

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

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

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

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

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

IMMIGRANT DEFENDERS LAW
CENTER, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

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

**PLAINTIFFS' SUPPLEMENTAL
BRIEF IN SUPPORT OF THEIR
EMERGENCY MOTIONS FOR
PROVISIONAL CLASS
CERTIFICATION (ECF 35) AND
PRELIMINARY INJUNCTION
(ECF 36)**

Honorable Jesus G. Bernal

Action Filed: October 28, 2020

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

3 GRACIE WILLIS*
4 Gracie.Willis@splcenter.org
5 SOUTHERN POVERTY LAW
6 CENTER
7 150 E. Ponce de Leon Avenue,
8 Suite 340
9 Decatur, GA 30030
10 Tel: (404) 521-6700
11 Fax: (404) 221-5857

MATTHEW VOGEL*†
matt@nipnl.org
AMBER QURESHI*‡
amber@nipnl.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

10 JORDAN CUNNINGS*
11 jordan@innovationlawlab.org
12 KELSEY PROVO*
13 kelsey@innovationlawlab.org
14 TESS HELLGREN*
15 tess@innovationlawlab.org
16 INNOVATION LAW LAB
17 333 SW 5th Avenue, Suite 200
18 Portland, OR 97204
19 Tel: (503) 241-0035

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

20 * Admitted Pro Hac Vice
21 † not admitted in DC; working remotely from and admitted in Louisiana only
22 ‡ admitted in Maryland; DC bar admission pending
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. Introduction..... 1

II. Defendants’ Phase One Processing Efforts Have Been Chaotic..... 1

III. Phase One Does Not Include the Entirety of the Putative Class..... 3

IV. Claims of Individual Plaintiffs and Putative Class Members Are Not
Moot..... 4

V. Defendants’ Improper Stay Request Should Be Denied. 8

VI. Conclusion.....10

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Am. Diabetes Ass’n v. Dep’t of the Army,*
938 F.3d 1147 (9th Cir. 2019)..... 5

5

6 *Ample Bright Dev., Ltd. v. Comis Int’l,*
Case No. CV 11-01329 MMM, 2012 WL 13006277 (C.D. Cal. May 14, 2012)... 8

7 *Biodiversity Legal Found. v. Badgley,*
309 F.3d 1166 (9th Cir. 2002)..... 6

8

9 *Cheverez v. Plains All Am. Pipeline, LP,*
Case No. CV15-4113 PSG, 2016 WL 4942328 (C.D. Cal. Feb. 25, 2016)5, 8

10 *City of Los Angeles v. Lyons,*
461 U.S. 95 (1983)..... 5

11

12 *Clinton v. Jones,*
520 U.S. 681 (1997)..... 8

13 *Decker v. Nw. Eenvtl. Def. Ctr.,*
568 U.S. 597 (2013)..... 5

14

15 *Doe v. Wolf*
Case No. 19-cv-2110 (S.D. Cal)..... 10

16 *Friends of the Earth, Inc. v. Laidlaw Eenvtl. Servs. (TOC), Inc.,*
528 U.S. 167 (2000)..... 7

17

18 *In re Palmdale Hills Prop. LLC,*
654 F.3d 868 (9th Cir. 2011) 7

19 *K.P.P.R v. Wolf,*
Case No. 21-cv-007 (S.D. Tex.)..... 10

20

21 *Karuk Tribe of Cal. v. U.S. Forest Serv.,*
681 F.3d 1006 (9th Cir. 2012)..... 4

22 *Knox v. Serv. Emps. Int’l Union, Local 1000,*
567 U.S. 298 (2012)..... 5

23

24 *Landis v. N. Am. Co.,*
299 U.S. 248 (1936).....8, 9

25 *Leonard v. Clark,*
12 F.3d 885 (9th Cir. 1993)..... 7

26

27 *Lockyer v. Mirant Corp.,*
398 F.3d 1098 (9th Cir. 2005).....8, 9

28

1 *McCormack v. Herzog*,
788 F.3d 1017 (9th Cir. 2015)..... 7

2

3 *Pitts v. Terrible Herbst, Inc.*,
653 F.3d 1081 (9th Cir. 2011)..... 7

4 *San Luis & Delta-Mendota Water Auth. v. Dep’t of the Interior*,
870 F. Supp. 2d 943 (E.D. Cal. 2012)..... 7

