MATTHEW T. HEARTNEY (SBN 123516)
Matthew.Heartney@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*
crowmelissa@uchastings.edu
CENTER FOR GENDER & REFUGEE STUDIES
1121 14th Street, NW, Suite 200
Washington, D.C. 20005
Tel: (202) 355-4471
Fax: (415) 881-8824

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) 922-3042
Fax: (503) 882-0281

EFRÉN C. OLIVARES*†
Efren.Olivares@splcenter.org
SOUTHERN POVERTY LAW CENTER
P.O. Box 1287
Decatur, GA 30031
Tel: (404) 821-6443
Fax: (877) 349-7039

Attorneys for Plaintiffs (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' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Judge: Honorable Jesus G. Bernal
Date: March 21, 2022
Time: 9:00 a.m.
Crtrm: 1

Action Filed: October 28, 2020

[Caption Page Continued - Additional Attorneys for Plaintiffs]

STEPHANIE M. ALVAREZ-JONES*⸸
Stephanie.AlvarezJones@splcenter.org
SOUTHERN POVERTY LAW CENTER
P.O. Box 1287
Decatur, GA 30031
Tel: (470) 737-8265
Fax: (877) 349-7039

MATTHEW VOGEL*†
matt@nipnlg.org
AMBER QURESHI*‡
amber@nipnlg.org
VICTORIA F. NEILSON*†
victoria@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

ANNE DUTTON (SBN 340648)
duttonanne@uchastings.edu
ANNE PETERSON (SBN 258673)
petersonanne@uchastings.edu
CENTER FOR GENDER & REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
Tel: (415) 581-8825
Fax: (415) 581-8824

REBECCA H. SCHOLTZ*
rebecca@nipnlg.org
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
30 S. 10th St.
(c/o Univ. of St. Thomas Legal Services Clinic)
Minneapolis, MN 55403
Tel: (202) 742-4423 / Fax: (617) 227-5495

JORDAN CUNNINGS*
jordan@innovationlawlab.org
KELSEY PROVO*
kelsey@innovationlawlab.org
TESS HELLGREN*
tess@innovationlawlab.org
SUMOUNI BASU (SBN 342355)††
sumouni@innovationlawlab.org
INNOVATION LAW LAB
333 SW 5th Avenue, Suite 200
Portland, OR 97204
Tel: (503) 922-3042
Fax: (503) 882-0281

HANNAH R. COLEMAN (SBN 327875)
Hannah.Coleman@arnoldporter.com
ALLYSON C. MYERS (SBN 342038)
Allyson.Myers@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

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*
† *admitted in Texas; GA bar admission forthcoming*
⸸ *admitted in New Jersey; GA bar admission forthcoming*
† *not admitted in DC; working remotely from and admitted in Louisiana only*
‡ *admitted in Maryland; DC bar admission pending*
¶ *not admitted in DC; working remotely from and admitted in New York only*
¶¶ *not admitted in Oregon; working remotely from and admitted in California only*

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I. INTRODUCTION

Plaintiffs have suffered ongoing harm as a result of Defendants' implementation of the misnamed "Migrant Protection Protocols" ("MPP 1.0" or "Initial Protocols"), a policy that forced asylum-seeking individuals to await their U.S. immigration court hearings in dangerous Mexican border towns. Plaintiffs brought this lawsuit to remedy their ongoing harms from Defendants' violation, through implementation of the Initial Protocols, of various statutory and constitutional rights.

Defendants have acknowledged that MPP 1.0 deprived asylum seekers of fundamental rights and have twice issued memoranda terminating the Initial Protocols. Though Defendants assert that they "do not defend MPP or its prior implementation" as a matter of policy, Defendants' Motion to Dismiss Second Amended Complaint ("Mot.") (ECF No. 189) at 3, they raise several unpersuasive arguments about why this Court is barred from hearing Plaintiffs' claims. For the reasons discussed below, this Court has authority to hear Plaintiffs' sufficiently alleged claims that MPP 1.0, as implemented, has denied Individual Plaintiffs their right to seek protection in the United States and obstructed Organizational Plaintiffs' ability to provide legal services. Therefore, the Court should deny Defendants' motion.

II. BACKGROUND

Between January 2019 and February 2021, Defendants used MPP 1.0 to trap nearly 70,000 asylum seekers in Mexico under perilous conditions that obstructed their ability to access the U.S. asylum system or obtain legal representation. Second Amended Complaint ("SAC") (ECF No. 175) ¶¶ 1, 57, 60, 61. In February 2021, Defendants suspended MPP 1.0 and began a "wind-down" process for those with active cases. *Id.* ¶ 79. Defendant Mayorkas conceded that MPP 1.0's "[i]nadequate access to counsel casts doubt on the reliability of removal proceedings." *Id.* ¶ 61.

Under the wind-down, Defendants allowed certain individuals who had been subjected to the Initial Protocols to enter the United States to pursue their asylum claims. *Id.* Beginning in late June 2021, Defendants expanded the wind-down to include

individuals with terminated cases and *in absentia* removal orders, but required those with *in absentia* orders to successfully reopen their cases in order to become eligible to enter the United States. *Id.* ¶ 81.

Defendants halted the wind-down in August 2021, after the U.S. District Court for the Northern District of Texas ordered the government to restart the Migrant Protection Protocols[1] for certain new arrivals at the U.S.-Mexico border. *Id.* ¶¶ 74–75. At the time Defendants ended the wind-down, thousands of individuals with final orders of removal or terminated cases remained stranded outside the United States. *Id.* ¶ 8. These individuals remain in legal limbo and continue to be deprived of meaningful access to the U.S. asylum system and their rights to counsel, to a full and fair hearing, and to petition the courts. *See id.* ¶¶ 85, 97–102.

On December 21, 2021, twelve Individual Plaintiffs and two Organizational Plaintiffs filed a Second Amended Complaint challenging the ongoing effects of MPP 1.0's implementation. Individual Plaintiffs are asylum seekers subjected to MPP 1.0 who either had their cases terminated or received final orders of removal. *Id.* ¶¶ 13–23, 110–268. They allege that because of Defendants' implementation of MPP 1.0, they remain stranded in dangerous conditions outside the United States with no viable way to pursue their asylum claims.[2] *Id.* ¶¶ 86–93. Organizational Plaintiffs allege that the continuing barriers to legal representation for individuals subjected to MPP 1.0 frustrate their missions and require them to expend resources they otherwise would invest in different programs. *Id.* ¶ 270. Together, Individual and Organizational Plaintiffs raise a

[1] This action challenges the implementation of MPP 1.0 and does not address Defendants' new implementation of the Protocols ("MPP 2.0"), which began in December 2021 following the *Texas v. Biden* injunction. *See* SAC ¶ 7; *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *cert. granted*, No. 21-954, 2022 WL 497412 (U.S. Feb. 18, 2022).

[2] All Individual Plaintiffs remained outside the United States as of the date of the filing of the SAC. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Class Certification (ECF No. 205-1) at 2 n.2 (describing "relation back" doctrine and citing cases).

number of challenges to MPP 1.0 as implemented, including that the Initial Protocols violate their statutory rights to seek asylum and access counsel, their Fifth Amendment right to a full and fair hearing, and their First Amendment rights. *Id.* ¶¶ 329–91. They also challenge Defendants' cessation of the wind-down. *Id.* ¶¶ 361–72.

On January 26, 2022, Defendants filed a Motion to Dismiss the Second Amended Complaint. ECF No. 189.

III. LEGAL STANDARD

Defendants seek to dismiss the SAC for lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). In adjudicating a motion to dismiss under Rule 12(b)(1), where "issues of jurisdiction and substance are intertwined," the "district court assumes the truth of allegations in a complaint . . . unless controverted by undisputed facts in the record." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). "To survive a motion to dismiss, [under Rule 12(b)(6)] a complaint must contain sufficient factual material, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). For a Rule 12(b)(6) motion, "all well-pleaded allegations of material fact [are accepted as true] and construe[d] . . . in the light most favorable to the non-moving party." *Padilla v. Yoo*, 678 F. 3d 748, 757 (9th Cir. 2012) (citation and internal quotation marks omitted).

IV. ARGUMENT

A. The *Texas* Injunction Does Not Affect the Relief Plaintiffs Seek.

The *Texas* injunction is forward-facing: it prohibits Defendants from implementing the Department of Homeland Security's ("DHS") June 1, 2021 Memorandum. That memo would have terminated MPP but did not impact the status of individuals with inactive cases, like Individual Plaintiffs, who had already been subjected to MPP 1.0. Plaintiffs seek relief from the ongoing effects of Defendants' *past* implementation of MPP 1.0. Thus, the *Texas* injunction has no bearing on this case. To the extent Defendants contest Plaintiffs' requested relief, this Court has broad remedial

powers to fashion an appropriate remedy, and such questions are inappropriate to resolve on a motion to dismiss.

