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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION, and UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Hearing Date: December 14, 2020
Hearing Time: 1:30 p.m.
Ctrm: First Street Courthouse
350 W. 1st Street
Los Angeles, CA. 90012
Ctrm. 5D, 5th Floor

Hon. Jesus G. Bernal

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I. INTRODUCTION

On October 28, 2020, Plaintiffs filed a complaint for injunctive and declaratory relief alleging, *inter alia*, the following claims for relief pursuant to the Administrative Procedure Act ("APA"): (1) a violation of the right of the Individual Plaintiffs to apply for asylum pursuant to 8 U.S.C. § 1158(a)(1) and the frustration of the right of the Organizational Plaintiffs to fulfill their missions (Dkt. 36 ¶¶ 253-254.); (2) a violation of the authority of Defendants to return Individual Plaintiffs to Mexico pursuant to 8 U.S.C. § 1225(b)(2)(C) because the suspension of hearings makes their immigration proceedings no longer "pending"; (3) infringement of the Individual Plaintiffs' statutory right to counsel; and (4) interference with the Organizational Plaintiffs' ability to deliver meaningful legal assistance in violation of the cited statutes. (Complaint at ¶¶ 250-287.)

On November 9, 2020, Plaintiffs filed an emergency motion seeking a preliminary injunction on the basis of the four APA claims set forth above. (Dkt. 36-1 at 24-32.) Specifically, Plaintiffs' motion seeks an order from this Court: (1) enjoining the Migrant Protection Protocols' "Return Policy" until hearings safely resume; (2) allowing the Individual Plaintiffs to return to the United States to pursue their asylum claims; and (3) requiring Defendants to provide "meaningful access to legal services." (Dkt. 36 at 3.)

The relief requested by Plaintiffs is similar to an injunction already entered by a district court in the Northern District of California that the Supreme Court stayed in its entirety pending the completion of appellate review. *See Innovation Law Lab v. Wolf*, 2020 WL 6121563 (Mem.) The Plaintiffs here are attempting to have this Court circumvent the Supreme Court's order. Their request is especially unwarranted because Plaintiffs challenge the Government's lawful efforts to manage an unprecedented global pandemic while requesting relief that poses dramatic risks to the safety of Government personnel, the aliens themselves, and the public at large.

II. FACTUAL BACKGROUND

A. Migrant Protection Protocols

In 2018, the United States faced a humanitarian, public safety, and security crisis

on our southern border as a surge of hundreds of thousands of migrants, many from the Northern Triangle countries of Central America (Honduras, El Salvador, and Guatemala), attempted to cross through Mexico to enter the United States despite having no lawful basis for admission. *See, e.g.*, 83 Fed. Reg. 55,934, 55,944-55,945 (Nov. 9, 2018). By fall 2018, U.S. officials encountered an average of approximately 2,000 inadmissible aliens per day at the border. *Id.* at 55,935.

Amidst this crisis, in December 2018, the Secretary of Homeland Security announced the implementation of the Migrant Protection Protocols ("MPP"), which implements the Secretary's contiguous territory return authority in 8 U.S.C. § 1225(b)(2)(C). MPP directs that certain aliens who are arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their section 1229a removal proceedings. (Dkt. 53-1 at 2.)

B. COVID-19

In March 2020, the Centers for Disease Control and Prevention ("CDC") issued an order temporarily suspending the "introduction . . . into the United States . . . [of] persons traveling from Canada or Mexico . . . who would otherwise be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada and Mexico," subject to certain exceptions. 85 Fed. Reg. 17,060, 17,061 (Mar. 26, 2020). The Order was issued under Title 42 of the U.S. Code, which authorizes the Surgeon General to "prohibit . . . the introduction of persons and property" to protect against a "serious danger of the introduction of [any communicable] disease into the United States." 42 U.S.C. § 265. The Order aims to "protect the public health from an increase in the serious danger of the introduction of Coronavirus Disease 2019 ("COVID-19") into the land POEs, and the Border Patrol stations between POEs, at or near the United States borders with Canada and Mexico." 85 Fed. Reg. at 17,061.

The CDC Order called for "the movement of all . . . aliens [covered by the order]

to the country from which they entered the United States, or their country of origin . . . as rapidly as possible, with as little time spent in congregate settings as practicable under the circumstances." *Id.* at 17,067. The Order requested that "DHS implement this order because CDC does not have the capability, resources, or personnel needed to do so." *Id.*; *see also* Dkt. 53-12. The Order was extended in April and May 2020 and now applies at land and coastal POEs and remains effective until the CDC Director determines the danger of further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health. 85 Fed. Reg. 22,424 (Apr. 22, 2020); 85 Fed. Reg. 31,503 (May 26, 2020). The CDC Order is subject to periodic reviews. *See* Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 FR 65806-01 ("Every 30 days, the CDC shall review the latest information regarding the status of the COVID-19 pandemic and associated public health risks to ensure that the Order remains necessary to protect public health.").