5

6 *Sierra Club v. Env’tl. Prot. Agency*,
762 F.3d 971 (9th Cir. 2014)..... 7

7 *United States Parole Comm’n v. Geraghty*,
445 U.S. 388 (1980)..... 7

8

9 *Vasquez v. Mayorkas*,
Civil Action No. 1:20-cv-10566-IT, 2021 WL 531970 (D. Mass. Feb. 13, 2021). 9

10 *Wilson v. Odwalla, Inc.*,
Case No. CV 17-2763 DSF, 2017 WL 3084278 (C.D. Cal. June 28, 2017) 9

11

12 **Other Authorities**

13 Haiyun Damon-Feng, *Restoring the Right to Seek Asylum: The Case for Rescinding*
Removal Orders Issued Under the “Remain in Mexico” Policy
Harv. L. & Pol’y Rev. (Mar. 5, 2021) 4

14 L.R. 7-4..... 8

15 U.S. Customs & Border Protection, *Migrant Protection Protocols FY2020*,
16 <https://www.cbp.gov/newsroom/stats/migrant-protection-protocols-fy-2020>..... 3

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. Introduction**

2 On February 19, 2021, Defendants began to “wind down” the Migrant Protection
3 Protocols (MPP). Despite this positive step to allow a limited group of individuals
4 subject to MPP to enter the United States, Defendants’ processing efforts have been
5 chaotic. Additionally, thousands of putative class members – including, for example,
6 individuals like Plaintiff Jaqueline Doe who have *in absentia* removal orders, *see infra*
7 Section III – have been left out of this process and continue to suffer irreparable harm.
8 For these reasons, both Individual and Organizational Plaintiffs maintain an interest in
9 a preliminary injunction, class certification, and ultimate resolution of their claims.
10 Defendants’ efforts thus have a minimal impact on the pending motions, and their
11 request for a stay should be denied.

12 **II. Defendants’ Phase One Processing Efforts Have Been Chaotic.**

13 Defendants’ recent revisions to MPP have been poorly communicated and
14 implemented, resulting in widespread confusion, pervasive misinformation, and
15 frequent missteps that have further endangered the safety of tens of thousands of
16 affected asylum seekers. Organizational Plaintiffs Jewish Family Service of San Diego
17 (JFSSD) and Immigrant Defenders of Los Angeles (ImmDef) are both leaders in the
18 California Welcoming Task Force (CWTF), a coalition of non-governmental
19 organizations formed to facilitate the wind-down of MPP. Supplemental Declaration of
20 Lindsay Toczykowski (“Toczykowski Decl.”) ¶ 3; Supplemental Declaration of Luis
21 Gonzalez (“Gonzalez Decl.”) ¶ 6. Despite concerted efforts by JFFSD, ImmDef, and
22 other coalition members to collaborate with the government, Defendants have “failed
23 to adequately coordinate with and communicate critical information” to them. Gonzalez
24 Decl. ¶ 10 (describing organizational meetings where government agencies “punted”
25 critical questions that went “unanswered”); ¶ 3 (lack of clear guidance about whether
26 Phase One includes certain categories of MPP cases). The government has also provided
27 inaccurate or confusing information about issues such as changing the venue of
28 immigration proceedings, checking in with ICE, and obtaining work authorization, all

1 of which could have long-term ramifications on asylum seekers' cases. Toczyłowski
2 Decl. ¶¶ 17-18; Gonzalez Decl. ¶¶ 9, 15-19.

3 Many asylum seekers included in Phase One, including Plaintiff Anthony Doe
4 and other putative class members, remain trapped in Mexico with no information
5 about if or when they will be processed. A number of these individuals have been
6 unable to even register for processing, as the online registration system has been
7 unreliable and at times wholly ineffective. Gonzalez Decl. ¶¶ 11-13. The online
8 registration process through conecta.acnur.org (Conecta) fails to account for
9 accessibility barriers for individuals who do not have an internet connection, who
10 speak indigenous languages, or who do not have certain information required for
11 registration. Toczyłowski Decl. ¶¶ 12-15; Gonzalez Decl. ¶ 13. The website did not
12 function properly during the first week of Phase One and has periodically continued
13 to crash as migrants and advocates attempt to access it. Toczyłowski Decl. ¶¶ 8-11.