Defendants claim that the relief sought by Plaintiffs would "make it difficult for Defendants to lawfully comply with the *Texas* injunction" and may conflict with the *Texas* court's order "to reimplement MPP in good faith." Mot. at 4. But Plaintiffs were not covered by the termination memo enjoined by the *Texas* case[3] because they were no longer even subject to MPP. *See* Defs' Mot. to Stay (ECF No. 126) at 8 (noting that "individuals who have already [been] ordered removed [are] by definition no longer in MPP"). And, as Defendants concede, Plaintiffs do not challenge the government's authority to place noncitizens into MPP 2.0. *See* Mot. at 7 ("Plaintiffs do not challenge the court-ordered MPP that the Government is currently implementing."). Rather, Plaintiffs allege that because Defendants' implementation of MPP 1.0 violated their rights, this Court should order relief to remedy that harm.

Nothing in the *Texas* injunction prevents Defendants from providing redress to Plaintiffs who were denied their rights under MPP 1.0 by allowing them to pursue their claims in the United States. Defendants acknowledge that "the original MPP no longer exists, and none of the Individual Plaintiffs or proposed class members are currently in the original MPP." *Id.* Rather, Individual Plaintiffs and the putative class are asylum seekers who have been denied meaningful access to the U.S. asylum system, and their rights to counsel, to a full and fair hearing, and to petition the courts because of the prior implementation of the Initial Protocols.

Defendants also mistakenly conflate the suspension of future placements in MPP 1.0 with the wind-down, which facilitated an "orderly entry into the United States" for some noncitizens subjected to MPP 1.0. Exec. Order No. 14010, 86 Fed. Reg. 8,267, 8,269 (Feb. 2, 2021), https://bit.ly/31Tc9AZ; *see* Mot. at 5–6. The wind-down—an

[3] Memorandum from Secretary Alejandro N. Mayorkas to Acting Heads of CBP, ICE, and USCIS, Termination of the Migrant Protection Protocols Program, at 7 (June 1, 2021), https://bit.ly/3IQsua5 ("June 1 Termination Directive").

umbrella term describing processing of certain persons previously subjected to MPP 1.0 for entry into the United States—began months before the June 1 Termination Directive, underscoring the independent nature of these two distinct processes.[4] *See* SAC ¶¶ 78–79. The injunction decision expressly distinguished the wind-down from the termination memo,[5] yet Defendants incorrectly assert that Plaintiffs want "the Government to continue its prior efforts to terminate the now defunct MPP policy." Mot. at 5–6. Even the plaintiffs in *Texas* have acknowledged that the wind-down was not before the court in that case.[6] Neither the injunction nor its subsequent affirmance indicates that it encompasses the wind-down. Indeed, the *Texas* court disclaimed requiring DHS to alter its enforcement actions for individuals no longer part of MPP: "Nothing in this injunction requires DHS to take any immigration or removal action nor withhold its statutory discretion towards any individual that it would not otherwise take." *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, at *28 (N.D. Tex. Aug. 13, 2021).

Defendants further raise the specter of conflict with the injunction by pointing to a claimed risk of "en masse" returns to the United States. Mot. at 5. However, the *Texas* injunction covers noncitizens who have been or will be subjected to MPP 2.0. The Fifth Circuit's concern was that, absent a new version of MPP, the government was

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[4] Some Individual Plaintiffs would have been covered by the subsequent expansion of the wind-down to include individuals with terminated cases and *in absentia* orders. *See, e.g.*, SAC ¶¶ 81, 83–84, 133, 150, 182, 198, 361–72. However, DHS canceled all aspects of the wind-down following the *Texas* injunction. *See id.* ¶¶ 86–93.

[5] Memorandum Opinion and Order, *Texas v. Biden*, No. 2:21-CV-067-Z, ¶¶ 124–27 (N.D. Tex. Aug. 13, 2021); *see also* June 1 Termination Directive, at 7 ("The termination of MPP does not impact . . . the phased entry process . . . .").

[6] Defendants' Response to Plaintiffs' Notice of Related Cases, No. 2:22-cv-00014-M (N.D. Tex.) (Feb. 1, 2022), 10 n.4 ("During the bench trial in *Texas* [*v. Biden*], the Court asked counsel for Plaintiffs: 'Isn't Plaintiffs' case truly a challenge to the government's parole practices and not the termination of MPP?' To which Plaintiffs' counsel responded: 'No, Your Honor. We're not challenging, you know, any kind of individual grant of parole or even the parole policies.'" (citation omitted)).

"propos[ing] to parole every [noncitizen] it cannot detain [into the United States]." *Texas v. Biden*, 20 F.4th 928, 997 (5th Cir. 2021). By contrast, the number of individuals in this litigation seeking the injunctive remedy of entry into the United States in order to access the asylum system is limited by the class and subclass definitions and, as explained above, does not include individuals impacted by the *Texas* injunction.

Even if this Court were to agree with Defendants' erroneous interpretation of the *Texas* injunction, Federal Rule of Civil Procedure 12 provides no basis to dismiss a complaint based on the possibility of a conflicting injunction. First, this Court has broad powers to fashion an appropriate remedy at the relevant point in litigation. *See Brown v. Plata*, 563 U.S. 493, 526 (2011) (explaining that relevant statute "should not be interpreted to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations"); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15, 31 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *see also* SAC at 97 (requesting that this Court "[g]rant such further relief as this Court deems just and proper").[7] Second, at this stage, Plaintiffs are not directly seeking an injunction from this Court, but rather an opportunity to pursue their claims. The fact that *Texas* is still being litigated—and the possibility that the *Texas* injunction may ultimately be vacated—also counsels in favor of allowing this case to proceed to discovery.[8] Defendants' own cited authority notes that this Court has

[7] Indeed, other courts have granted similar relief ordering the return of plaintiffs to the United States as an appropriate remedy for Defendants' violations. *See, e.g.*, *J.L. v. Cuccinelli*, No. 18-CV-04914-NC, 2020 WL 2562895, at *3 (N.D. Cal. Feb. 20, 2020), *modified on other grounds*, 2020 WL 2562896 (N.D. Cal. Mar. 27, 2020); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 105 (D.D.C. 2018), *aff'd in part, rev'd in part, and remanded sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020).

[8] Defendants cite *Bergh v. State of Wash.* to suggest that dismissal of the claims is appropriate, but *Bergh* stated that "issuance of an injunction" on the same issue is rarely

discretion to continue exercising jurisdiction over this case. *See Zambrana v. Califano*, 651 F.2d 842, 844 (2d Cir. 1981) ("[A]n ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183–84 (1952)). Because the government's erroneous interpretation of the *Texas* injunction should not preclude review of Plaintiffs' claims, this Court can and should allow this case to proceed.

B. Plaintiffs' Claims Are Not Moot.

A case is not moot so long as an "active controversy" is "extant at all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). An active controversy exists when plaintiffs demonstrate that they suffer "continuing, present adverse effects" due to the defendants' past wrongful conduct. *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1119–20 (9th Cir. 2020) (holding active controversy existed where plaintiffs sought injunctive relief to remedy defendant's terminated policy because plaintiffs demonstrated continuing harm). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted). Each of Plaintiffs' claims seeks redress for the continuing adverse effects of Defendants' unlawful conduct.[9] Because Plaintiffs suffer ongoing effects, their claims are not moot.

Furthermore, this Court can grant "effectual relief" to redress Plaintiffs' claims. *Id.* Plaintiffs seek an order requiring Defendants to allow Individual Plaintiffs "to return

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appropriate by two federal courts that have "their . . . decisions reviewed by the same Court of Appeals." 535 F.2d 505, 507 (9th Cir. 1976). The Ninth Circuit acknowledged that this Court has discretion to dismiss a suit "if the same issue is pending in litigation elsewhere." *Id*. By allowing this case to proceed, this Court will not issue an injunction on the same issue, need not reach any questions decided by the *Texas* court, and will not be at risk of creating conflicting decisions within the same circuit.

[9] *See, e.g.*, SAC ¶¶ 340, 352, 371 ("Defendants' violation . . . causes ongoing harm to Individual Plaintiffs, similarly situated individuals, and Organizational Plaintiffs."), 346, 359, 367, 368, 377, 380, 389, 391.

to the United States . . . for a period sufficient to enable them to seek legal representation, and pursue their asylum proceedings from inside the United States." SAC at 96. That order would remedy Individual Plaintiffs' harms by enabling them to meaningfully access the U.S. asylum system and their rights to counsel, to a full and fair hearing, and to petition the courts. Similarly, it would prevent Organizational Plaintiffs from having to divert additional resources to provide services to individuals subjected to MPP 1.0 who are stranded outside the United States. Because this Court can provide relief to redress Plaintiffs' continuing, present injuries, Plaintiffs' claims are not moot.

