893. Chepo Doe alleges he received an order of removal *in absentia*. FAC ¶ 143. Victoria Doe, Fredy Doe, and Jaqueline Doe each allege they were removed *in absentia* or have final orders of removal after appearing in-person at their removal proceedings, *id.* ¶¶ 103, 122, 153, however, as stated in Defendants' opposition to Plaintiffs' TRO application, these Plaintiffs were granted humanitarian parole. ECF No. 163 at 10 n.1. Thus, their claims—which all challenge the

(footnote cont'd on next page)

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. Moreover, 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 their 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. Even if some exception to exhaustion applied, it would not permit suit in *this* Court. Instead, it might allow Plaintiffs to argue *in the court of appeals* on a petition for review that the exception to exhaustion excused Plaintiffs failure to raise their claims before the Board. *See, e.g.*, *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) (describing narrow exception to exhaustion applicable in the courts of appeals 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"); *Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014)).

2. Plaintiffs' Claims Are Barred By 8 U.S.C. § 1252(b)(9)

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.

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impact of their physical location and circumstances in Mexico on their removal orders and only seek relief addressing their physical location and circumstances in Mexico—are moot. But regardless, they press claims that are not exhausted.

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. *Id.*; *Reno v. Am.-Arab Anti Discrim. Comm.*, 525 U.S. 471, 482–83 (1999). 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; *see* 8 U.S.C. § 1252(a)(5) ("[n]otwithstanding any other provision of law … 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"); *see Singh*, 499 F.3d at 975–76 ("'review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding'") (quoting H.R. Rep. No. 109-72 at 173 (May 3, 2005))).

Given that clear purpose, "Section 1252(b)(9) . . . swallows up virtually all claims

that are tied to removal proceedings." *J.E.F.M.*, 837 F.3d at 1031; *see also Aguilar v. U.S. Immigr. & Customs Enf't Div.*, 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)). That includes claims by noncitizens, however framed, that challenge the procedure and substance of an agency determination that is "inextricably linked" to the order of removal. *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (citing 8 U.S.C. § 1252(a)(5)). "Taken 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).

Given the foregoing, Plaintiffs' claims are all subject to Section 1252(b)(9). Each of their claims alleges that their being subject to MPP impacted their removal proceedings, including their ability to apply for asylum, to access counsel, and to receive a fair hearing. To start, Plaintiffs allege a purported interference with their right to access counsel and ability to apply for asylum during their removal proceedings. Those claims 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. *J.E.F.M.*, 837 F.3d at 1033 ("[C]ounsel 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."); *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"). Right-to-counsel claims are "routinely" raised in petitions for review. *Id.*; *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 or protections 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.").

As in *J.E.F.M.*, Plaintiffs are not alleging that they were denied access to their own counsel. *See* FAC ¶ 298 ("*Pro se* Individual Plaintiffs . . . , like many proposed class members, were denied even that single hour to seek legal advice."). Instead, Plaintiffs allege claims related to their inability to retain counsel, and the impact of that on their removal proceedings. FAC ¶¶ 86 ("Being stranded outside the United States obstructs Individual Plaintiffs' ability to identify, retain, and consult with legal representatives familiar with U.S. immigration law."), 87-93, 230. Plaintiffs' allegation that their right to counsel is being infringed because their final removal orders were impacted by their inability to retain counsel and they are not permitted to return to the United States to move to reopen their cases to then pursue their claims for asylum thus "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 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."); *Arroyo v. U.S. Dep't of Homeland Security*, 2019 WL 2912848, at *13 (C.D. Cal. 2019) (claims of denial of access to counsel by unrepresented noncitizen plaintiffs were inextricably intertwined with the administrative process).