On July 17, 2020, DHS and the Department of Justice ("DOJ") issued a joint press release announcing, based on an evaluation of health conditions in United States and Mexico, and with the backdrop of surging cases in Texas, Arizona, and Mexico, criteria to be used to determine when to resume immigration hearings swiftly and safely. (Dkt. 53-13; Decl. of James McCament ¶¶ 7-9.)[1]

III. LEGAL BACKGROUND

A. Relevant Statutes

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

In 1996, Congress enacted the following three statutes:

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[1] The Government has also placed restrictions on non-essential travel. *See* https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus

- 8 U.S.C. § 1158(d)(4), which provides that when aliens file applications for asylum, they are to be advised of the privilege of being represented by counsel and provided a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis;
- 8 U.S.C. § 1229a(b)(4)(A), which provides aliens with (1) the privilege of being represented, at no expense to the Government, by counsel of their choosing, (2) a reasonable opportunity to examine evidence, present evidence, and cross-examine witnesses, and (3) a complete record of the testimony and evidence; and
- 8 U.S.C. § 1225(b)(2)(C), which permits the return of aliens to a contiguous territory who arrive on land (whether or not at a designated port of arrival) from that territory pending removal proceedings.

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

The contiguous return authority in Section 1225(b)(2)(C) authorizes DHS to temporarily return certain applicants for admission arriving by land (whether or not at a designated port of arrival) from Mexico or Canada to those countries "during the pendency of section 1229a removal proceedings." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019).

B. Innovation Law Lab v. Wolf

In April 2019, a district court in the Northern District of California entered a nationwide injunction prohibiting the Government from continuing to implement MPP, finding that it is inconsistent with Section 1225. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019). The Ninth Circuit stayed that injunction, and the Government resumed the implementation of MPP. *Innovation Law Lab v. Wolf*, 924 F.3d 509 (9th Cir. 2019). MPP has now been in operation for 22 months. Since January 2019, the Government has returned approximately 66,700 aliens to Mexico pursuant to MPP. (Davies Decl. ¶ 4.)

In February 2020, the Ninth Circuit affirmed the preliminary injunction entered by

the district court and briefly lifted the injunction's stay. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). On March 11, 2020, the Supreme Court of the United States granted an application for a stay of the injunction of MPP, pending completion of proceedings in that Court. 140 S. Ct. 1564 (Mem). On October 19, 2020, the Supreme Court granted the Government's petition for a writ of certiorari to review MPP. 2020 WL 6121563 (Mem). Briefing in that case is ongoing.

IV. LEGAL STANDARD

A. Standard of Review

Preliminary injunctive relief "is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The moving party has the burden of persuasion. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20.

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

A plaintiff who seeks a mandatory injunction ordering the defendant to take action "must establish that the law and facts clearly favor [its] position, not simply that [it] is likely to succeed." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014). A mandatory injunction goes beyond simply maintaining the status quo and is particularly disfavored. *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). Mandatory preliminary

injunctive relief should not be issued unless the facts and law clearly favor the moving party. *Id.*; *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) (mandatory injunctions should not issue in "doubtful cases").

V. ARGUMENT

A. This Court lacks jurisdiction over Plaintiffs' APA claims

1. This Court lacks jurisdiction over Plaintiffs' APA claims pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii)

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

All four of Plaintiffs' APA claims in the motion for preliminary injunction ultimately challenge DHS's discretionary decisions to return them to Mexico pursuant to 8 U.S.C. § 1225(b)(2)(C). The Individual Plaintiffs allege that the Secretary's return decisions frustrate their ability to apply for asylum and to access counsel, and the Organizational Plaintiffs similarly allege that the Secretary's return decisions have adversely impacted their missions. (*See* Complaint ¶¶ 250-287.)

Section 701 of the APA excludes from judicial review agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a). Section 1225(b)(2)(C) provides that DHS "*may* return" an alien to a contiguous country. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). "The word 'may' clearly connotes discretion." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016); *see also Poursina v. USCIS*, 936 F.3d 868, 871 (9th Cir. 2019). Return decisions pursuant to Section 1225(b)(2)(C) are squarely in the discretion of the Secretary and therefore unreviewable.

See Gebhardt v. Nielsen, 879 F.3d 980, 987 (9th Cir. 2018).

Here, Individual Plaintiffs challenge the "standards" used to arrive at the ultimate decisions to return them to Mexico. That is, decisions to return proposed class members to Mexico despite (a) allegedly "dangerous conditions" in Mexico that "obstruct[] access to all of the components of the U.S. asylum system," (b) temporary postponement of individual hearings, (c) failing to consider "Plaintiffs' inability to meaningfully access legal representatives," and (d) failing to consider "the obstacles that Organizational Plaintiffs would face in safely meeting and meaningfully communicating with clients and potential clients." (Complaint ¶¶ 284, 253, 266, 269, 276, 284.) But Section 1252(a)(2)(B)(ii) does not permit judicial review of the Secretary's standards for those return decisions.

Notably, Plaintiffs do not allege that Defendants lack authority to implement MPP generally pursuant Section 1225(b)(2)(C). This case is therefore unlike *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), where the court found that the "very point of dispute in this action is whether Section 1225(b)(2)(C) applies such that DHS has such discretion, or not." *Id.* at 1118. That very issue is currently pending before the Supreme Court.

Therefore, this Court should find that it lacks jurisdiction over Plaintiffs' APA claims pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii).