Defendants argue that Claims 1–3 and 5–6 are moot because they "challenge the *prior administration's* past implementation of a now defunct version of MPP." Mot. at 6. Defendants fail to explain how the discontinuation of MPP 1.0 alleviates Plaintiffs' ongoing injuries caused by that policy. A claim is not moot so long as parties retain "a legally cognizable interest in the outcome." *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019). Defendants do not dispute that Plaintiffs suffer continuing adverse effects due to Defendants' implementation of MPP 1.0. Because this Court can provide relief for these injuries, Plaintiffs retain a legally cognizable interest in the outcome of this case.

Defendants further argue that Plaintiffs' request for declaratory relief is moot because such a judgment would be an advisory opinion. Mot. at 8. However, a declaratory judgment is not advisory if an "actual controversy" exists, meaning that the dispute is "definite and concrete, touching the legal relations of parties having adverse legal interests." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)). Declaratory relief is proper when a challenged policy "casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989).

Plaintiffs' request for declaratory relief is not moot because they have presented a definite and concrete controversy. Plaintiffs seek a declaratory judgment that Defendants' implementation of MPP 1.0 violated their rights so that Plaintiffs can seek to vindicate those rights. As demonstrated above, Plaintiffs continue to suffer "substantial adverse effect[s]" of Defendants' conduct. *Headwaters*, 893 F.2d at 1015. Therefore, Plaintiffs' request for declaratory relief clearly "touch[es] the legal relations of parties having adverse legal interests." *MedImmune*, 549 U.S. at 127.

C. This Court Has Jurisdiction Over Plaintiffs' Claims.

i. Neither 8 U.S.C. § 1252(d) nor § 1252(b)(9) Precludes Jurisdiction.

Plaintiffs Chepo Doe, Yesenia Doe, Sofia Doe, Ariana Doe, Francisco Doe, Gabriela Doe, Reina Doe, Carlos Doe, and Dania Doe ("Removal Order Plaintiffs") challenge Defendants' implementation of MPP 1.0 on the basis that it has denied them access to the U.S. asylum system. They do not, however, challenge the outcomes of their underlying immigration proceedings; instead, they seek relief from the harms that continue to impede their ability to access the U.S. asylum system. *See Chhoeun v. Marin*, 306 F. Supp. 3d 1147, 1159 (C.D. Cal. 2018). Because Plaintiffs do not seek review of their removal proceedings or orders, §§ 1252(d) and (b)(9) do not divest this Court of jurisdiction.[10]

1. 8 U.S.C. § 1252(d) Does Not Bar Jurisdiction.

Removal Order Plaintiffs do not ask this Court to review their final orders of removal or reopen their proceedings. *See infra* Section IV.C.i.2. Instead, they request declaratory relief establishing "that MPP as implemented violates federal statutes and

[10] Defendants rightly make no effort to argue that §§ 1252(d) and (b)(9) apply to the claims of Organizational Plaintiffs or Individual Plaintiffs representing the Terminated Case Subclass. Mot. at 10, 12. Additionally, Individual Plaintiffs' challenge to the arbitrary and capricious nature of the termination of the wind-down and First Amendment claims are entirely independent of removal proceedings and thus beyond the scope of §§ 1252(d) and (b)(9). SAC ¶¶ 361–72.

the [U.S.] Constitution" and injunctive relief allowing them to return to the United States to access the asylum system. SAC at 96. Because § 1252(d) restricts a court's review of a final order of removal, that provision does not bar jurisdiction in this case.

Defendants' reliance on cases involving petitions for review ("PFRs") to federal courts of appeals highlights the inapplicability of § 1252(d). *See* Mot. at 8–10. Such petitions seek review of a final order of removal, *see* 8 U.S.C. § 1252(a)(1), and the petitioners in those cases were thus required to comply with § 1252(d)(1)'s administrative exhaustion requirement. *See, e.g.*, *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 893–96 (9th Cir. 2021); *Sola v. Holder*, 720 F.3d 1134, 1136 (9th Cir. 2013).[11] Because Removal Order Plaintiffs do not seek judicial review of their removal orders, Defendants' cited cases are inapposite.[12]

2. 8 U.S.C. § 1252(b)(9) Does Not Bar Jurisdiction.

Section 1252(b)(9) consolidates judicial review of a removal proceeding into a single PFR. *Singh v. Gonzales*, 499 F.3d 969, 976 (9th Cir. 2007). The provision applies only to claims in which plaintiffs seek review of "the decision to detain them," the decision "to seek removal," or "any part of the process by which their removability will

[11] *Singh v. Napolitano*, 649 F.3d 899 (9th Cir. 2011) (per curiam), is also inapposite. There, the court denied a noncitizen's habeas petition after retroactively applying a new Board of Immigration Appeals ("BIA") decision clarifying the BIA's jurisdiction over noncitizens' ineffective assistance of counsel claims. *Id.* at 902–03. While ineffective assistance of counsel claims address infirmities with the underlying proceedings that "could have been raised in a motion to reopen," Mot. at 9, the BIA has no authority to consider challenges collateral to the final order like the ones raised by Plaintiffs here.

[12] 8 U.S.C. § 1252(d) requires only exhaustion of administrative remedies "available . . . as of right." *See Vasquez-Rodriguez*, 7 F.4th at 896 (cleaned up). Despite Defendants' repeated references to the availability of a motion to reopen for the Removal Order Plaintiffs, motions to reopen are not remedies available "as of right." *See Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003). Because Plaintiffs do not challenge their underlying removal orders, § 1252(d)'s exhaustion requirement does not apply. And although Defendants again cite several cases in which courts required prudential exhaustion, which is discretionary, they do not explain why the prudential exhaustion factors should apply here—and they should not. *See* Mot. at 8–9; *Gonzales v. DHS*, 508 F.3d 1227, 1234 (9th Cir. 2007).

be determined." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion); *see DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020); *Singh*, 499 F.3d at 978. It does not reach claims "that are independent of or collateral to the removal process." *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 810 (9th Cir. 2020). And it cannot be applied to preclude "any meaningful chance for judicial review." *Jennings*, 138 S. Ct. at 840. Because Removal Order Plaintiffs challenge how the implementation of MPP 1.0 has prevented them from meaningfully accessing the removal process itself, rather than the processes by which their removability was determined, § 1252(b)(9) does not bar their claims.

First, Removal Order Plaintiffs seek only to enter the United States so they can meaningfully access the asylum system through their removal proceedings, the very process of direct review Defendants insist they must use under 8 U.S.C. § 1252(b)(9). *See* SAC ¶¶ 213, 223, 237–38. In contrast to *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016), which held that § 1252(b)(9) barred right-to-counsel claims in part because class members could bring such challenges in their ongoing removal proceedings, Removal Order Plaintiffs here have no such option.[13] The implementation of MPP 1.0 has prevented them from "forming an[] attorney-client relationship to begin with," *Torres v. DHS*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019), and has imposed significant obstacles to confidential communication for those with representation. These barriers, in turn, have prevented Removal Order Plaintiffs from accessing both the PFR and motion to reopen processes.[14] Importantly, these harms transcend the removal

[13] Notably, *J.E.F.M.* pre-dated the Supreme Court's decision in *Jennings*, which adopted a narrower reading of § 1252(b)(9). *See Jennings*, 138 S. Ct. at 840–41. The issue in *J.E.F.M.* was whether conducting removal proceedings for minors without court-appointed counsel violated their constitutional and statutory rights. 837 F.3d at 1029. Plaintiffs here challenge only harms arising from DHS's implementation of MPP 1.0, an issue independent of the conduct of their removal proceedings.

[14] While Defendants assert that other people subjected to MPP have availed themselves of the PFR process, Mot. at 14, the proposed class and subclass definitions in this case

process, resulting in Removal Order Plaintiffs' inability to access counsel or the asylum process. *See, e.g.*, SAC ¶¶ 64, 213. Plaintiffs' claims are thus distinct from those found to be barred by § 1252(b)(9) in *Arroyo v. DHS*, No. SACV 19-815-JGB, 2019 WL 2912848 (C.D. Cal. June 20, 2019) (Bernal, J.). In *Arroyo*, the plaintiffs alleged that separation from family members implicated their rights to present evidence and have a full and fair hearing in their removal processes. Because these rights could not "be violated without reference to the underlying fairness of the removal process," this Court found that they fell within § 1252(b)(9). *Id.* at *14. In contrast, Removal Order Plaintiffs allege harms resulting from the implementation of MPP 1.0, "without looking to the effect of th[e harm] on the underlying removal proceedings." *Id.* at *13. Moreover, *Arroyo* explicitly recognized that individuals who have final orders of removal, with no PFR pending, and who challenge harms separate from the conduct of their removal process—like Removal Order Plaintiffs—"are beyond the reach of [§ 1252(b)(9)]." *Id.* at *16.