14 Defendants have provided materially inaccurate or incomplete information
15 about Phase One, which has exacerbated dangerous conditions. *See, e.g.*, Gonzalez
16 Decl. ¶ 5 (government's failure to provide information caused confusion and further
17 jeopardized safety of migrants in Mexico); ¶ 24 (JFSSD MPP hotline receives an
18 average of 30-40 calls and 70-80 messages per day seeking information). This
19 information has led many migrants to return to dangerous border towns for fear of
20 missing their opportunity to be processed. *Id.* ¶ 27. This trend has created a dangerous
21 situation at the San Ysidro Port of Entry (POE) where an encampment, estimated to
22 include more than 1,000 migrants, has formed. Toczyłowski Decl. ¶¶ 26-30. This
23 growing encampment lacks basic sanitation, running water, and reliable bathroom
24 access, raising grave concerns about the spread of COVID-19 and other diseases. *Id.*
25 ¶¶ 27-28.

26 Defendants have failed to take appropriate measures to protect asylum seekers
27 on the U.S. side of the border by refusing to provide transportation from the San
28 Ysidro POE to JFSSD's shelter and failing to implement adequate precautionary

1 measures for COVID-19 following processing. Gonzalez Decl. ¶¶ 9, 20-21 (noting
2 that asylum seekers would have been able to leave San Diego without public health
3 precautions if the State of California had not intervened).

4 **III. Phase One Does Not Include the Entirety of the Putative Class.**

5 Despite acknowledging that Phase One does not include people subject to MPP
6 “who do not have active immigration court cases,” Defendants do not define what
7 constitutes an “active” immigration court case. Defs.’ Supp. Br., ECF No. 119, at 2.
8 Based on incomplete and sometimes contradictory information provided by
9 Defendants, the following categories of people currently appear to be ineligible for
10 processing during Phase One: (1) asylum seekers who received *in absentia* removal
11 orders after failing to appear for their immigration court hearings (like Plaintiff
12 Jaqueline Doe);¹ (2) asylum seekers seeking review of a removal order by the Board
13 of Immigration Appeals or a federal circuit court; (3) asylum seekers whose cases
14 were terminated by immigration judges;² (4) asylum seekers who do not have access
15 to certain identity or other documents required to register for processing; and (5)
16 asylum seekers who were ordered removed despite having been deprived of their
17 procedural rights, including their right to counsel, in their removal proceedings. *See*
18 Toczyłowski Decl. ¶ 22-25; Gonzalez Decl. ¶¶ 3, 23, 28. To date, Defendants have
19 given no indication that they will implement additional phases of processing.
20 Gonzalez Decl. ¶ 23.

21 Notably, all individuals in the above-referenced categories are also members
22 of the putative class, which includes asylum seekers who have been subjected to MPP
23 after presenting or being directed to present at the San Ysidro or Calexico POEs,

24 ¹ According to government statistics, out of all MPP cases that had been adjudicated
25 as of July 2020, over 32,000 resulted in removal orders, with the vast majority—over
26 28,000—issued *in absentia*. *See* U.S. Customs & Border Protection, *Migrant*
27 *Protection Protocols FY2020*, [https://www.cbp.gov/newsroom/stats/migrant-
28 protection-protocols-fy-2020](https://www.cbp.gov/newsroom/stats/migrant-protection-protocols-fy-2020).

² Immigration judges have terminated the cases of over 10,000 people subject to MPP.
Id.