Moreover, the INA provides an explicit and mandatory mechanism for moving to reopen cases, *see* 8 U.S.C. § 1229a(c)(7), and 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. The fact that Plaintiffs are not in the United States does not excuse them from filing a motion to reopen and seeking review of their

claims in the appropriate court of appeals. Indeed, other courts of appeals reviewing removal orders issued to individuals subject to MPP, including those issued *in absentia*, have done without issue. *See, e.g.*, *Luna-Garcia v. Barr*, 932 F.3d 285, 287 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 157 1096 (2020) (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). 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). And, as explained, it is no answer to contend that some exception to section 1252(b)(9) might apply. That is for the courts of appeal to determine in the first instance. *See supra* Section III.C.2. 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. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177, 187–88 (3d Cir. 2020).

3. Plaintiffs' Claims are Barred by 8 U.S.C. § 1252(a)(2)(B)(ii)

Under 8 U.S.C. § 1252(a)(2)(B)(ii), this Court lacks jurisdiction to review Plaintiffs' claims for which they seek an order requiring that they be permitted to enter the United States to pursue reopening of their immigration proceedings. Section 1252(a)(2)(B)(ii) provides that, "[n]otwithstanding 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). Both the decision to initially return an individual to Mexico in the first place and the decision to permit an individual to enter the United States are subject to this provision.

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). 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). Therefore, return decisions pursuant to Section 1225(b)(2)(C)—and the procedures or process by which the agencies choose to implement those decisions—are squarely in the discretion of the Secretary and therefore unreviewable. *See Poursina v. United States Citizenship & Immigr. Servs.*, 936 F.3d 868, 871 (9th Cir. 2019); *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018); *see, e.g.*, *Bourdon v. U.S. Dep't of Homeland Sec.*, 940 F.3d 537, 542 (11th Cir. 2019) (collecting cases); *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 and the consequences of those return decisions. For example, in *Nora v. Wolf*, 2020 WL 3469670, at *7–10 (D.D.C. 2020), the district court held that claims which challenged "individual, discretionary determinations" regarding returning an individual to Mexico under MPP, including claims that returning noncitizens to Mexico placed them in danger, were unreviewable under Section 1252(a)(2)(B)(ii). *See also 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 back to Mexico under the statute).

Although Plaintiffs demand that they be returned to the United States (that is, recission or reversal of the initial return decision), any procedures and processes used to implement that decision, are likewise discretionary. Therefore, Plaintiffs' claims seeking

the relief of being returned to the United States are barred by Section 1252(a)(2)(B)(ii). 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 itself provides that such determination is "in the discretion of the . . . Secretary of Homeland Security . . . ." 8 U.S.C. § 1252(a)(2)(B)(ii). That section 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). As such, 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"). Indeed, long-settled precedent firmly establishes that the decision to parole a particular noncitizen into the United States is a matter assigned by the Constitution and statute to the Executive Branch. *See U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (power to admit or exclude 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"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (control of movement across the borders and determinations as to which persons may enter the United States implicate foreign relations, which are "exclusively entrusted to the political branches of government"); *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."); *accord Kleindienst v. Mandel*, 408 U.S. 753, 765–66 & n.6 (1972).

These authorities foreclose Plaintiffs' claims. Individual 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. FAC ¶¶ 237-314. They allege that the "attempted wind-down fails to rectify much of the harm caused by" MPP, specifically for the proposed class of individuals previously subjected to MPP who were ordered removed, and that the current administration failed to appropriately consider its effect on Plaintiffs and the proposed class. *Id.* ¶¶ 4, 237-314. All of Plaintiffs' claims seek review of the unreviewable "determination" to return Plaintiffs to Mexico, and the "method for reaching [the] final decision" not to parole any of them back into the United States. *Bourdon*, 940 F.3d at 542.[9]

Because the statutory source of DHS's contiguous return and parole authority expressly provides for the Secretary to exercise discretion, this Court lacks jurisdiction to review any claim seeking to challenge that discretion or the exercise of discretion to not allow Plaintiffs to enter the United States, and therefore all eight claims should be dismissed except insofar as they seek an order requiring "Defendants to facilitate the provision of legal services . . . for the purpose of informing them of . . . U.S. immigration law and procedures." FAC, Prayer for Relief, ¶ (g).