By seeking an order allowing them to enter the United States to meaningfully access the asylum system, Plaintiffs "do not directly challenge the bases for their orders of removal" but instead seek to "avail themselves of the administrative system that exists to litigate meritorious motions to reopen." *Chhoeun*, 306 F. Supp. 3d at 1159. Section 1252(b)(9) allows such relief: courts in the Ninth Circuit have held that challenges to barriers to filing appeals or motions to reopen are not barred by § 1252(b)(9). *See Poghosyan v. Wolf*, No. 5:20-CV-02295-ODW, 2020 WL 7347858, at *3 (C.D. Cal. Nov. 6, 2020) (Section 1252(b)(9) did not bar district court review of due process violations preventing plaintiff from filing motion to reopen); *Sied v. Nielsen*, No. 17-CV-06785-LB, 2018 WL 1142202, at *14–15 (N.D. Cal. Mar. 2, 2018)

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explicitly exclude individuals with final orders who have currently pending petitions for review. *See* SAC ¶¶ 315–16. Thus, the proposed classes include only those individuals who have been fully shut out of the normal appellate process contemplated by 8 U.S.C. § 1252(b)(9).

(same); *see also Tapia–Fierro v. Mukasey*, 305 F. App'x 361, 363 (9th Cir. 2008) (unpub.) (habeas claim challenging failure of immigration judge ("IJ") to inform petitioner of his right to appeal not barred by § 1252(b)(9) because that failure led to a "deprivation of an opportunity for direct review in the court of appeals").

Second, Plaintiffs' inability to reopen removal proceedings arises from a broadly applicable DHS policy, rather than the conduct of any specific removal proceeding. *See Torres*, 411 F. Supp. 3d at 1048–49 (finding § 1252(b)(9) inapplicable in challenge to "detention conditions . . . set by [DHS's] global policies" that did "not hinge on case-by-case determinations"). In seeking entry into the United States, Removal Order Plaintiffs' claims are akin to a challenge to collateral detention conditions denying them a full and fair hearing, which is permissible under § 1252(b)(9). *See id.*; *cf.* Order Denying Plaintiffs' Emergency Motion for Preliminary Injunction (ECF No. 135), at 10 (noting that people subject to MPP "are legally in the custody of the United States while in Mexico").

Third, the relief Plaintiffs seek is unavailable in removal proceedings, which illustrates that Plaintiffs' claims are independent of the removal process. When adjudicators in removal proceedings would be "powerless to remedy the conditions alleged," § 1252(b)(9) does not bar review. *Torres*, 411 F. Supp. 3d at 1049; *see also Inland Empire – Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048-PSG, 2018 WL 4998230, at *14 (C.D. Cal. Apr. 19, 2018) (holding that § 1252(b)(9) does not apply when the IJ has no authority to order the requested relief). Adjudicators in removal proceedings do not have the authority to declare MPP 1.0 unlawful as implemented or order Plaintiffs' return to the United States.[15] This Court, in contrast, can issue such relief. *See E.O.H.C. v. DHS*, 950 F.3d 177, 195 (3d Cir. 2020) (finding district court

[15] The only avenue to obtain release from MPP 1.0 and return to the United States was passing a non-refoulement interview with DHS. *See* SAC ¶ 59, n.24: ICE, Memorandum from Ronald D. Vitiello, Deputy Director and Senior Official Performing the Duties of the Director, Implementation of the Migrant Protection Protocols (Feb. 12, 2019), https://bit.ly/33JY89D.

had ability to hear plaintiffs' MPP 1.0 claims seeking to prevent their return to Mexico); *cf. Turcios v. Wolf*, No. 1:20-cv-00093, 2020 WL 10788713, at *5 (S.D. Tex. Oct. 16, 2020) (ordering plaintiffs subjected to MPP 1.0 released into the United States). And doing so will not affect the outcome of Plaintiffs' underlying removal proceedings. Once Plaintiffs are able to enter the United States in order to pursue their claims in removal proceedings, their applications for relief will be decided solely on the merits of those claims. *See Torres*, 411 F. Supp. 3d at 1048–49 (Section 1252(b)(9) inapplicable when plaintiffs "assert rights that can be violated without reference to the effect on their underlying removal proceedings").

ii. 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 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).

Defendants cite *Poursina v. United States Citizenship & Immigration Services*, 936 F.3d 868, 871 (9th Cir. 2019); *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018); and various out-of-circuit cases to argue that return decisions under § 1225(b)(2)(C) "are squarely in the discretion of the Secretary and therefore unreviewable." But contrary to Defendants' arguments, *see* Mot. at 14–15, Plaintiffs do not seek review of discretionary decisions made under § 1225(b)(2)(C). Instead, Plaintiffs' claims challenging MPP 1.0's implementation raise the threshold legal issue of whether Defendants have the authority to apply § 1225(b)(2)(C) in a manner that violates Plaintiffs' rights under the INA, the APA, and the Constitution. As in *Zadvydas v. Davis*, Plaintiffs "do not seek review of [DHS's] exercise of discretion; rather, they

challenge the extent of [DHS's] authority under the . . . statute." 533 U.S. 678, 688 (2001). Plaintiffs' claim challenging the cessation of the wind-down similarly does not address Defendants' discretionary parole power, but rather their arbitrary and capricious elimination of a program provided to facilitate the return to the United States of people subjected to MPP 1.0. *See DHS v. Regents*, 140 S. Ct. at 1906 (concluding that the rescission of an immigration relief program "is an action [that] provides a focus for judicial review") (internal quotation marks omitted); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (emphasizing that "an agency changing its course must supply a reasoned analysis"). Plaintiffs' challenge therefore falls squarely within the federal courts' jurisdiction to review questions of law. *See Hernandez*, 872 F.3d at 988; *Spencer*, 345 F.3d at 689.

Plaintiffs do not dispute that § 1225(b)(2)(C) conveys discretion upon Defendants. *See* Mot. at 16. However, that discretion does not permit Defendants to act in violation of law. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915) ("The Constitution does not confer upon [the Executive] any power to . . . suspend or repeal such [laws] as the Congress enacts."); *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014) (power to execute the laws does not "include a power to revise clear statutory terms that turn out not to work in practice"). As Defendants recognize, statutes must be read as a "harmonious whole," and any authority to return individuals to Mexico pursuant to § 1225(b)(2)(C) must "cohere with, not conflict with, the general right to apply for asylum." Mot. at 24. Defendants have no discretion to adopt a policy under § 1225(b)(2)(C) that violates other provisions of the INA, the APA, or the Constitution. As a result, 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar judicial review.

Contrary to Defendants' arguments, *Nora v. Wolf* and *Cruz v. DHS* did not "appl[y] Section 1252(a)(2)(B)(ii) to analogous claims." Mot. at 15–16. Both decisions 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 v. DHS*, No. 19-CV-2727, 2019

WL 8139805, at *4 (D.D.C. Nov. 21, 2019); *see Nora v. Wolf*, No. CV 20-0993 (ABJ), 2020 WL 3469670, at *7 (D.D.C. June 25, 2020).

Defendants also conflate Plaintiffs' claims, which challenge Defendants' unlawful conduct, with their prayer for relief, which requests that this Court grant appropriate and proportionate injunctive relief, including (but not limited to) return to the United States. *See* Mot. at 16–17. Section 1252(a)(2)(B)(ii) applies to the scope of judicial review; it does not restrict this Court's equitable power. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (limiting judicial review over any discretionary "decision or action of the Attorney General"); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("[T]he scope of the remedy is determined by the nature and extent of the constitutional violation").

iii. 8 U.S.C. § 1252(f)(1) Does Not Preclude Jurisdiction.

This Court has already rejected Defendants' argument that 8 U.S.C. § 1252(f)(1) bars Plaintiffs' claims for injunctive relief. ECF No. 135 at 5–6. Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). Courts may depart from the law of the case if: "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998) (emphasis omitted). Defendants' motion to dismiss neither acknowledges the Court's prior holding nor provides any compelling reason why the Court should reconsider it. As such, the Court should reject the government's argument.