1 regardless of whether they have “active” immigration court cases. *See* Mot. for Class.
 2 Cert., ECF No. 35, at 1. Individuals who do not have an “active” immigration case—
 3 who remain in Mexico in an attempt to secure and appear at future hearings—often
 4 suffer the worst harms as a result of MPP.³ For instance, after appearing for her first
 5 two immigration court hearings, Plaintiff Jaqueline Doe was returned to Mexico with
 6 instructions to appear at the San Ysidro POE on February 6, 2020. Decl. of Jaqueline
 7 Doe, ECF No. 46, ¶ 40. When she did so, immigration officers refused to allow her
 8 to enter the United States and told her that her case was “closed.” *Id.* Jaqueline was
 9 then ordered removed *in absentia* and, as a result, is not eligible for Phase One
 10 processing. She remains trapped in a dangerous area of Mexico, without counsel or
 11 the ability to meet her basic needs. *Id.* ¶¶ 7-9, 19, 20, 22, 25, 26, 33, 46, 49-55, 57
 12 (describing lack of access to basic needs in Mexico, and being the victim of robberies,
 13 physical violence, and verbal abuse because of her gender identity). Like many others,
 14 due to a removal order issued as a result of Defendants’ unlawful policies, Jaqueline
 15 is now ineligible for Defendants’ proffered process and is forced to live under
 16 untenable conditions in the hope of finding a way to reopen her asylum case. *See id.*
 17 ¶ 40; Toczykowski Decl. ¶¶ 19-25 (describing cases ineligible for Phase One
 18 processing), ¶¶ 16, 27-28 (describing the living conditions and public health concerns
 19 at the encampment at the San Ysidro POE).

20 **IV. Claims of Individual Plaintiffs and Putative Class Members Are Not**
 21 **Moot.**

22 Defendants have not met their “heavy” burden to demonstrate that the claims
 23 of any Individual Plaintiffs or putative class members are moot. *See Karuk Tribe of*
 24 *Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012). A case becomes moot

25 _____
 26 ³ *See* Haiyun Damon-Feng, *Restoring the Right to Seek Asylum: The Case for*
 27 *Rescinding Removal Orders Issued Under the “Remain in Mexico” Policy*, Harv. L.
 28 & Pol’y Rev. (Mar. 5, 2021), <https://harvardlpr.com/2021/03/05/restoring-the-right-to-seek-asylum-the-case-for-rescinding-removal-orders-issued-under-the-remain-in-mexico-policy/>.

1 only when it is “impossible for a court to grant any effectual relief whatsoever to the
2 prevailing party.” *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013). “[A]s
3 long as the parties have a concrete interest, however small, in the outcome of the
4 litigation, the case is not moot.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567
5 U.S. 298, 307-08 (2012). Here, both putative class members with “non-active” cases
6 and Individual Plaintiffs in the United States continue to have a concrete interest in
7 receiving injunctive, declaratory, and classwide relief.⁴

8 First, the relief Plaintiffs seek is not limited to putative class members with
9 “active” immigration cases. Defendants argue that excluded class members with
10 “non-active” cases no longer have a live case or controversy. Defs.’ Supp. Br. at 6.
11 But individuals who are ineligible for Phase One could still obtain relief through this
12 case, including through an injunction allowing *all* class members to return to the
13 United States and providing interim relief during any additional time they are forced
14 to remain in Mexico. Complaint, ECF No. 1, Prayer for Relief, 80-81. Defendants’
15 recent actions have not remedied any of the harms alleged by putative class members
16 excluded from Phase One, who continue to suffer extreme, irreparable harm as a result
17 of MPP. Indeed, Plaintiff Jaqueline Doe and similarly situated class members remain
18 in peril in Mexico due to *in absentia* removal orders that were issued as a result of
19 Defendants’ unlawful policies, in some cases despite good faith attempts to appear
20 for their hearings that were impeded by the dangers in Mexico or changes to their
21 hearing dates without notice. *See, e.g.*, Toczyłowski Decl. ¶¶ 20-22 (describing the
22 circumstances of individuals who received *in absentia* orders, including
23 hospitalizations and being bussed over 1,000 miles south of the border with no
24 transportation provided to attend their hearings). These individuals continue to be

25 ⁴ The cases Defendants cite are inapposite. Unlike in *Am. Diabetes Ass’n v. Dep’t of*
26 *the Army*, 938 F.3d 1147 (9th Cir. 2019), the issues presented in this case remain live,
27 and Individual Plaintiffs in the United States retain legally cognizable interests in their
28 outcome. And Defendants cite *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), for
its propositions on standing, not mootness.