2. <u>This Court lacks jurisdiction over Plaintiffs' APA claims pursuant to 8 U.S.C. § 1252(b)(9)</u>

This Court additionally lacks jurisdiction to review Plaintiffs' right-to-counsel claims under 8 U.S.C. § 1252(b)(9), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

Id. Section 1252(b)(9) is an "unmistakable zipper clause" that channels judicial review of "all questions of law and fact," including both "constitutional and statutory" challenges into a petition for review ("PFR") once administrative immigration proceedings have ended. *Reno v. Am.-Arab Anti Discrim. Comm.*, 525 U.S. 471, 482-83 (1999); *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (citing to 8 U.S.C. § 1252(b)(9)); *see also E.O.H.C. v. Secretary United States Department of Homeland Security*, 950 F.3d 177, 186 (3d. Cir. 2020) (barring statutory right-to-counsel claim).

The reach of this provision is capacious. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("Section 1252(b)(9) is . . . breathtaking in scope and vise-like in grip and therefore swallows up virtually all claims that are tied to removal proceedings."); *see also Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) ("By its terms, the provision aims to consolidate *all* questions of law and fact that arise from either an action or a proceeding brought in connection with the removal of an alien." (internal quotations omitted)).

The broad reach of section 1252(b)(9) is consistent with the Congressional purpose underpinning its enactment, namely to "streamline immigration proceedings" and "eliminate[] the previous initial step in obtaining judicial review—a suit in a District Court," so that "'review of a final removal order is the only *mechanism* for reviewing any issue raised in a removal proceeding.'" *Singh v. Gonzales*, 499 F.3d 969, 975-76 (9th Cir. 2007) (emphasis added) (quoting H.R. Rep. No. 109-72 at 173 (May 3, 2005)); *Aguilar*, 510 F.3d at 9 ("In enacting section 1252(b)(9), Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings.").

With regard to an APA challenge in the district court, "[w]hen a claim by an alien, however it is framed, challenges the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal, it is prohibited by section 1252(a)(5)." *Martinez*, 704 F.3d at 623. Accordingly, "[t]aken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue – whether legal or factual – arising from any removal-related activity can be reviewed *only* through the [petition for review] process."

J.E.F.M., 837 F.3d at 1031 (emphasis internal).

Plaintiffs' claims alleging a purported interference with their right to counsel and ability to apply for asylum are clearly "part and parcel," *J.E.F.M.*, 837 F.3d at 1033, "of the process by which their removability will be determined," *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018), and can accordingly only be raised in a PFR. Right to "counsel claims are not independent or ancillary to the removal proceedings. Rather these claims are bound up in and an inextricable part of the administrative process." *J.E.F.M.*, 837 F.3d at 1033. Plaintiffs' allegation that their right to counsel is being infringed because they are not permitted to remain in the United States pending their removal proceedings "possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned." *Aguilar*, 510 F.3d at 13. Similarly, their claims of infringement of their ability to apply for asylum directly affect the outcome of their removal proceedings.

The statutory provisions on which Plaintiffs base their claim explicitly tie the right to counsel to removal proceedings and claims for relief from removal. *See, e.g.*, 8 U.S.C § 1362 ("In any removal proceedings before an [IJ] . . . the person concerned shall have the privilege of being represented . . . by such counsel . . . as he shall choose."). Therefore, this Court lacks jurisdiction over these claims. *See J.E.F.M.*, 837 F.3d at 1033-34; *E.O.H.C.*, 950 F.3d at 187-88; *Aguilar*, 510 F.3d at 13; *Skurtu v. Mukasey*, 552 F.3d 651, 658 (8th Cir. 2008) ("Skurtu's claims that he was denied his right to counsel and a fair hearing are a direct result of the removal proceedings before the IJ.").

Therefore, this Court should find that it lacks jurisdiction over Plaintiffs' APA claims pursuant to 8 U.S.C. § 1252(b)(9).

B. Plaintiffs Have Not Established a Likelihood of Success on the Merits

1. Plaintiffs Have Failed to Establish a Likelihood of Success on their First Claim

a. **The Individual Plaintiffs cannot succeed on their claim that contiguous-territory return violates their right to apply for asylum or to access retained counsel**

The INA provides that any alien who is "physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), may apply for asylum," 8 U.S.C. § 1158(a)(1), and shall be advised of the privilege of being represented by retained counsel, 8 U.S.C. § 1158(d)(4). But Section 1158 does not state or guarantee that any person who indicates an intention to apply for asylum or who applies for asylum must be allowed to remain in the United States pending adjudication or must be guaranteed the right to counsel. On the contrary, Section 1225(b)(2)(C) explicitly provides that the Secretary "may return" certain aliens to a "foreign territory contiguous to the United States "pending a proceeding under section 1229a"—a proceeding in which the alien's application for asylum will be adjudicated. 8 U.S.C. § 1225(b)(2)(C). Plaintiffs cannot demonstrate that their return to a contiguous foreign territory violates an asserted "statutory right to asylum," (Dkt. 36-1 at 26), when it is the *statute* that expressly authorized their return. Put another way, Congress's decision to authorize contiguous-territory-return in the INA cannot simultaneously "violate" another part of the INA and thereby give rise to a claim for relief under the APA. Congress does not write two provisions within the same chapter at war with one another, and the more specific authority to return certain aliens to Mexico pending removal proceedings must be read to cohere with, not conflict with, the generic right to apply for asylum and have representation by counsel in that proceeding.

