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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Innovation Law Lab, *et al.*,

Plaintiffs,

v.

Kirstjen Nielsen, *et al.*,

Defendants.

CASE NO.: 3:19-CV-00807-RS

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Legislative History

INTRODUCTION

On January 29, 2019, Defendants began implementing an unprecedented forced return policy at the southern border. Under the new policy, individuals who have come to the United States to seek asylum are forced to return to Mexico while their removal proceedings are pending, even though they are not from Mexico, have no domicile in that country, and the border regions they are being sent back to are among the most dangerous in the world. The new policy, which Defendants dub the "Migrant Protection Protocols," is the government's latest effort to deter asylum seekers from seeking protection in the United States under the pretext of a manufactured border crisis. Apprehension rates at the southern border in FY 2017 were the lowest since 1972. *See* Isacson Decl. ¶ 4. Meanwhile U.S. Customs and Border Protection's budget is at a record high. *See id.* ¶ 9.

A bedrock principle of U.S. and international law known as *nonrefoulement* prohibits the United States from returning individuals to countries where they are more likely than not to face persecution, torture, or cruel, inhuman, or degrading treatment. Defendants pay lip service to this standard, stating that under their new policy no one who can prove such a claim will be returned. *See, e.g.*, Rodriguez Decl., Ex. A (Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Security, Policy Guidance for Implementation of the Migrant Protection Protocols, at 3-4, Jan. 25, 2019). But Defendants have failed to put in place even the most minimal safeguards to comply with this obligation. As a result, asylum seekers, including the Individual Plaintiffs, are being returned to Mexico without any meaningful consideration of the dangers they face there, including the very real threat that Mexican authorities will return them to the countries they fled to escape persecution and torture.

The eleven Individual Plaintiffs all have strong claims for asylum. They fled their homes in El Salvador, Guatemala, and Honduras to escape extreme violence, including rape and death threats. One Plaintiff was forced to flee Honduras after her life was threatened for being a lesbian. ECF No. 5-3 (Bianca Doe Decl.) ¶¶ 6, 47-48. Another suffered brutal beatings and death threats by a "death squad" in Guatemala that targeted him for his indigenous identity. ECF No. 5-1 (John Doe Decl.) ¶¶ 4-5. Yet Defendants returned the Individual Plaintiffs to Mexico where they had already experienced physical and verbal assaults, are living in fear of future violence, and are struggling to

survive. It will be difficult if not impossible for them to pursue their asylum cases from Mexico. Almost none of the Individual Plaintiffs were even asked about the dangers they fear in Mexico, *see, e.g.*, ECF No. 5-7 (Evan Doe Decl.) ¶ 17, and two Plaintiffs who attempted to describe their fears to an asylum officer were summarily returned to Mexico without explanation. *See* ECF No. 5-10 (Howard Doe Decl.) ¶¶ 21-25; ECF No. 5-8 (Frank Doe Decl.) ¶¶ 18-22. Meanwhile the six Organizational Plaintiffs—all legal service providers whose core mission is to provide high quality, comprehensive legal representation and education to asylum seekers—are working to meet the needs of asylum seekers who are now stranded outside the country, and are diverting resources that would otherwise be spent on serving clients inside the United States.

Plaintiffs seek a temporary restraining order ("TRO") to maintain the status quo and enjoin Defendants' forced return policy until a preliminary injunction can be obtained. The TRO is sought on four grounds:

First, Defendants are carrying out their new policy in violation of the statute that they claim authorizes it. Title 8 U.S.C. § 1225(b)(2)(C) expressly exempts from its scope individuals to whom the expedited removal statute, 8 U.S.C. § 1225(b)(1), applies. Yet those are the people, including the Individual Plaintiffs, to whom Defendants are applying the forced return policy. In addition, § 1225(b)(2)(C) only applies to individuals who are in pending removal proceedings under 8 U.S.C. § 1229a. Although the Individual Plaintiffs have been issued notices to appear ("NTAs") for such removal proceedings, those NTAs apparently have not yet been filed with the immigration court, and thus no proceedings are officially pending.