1 injured by Defendants’ policies, which unlawfully deprive them of their rights to
2 apply for asylum, to access counsel, to a full and fair hearing, and to reasonable safety
3 and to access basic human needs. Their claims thus remain live and can be remedied
4 by this Court.

5 Second, this Court can still provide meaningful injunctive relief to remedy
6 Defendants’ violations of the rights of Individual Plaintiffs who have entered the
7 United States. *See* Complaint, Prayer for Relief, (d), (j) (seeking injunction to remedy
8 rights violations and “such further relief as this Court deems just and proper”).
9 Specifically, this Court can grant injunctive relief to remedy potentially ongoing
10 prejudice to these Individual Plaintiffs’ asylum claims resulting from Defendants’
11 unlawful policies⁵ and trauma they suffered in Mexico.⁶

12 Third, all Individual Plaintiffs and putative class members retain a legal interest
13 in this action based on their request for declaratory relief. *See* Complaint, Prayer for
14 Relief, (c). Under Ninth Circuit law, a “district court ha[s] a duty to decide the merits
15 of [a] declaratory judgment claim even [when] the request for an injunction ha[s]
16 become moot.” *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-75 (9th
17 Cir. 2002). Neither putative class members’ “non-active” immigration court cases nor
18 Individual Plaintiffs’ presence in the United States moots these individuals’ request
19 that the Court declare MPP unlawful.

20 Fourth, Individual Plaintiffs in the United States retain their interest in
21 obtaining class certification and classwide relief. *See* Complaint, Prayer for Relief,

22
23 ⁵ *See, e.g.*, Decl. of Feliza Doe, ECF No. 45, ¶ 19 (unable to communicate with the
24 immigration judge at first hearing due to lack of Mam interpreter); Decl. of Jessica
25 Doe, ECF No. 42, ¶ 12 (“feel[ing] confused about what is happening with [her]
asylum case”); Decl. of Nicholas Doe, ECF No. 44, ¶ 14 (describing having his
passport stolen).

26 ⁶ *See, e.g.*, Decl. of Hannah Doe, ECF No. 40, ¶ 13 (surviving an attempted rape);
27 Decl. of Jessica Doe, ECF No. 42, ¶¶ 10-11 (attempted kidnapping of her son); Decl.
28 of Benjamin Doe, ECF No. 41, ¶ 18 (same); Decl. of Feliza Doe, ECF No. 45, ¶¶ 39-
40 (fear for daughters’ safety after surviving an attempted kidnapping); Decl. of
Nicholas Doe, ECF No. 44, ¶¶ 13-14 (living in constant fear).

1 (a). As putative class representatives, Individual Plaintiffs present “two separate
2 issues for judicial resolution,” their claims on the merits and their claim of entitlement
3 to represent the class. *See United States Parole Comm’n v. Geraghty*, 445 U.S. 388,
4 402 (1980); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011)
5 (recognizing putative class representatives’ interest in obtaining a final decision on
6 class certification).

7 Finally, it is worth noting that although Defendants have *suspended*
8 enrollments in MPP, they are still considering whether to rescind the policy. Defs.’
9 Supp. Br. at 1. Thus, Defendants could conceivably re-enroll Individual Plaintiffs and
10 putative class members in MPP in the future. Even if “the prospect that [Defendants]
11 will . . . resume harmful conduct may be too speculative to support standing,” it is
12 “not too speculative to overcome mootness” where Plaintiffs initially had standing to
13 bring their claims. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528
14 U.S. 167, 190 (2000); *see also McCormack v. Herzog*, 788 F.3d 1017, 1027 n.9 (9th
15 Cir. 2015) (same).

16 Because there is still effective injunctive and declaratory relief that this Court
17 can grant to all Individual Plaintiffs and putative class members, Defendants are
18 unable to meet their burden “to establish that there is no effective relief remaining for
19 a court to provide.” *In re Palmdale Hills Prop. LLC*, 654 F.3d 868, 874 (9th Cir.
20 2011); *San Luis & Delta-Mendota Water Auth. v. Dep’t of the Interior*, 870 F. Supp.
21 2d 943, 953 (E.D. Cal. 2012).⁷

22
23

24 ⁷ Even if the claims of the Individual Plaintiffs in the United States were deemed
25 moot, this conclusion would have no impact on the case at this time, as other
26 Individual Plaintiffs remain trapped in Mexico. “[O]nly one [plaintiff] must establish
27 standing to enable review.” *Sierra Club v. Envtl. Prot. Agency*, 762 F.3d 971, 976
28 (9th Cir. 2014), and “once the court determines that one of the plaintiffs has standing,
it need not decide the standing of the others,” *Leonard v. Clark*, 12 F.3d 885, 888 (9th
Cir. 1993). As discussed in Section V *infra*, Organizational Plaintiffs’ standing also
remains unaffected by Defendants’ recent actions.