Nor have Plaintiffs plausibly alleged any violation of a purported statutory "right to uniform treatment." (Dkt. 36-1 at 26.) Again, it was Congress that authorized contiguous-territory return for certain "applicants for admission" arriving on land from

Mexico, so DHS's decision to exercise that specific statutory authority cannot be enjoined through the APA on the ground that it conflicts with a generic requirement to establish "a uniform method" of applying for asylum. *Id.* At bottom, Plaintiffs contend that "geographic location . . . should have no bearing" on how an asylum application is processed, *id.*, but Congress expressly disagreed: it provided that, if the applicant for admission arrived on land from Mexico (whether or not at a designated port of arrival), then DHS may return that alien to Mexico while the alien's asylum application is being heard in a proceeding under Section 1229a.

Even if Plaintiffs' legal theory made any sense—that exercising authority from one statutory provision (contiguous-territory-return in Section 1225(b)(2)(C)) can "violate" another (the rights to apply for asylum with retained counsel)—Plaintiffs have not substantiated their allegations that they have been denied the opportunity to apply for asylum by alleging that they have been prevented from filing or preparing to file applications for asylum. Plaintiffs' only real complaint is that their return to Mexico has made it more difficult for them to prepare their asylum applications and communicate with their counsel. But Congress authorized those consequences in Section 1225(b)(2)(C), and the APA provides no basis to reject an immigration procedure that Congress explicitly created.

Therefore, Plaintiffs cannot succeed on their claim that contiguous-territory return violates their right to apply for asylum or to access retained counsel.

b. **The Organizational Plaintiffs cannot succeed on their APA claim invoking 8 U.S.C. § 1158(a)(1)**

For all the reasons just stated, the Organizational Plaintiffs cannot demonstrate that contiguous-territory return violates the INA, and the APA does not allow them to enjoin a return procedure that Congress created. But the Organizational Plaintiffs' claim fails for an additional reason as well: they are outside the zone of interest for 8 U.S.C. § 1158(a)(1), and therefore cannot use that statute as the basis for an APA suit.

The APA does not "allow suit by every person suffering injury in fact." *Clarke v.*

Secs. Indus. Ass'n, 479 U.S. 388, 395 (1987). It provides a cause of action only to one "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. To be "aggrieved," "the interest sought to be protected" must "be arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Clarke,* 479 U.S. at 396 (modifications omitted). "[O]n any given claim the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). Organizational Plaintiffs identify no such interest here.

Plaintiffs cite 8 U.S.C. § 1158(a), which governs the conduct of removal proceedings, and emphasize that asylum seekers have statutory rights to representation by retained counsel at no cost to the Government, *id.* § 1229a(b)(4)(A), to examine evidence, *id.* § 1229a(b)(4)(B); to have a complete record kept of the proceedings, *id.* § 1229a(b)(4)(C); and to a decision from the immigration judge based on the evidence at the hearing, *id.* § 1229a(c)(1)(A). Compl. ¶¶ 35-38, 210, 228. But none of those provisions even arguably suggests that the statute protects the interests of "immigration legal service providers" who seek to assist aliens who are already in removal proceedings. *Id.* ¶ 13. The provisions cited by Plaintiffs neither regulate the Organizational Plaintiffs' conduct nor create any benefits for which the organizations are eligible.

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

organizations are outside the immigration statutes' zone of interests. *See, e.g.*, *Fed'n for Am. Immigration Reform, Inc. (FAIR) v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996)

That reasoning fully applies here. Organizational Plaintiffs are not applying for asylum; they seek to help others do so. Nothing in "the relevant provisions [can] be fairly read to implicate Organizational Plaintiffs' interest in the efficient use of resources" or a requirement that proceedings in immigration court be scheduled to serve such an interest. *Nw. Immigrant Rights Project v. USCIS*, 325 F.R.D. 671, 688 (W.D. Wash. 2016). *Situ v. Leavitt*, 2006 WL 3734373, at *10 (N.D. Cal. 2006) ("[T]he organizational plaintiffs in this case fail to satisfy the zone of interests test because they have failed to rebut Defendant's argument that the Medicare statutory scheme is intended to protect individuals, not advocacy organizations.").

Therefore, the Organizational Plaintiffs cannot succeed on their APA claim invoking 8 U.S.C. § 1158(a)(1).

2. Plaintiffs have not shown any violation of 8 U.S.C. § 1225(b)(2)(C)

Plaintiffs contend that, because the Government temporarily paused immigration hearings starting in July 2020 in response to the global pandemic, their removal proceedings are no longer "pending" as that term is used in 8 U.S.C. § 1225(b)(2)(C). (Dkt. 36-1 at 17-18; Dkt. 53-13 (Coleman Decl., Ex. M).) Plaintiffs' argument lacks merit. MPP was authorized expressly by Congress, and it did not stop being lawful when the Government adopted emergency measures to manage a public health crisis. Plaintiffs do not contend—nor could they—that the Government acted improperly or unlawfully by temporarily pausing immigration hearings at the same time that schools, civil courts, and many other vital Governmental services were being shut down due to the pandemic. The very press release cited by Plaintiffs describes criteria for DHS and DOJ to use to determine when to *resume* MPP hearings as soon as it is safe to do so. (Dkt. 53-13 at 2.) The press release also describes the safeguards that will be used to protect DHS employees and aliens in MPP once those hearings can safely resume. (Dkt.