4. Plaintiffs' Claims for Injunctive Relief Are Barred Under 8 U.S.C. § 1252(f)(1)

The injunctive relief Plaintiffs seek is barred by 8 U.S.C. Section 1252(f)(1):

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV [Sections 1221-1232] of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,

[9] Notably, Plaintiffs do not allege (and could 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.

other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

Here, Individual Plaintiffs and the proposed class are all individuals who are subject to removal orders and now outside the United States (other than those who have received humanitarian parole). By seeking an injunction to "[a]llow each of the Individual Plaintiffs and class members to return to the United States," FAC, Prayer For Relief, Plaintiffs seek to "enjoin or restrain the operation of part IV of [Subchapter II]," namely, 8 U.S.C. § 1225(b)(2)(C) (providing for return of noncitizens to contiguous territory), and 8 U.S.C. §§ 1229, 1229a, and 1231 (providing for removal of noncitizens subject to orders of removal). 8 U.S.C. § 1252(f). Put differently, the injunctive relief Plaintiffs seek would prevent the Government from relying on the return authority that is statutorily authorized and from executing valid removal orders and would require the Government to rescind its return authority. Yet, Individual Plaintiffs and the proposed class who are not presently in ongoing removal proceedings and are subject to final orders of removal are not "an individual alien against whom proceedings under [Section 1221-1232] have been initiated" because, as they allege, they seek to represent a class that has already been ordered removed and are not currently in removal proceedings. *See Padilla v. Immigr. and Customs Enf't*, 953 F.3d 1134, 1151 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (recognizing availability of classwide injunctive relief in the narrow circumstance where "the class is composed of individual noncitizens, each of whom *is in removal proceedings and facing an immediate violation of their rights*"). And Organizational Plaintiffs may not seek injunctive relief to restrain the operation of Sections 1221-1232 at all. *See id.* at 1150 ("Congress adopted § 1252(f)(1) after a period in which organizations and classes of persons, many of whom were not themselves in proceedings, brought preemptive challenges to the enforcement of certain

immigration statutes.").[10] Therefore, Plaintiffs' claims should be dismissed insofar as they each request return to the United States.

D. Organizational Plaintiffs Lack Standing to Pursue their Claims

1. Organizational Plaintiffs Are Outside the Zone of Interests

The Organizational Plaintiffs' First, Second, Third and Fifth claims are brought pursuant to the APA for alleged violations of 8 U.S.C. §§ 1158(a)(1), 1229a(b)(4), 1229a(b)(5)(C), 1229a(c)(7), & 1362. But the Organizational Plaintiffs' APA claims fail because they are outside the zone of interests for these statutory provisions, and therefore cannot use them as the basis for an APA suit.

The APA does not "allow suit by every person suffering injury in fact." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 395 (1987). It provides a cause of action only to one "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. To be "aggrieved," "the interest sought to be protected" must "be arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Clarke,* 479 U.S. at 396 (modifications omitted). "[O]n any given claim the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). Organizational Plaintiffs identify no such interest here.

None of the provisions cited by Organizational Plaintiffs as forming the basis for their claims suggest that they protect the interests of "legal service providers" who seek to assist noncitizens who are already in removal proceedings or have already been

[10] This is not a case where Plaintiffs may get around that they challenge conduct unauthorized by statute. *See, e.g.*, *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003) (where litigant seeks to enjoin "conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated"). Plaintiffs do not allege that § 1225(b)(2)(C) did not authorize the Individual Plaintiffs' and proposed class's return. And Plaintiffs cannot identify any statute the Government is violating by declining to parole the proposed class into the United States. Similarly, Section 1158(a)(1) could not be violated here because it explicitly provides that noncitizens can apply for asylum either under the procedures laid out in 1158 "or, where applicable, section 1225(b)," that is, after being returned to a contiguous territory. 8 U.S.C. §§ 1158(a)(1), 1225(b)(2)(C).

ordered removed.[11] FAC ¶ 2. These provisions neither regulate the Organizational Plaintiffs' conduct nor create any benefits for which the organizations are eligible.