As this Court recognized in the Preliminary Injunction Order, "the Ninth Circuit has made clear" that "where a litigant 'seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of [any covered provision], and § 1252(f)(1) therefore is not implicated.'" ECF No. 135 at 6 (quoting *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)). This rule applies both to

conduct that conflicts with specific provisions of the INA, as well as to conduct that is not authorized by the INA because it is unconstitutional and therefore beyond the government's authority. *See Torres*, 411 F. Supp. 3d at 1050 (holding that § 1252(f)(1) does not bar an order enjoining conduct that violates the government's own detention standards); *Kidd v. Mayorkas*, No. 2:20-cv-03512-ODW, 2021 WL 1612087, at *5 (C.D. Cal. Apr. 26, 2021) (holding that § 1252(f)(1) does not apply to challenges that ICE conduct is unconstitutional and therefore not authorized by the INA); *cf. Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (courts assume that Congress "legislates in the light of constitutional limitations"). Here, Plaintiffs' First and Second claims allege that MPP 1.0 as implemented violates Plaintiffs' statutory rights under the INA. *See* SAC ¶¶ 329–41, 342–53. Plaintiffs' Third, Fifth, and Sixth claims allege that MPP 1.0 as implemented violates Plaintiffs' Fifth Amendment and First Amendment rights. *See id.* ¶¶ 354–60, 373–80, 381–91. And Plaintiffs' Fourth claim alleges that the MPP 1.0 wind-down was arbitrary and capricious and therefore outside the government's authority. *See id.* ¶¶ 361–72. Because each of these claims alleges action outside the government's statutory or constitutional authority, none is barred by § 1252(f)(1).

Even if § 1252(f)(1) would otherwise bar the relief Plaintiffs seek (which it does not), it still does not apply to the claims raised by Individual Plaintiffs due to the exception under § 1252(f)(1), as all putative class members are "individual [noncitizens] against whom proceedings . . . have been initiated." 8 U.S.C. 1252(f)(1); *see Torres*, 411 F. Supp. 3d at 1050 (citing *Rodriguez v. Marin*, 909 F.3d 252, 256–57 (9th Cir. 2018)). It is of no consequence that all Individual Plaintiffs have been ordered removed or had their removal proceedings terminated, as Defendants note. Mot. at 18. As this Court has recognized, this exception to § 1252(f)(1) "[does] not require that every detainee in the class still be in removal proceedings . . . but rather that proceedings have been initiated." *Torres*, 411 F. Supp. 3d at 1050 (cleaned up).

Finally, Defendants do not contest that, even if § 1252(f)(1) does not allow class-wide injunctive relief, it does not bar class-wide declaratory relief. *See Rodriguez*, 909 F.3d at 256.

D. Organizational Plaintiffs Have Standing to Bring Their Claims.

To establish standing, a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). Here, Organizational Plaintiffs Immigrant Defenders Law Center ("ImmDef") and Jewish Family Service of San Diego ("Jewish Family Service") have standing because they (i) have sufficiently alleged organizational harm that is a direct result of Defendants' actions, and (ii) fall within the zone of interests of the INA.

i. Organizational Plaintiffs Have Sufficiently Alleged Frustration of Mission and Diversion of Resources.

An organization may establish standing on its own behalf if Defendants' actions have frustrated its mission and caused a resulting diversion of resources. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) ("*EBSC III*") (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). Allegations that an organization "expended additional resources that they would not otherwise have expended, and in ways that they would have not expended them" are sufficient to establish organizational standing. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015).

Organizational Plaintiffs are non-profit organizations that provide legal and other services to detained and non-detained noncitizens in California. SAC ¶ 269. The Initial Protocols have frustrated their missions by stranding asylum seekers in Mexico and severely impeding their ability to provide legal services to clients and potential clients. In response to these challenges, Organizational Plaintiffs have been required to divert resources in order to serve their target populations. In particular, ImmDef has, *inter alia*, diverted resources to projects established to provide representation and other assistance

to individuals subjected to MPP 1.0 and devoted increased staff time to meeting the special challenges related to the representation of those individuals, as well as responding to inquiries from individuals denied processing during the MPP 1.0 wind-down. *Id.* ¶¶ 273–87. ImmDef has spent at least $400,000 on costs associated with representation of MPP 1.0 clients; this diversion of resources is ongoing notwithstanding the discontinuation of MPP 1.0. *Id.* ¶¶ 277, 283. Jewish Family Service has, *inter alia*, diverted resources and staff time from existing programs in order to provide legal services to individuals and families subjected to MPP 1.0 and dedicated additional resources to facilitate cross-border travel to meet with clients subjected to MPP 1.0. *Id.* ¶¶ 289–310. Thus, both Jewish Family Service and ImmDef have been forced to divert resources due MPP 1.0's implementation.

Defendants allege that Organizational Plaintiffs' missions were not frustrated because they did not previously provide significant legal services to assist noncitizens in Mexico and chose to alter their activities following the implementation of MPP 1.0. Mot. at 22–23. However, as the Ninth Circuit has held, where a non-profit legal services organization would lose clients had it not diverted resources, that diversion is sufficient to establish injury-in-fact. *EBSC III*, 993 F.3d at 664. Here, the Organizational Plaintiffs were forced to overhaul their programs to adhere to their missions. Defendants incorrectly argue that the organizations' missions are "not impaired by th[e] modest and unspecified MPP workload." Mot. at 23. The Ninth Circuit has made clear that "plaintiffs who suffer concrete, redressable harms that amount to pennies are still entitled to relief." *EBSC III*, 993 F.3d at 664.

Finally, Defendants' argument that "neither organization alleges that the termination of the wind-down of MPP affected them in any way," Mot. at 23, is factually incorrect. As alleged in the SAC, following the discontinuation of MPP 1.0, ImmDef has continued to divert resources to serve individuals outside the United States, including those who were subjected to MPP 1.0. Similarly, Jewish Family Service alleged that they have continued to represent and advise individuals subjected to MPP

1.0, including by responding to MPP-related inquiries from individuals who received final orders of removal or had their cases terminated. SAC ¶¶ 283, 305.

ii. Organizational Plaintiffs Fall Within the INA's Zone of Interests.

The zone-of-interests test "is a 'prudential' inquiry that asks 'whether the statute grants the plaintiff the cause of action that he asserts.'" *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 767–69 (9th Cir. 2018) ("*EBSC I*") (quoting *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017)). The Ninth Circuit has found that "[w]ithin the asylum statute, Congress took steps to ensure that pro bono legal services of the type that the [plaintiff legal service] Organizations provide are available to asylum seekers" and "other provisions in the INA give institutions like the Organizations a role in helping immigrants navigate the immigration process." *EBSC I*, 932 F.3d at 768–69. For these reasons, the court concluded that the organizational plaintiffs' interests were plainly "sufficient for the Court's lenient APA test." *EBSC III*, 993 F.3d at 668 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224–25 (2012)).

So too here. Organizational Plaintiffs are non-profit organizations that provide legal services to noncitizens. SAC ¶¶ 24, 25, 271, 288. The implementation of MPP 1.0 has frustrated their missions by forcing a significant number of people they otherwise would have served to await their immigration court hearings in Mexico and forced Organizational Plaintiffs to overhaul their programs in response. *Id.* ¶¶ 329–53, 361–72, 381–91. Organizational Plaintiffs have "more than met their burden to show that their interests are, at a minimum, 'marginally related to' and 'arguably within' the scope of the relevant statutes." *See Immigrant Defs. Law Ctr. v. DHS*, No. CV 210395 (FMO) (RAOx), 2021 WL 4295139, at *6 (C.D. Cal. July 27, 2021) (quoting *EBSC III*, 993 F.3d at 668).

Defendants incorrectly assert that "[t]he INA confers 'no legally protected interests' on advocacy organizations in the scheduling or other aspects of third-party

noncitizens' hearings in immigration court." Mot. at 19. They rely exclusively on out-of-circuit precedent, *id.* at 21,[16] while ignoring the Ninth Circuit's holding that the interests of legal services organizations fall squarely within the INA's zone of interests. *See, e.g.*, *EBSC III*, 993 F.3d at 668 (finding that organizations representing asylum applicants fell within the INA's zone of interests where the challenged policy affected migrants' access to the asylum process and "[t]he Organizations' purpose [wa]s to help individuals apply for and obtain asylum").

E. Plaintiffs Have Sufficiently Pleaded Their Claims.

i. Plaintiffs Have Sufficiently Stated Their First Claim (APA – Right to Apply for Asylum).

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." Mot. at 24. Plaintiffs do not challenge the authority conveyed by Congress in § 1225(b)(2)(C) or the possibility of lawful contiguous-territory return, *see* Mot. at 25; they challenge the implementation of Defendants' policies that have exceeded that authority in violation of law. Nothing in the INA suggests that Congress, through § 1225(b)(2)(C), intended to authorize violations of the right to apply for asylum or to

[16] Defendants' citation to *Federation for American Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900–01 (D.C. Cir. 1996), is both unhelpful and misleading. *See* Mot. at 21. There, the D.C. Circuit rejected arguments made by an *anti*-immigrant advocacy group that their members' interests in reducing immigration fell within the INA's zone of interests. The D.C. District Court later considered this decision "inapposite" when finding that immigration legal services organizations fell within the INA's zone of interests. *O.A. v. Trump*, 404 F. Supp. 3d 109, 145 n.14 (D.D.C. 2019). Further, while Defendants rely on Justice O'Connor's opinion in *INS v. Legalization Assistance Project of L.A. Cnty.*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers), the Ninth Circuit has characterized that opinion as "not only . . . non-binding and concededly 'speculative,' . . . but the interest asserted by the organization in that case—conserving organizational resources to better serve *non*immigrants—is markedly different from the interest in aiding immigrants" alleged here. *EBSC I*, 932 F.3d at 769 n.10 (citation omitted).

undermine the principle of uniform treatment of asylum applications. But Defendants' implementation of MPP 1.0 did both. *See, e.g.*, SAC ¶¶ 333–34, 336–38.