53-13 at 3.) *See generally* McCament Decl.

Plaintiffs cite no authority for their assertion—which they advance in a single paragraph of legal argument—that the Government's decision to temporarily pause their hearings means that their immigration proceedings are no longer "pending" within the meaning of Section 1225(b)(2)(C). No one who is familiar with federal immigration law—and for that matter, no one using ordinary English—would say that Plaintiffs' proceedings are no longer "pending" when they have merely been temporarily delayed. Each Individual Plaintiff has a proceeding that is active on the docket before an immigration judge, and at the time their declarations were filed, a scheduled hearing. As the Government has publicly stated, hearings will resume on those proceedings as soon as it is safe to do so. Indeed, whether removal proceedings are "pending" is proscribed by law. *See* 8 C.F.R. § 1241.1(a-f) (identifying when an order of removal by an immigration judge at the conclusion of proceedings under section 240 of the Act become final). Until an order of removal is made final, or until the immigration judge grants a motion filed by DHS or an alien seeking termination/ dismissal of removal proceedings, the proceedings remain pending.

Plaintiffs cite *United States v. Olsen*, 467 F. Supp. 3d 892 (C.D. Cal. 2020), but that case is far afield: the court relied on the Speedy Trial Act to deny an ex parte application of the Government to continue a criminal trial based on safety concerns related to the coronavirus. Section 1225(b)(2)(C) is not like the Speedy Trial Act; it requires only a "pending" proceeding and does not provide any requirements regarding the timing of that proceeding.

At bottom, Plaintiffs' argument amounts to a collateral attack on the Government's public health measures—even though Plaintiffs cite no source of law that would allow them to challenge those eminently reasonable safety decisions.

Therefore, this Court should find that Plaintiffs have not shown any violation of 8 U.S.C. § 1225(b)(2)(C).

3. The Individual Plaintiffs are not likely to succeed on their claim that Defendants' policies violate their right to access to counsel, in violation of 8 U.S.C. §§ 1158, 1229a(b)(4)(A), 1362

As set forth above, the INA authorizes contiguous-territory return, so the Government's decision to exercise that authority cannot give rise to an APA suit for violating a separate statutory right regarding counsel. Nonetheless, in Plaintiffs' third claim for relief, they argue a violation of their right to counsel in immigration proceedings pursuant to 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A).[2] *See Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) (citations omitted). *Biwot* is irrelevant here because it did not concern the application of the right to counsel in the face of an explicit grant of statutory authority to the Government.

In any event, Plaintiffs' claim under *Biwot* fails for other reasons as well. The regulations that effectuate the right to counsel provide that "[t]he alien may be represented in proceedings before an [IJ] by an attorney or other representative of his or her choice." 8 C.F.R. § 1003.16(b). The Ninth Circuit has held that Immigration Judges must provide aliens with reasonable time to locate counsel and permit counsel to prepare for their hearings. *Id.* at 1098-99 (citations omitted). In *Biwot*, the Ninth Circuit held that where aliens are being diligent in their efforts to obtain counsel, the denial of a continuance so that they may secure counsel was an abuse of discretion because it was "tantamount to denial of counsel." *Id.* at 1100.

The key phrase in *Biwot* is "denial of counsel," which suggests that the right to access to counsel is infringed when it is "denied." Here, Plaintiffs have not alleged any facts that constitute a "denial of counsel." Indeed, none of the Plaintiffs has set forth any actions being taken by Defendants to infringe upon their rights to contact counsel of their

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[2] 8 U.S.C. § 1158(d)(4), cited as an additional legal basis for this APA claim, merely provides that at the time that aliens file applications for asylum, they are to be advised of the privilege of being represented by counsel and provided a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis. Plaintiffs have not presented any evidence of Defendants' failure to perform the acts required by this statute.

choosing and communicate with them in any manner they choose. Although Plaintiffs are restricted from entering the United States and meeting with counsel in this country in person other than the time immediately prior to their immigration court hearing, there are no restrictions imposed upon them by Defendants as to meeting with counsel in Mexico, nor are there any restrictions imposed upon them by Defendants concerning communicating by telephone or other application.

While Plaintiffs' declarations identify technological and other issues they are individually having with obtaining and communicating with their counsel, both in Mexico and in the United States, or other issues in finding counsel that are not uncommon among individuals seeking counsel in the United States, Plaintiffs have not identified any issues that relate directly to any restrictions imposed on them by Defendants. On the contrary, Plaintiffs' declarations demonstrate in several places that they have successfully communicated with their counsel, which refutes their contention that they have suffered a "denial of counsel.": "I went to [a] clinic and was able to meet with an attorney there, and thank God she agreed to take my case." (Daniel Doe Decl., Dkt. 39 at ¶ 18.); "My family and I have never met our attorney in person and only communicate with her by phone." (Benjamin Doe Decl., Dkt. 41 at ¶ 26.); "[A] friend gave us the phone number for her immigration attorney. That attorney was not able to take our case, but she referred us to an attorney who began representing us in March 2020." (Jessica Doe Decl., Dkt. 42 at ¶¶ 12-13.); "It is difficult for me to send documents to my legal representative. Sending pictures of my documents through WhatsApp takes a long time because I have to take a picture of each page individually." (Feliza Doe Decl., Dkt. 45 at ¶ 33.); "The lawyers at [the Border Line Crisis Center] helped me fill out and submit what I believe is an asylum application to the court by email." (Jaqueline Doe Decl., Dkt. 46 at ¶ 47.)