Organizations have "no judicially cognizable interest" in the "enforcement of the immigration laws," in preventing the Government from applying the law to third parties, or in immigration courts granting asylum to a higher percentage of applicants. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The INA confers no "legally cognizable interests" on advocacy organizations in the scheduling or other aspects of third-party noncitizens' hearings in immigration court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). In fact, it does the opposite. The INA channels review of all removal-related claims into removal proceedings, appeals to the BIA, and then to the federal courts of appeals—in claims brought by individual noncitizens. *See* 8 U.S.C. § 1252(a)(5), (b)(9).

Courts have recognized that immigration statutes are directed at noncitizens, not the organizations advocating for them. When confronted with a similar argument by "organizations that provide legal help to immigrants," Justice O'Connor explained that the Immigration Reform and Control Act "was clearly meant to protect the interests of undocumented aliens, not the interests of [such] organizations," and the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *I.N.S. v. Legalization Assistance Project of Los Angeles Cty.*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). Courts have thus held that immigrant advocacy organizations are outside the immigration statutes' zone of interests. *See, e.g.*,

[11] 8 U.S.C. Section 1158(a) provides the circumstances under which noncitizens may apply for asylum; Section 1229a(b)(4)(B) provides that noncitizens in removal proceedings shall have a reasonable opportunity to examine the evidence against them, present evidence, and cross-examine witnesses presented by the Government; Section 1229a(b)(4)(C) provides that a complete record shall be kept of the removal proceedings; Sections 1362 and 1229a(b)(4)(A) provide for the right to counsel at no expense to the Government in removal proceedings; Section 1229a(b)(5)(C) provides the circumstances under which noncitizens may move to reopen removal proceedings based on *in absentia* removal orders; and Section 1229a(c)(7) provides the circumstances under which noncitizens may move to reopen removal proceedings more generally.

Fed'n for Am. Immigration Reform, Inc. (FAIR) v. Reno, 93 F.3d 897, 900-04 (D.C. Cir. 1996) (organizations challenging parole decisions outside the INA's zone of interests); *Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding that organizational plaintiff could not challenge INS policies "that bear on an alien's right to legalization").

That reasoning fully applies here. Organizational Plaintiffs are not applying for asylum; they seek to help others do so. While they allege that they started providing services to individuals in MPP related to the wind-down (operating a hotline and/or fielding phone calls and providing support to individuals being processed into the United States, including processing paperwork), FAC ¶¶ 198-200, 217-219, nothing in "the relevant provisions [can] be fairly read to implicate Organizational Plaintiffs' interest in the efficient use of resources." *Nw. Immigrant Rights Project v. United States Citizenship & Immigr. Servs.*, 325 F.R.D. 671, 688 (W.D. Wash. 2016); *Situ v. Leavitt*, 2006 WL 3734373, at *10 (N.D. Cal. 2006) ("[T]he organizational plaintiffs in this case fail to satisfy the zone of interests test because they have failed to rebut Defendant's argument that the Medicare statutory scheme is intended to protect individuals, not advocacy organizations."). Therefore, the Organizational Plaintiffs' APA claims (First, Second, Third, and Fifth Claims) must be dismissed.

2. Organizational Plaintiffs Have Not Sufficiently Alleged Organizational Harm

In the FAC, Organizational Plaintiffs allege that they provided services related to the MPP wind-down—but do not allege any services specifically related to the "Reopened Case Policy" that form the basis for their claims. FAC ¶¶ 198-200, 217-219. As such, they have failed to allege any cognizable organizational harm.