To the extent that Defendants argue that their authority under § 1225(b)(2)(C) is not bound by § 1158(a)(1), *see* Mot. at 24, they are incorrect. Section 1225(b)(2)(C) does not reference the right to apply for asylum, and nothing in the statutory scheme suggests Congress intended to subvert that right or the uniformity principle. It would be strikingly odd for Congress to amend the "historic" purpose of the Refugee Act without mentioning or referencing the asylum statute. *See* Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980).[17] Whatever latitude Defendants have in implementing § 1225(b)(2)(C), they cannot do so in a manner that subverts § 1158 or the uniformity principle.

Defendants also misconstrue the uniformity principle, with a myopic focus on adjudication of asylum applications in immigration court. *See* Mot. at 25. The Refugee Act requires the U.S. government to "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. However, Defendants implemented the Initial Protocols in a manner that has deprived Plaintiffs of uniform, nondiscriminatory access to the asylum system. *See Orantes-Hernandez v. Smith,* 541 F. Supp. 351, 375 (C.D. Cal. 1982). As a result, Individual Plaintiffs were prevented from understanding, preparing for, and in many cases even attending their asylum proceedings.[18] *See* SAC ¶¶ 58, 60, 94, 103–05, 116,

[17] The contiguous territory provision at § 1225(b)(2)(C) was added to the INA in 1996, sixteen years after passage of the Refugee Act, and makes no reference to asylum seekers. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 302, 110 Stat. 3009-1, 583 (1996).

[18] Defendants' argument that other noncitizens may be able to pursue their immigration cases from abroad is inapposite. *See* Mot. at 25 n.14. The cases they cite establish that certain noncitizens are *entitled*, not required, to pursue their cases from outside the United States. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *Toor v. Lynch*, 789 F.3d 1055, 1057 (9th Cir. 2015); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011). Moreover, all three cases involve noncitizens who were able to initially access

118, 129, 144, 162–64, 172–74, 190–93, 210, 219–22. Defendants' implementation of MPP 1.0 has also deprived Individual Plaintiffs of meaningful access to counsel and the motion to reopen process. As a result, none of the Plaintiffs with final orders have been able to submit motions to reopen their proceedings despite their desire to do so. *See id.* ¶¶ 119, 183, 194, 213, 223–24, 238, 253. Finally, as discussed *supra* at Section IV.D.i–ii, Organizational Plaintiffs have standing to bring this claim. Defendants' argument that Organizational Plaintiffs "do not allege any existing attorney-client relationship with the Individual Plaintiffs or proposed class or even any specific plans to represent them" (Mot. at 26) is factually incorrect. Indeed, Organizational Plaintiffs allege just that ImmDef represents Chepo Doe and provides direct representation to other individuals subjected to MPP 1.0 through its Cross Border Initiative, while Jewish Family Service has continued to represent individuals subjected to MPP 1.0 since Defendants halted the wind-down. SAC ¶¶ 159, 273, 305.

ii. Plaintiffs Have Sufficiently Stated Their Second Claim (APA – Right to Access Counsel).

Defendants have acknowledged that the government's past implementation of the Protocols violated the INA's right to access counsel. *See* Mot. at 26 (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* Mot. at 26–27. 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.*, SAC ¶¶ 37, 40, 345; *Torres*, 411 F. Supp. 3d at 1060–61, 1063–65; *see also Lin v. Ashcroft*, 377 F.3d 1014, 1023, 1025 (9th

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the asylum process inside the United States. Here, by contrast, Plaintiffs were forced to remain outside the United States as a result of a policy that fundamentally undermined their ability to prepare and present their claims for relief.

Cir. 2004); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000), *amended on other grounds*, 213 F.3d 1221 (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' implementation of MPP 1.0 unlawfully deprived Individual Plaintiffs of access to counsel at critical stages in their asylum proceedings. Defendants do not contest that Plaintiffs have amply alleged the ways in which Defendants have actively obstructed access to counsel, including by limiting access to attorneys present in immigration court.[19] *See* SAC ¶¶ 61–63, 156–57.

Moreover, Organizational Plaintiffs have standing to bring this claim because, contrary to Defendants' assertions (Mot. at 27 n.15) and as outlined *supra,* Organizational Plaintiffs continue to represent individuals subjected to MPP 1.0.

iii. Plaintiffs Have Sufficiently Stated Their Third Claim (Fifth Amendment – Right to Full and Fair Hearing).

Defendants argue that Plaintiffs are not entitled to constitutional protections because they are currently outside the United States. *See* Mot. at 27–29. 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 United States 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). Furthermore, many of the violations that Plaintiffs experienced while subjected to the Initial Protocols, including of their right to apply for asylum and their right to access counsel, occurred while they were physically in the United States. *See* SAC ¶¶ 63, 125–26, 156–57, 168, 186–87, 202, 217, 221, 227, 241, 249.

[19] Defendants argue that § 1158 does not create a private right of action. Mot. at 27. But Plaintiffs raise an APA claim alleging that MPP 1.0 as implemented violated the right to access counsel that is codified throughout the INA. SAC ¶ 345 (citing 8 U.S.C. §§ 1158(d)(4), 1229a(b)(4)(A), 1362); *see, e.g.*, *Torres*, 411 F. Supp. 3d at 1058 n.8 (declining to consider private right of action concerns where "Plaintiffs invoke the APA as a vehicle" for access to counsel claims under INA).

Defendants' argument that the "entry fiction" eliminates Plaintiffs' due process rights is equally without merit. *See* Mot. at 27–28. "It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993); *see also Usubakunov v. Garland*, 16 F.4th 1299, 1303 (9th Cir. 2021) ("Meticulous care must be exercised lest the procedure by which [the noncitizen] is deprived of . . . liberty not meet the essential standards of fairness.") (citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (internal quotation marks omitted)).

None of Defendants' authorities hold otherwise. Defendants' reliance on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and its progeny is inapposite. Mot. at 27–29. Because these decisions concern the procedural rights governing admission or exclusion of noncitizens, they do not affect Plaintiffs' procedural due process claims arising from MPP 1.0. *See Lucas R. v. Azar*, No. CV 18-5741 (DMG), 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 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 marks 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 United States, Mot. at 3, the repercussions of this decision must accord with Plaintiffs' due process rights.

Defendants' reliance on *Thuraissigiam*, where the plaintiff sought habeas review of a credible fear determination, is misplaced. As Defendants note, in *Thuraissigiam* the Supreme Court reiterated that "[w]hatever the procedure authorized by Congress is, it is due process as far as [a noncitizen] denied entry is concerned." Mot. at 28; *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). *Thuraissigiam* did not address the process due during immigration court proceedings authorized by Congress; rather, it addressed the expedited removal system, a summary removal process not at issue in this case. For people like Individual Plaintiffs who were placed into regular removal proceedings, Congress has conferred additional statutory rights, and additional due process protections also apply.[20] *See Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) ("[A noncitizen] who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf."); 8 U.S.C. §§ 1158(a)(1), (d)(4), 1229a(b)(4), 1362 (enshrining right to apply for asylum, right to counsel, and other procedural rights). Notably, following *Thuraissigiam*, courts have allowed procedural due process claims to proceed for plaintiffs seeking admission when the challenged conduct also violated statutory rights.[21] *See e.g.*, *Al Otro Lado*, 2021 WL

[20] *United States v. Verdugo-Urquidez*, a non-immigration case addressing U.S. authorities' search of a foreign national's residence outside the United States, does not hold otherwise. Defendants' citation to the case is misleading; the full quotation is: "*These cases, however, establish only* that [noncitizens] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. 259, 271 (1990) (emphasis added).

[21] Defendants' reliance on *Angov v. Lynch*, a case narrowly focused on admissibility of documentary evidence in removal proceedings, is misplaced. *Angov* did not address the issue of what "minimum due process" is afforded to asylum applicants, as the court noted that the petitioner "was clearly given fair *access* to all his statutory rights." *See Angov v. Lynch*, 788 F.3d 893, 898 n.3 (9th Cir. 2015) (emphasis in original). The same is not true here, as Individual Plaintiffs were squarely denied the due process that

3931890, at *20 ("Because Defendants' turning back of asylum seekers unlawfully withholds their duties under statute, it violates the process due to class members.").