Second, Defendants are violating their duty of *nonrefoulement* as codified in the Immigration and Nationality Act's ("INA") withholding of removal provision, 8 U.S.C. § 1231(b)(3), and its implementing regulations, 8 C.F.R. §§ 208.16(a), 1208.16(a), by failing to provide a minimally adequate procedure to prevent the return of individuals to conditions of persecution or torture. For similar reasons, Defendants' policy is arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), because its procedure for making fear determinations is wholly lacking in procedural safeguards and deviates from longstanding agency practice without any acknowledgment, let alone a reasoned explanation.

Third, Defendants violated the APA rulemaking requirements when they established their new, nondiscretionary procedure for determining who has a fear of persecution or torture in Mexico, and failed to comply with their notice-and-comment obligations.

Finally, Defendants' forced return policy is arbitrary and capricious because their asserted justifications—such as deterring illegal migration and fraudulent asylum claims—are not rationally connected to the policy's design. And indeed, some of the purported justifications for Defendants' policy—such as circumventing court decisions and laws that Defendants simply do not like, and responding to *in absentia* rates in immigration court—are either patently illegitimate or belied by the facts.

Plaintiffs are likely to succeed on the merits of their claims, are suffering irreparable harm as a result of the policy, and satisfy the remaining TRO factors. Thus, this Court should grant an immediate TRO.

BACKGROUND

I. Legal Framework For Asylum Seekers At The Border

Until recently, individuals applying for asylum at a port of entry along the southern border were either placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1), or placed in regular removal proceedings before an immigration judge ("IJ") under 8 U.S.C. § 1229a. Expedited removal allows for the summary removal of certain noncitizens who lack valid entry documents or attempt to enter the country through fraud—unless they express a fear of removal and pass a "credible fear" interview to assess whether they have a potentially meritorious asylum claim. *See* 8 U.S.C. § 1225(b)(1)(A)(i). Most asylum seekers at the southern border lack valid entry documents and are therefore subject to expedited removal proceedings. However, the government has prosecutorial discretion to place them in regular removal proceedings instead. *See, e.g., Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-24 (BIA 2011); 8 C.F.R. § 235.3(b)(3).

Prior to Defendants' new policy, asylum seekers went through these proceedings *inside* the United States. Those in expedited removal proceedings first underwent a credible fear interview with an asylum officer, a low-threshold screening, which if they passed resulted in their being placed in regular removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). Those not placed in

expedited removal proceedings were issued notices to appear for regular removal proceedings, without going through the credible fear process. No asylum seeker could be physically removed from the United States without an order of removal duly issued either by an IJ in regular removal proceedings or, for those asylum seekers who failed to pass a credible fear screening, by an immigration officer in expedited removal proceedings, subject to IJ review.

II. Defendants' Forced Return Policy

On December 20, 2018, Department of Homeland Security ("DHS") Secretary Nielsen announced a change to the existing policy. Rodriguez Decl., Ex. B (Press Release, DHS, Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, Dec. 20, 2018). In what DHS described as an "historic action to confront illegal immigration," Defendant Nielsen announced the "Migrant Protection Protocols" ("MPP"), under which DHS will require noncitizens who arrive in or enter the United States from Mexico "illegally or without proper documentation" to be "returned to Mexico for the duration of their immigration proceedings." *Id*. at 1. According to DHS, the new policy will address the problem of noncitizens who allegedly "game the system" and "disappear into the United States," and will deter migrants from making "false" asylum claims at the border, while ensuring that "[v]ulnerable populations receive the protections they need while they await a determination in Mexico." *Id*. at 1-2.

On January 24, 2019, in another press release, Secretary Nielsen and DHS respectively described the policy as "an unprecedented action" necessitated by "[m]isguided court decisions and outdated laws." *Id*., Ex. C at 1-2 (Press Release, DHS, Migrant Protection Protocols, Jan. 24, 2019). DHS stated that the new policy "will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum." *Id*. at 3.