An organization may assert standing on its own behalf without invoking the rights of third-party individuals. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) ("*EBSC II*"). But in order to do so, it must show that a defendant's behavior has "frustrated its mission and caused it to divert resources in response to that frustration of purpose." *Id.* (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th

Cir. 2002)). An organizational plaintiff must also show it has been "perceptibly impaired" in its ability to perform its services in order to prevail on its burden to prove standing. *EBSC II*, 950 F.3d at 1265. However, organizations cannot "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Id.* at 1265-66 (citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *Am. Soc. For Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011).

Here, the Organizational Plaintiffs have failed to adequately allege that the wind-down of MPP directly affected their existing missions. They do not allege that, prior to the implementation of MPP, they focused on asylum applications or engaged in any significant legal services to assist noncitizens in Mexico. FAC ¶¶ 184, 202.[12] Nor do they allege that any of their wind-down work pertained to the "Reopened Case Policy" that the FAC challenges or that they provided assistance to the Individual Plaintiffs or proposed class (*i.e.*, the individuals subject to the Reopened Case Policy). *Id.*

The Organizational Plaintiffs' allegations are insufficient to demonstrate that the Reopened Case Policy challenge impaired their ability to provide services by inhibiting their daily operations. *See, e.g.*, *Turlock Irr. Dist. v. F.E.R.C.*, 786 F.3d 18, 24 (D.C. Cir. 2015); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015). Moreover, both entities made decisions to change their

[12] Immigrant Defenders Law Center's ("ImmDef's") "primary focus was on detained and non-detained individuals in immigration court proceedings in the Greater Los Angeles and Orange County areas (including the Inland Empire), but not generally focused on the San Diego border area." FAC ¶ 184. Jewish Family Service of San Diego's ("Jewish Family Service") mission was to provide "holistic, culturally competent, trauma-informed, quality legal and other supportive services to immigrants in San Diego and Imperial Counties." *Id.* ¶ 201. After the implementation of MPP, ImmDef alleges that it established the Cross-Border initiative, and Jewish Family Service alleges that it provided "Know Your Rights" presentations and provided some representation to individuals in MPP. *Id.* ¶¶ 185-196, 203-216. And during the wind down of MPP, the Organizational Plaintiffs allege that they provided services to individuals in MPP related to the wind down, including operating a hotline and/or fielding phone calls, providing support to individuals being processed into the United States, and helping individuals "who are eligible for processing" into the United States through the registration process. *Id.* ¶¶ 198-200, 217-219.

missions following the implementation of MPP, and therefore they do not allege that their existing missions were perceptibly impaired by the implementation of MPP.

Having failed to allege any involvement with the Reopened Case Policy, the Organizational Plaintiffs have also necessarily failed to allege that it jeopardized their client base or their funding, as was the case in *EBSC II*. Instead, they argue that they wish to assist individuals subject to the Reopened Case Policy but believe it would be difficult to do so. *See, e.g.*, FAC ¶ 284. But Article III standing requires that an injury in fact, whether past or future, be "actual or imminent" or "real and immediate," not "conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see also EBSC II*., 950 F.3d at 1265-66 (organizations cannot "manufacture the injury"). For these reasons, all of the Organizational Plaintiffs' claims (Claims 1-3, 5, 8) must be dismissed.

E. Plaintiffs' First Claim (APA – Right to Apply for Asylum) Fails

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' return to a contiguous foreign territory in compliance with Section 1225(b)(2)(C) cannot violate 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 1158 "or, where applicable, section 1225(b)." 8 U.S.C. § 1158(a)(1).

Courts 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]").

Furthermore, Plaintiffs' claim that Defendants have violated a right to "uniform method" to apply for asylum under the Refugee Act fails. FAC ¶¶ 239-41. 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.[13]

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 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"). Therefore, Plaintiffs' claim that

[13] In any event, Plaintiffs' geographic location is not unique or non-"uniform." Other noncitizens without any ties to MPP may be required to pursue their immigration cases from abroad. *See Nken*, 556 U.S. at 435; *Toor*, 789 F.3d at 1060; *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011).

contiguous-territory return violates their right to apply for asylum fails.