Defendants' argument that Plaintiffs' due process claim is duplicative of their access to counsel claim also fails. *See* Mot. at 29. 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. Defendants argue that *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005) does not apply because Plaintiffs have not alleged facts constituting denial of counsel. *See* Mot. at 29. However, as discussed in Section IV.E.ii, *supra*, Plaintiffs have amply alleged how implementation of the Initial Protocols has violated Plaintiffs' right to access counsel and thereby infringed their statutory and constitutional due process rights.[22] *See, e.g.*, SAC ¶¶ 61–63, 156–57, 355–57.

iv. Plaintiffs Have Sufficiently Stated Their Fourth Claim (APA – Unlawful Cessation of MPP Wind Down).

An agency action is "final" when (1) it "mark[s] the 'consummation' of the agency's decision-making process" and (2) as a result of the action, "'rights or obligations have been determined,' or . . . 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Courts interpret finality in a "pragmatic and flexible manner," "focus[ing] on the practical and legal effects of the agency action." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). For

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Congress has explicitly afforded to asylum seekers through the INA. *See, e.g.*, *Usubakunov*, 16 F.4th at 1303 (recognizing "right to counsel in removal proceedings" as "[r]ooted in the Due Process Clause and codified [in the INA]").

[22] For the reasons articulated *supra* at note 27, Defendants' arguments that other noncitizens pursue their claims from abroad are wholly unavailing. *See* Mot. at 29.

the reasons discussed below, Defendants' termination of the wind-down is a "final agency action" under § 706(2).

An agency action satisfies the finality test's first prong when it reflects a "conscious" and "deliberate" decision, *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998), and is not "merely tentative or interlocutory [in] nature," *Bennett*, 520 U.S. at 178. Here, Defendants' termination of the wind-down represents a deliberate response to the *Texas* injunction based on their erroneous interpretation of its terms. Mot. at 30; *see supra* Section IV.A (explaining that the *Texas* injunction did not compel Defendants to cease processing some Plaintiffs into the United States). Because the termination of the wind-down represents the "consummation" of DHS's flawed response to the *Texas* injunction, it satisfies the first prong of the finality test. *Bennett*, 520 U.S. at 177–78; *see also San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 578 (9th Cir. 2019) (finding final agency action where agency had "arrived at a definitive position").

The second prong of the finality test focuses "on the practical and legal effects" of the *challenged* agency action: DHS's unexplained termination of the wind-down.[23] *Oregon Nat. Desert Ass'n*, 465 F.3d at 982. The legal consequences of Defendants' termination of the wind-down are both profound and immediate: people previously eligible for processing into the United States under the wind-down now have no viable avenue to vindicate their rights to access counsel and seek asylum. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (explaining that a "final agency action" is reviewable where it "has an actual or immediately threatened effect"); SAC ¶¶ 366–67, 369. In terminating the wind-down, Defendants failed to consider the reliance interests of individuals with terminated cases and *in absentia* orders who chose to remain in harm's way believing that they would ultimately be allowed to access the U.S. asylum

[23] Though Plaintiffs do not concede, as Defendants suggest, that the wind-down did not create legal rights and consequences—it did—that question is not before the Court. *See* SAC ¶¶ 78–79, 81–85; *cf.* Mot. at 30–31.

system; instead, they are still stranded in danger outside the United States, and their cases remain in legal limbo. *See DHS v. Regents*, 140 S. Ct. at 1913 ("When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (citing *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (cleaned up))); SAC ¶¶ 366–67, 369. Nor did Defendants adequately consider Organizational Plaintiffs' reliance interests, who diverted substantial resources and restructured their programming in reliance on the wind-down process, and whose core missions have been frustrated by the abrupt cessation of the wind-down. *See* SAC ¶¶ 364, 368.

Defendants' speculative assertion that the wind-down will be re-implemented after a judicial decision vacating the *Texas* injunction does not transform the agency's final decision to terminate the wind-down into a temporary, inconsequential action, Mot. at 30; nor does the possibility that DHS might reverse its termination of the wind-down at some future point alter its finality. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016) (observing that the possibility that an agency action will be revised "is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal"). For now, the termination of the wind-down is Defendants' "last word on the matter," opening its decision to judicial review. *See Or. Nat. Desert Ass'n*, 465 F.3d at 984.

v. Plaintiffs Have Sufficiently Stated Their Fifth Claim (First Amendment – Individual Plaintiffs).

Contrary to Defendants' assertions, *see* Mot. at 31, Plaintiffs allege that, in implementing MPP 1.0, Defendants placed specific and direct restrictions on their speech that impeded their communication with retained and prospective counsel. *See generally* SAC ¶¶ 376–79, 387–90. First, Defendants restricted respondents in MPP 1.0 to only one hour (and, in practice, much less) to consult with counsel while they were in the United States for their MPP 1.0 hearings – and that minimal amount of consultation was allowed only in non-confidential settings. *See* SAC ¶¶ 62–63, 156–57,

279–81, 299. Defendants implemented this restriction so as to allow only represented individuals to utilize that hour to consult with previously retained counsel. *See id.* Second, Defendants prohibited individuals from speaking with counsel outside of that hour. *See id.* The effect was that Defendants severely restricted represented individuals' consultation with counsel to only one hour in a non-confidential setting, and effectively prohibited unrepresented people from consulting with potential counsel or trying to secure counsel at all while they were in the United States.

Because of these restrictions, Individual Plaintiffs had no choice but to attempt to communicate virtually from Mexico with counsel and potential counsel. However, because Defendants' implementation of MPP 1.0 left them stranded in precarious conditions in Mexico, Individual Plaintiffs lacked sufficient resources and/or adequate technology to enable meaningful communication with counsel and potential counsel in the United States. *See* SAC ¶¶ 60, 104–08, 130, 178, 194, 251, 282, 295, 300, 302, 307.

While Defendants provided Individual Plaintiffs with a list of potential counsel in the United States whom they could ostensibly contact from Mexico, most of the legal service providers on that list were unwilling to take MPP 1.0 cases, making the time they spent in the United States for their hearings particularly critical to identify and secure counsel. However, by prohibiting unrepresented individuals from speaking with counsel at all during their time in the United States, Defendants effectively prevented them from consulting with or retaining counsel. *See* SAC ¶¶ 62, 63, 113–14, 125, 128, 139–40, 154, 156–57, 190–92, 204–05, 219–20, 222, 229–30, 244–46, 259–60.

Defendants do not contest that the First Amendment protects Individual Plaintiffs' rights to hire and consult with counsel.[24] While Defendants suggest that MPP

[24] Nor can they, for that right is well established. *See, e.g.*, *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611 (9th Cir, 2005), *as amended on denial of reh'g* (9th Cir. July 21, 2005) ("the 'right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.'") (quoting *Denius v. Dunlap*, 209 F.3d 944, 953 (7th Cir. 2000)); *Eng v. Coolev*, 552 F.3d 1062, 1069 (9th Cir. 2009) (courts have "long-recognized [the] First Amendment right to hire and consult an attorney").

1.0 constitutes merely a "policy of general applicability" with an "incidental effect" on speech, Plaintiffs have alleged that Defendants' implementation of MPP 1.0 included far-reaching restrictions on protected speech. Indeed, Defendants' prohibition on unrepresented people communicating with counsel during their time in the United States is a classic content-based restriction, which targets a certain form of speech on a specific subject: immigration-related legal advice to unrepresented noncitizens in removal proceedings. Such a restriction "cannot be justified without reference to the content of the regulated speech" and is subject to strict scrutiny. *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 164 (2015) (internal quotation marks omitted).

Even if viewed as content-neutral, Defendants' restrictions on all MPP 1.0 respondents' communications with counsel, whether represented or not, are unreasonable time, place, and manner restrictions. Time, place, and manner restrictions are reasonable only if they are "justified without reference to the content of the regulated speech," are "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information."[25] *Mothershed*, 410 F.3d at 611 (internal quotation marks omitted). Defendants' speech restrictions cannot be considered narrowly tailored. While Individual Plaintiffs were inside the United States, Defendants' implementation of MPP 1.0 entirely restricted all communication by unrepresented individuals with potential counsel and severely limited communication by represented individuals with counsel, both in time and place. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) ("narrowly tailored" regulations must "promote[] a substantial government interest that would be achieved less effectively absent the regulation," and must not "burden substantially more speech than is necessary to further the government's legitimate interests") (citation and internal quotation marks omitted). Such restrictions on speech do not serve any government

[25] The government bears the burden of making this showing. *See*, *e.g.*, *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000) (collecting cases).

interest, and Defendants do not claim otherwise. And, when Individual Plaintiffs were sent back to Mexico, Defendants' implementation of MPP 1.0 trapped them in circumstances where they lacked adequate technology or resources to communicate with counsel or potential counsel. Defendants' restrictions thus did not allow for any meaningful alternative channels for communicating with counsel, let alone "ample" alternative channels.