In the following days, DHS issued memoranda and guidance documents implementing its forced return policy. On January 25, 2019, a memorandum issued by Defendant Nielsen stated that DHS will implement the forced return policy "on a large-scale basis." *Id*., Ex. A at 1. The memorandum recognized Defendants' obligation not to return individuals to a country where they are more likely than not to face persecution or torture. *Id*. at 3-4. A memorandum subsequently

issued by U.S. Citizenship and Immigration Services ("USCIS") on January 28, 2019, set out the procedures for satisfying this obligation. Rodriguez Decl., Ex. D (USCIS, Policy Memorandum, PM-602-0169, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, Jan. 28, 2019). It provides that individuals will be referred (in person, by videoconference, or by phone) to an asylum officer only if they affirmatively express a fear of return to Mexico during processing. *Id.* at 3. The asylum officer must then determine whether they are more likely than not to face persecution or torture there. *Id*. at 4. The officer's decision is not reviewable by an IJ or the Board of Immigration Appeals. *Id*.

On the same day, U.S. Customs and Border Protection ("CBP") Commissioner McAleenan announced that Defendants would begin implementing the new policy at the San Ysidro port of entry, and that expansion to other ports of entry and border areas was anticipated "in the near future." *Id*., Ex. E at 1 (Memorandum from Kevin K. McAleenan, CBP Commissioner, Implementation of the Migrant Protection Protocols, Jan. 28, 2019). Although initially the new policy was applied only to adults travelling individually, on February 13, 2019, Defendants began forcing asylum-seeking families to return to Mexico, including a family with a one-year old child. First Manning Decl. ¶ 23. On February 12, 2019, a DHS official informed the media that the forced return policy would imminently be expanded to the Eagle Pass port of entry in Eagle Pass, Texas. Rodriguez Decl., Ex. F at 2-3 (Rebecca Rainey, *Border 'agreement in principle' reached*, POLITICO.com, Feb. 12, 2019).

LEGAL STANDARD

On a motion for a TRO, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 2018 WL 6053140, at *10 (N.D. Cal. Nov. 19, 2018) (quoting *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)). A TRO may issue where "serious questions going to the merits [are] raised and the balance of hardships tips sharply in [plaintiff's] favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir.

2003)).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. The Forced Return Policy Violates 8 U.S.C. § 1225(b)(2)(C).

Defendants claim that their new forced return policy is authorized by 8 U.S.C. § 1225(b)(2)(C), which allows certain individuals to be returned to Mexico or Canada while their removal proceedings are pending. That is wrong: Defendants are misapplying the return provision to a class of individuals who are not subject to it. The provision specifically exempts from its scope individuals to whom the expedited removal statute, 8 U.S.C. § 1225(b)(1), "applies." *See* 8 U.S.C. § 1225(b)(2)(B)(ii). That includes all the Individual Plaintiffs and the general population affected by the forced return policy. Thus, the policy violates § 1225(b)(2)(C). In addition, § 1225(b)(2)(C) only authorizes return of individuals "pending a [regular removal] proceeding under section 1229a[.]" *Id*. Although the Individual Plaintiffs were issued notices to appear ("NTAs") for such removal proceedings, to the best of counsel's knowledge, those NTAs have not been filed with the immigration court, and thus no proceedings are officially pending. *See* 8 C.F.R. § 1239.1(a); *see also* Tavarez Decl. ¶¶ 1-4 (summarizing Individual Plaintiffs' case information available on the Executive Office for Immigration Review's ("EOIR") automated immigration court case information system).

Section 1225(b)(2) provides:

> (2) Inspection of other aliens
>
> (A) In general
> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.
>
> (B) Exception *Subparagraph (A) shall not apply to an alien—*
>
> (i) who is a crewman,
>
> (ii) *to whom paragraph (1) applies*, or

> (iii) who is a stowaway.
>
> (C) Treatment of aliens arriving from contiguous territory
> In the case of an alien *described in subparagraph (A)* who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory *pending a proceeding under section 1229a of this title*.

Id. (emphasis added).