F. Plaintiffs' Second and Third Claims (APA – Right to Seek Reopening of Asylum Proceedings) Fail

Plaintiffs' Second and Third Claims allege that the Reopened Case Policy makes it difficult for Individual Plaintiffs to apply to reopen their removal proceedings, from outside the United States, after in-person orders of removal and *in absentia* removal orders, respectively, and that it "interferes with Organizational Plaintiffs' ability to deliver meaningful legal assistance to individuals seeking to reopen their cases as provided for under the INA." FAC ¶¶ 253, 257, 265, 268. However, noncitizens do not have a right to be paroled into the United States to pursue motions to reopen. Instead, noncitizens have the ability to apply, subject to one exception, to reopen their immigration proceedings from abroad, and the statutory provision permitting individuals to move to reopen does not provide for individuals' return to the United States in order to do so. *See* 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(d); *Toor*, 789 F.3d at 1060.

The Organizational Plaintiffs' claims also fail because they do not allege any existing attorney-client relationship with the Individual Plaintiffs or proposed class or even any specific plans to represent them. ImmDef and Jewish Family Service allege that they *previously* represented individuals who were *previously* in MPP. FAC ¶¶ 185-195, 202-216. But they do not allege they have represented Individual Plaintiffs or the proposed class (*i.e.*, individuals outside the United States who were previously enrolled in MPP and currently ineligible to return to the United States) since the wind down of MPP. *See id.* ¶¶ 197-200, 217-219. The closest Organizational Plaintiffs get is to allege that they have operated hotlines, but they do not specify whether these hotlines actually include proposed class members. *Id.* ¶¶ 198, 218. Nor do they allege that these hotlines are ineffective or that they have an attorney-client relationship with these individuals or intend to represent any of these individuals. Because Organizational Plaintiffs have not alleged any harms applicable to *them*, they lack standing to bring this claim.

G. Plaintiffs' Fourth Claim (APA – Access to Counsel) Fails

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 alleged Defendants failed to perform the acts required by this statute. Indeed, 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 claim they have been denied a right to access counsel under Section 1158(d)(4) fails.

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.

H. Plaintiffs' Fifth Claim (APA – Violation of 8 U.S.C. §§ 1158, 1229a(b)(4), 1362) Fails

For their Fifth Claim, Organizational Plaintiffs allege that the "Reopened Case Policy" is arbitrary and capricious because Defendants failed to consider the obstacles that Organizational Plaintiffs would face in safely meeting and effectively communicating with clients and potential clients who were subjected to MPP and are

seeking to reopen their immigration proceedings from outside the United States." FAC ¶ 284. But, as with their Second and Third Claims, the Organizational Plaintiffs do not allege any existing attorney-client relationship with the Individual Plaintiffs or proposed class or any specific plans to represent them, and therefore lack standing for this claim.

I. Plaintiffs' Sixth Claim (Fifth Amendment Due Process) Fails

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 *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)); *see also Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (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[14] [noncitizens],' '[e]ven if physically in this country, . . . are

[14] 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.

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-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 allege 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" by "obstructing their meaningful access to legal representation." FAC ¶¶ 289, 291. But this merely duplicates Plaintiffs' Fourth Claim (access to counsel). Moreover, through a petition for review, courts of appeals may consider whether a noncitizen 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)).

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 government action similar to that in *Biwot* that would constitute a "denial of counsel." And, as in *Biwot* itself, Plaintiffs must pursue constitutional challenges to the adequacy of the procedures afforded through the petition for review process. *Id.* at 1097-99 (considering access to counsel claim on petition for review, and only after determining noncitizen had exhausted administrative remedies). 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' claim that contiguous-territory return violates their right to access to counsel fails.

For these reasons, Plaintiffs' Sixth Claim is subject to dismissal.