1 **V. Defendants’ Improper Stay Request Should Be Denied.**

2 For at least the second time in this litigation, Defendants have ignored the local
3 rules by seeking a stay without filing a noticed motion under L.R. 7-4.⁸ Defendants
4 have not offered any explanation for “why [they] did not file a regularly-noticed
5 motion to stay this action.” *Ample Bright Dev., Ltd. v. Comis Int’l*, Case No. CV 11-
6 01329 MMM (FMOx), 2012 WL 13006277, at *3 (C.D. Cal. May 14, 2012). For this
7 reason alone, the Court should deny Defendants’ request.

8 Defendants also fail to show that a stay is warranted. In determining whether to
9 grant a stay pursuant to *Landis v. North American Co.*, 299 U.S. 248, 254 (1936),
10 courts in the Ninth Circuit weigh the “competing interests which will be affected by
11 the granting or refusal to grant a stay,” including “the possible damage which may
12 result from the granting of a stay, the hardship or inequity which a party may suffer
13 in being required to go forward, and the orderly course of justice measured in terms
14 of the simplifying or complicating of issues, proof, and questions of law which could
15 be expected to result from a stay.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th
16 Cir. 2005). The burden is on the movant to show that a stay is appropriate. *Clinton v.*
17 *Jones*, 520 U.S. 681, 708 (1997). Here, none of the *Landis* factors support the issuance
18 of a stay.

19 First, Plaintiffs will continue to suffer if a stay is granted. A stay is disfavored
20 where the underlying suit seeks injunctive relief to remedy ongoing harm or to prevent
21 future harm from occurring. *Lockyer*, 398 F.3d at 1112; *Cheverez v. Plains All Am.*
22 *Pipeline, LP*, Case No. CV15-4113 PSG (JEMx), 2016 WL 4942328, at *3-*5 (C.D.
23 Cal. Feb. 25, 2016). The harms detailed in the Complaint and Plaintiffs’ Motion for
24 Preliminary Injunction continue to pose immediate, significant risks to certain
25 Individual Plaintiffs and many putative class members. Complaint ¶¶ 98-206; Mot.

26
27
28

⁸ *Cf.* Defs. Opp. to Class Certification, ECF No. 87 at 21-25 (requesting transfer of this case to the Southern District of California).

1 for Prelim. Inj., ECF No. 36-1, at 12-15; *see supra* Section II.⁹ The zones and transit
2 corridors where many of these individuals are trapped despite Phase One processing
3 remain dangerous. *See* Toczykowski Decl. ¶ 26; Gonzalez Decl. ¶ 25; *see generally*
4 Complaint ¶¶ 98-110. Conditions worsen daily at the San Ysidro POE, where putative
5 class members and other migrants are congregating due to the government’s failure
6 to provide adequate information regarding registration and processing. Toczykowski
7 Decl. ¶¶ 26-31; Gonzalez Decl. ¶ 27.

8 Second, Defendants have proffered no justification for a four-month stay. “[I]f
9 there is even a fair possibility that the stay for which [the movant] prays will work
10 damage to someone else,’ the movant ‘must make out a clear case of hardship or
11 inequity in being required to go forward.’” *Wilson v. Odwalla, Inc.*, Case No. CV 17-
12 2763 DSF (FFMx), 2017 WL 3084278, at *4 (C.D. Cal. June 28, 2017) (quoting
13 *Landis*, 299 U.S. at 255). At a minimum, a stay of this litigation would allow ongoing
14 harm to those Individual Plaintiffs and putative class members in Phase One who are
15 unable to register, as well as to Jaqueline Doe and all putative class members who are
16 not included in Phase One. *See supra* Sections II and III. Defendants have offered
17 only vague, unsupported assertions about “efficien[cy]” and the administration’s need
18 for more time to process a portion of the putative class. Defs.’ Supp. Br. at 8-9. These
19 assertions do not constitute a “clear case of hardship or equity.” *Wilson*, 2017 WL
20 3084278, at *4 (quoting *Landis*, 299 U.S. at 255); *see also Lockyer*, 398 F.3d at 1112.