Moreover, as Plaintiffs have noted, they believe their scheduled hearings will continue to be postponed for the foreseeable future. Additionally, as their declarations demonstrate, the immigration judges they have appeared before have continued their

hearings to give them more time to obtain counsel. As a result, any arguments they raise concerning denial of counsel immediately prior to or at their to-be-scheduled immigration court hearings are hypothetical.

Finally, the Individual Plaintiffs describe their living conditions and the risks to them of harm while awaiting adjudication of their applications for asylum in Mexico (PI Motion at ¶ I.A.), but they do not set forth any issues they themselves are having regarding access to counsel as it concerns their pending applications for asylum. Therefore, the Individual Plaintiffs are not likely to succeed on this claim.

4. The Organizational Plaintiffs are not likely to succeed on their claim that Defendants' policies violate their ability to serve as counsel to the Individual Plaintiffs, in violation of 8 U.S.C. §§ 1158, 1229a(b)(4)(A), 1362

a. **The Organizational Plaintiffs cannot demonstrate standing to pursue this claim**

The Organizational Plaintiffs argue that Defendants' implementation of MPP was arbitrary and capricious because Defendants failed to consider the obstacles that they would face in safely meeting and meaningfully communicating with clients and potential clients who are placed into MPP. (Dkt. 36-1 at 9.) Again, the APA provides no basis for Plaintiffs to disregard Congress's decision to create contiguous-territory return. It was *Congress* that determined that aliens arriving on land from Mexico can be permitted to await removal proceedings while in Mexico (which includes the adjudication of their asylum applications during such proceedings), irrespective of any difficulties that such returns might pose for the aliens themselves or their lawyers.

Even if Organizational Plaintiffs' theorized APA violation were plausible, they lack standing to assert it. An organization may assert standing on its own behalf without invoking the rights of third-party individuals. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) ("*EBSC II*"). But in order to do so, it must show that defendant's behavior has "frustrated its mission and caused it to divert

resources in response to that frustration of purpose." *Id.* (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). An organizational plaintiff must also show it has been "perceptibly impaired" in its ability to perform its services in order to prevail on its burden to prove standing. *EBSC II*, 950 F.3d at 1265. However, organizations cannot "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Id.* at 1265-66 (citing *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)); *see also Clapper v. Amnesty Int'l*, 568 U.S. 398, 416 (2013); *Am. Soc. For Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011).

In *EBSC II*, the Ninth Circuit found that two organizations whose missions to assist aliens seeking asylum were directly affected by Government action had established concrete, redressable harms that they could challenge, including that their funding was jeopardized by that action. *Id.* at 1266-67. Here, however, the Organizational Plaintiffs have failed to establish that the implementation of MPP directly affected the existing missions of either organization.

Prior to the implementation of MPP, it does not appear that either organization focused on asylum applications. *See generally* Gonzalez and Toczylowski declarations.[3] Immigrant Defenders Law Center's ("ImmDef's") mission was to serve detained and non-detained individuals in immigration court proceedings in the Greater Los Angeles and Orange County areas (including the Inland Empire), but not generally focused on the San Diego border area." (Complaint at ¶ 21.) Jewish Family Service of San Diego's ("Jewish Family Service") mission was to provide holistic, culturally competent, trauma-

[3] It also does not appear that prior to the implementation of MPP, either of the two Organizational Plaintiffs, Immigrant Defenders Law Center ("ImmDef") or Jewish Family Service of San Diego ("Jewish Family Service") engaged in any significant legal services to assist aliens in Mexico. *See* Gonzalez Decl., Dkt. 38 at ¶ 12 ("Prior to the implementation of MPP, JFSSD rarely engaged in cross-border legal work. On the few occasions where there was a need to provide legal services to an individual or family on the south side of the U.S.-Mexico border, the legal intervention provided was limited in scope (e.g. parole request)"; Toczylowski Decl., Dkt. 36-2 at ¶ 16 ("Prior to MPP, ImmDef attorneys . . . rarely needed to travel to Mexico to meet with our clients").

informed, quality legal and other supportive services to the immigrant community in San Diego and Imperial Counties. (Complaint at ¶ 22.) After the implementation of MPP, the two organizations established new initiatives to assist individuals subject to MPP. (Complaint ¶ 22.)

The Organizational Plaintiffs' allegations are insufficient to demonstrate that the MPP impaired their ability to provide services by inhibiting their daily operations. *See, e.g.*, *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015); *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015). Here, both entities made decisions to change their missions following the implementation of MPP, and therefore they cannot establish that their existing missions were perceptibly impaired by the implementation of MPP.[4]

The Organizational Plaintiffs have also failed to allege or present evidence that the implementation of MPP jeopardized their client base or their funding, as was the case in *EBSC II*. Instead, their argument is that their representation of aliens in MPP who are currently in Mexico is more costly than it would be if they were able to reenter the United States. As the Ninth Circuit explained in *EBSC II*, organizations cannot "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *EBSC II*., 950 F.3d at 1265-66.