Because Individual Plaintiffs have alleged that Defendants placed specific, direct restrictions on their protected speech, Defendants' reliance on *Arroyo v. DHS* is misplaced.[26] In *Arroyo*, this Court found that the effects of detention center transfers alone did not trigger First Amendment protections, reasoning that the transfers were "silent as to any expressive conduct" and noting that the plaintiffs had offered "no argument as to how the prospective transfers constitute[d] speech regulation, either content-based or content-neutral." 2019 WL 2912848 at *21. Not so here. Defendants' restrictions are explicit restrictions on protected expressive conduct: they regulate who may seek a particular kind of speech—legal advice for noncitizens—when, where, and for how long. While the effects of these restrictions are heightened because of Defendants' decision to strand Individual Plaintiffs outside the United States without adequate means of communication with counsel or potential counsel, Defendants' explicit restrictions on their speech in the United States are the root of the problem.

Finally, Defendants' suggestion that the First Amendment right of access to the courts may not apply in immigration proceedings is unsupported and incorrect. *See* Mot. at 32. The Ninth Circuit has recognized that "the First Amendment extends to the right

[26] The cases Defendants cite for basic propositions of First Amendment law are unavailing, *see* Mot. at 31, as Defendants' implementation of MPP 1.0 did not regulate merely nonexpressive conduct. Rather, Defendants directly restricted protected speech, and imposed much more than "incidental" burdens on that speech. Indeed, Defendants' restrictions on protected speech here are strikingly similar in their effects to the restrictions overturned in the cases Defendants cite. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020).

to petition an administrative agency." *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 595 (9th Cir. 1992), *as amended on denial of reh'g* (June 18, 1993) (citing *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). And at least one court in this circuit has applied this right explicitly in immigration proceedings. *See Lyon v. U.S. Immig. & Customs Enf't*, 171 F. Supp. 3d 961, 994 (N.D. Cal. 2016). Contrary to Defendants' claim that MPP 1.0 "d[id] not regulate court access at all," Mot. at 32, Individual Plaintiffs have sufficiently pleaded that Defendants' restrictions denied them meaningful access to the asylum process. *See, e.g.*, SAC ¶¶ 60, 62, 63, 97, 104–08, 113–14, 128, 130, 139–40, 154, 156–57, 162–64, 178, 190–92, 194, 204–05, 219–20, 222, 229–32, 244–46, 251, 259–65, 282, 295, 300, 302, 307; *Silva v. Di Vittorio*, 658 F.3d 1090, 1101–02 (9th Cir. 2011), *abrogated on other grounds as stated in Richey v. Dahne*, 807 F.3d 1202, 1209 n.6 (9th Cir. 2015) (recognizing the right requires "meaningful access" to the courts).

While MPP 1.0 has ended, Defendants' restrictions cause ongoing harm to Individual Plaintiffs. *See, e.g.*, SAC ¶¶ 119, 129–30, 134, 145–46, 150, 183, 194, 213, 222–24, 238, 251, 253, 265, 380. For example, because Defendants' restrictions have prevented them from communicating with and/or retaining potential counsel, Removal Order Plaintiffs have not been able to submit motions to reopen their proceedings, despite their desire to do so. *See* SAC ¶¶ 119, 183, 194, 213, 223–24, 238, 253.

For the same reasons described above, *see supra* Section IV.E.iii, Defendants' extraterritoriality arguments fail as to Plaintiffs' First Amendment claims.[27]

[27] Additionally, Defendants do not explain how the cases they cite in discussing extraterritoriality regarding the Fifth Amendment apply in the First Amendment context. Further, *Verdugo-Urquidez* depends on particular language in the Fourth Amendment, which the Court reads as limiting its reach to "the people." 494 U.S. at 265. The First Amendment's Speech Clause has no such limitation, rendering *Verdugo-Urquidez*'s application to this case unclear at best. Fundamentally, none of the cases Defendants cite regarding extraterritoriality addresses the violation of noncitizens' First Amendment rights by U.S. government officials on U.S. soil.

vi. Plaintiffs Have Sufficiently Stated Their Sixth Claim (First Amendment – Organizational Plaintiffs).

Defendants' arguments against Organizational Plaintiffs' First Amendment claims are unavailing. Organizational Plaintiffs have pleaded that they represent certain Individual Plaintiffs, *see* SAC ¶¶ 159, 273, 290, 291, 294, and that they continue to provide legal services to putative class members, *see id.* ¶¶ 283, 285, 305.

The same analysis governing Individual Plaintiffs' First Amendment claims applies to Defendants' restrictions of Organizational Plaintiffs' protected speech. In their implementation of MPP 1.0, Defendants placed explicit restrictions on Organizational Plaintiffs' protected speech in the United States, including by (1) strictly limiting the time they were allowed to provide legal services to existing clients, *see* SAC ¶¶ 62–63, 156–57, 279–81, 299, 387–88, (2) prohibiting them from communicating with or advising potential clients, *see id.*, and (3) forbidding them from conducting "know your rights" presentations for MPP 1.0 respondents, *see id.* ¶¶ 297–98. Thus, like Individual Plaintiffs, Organizational Plaintiffs challenge the ways in which Defendants' particular implementation of MPP 1.0 specifically restricted their protected speech—not the constitutionality of § 1225(b)(2)(C).

Contrary to Defendants' assertion that there is "no general right to 'advise potential clients,'" Mot. at 32, the First Amendment rights of legal services providers like Organizational Plaintiffs are longstanding and well-established—by the very cases Defendants cite. The Supreme Court has long recognized that the First Amendment protects legal service providers from government interference when they are "advocating lawful means of vindicating legal rights." *NAACP v. Button*, 371 U.S. 415, 437 (1963). The Court has acknowledged such organizations' right to solicit potential clients, concluding that the "efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *In re Primus*, 436 U.S. 412, 431 (1978). Further, as the district court found in *Northwest Immigrant Rights Project v. Sessions*, pro bono legal assistance to

noncitizens in removal proceedings "falls neatly within the precedent set by the Supreme Court in *Button* and its progeny." No. C17-716 RAJ, 2017 WL 3189032, at *3 (W.D. Wash. July 27, 2017). Moreover, by advising, assisting, and consulting with existing and potential clients, attorneys disseminate important legal information, which is protected. *See Sorrell*, 564 U.S. at 570 ("creation and dissemination of information are speech within the meaning of the First Amendment.").

Similar to the legal service providers in *NAACP* and *Primus*, Organizational Plaintiffs are seeking to engage in pro bono legal advocacy for the rights of an "unpopular minority"—noncitizens seeking asylum at the southern border who were subjected to MPP 1.0. *Button*, 371 U.S. at 434; *see* SAC ¶¶ 271–73, 278, 288–90, 294, 297–98. The legal services Organizational Plaintiffs provide are part of their broader efforts to promote immigrant rights. *See, e.g.*, SAC ¶¶ 271–73, 278, 288–90, 294. By specifically restricting Organizational Plaintiffs' ability to conduct know-your-rights sessions and to consult with potential and existing clients, Defendants' implementation of MPP 1.0 has limited Organizational Plaintiffs' ability to engage in such advocacy, and thereby infringed on their First Amendment rights. *See, e.g.*, *id.* ¶¶ 62–63, 156–57, 279–81, 297–300, 302, 307, 387–88. Though MPP 1.0 has ended, Organizational Plaintiffs—like Individual Plaintiffs—continue to suffer harm from Defendants' unlawful policies. *See id.* ¶¶ 282, 283–87, 307–10, 389, 391.

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

Dated: February 23, 2022

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Matthew T. Heartney
MATTHEW T. HEARTNEY
HANNAH R. COLEMAN
ALLYSON C. MYERS
JOHN A. FREEDMAN
CAROLINE D. KELLY
EMILY REEDER-RICCHETTI

Attorneys for Plaintiffs

Dated: February 23, 2022

CENTER FOR GENDER & REFUGEE STUDIES

By: /s/ Melissa Crow
MELISSA CROW
ANNE DUTTON
ANNE PETERSON

Attorneys for Plaintiffs

Dated: February 23, 2022

SOUTHERN POVERTY LAW CENTER

By: /s/ Efrén Olivares
EFRÉN OLIVARES
STEPHANIE M. ALVAREZ-JONES

Attorneys for Plaintiffs

Dated: February 23, 2022

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD

By: /s/ Sirine Shebaya
SIRINE SHEBAYA
MATTHEW VOGEL
AMBER QURESHI
VICTORIA F. NEILSON
REBECCA SCHOLTZ

Attorneys for Plaintiffs

Dated: February 23, 2022

INNOVATION LAW LAB

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

Attorneys for Plaintiffs