21 Third, Organizational Plaintiffs are also experiencing ongoing harm due to
22 Defendants’ chaotic implementation of Phase One. Toczykowski Decl. ¶¶ 25, 34-36;

23
24
25
26
27
28

⁹ *See also Vasquez v. Mayorkas*, Civil Action No. 1:20-cv-10566-IT, 2021 WL 531970, at *14 (D. Mass. Feb. 13, 2021) (“The court note[d] recent news reports describing DHS’s plan to begin a new asylum process to allow about 300 asylum seekers a day into the United States. . . . While this development may result in the New Returned Plaintiffs’ admission into the United States, it is unclear when that may occur. The New Returned Plaintiffs have demonstrated that they face daily peril such that there is a high likelihood they will suffer irreparable harm should the preliminary injunction not issue.”).

1 Gonzalez Decl. ¶¶ 5-6, 8-10, 14, 18, 21-22. Further, they remain unable to safely and
2 reliably access clients and potential clients who are trapped in Mexico. Mot. for
3 Prelim. Inj. at 15-17; Toczyłowski Decl. ¶¶ 30-33, 35-36; Gonzalez Decl. ¶ 25. These
4 difficulties are exacerbated by Organizational Plaintiffs’ limited access to critical
5 locations for the wind-down, such as the shelter in Mexico where those eligible for
6 Phase One are processed and the San Ysidro POE. Toczyłowski Decl. ¶¶ 30-33, 35.

7 Finally, a stay will not simplify the issues, proof, or questions of law in this
8 case. As discussed *supra*, although the contours of Phase One processing remain
9 unclear, Defendants’ plan clearly excludes thousands of asylum seekers, including
10 Plaintiff Jaqueline Doe and many putative class members. *See supra* Section III. Class
11 certification is thus still required to ensure relief to the whole class. *See supra* Section
12 III. And, as noted in Section IV, all Plaintiffs, including those in the United States,
13 retain a legal interest in declaratory, injunctive, and classwide relief. Defendants’
14 proposed stay will not address any of these outstanding issues.

15 The three cases cited by Defendants are inapposite. As explained in Plaintiffs’
16 previous briefing, *Mayorkas v. Innovation Law Lab* “is not implicated because the
17 issues raised in the government’s petition for certiorari are distinct.” Reply ISO Mot.
18 for Prelim. Inj., ECF No. 92 at 1; *see* Defs.’ Opp. to Mot. for Prelim. Inj., ECF No.
19 88 at 7 (noting that legal questions in this case are “unlike *Innovation Law Lab v.*
20 *Nielsen*”). In *Doe v. Wolf*, Case No. 19-cv-2110 (S.D. Cal), and *K.P.P.R v. Wolf*, Case
21 No. 21-cv-007 (S.D. Tex.), the courts granted Defendants’ *unopposed* motions for
22 extensions of time.

23 **VI. Conclusion**

24 Accordingly, Plaintiffs respectfully request that this Court deny Defendants’
25 request for a stay and grant Plaintiffs’ Emergency Motion for Preliminary Injunction
26 and Emergency Motion for Provisional Class Certification.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: March 15, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ Angel Tang Nakamura
ANGEL TANG NAKAMURA
HANNAH R. COLEMAN
JOHN A. FREEDMAN
CAROLINE D. KELLY
EMILY REEDER-RICCHETTI

Attorneys for Plaintiffs

Dated: March 15, 2021

SOUTHERN POVERTY LAW CENTER

By: /s/ Melissa Crow
MELISSA CROW
GRACIE WILLIS

Attorneys for Plaintiffs

Dated: March 15, 2021

NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD

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

Attorneys for Plaintiffs

Dated: March 15, 2021

INNOVATION LAW LAB

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

Attorneys for Plaintiffs