Organizations also have "no judicially cognizable interest" in the "enforcement of

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[4] For ImmDef, after the implementation of MPP, it decided to eliminate positions in its Los Angeles office and divert them to a new Cross-Border Initiative Project not out of a lack of a continuing need for service by families in the Los Angeles area, but out of a desire to assist asylum seekers in MPP. (Dkt. 36-2 at ¶ 21.) Similarly, following the implementation of MPP, Jewish Family Service diverted its resources from providing representation and other services to noncitizens in the United States, including individuals detained at the Otay Mesa Detention Center and non-detained individuals in the San Diego area, to assisting with individuals subject to MPP. (Dkt. 38 at ¶ 17.)

Plaintiffs' submissions also appear to indicate that Jewish Family Service has been able to increase the number of individuals represented under its programs. Between November 2017 and January 2019, Jewish Family Service represented 61 individuals (15 detained and 46 non-detained). (*Id.*) From February 1, 2019 through October 20, 2020, Jewish Family Service represented 119 individuals (11 detained, 12 non-detained, and 96 subject to MPP). (*Id.*)

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

Therefore, this Court should find that the Organizational Plaintiffs have failed to establish a likelihood of success on this claim.

C. Plaintiffs Have Not Established Irreparable Harm

On July 17, 2020, immigration court hearings for aliens subject to MPP were suspended until certain criteria are met after initially being postponed beginning in March 2020. (Complaint ¶ 8; Dkt. 53-12, 53-13.) Plaintiffs did not file this action until October 28, 2020. The fact that Plaintiffs waited three months from the last notification of hearings being postponed to file this action and seek a preliminary injunction cuts strongly against any allegation of irreparable harm. *See, e.g.*, *Cruz v. DHS*, 2019 WL 8139805, at *6–7 (D.D.C. 2019) (finding that plaintiff's delay in bringing his lawsuit challenging MPP suggested a lack of urgency on his part and further weakened his claim of imminent and irreparable harm).

"A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . . ." *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) (citations omitted). *See also Li v. Home Depot USA Inc.*, 2013 WL 12120065, at *3 (C.D. Cal. 2013) (delay of three months in seeking preliminary injunction implies a lack of urgency and irreparable harm); *First Franklin Fin. Corp. v. Franklin First Fin., Ltd.*, 356 F. Supp. 2d 1048, 1055

(N.D. Cal. 2005) (three month delay "undercuts . . . claims of urgency and irreparable harm").

Plaintiffs' have also failed to establish irreparable harm tied to the alleged denial of counsel or rights to file asylum applications that are at issue in this motion. In their motion, the Individual Plaintiffs cite as irreparable harm the alleged dangers of remaining in Mexico. But these issues are not directly related to issues concerning access to counsel, which are the main focus of this litigation. As for the Organizational Plaintiffs, as noted above, their diversion of resources to assist aliens subject to the MPP was by choice and not necessity. Therefore, Plaintiffs cannot demonstrate irreparable harm in this motion.

D. The Balance of Equities and the Public Interest Weigh Against a Preliminary Injunction

The public interest favors the Government. MPP is "one of the few congressionally authorized measures available to process the approximately 2,000 migrants who are currently arriving at the Nation's southern border on a daily basis," so any injunction that curtails the Government's ability to use that tool inflicts tangible and immediate harm. *Innovation Law Lab*, 924 F.3d at 510. MPP has been a vital tool in combatting the humanitarian crisis at the U.S.-Mexico border. Border crossing decreased dramatically after MPP's implementation, and border encounters with Central American family units decreased by about 80%.[5]

The public interest also favors not disturbing the diplomatic relationship between the United States and Mexico as the two countries work together to address irregular migration, because "the public interest favors the efficient administration of the immigration laws at the border." *Innovation Law Lab*, 924 F.3d at 510. An injunction would constitute a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). The "United States has been engaged in sustained diplomatic negotiations with Mexico . . . regarding the

[5] https://www.dhs.gov/publication/assessment-migrant-protection-protocols-mpp

situation on the southern border." 83 Fed. Reg. 55,934 (Nov. 9, 2018). During the course of those negotiations, the United States obtained a commitment from the Mexican government that, "[f]or humanitarian reasons ... [it] will authorize the temporary entrance of" aliens subject to MPP. (Dkt. 53-1 at 3.) Any injunction would thus harm efforts to address a national security and humanitarian crisis that is the subject of ongoing diplomatic engagement—a matter that this Court should hesitate to disturb.

The magnitude of the crisis at the heart of these negotiations—and the government's corresponding need for all available tools to address it—is great. In the fall of 2018, U.S. officials "each day encountered an average of approximately 2,000 inadmissible aliens at the southern border," with an increase in the arrival of family units. 83 Fed. Reg. 55,934. In January 2019, DHS noted, "Historically, illegal aliens to the U.S. were predominantly single adult males from Mexico who were generally removed within 48 hours if they had no legal right to stay; now over 60% are family units and unaccompanied children and 60% are non-Mexican. In FY17, CBP apprehended 94,285 family units from Honduras, Guatemala, and El Salvador (Northern Triangle) at the Southern border. Of those, 99% remain in the country today." (Dkt. 53-3 at 3.)