J. Plaintiffs' Seventh Claim (First Amendment – Indiv. Plaintiffs) Fails

For their Seventh Claim, Individual Plaintiffs allege that the "Reopened Case Policy" "interfere[s] with and obstruct[s] Individual Plaintiffs' and proposed class members' First Amendment rights to hire and consult an attorney and petition the courts." FAC ¶¶ 5, 296. Plaintiffs allege that this policy necessitates that nearly all legal communication occur while Individual Plaintiffs are outside the United States, where meaningful legal communication is functionally impossible. *Id.* ¶ 300. Plaintiffs do not allege that the alleged Reopened Case Policy places restrictions on speech; rather, they allege that the Reponed Case Policy places limitations on their ability to be paroled into the United States, which, in turn simply makes attorney client-communication and ability to move to reopen more difficult. *See, e.g.*, FAC ¶ 72.

Individual Plaintiffs' Seventh Claim is essentially a challenge to their current presence outside the United States, which fails for the reasons previously stated. *See supra* Sections III.A, C. This claim also fails for the same reason their Fifth Amendment claim does: constitutional rights do not extend extraterritorially. The FAC also is devoid of any allegations showing Government interference with Individual Plaintiffs' communications with their attorneys or potential attorneys—aside from the fact that they

are currently outside of the United States. "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). "[A] law of general applicability does not 'offend the First Amendment simply because its enforcement may have an incidental effect on speech." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020). Limitations on consideration for parole into the United States are not even restrictions on conduct, and they certainly do not "constitute speech regulation, either content-based or content-neutral." *Arroyo*, 2019 WL 2912848, at *21 ("the Court is unpersuaded that Attorney Plaintiffs' First Amendment rights are implicated at all" from detention transfers that allegedly impeded ability of attorneys to communicate with clients).

Moreover, as it relates to the alleged violation of the right to access the courts, "[i]t is unclear whether [the] right of access extends to immigration proceedings such as a claim for asylum." *United States v. Heredia-Oliva*, 2008 WL 205574, at *2 (D. Ariz. 2008); *see Lewis v. Casey*, 518 U.S. 343, 355 (1996) (suggesting that the constitutional right of access to the courts may be limited to direct criminal appeals, habeas corpus proceedings, and § 1983 actions). Even if it were to extend to immigration, Plaintiffs cannot establish that it extends to the circumstances presented here: non-detained individuals who do not identify any direct and deliberate Government obstruction of access to courts, but rather challenge a policy that does not regulate court access at all and, at best, only affects it incidentally. *Cf. Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (recognizing as actionable "[d]eliberate retaliation" by state actors for a non-detained individual's exercise of his right to access the courts).

K. Plaintiffs' Eighth Claim (First Amendment – Org. Plaintiffs) Fails

Organizational Plaintiffs allege that the Reopened Case Policy interferes with their ability to "advise potential and existing clients." FAC ¶ 304. This claim fails because they have not alleged any restrictions on speech. It also fails because Organizational

Plaintiffs do not allege any existing attorney-client relationship with the Individual Plaintiffs or proposed class or any plans to represent them in connection with reopening their immigration proceedings. Even if they had done so, there is no general right to "advise potential clients," and in this context, laws have only been held to violate the First Amendment where they place substantial and direct restrictions on such communications. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 424-45 (1963) (law making it a crime for an organization to retain an attorney to represent a client); *In re Primus*, 436 U.S. 412, 414 (1978) (state bar discipline of attorney for advising a lay person of her legal rights and disclosing in a letter that free legal assistance was available from his organization). No such restrictions are alleged here. If Plaintiffs' theory were accepted, the First Amendment would be violated in virtually every, if not every, instance in which Section 1225(b)(2)(C) is used. Yet, Plaintiffs do not challenge the constitutionality of that section, and no court has ever concluded that it violates the First Amendment.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this motion and dismiss Plaintiffs' FAC.

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Respectfully submitted,

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