Furthermore, the rate of aliens claiming fear during the expedited removal process has gone up by over 1,900% since 2008, from "5,000 a year in [FY] 2008 to about 97,000 in FY 2018," while a large majority of these persons "never file an application for asylum or are ordered removed in absentia." 83 Fed. Reg. 55,934 (explaining that of 34,158 case completions in FY 2018 that began with a credible-fear claim, 71% resulted in a removal order and asylum was granted in only 17%). MPP re-calibrates incentives for aliens to make the "dangerous journey north" to the United States border and for "[s]mugglers and traffickers" to exploit "outdated laws" and "migrants" in order "to turn human misery into profit." (Dkt. 53-3 at 3.) MPP "provide[s] a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims to stay in the U.S.," which in turn will "allow more resources to be dedicated to

individuals who legitimately qualify for asylum." (Dkt. 53-3 at 3-4.) Therefore, an injunction ending MPP would thwart this important effort to address the crisis on the southern border.

Finally, if an injunction were granted ordering the return of a class of Plaintiffs, the burden on the Government to implement such an order would create significant implementation concerns and operational impacts on U.S. Customs and Border Protection ("CBP") Office of Field Operations ("OFO"), as set forth in the attached declaration of Matthew S. Davies. If an injunction were granted, upon arrival at a POE, OFO would need to confirm an alien's identity using biometrics, asking questions related to the alien's identification, and review related documents, among other screening actions. (Davies Decl. ¶¶ 7-9.) Screening would also need to be done to determine the risk to public safety and any medical issues further requiring increased time in congregate settings, and further heightening the risk of COVID-19 exposure for the processing officer and the other individuals in CBP custody. (*Id.*) Additionally, OFO facilities are congregate facilities that are not well equipped for social distancing, isolation, or quarantine. (*Id.* at ¶ 10.) OFO facilities are designed for short-term holding, have limited capacity, and are not designed for long-term detention. (*Id.* at ¶¶ 10, 15.) Thus, the granting of an injunction, especially with the attendant COVID-19 risk would place a tremendous strain on OFO's ability to effectively carry out its critical missions. (*See* Davies Decl. ¶¶ 14-22.) Such an order would also place significant risk to the CBP officers, the public, and aliens encountered by OFO should CBP be ordered to process such a large number of people to return to the United States. (*Id.*)

Therefore, the balance of equities and the public interest weigh against a preliminary injunction.

E. Plaintiffs Are Not Entitled to the Injunction They Request

The extraordinary remedy of a mandatory preliminary injunction is not warranted here on any of Plaintiffs' claims. If, however, the Court were to find any deficiency in MPP arising from the Government's temporary pause in immigration hearings, that still

could not justify Plaintiffs' requested relief—ordering suspension of MPP and the Individual Plaintiffs' return to the United States. Rather, Plaintiffs' claim would require preserving the option for the Government to choose to resume the Individual Plaintiffs' hearings.

Similarly, Plaintiffs' (incorrect) arguments about Defendants' interference with the Individual Plaintiffs' ability to apply for asylum could not justify an injunction preventing all returns until "Plaintiffs have meaningful access to legal services," (Dkt. 36-1 at 34); injunctions must be precisely tailored, as opposed to the vague mandate that Plaintiffs request. *See Nat. Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007). Even if Plaintiffs were entitled to additional procedural protections to assist their counsel in preparing their cases, that would not justify the remedy of returning them to the United States notwithstanding Section 1225(b)(2)(C).

Moreover, even if the Court were to order Individual Plaintiffs removed from MPP, the Court still lacks jurisdiction to parole them into the United States. Rather, it would be up to DHS to determine whether to parole Plaintiffs or detain them in immigration custody. *See Loa–Herrera v. Trominski*, 231 F.3d 984, 990–91 (5th Cir. 2000) ("Congress, however, has denied the district court jurisdiction to adjudicate deprivations of the plaintiffs' statutory and constitutional rights to parole."); *Palacios v. Dep't of Homeland Sec.*, 407 F. Supp. 3d 691, 698 (S.D. Tex. 2019) (Rosenthal, C.J.) ("[T]his court lacks jurisdiction to review denials of parole under the Immigration and Nationality Act because these actions are committed to agency discretion by law.") (quotations omitted); *Maldonado v. Macias*, 150 F. Supp. 3d 788, 795 (W.D. Tex. 2015) ("Under § 1252(a)(2)(B)(ii), this Court has no jurisdiction to review the Attorney General's discretionary decision not to apply the presumption and the resulting denial of parole.").

This Court should not enter an injunction that would impose massive operational difficulties on the Government in the middle of a pandemic. The severe effects of such an injunction are set forth in the attached declaration of Matthew S. Davies. (*See also*

Section D, *supra*.)

In the event the Court determines any injunction relief is warranted, it should stay its injunction pending appeal. At a minimum, the Court should stay its order for at least 14 days to give the Ninth Circuit an opportunity to consider whether to stay any injunction pending appeal.

VI. CONCLUSION

For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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