Section 1225(b)(2)(C) authorizes return to a contiguous territory only "[i]n the case of an alien described in subparagraph (A)." Subparagraph (B) sets out three categories of individuals to whom "Subparagraph A shall not apply." 8 U.S.C. 1225(b)(2)(B).[1] One of these categories is noncitizens "to whom paragraph (1) applies," *id*. § 1225(b)(2)(B)(ii)—"paragraph 1" refers to § 1225(b)(1), the expedited removal statute. Thus, § 1225(b)(2)(C) does not authorize the return pending removal proceedings of noncitizens to whom the expedited removal statute applies.

The expedited removal statute applies to noncitizens arriving at ports of entry, as well as certain recent entrants, who are determined during the inspection process to be "inadmissible under section 1182(a)(6)(C) or 1182(a)(7)." 8 U.S.C. § 1225(b)(1)(A)(i). Title 8 U.S.C. § 1182(a)(6)(C) is the ground of inadmissibility based on fraud or misrepresentation. Title 8 U.S.C. § 1182(a)(7) is the ground of inadmissibility based on lack of proper entry documents. In other words, the expedited removal statute applies to arriving aliens or recent entrants who are inadmissible for fraud or misrepresentation, or because they lack a visa or other immigration document that would permit them to enter the United States. This is the precise population that Defendants have targeted under their new forced return policy. *See, e.g.*, Rodriguez Decl., Ex. A at 1 (applying forced return policy to certain noncitizens "arriving in the United States . . . *illegally or without proper documentation*") (emphasis added). Because the expedited removal statute "applies" to these individuals, they cannot be subject to return under the contiguous territory return provision.

Congress had good reason to exempt noncitizens subject to expedited removal from the contiguous territory return provision: most asylum seekers who arrive at a land border are fleeing desperate circumstances with no documents or fraudulent documents, and are therefore inadmissible

[1] *See also* 8 U.S.C. § 1225(b)(2)(A) (providing that the description in Subparagraph A is "[s]ubject to subparagraphs (B) and (C)").

for that reason and subject to placement in expedited removal. *See, e.g.*, *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (recognizing that "a petitioner who fears deportation to his country of origin" may use "false documentation . . . to gain entry to a safe haven") (citing *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)); *see also E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1249 (9th Cir. 2018). In light of the vulnerability of refugees seeking safety in the United States, Congress established a credible fear screening as part of the expedited removal process to ensure that individuals with genuine asylum claims are not returned to danger. *See* H.R. Rep. No. 104-469, pt. 1, at 158 (1996). Section 1225(b)(2)(C)'s express exemption of this population from return to a contiguous territory pending their removal proceedings reflects this concern. Thus, consistent with the statutory scheme, asylum seekers arriving with no documents or fraudulent documents will, at a minimum, be entitled to remain in the United States pending a credible fear screening to assess whether they have potentially meritorious claims and, if so, pending a decision on those claims in full immigration court removal proceedings.

Congress' decision to exempt noncitizens subject to expedited removal from the contiguous territory return provision is particularly critical given that the contiguous territory return provision applies on its face to Mexicans and Canadians (even though Defendants are not presently applying it to them). It would make no sense for Congress to have provided that Mexican or Canadian asylum seekers, who are also subject to expedited removal under the statute, could be returned to their countries before their asylum claims were adjudicated. Yet without the exception carved out for those to whom the expedited removal statute "applies," that would be the result.

Defendants, however, appear to be taking the position that noncitizens subject to expedited removal under the statute are only exempted from contiguous territory return if expedited removal "*is* applied" to them. *See* Rodriguez Decl, Ex. G at 1 (CBP, MPP Guiding Principles, Jan. 28, 2019) ("Once an alien *has been processed for expedited removal*, including the supervisor approval, the alien may not be processed for [forced return].") (emphasis added). Thus, under Defendants' interpretation, the exception in § 1225(b)(2)(B)(ii) merely means that if a noncitizen is *actually* placed in expedited removal, then the contiguous territory return provision cannot be used. But § 1225(b)(2)(B)(ii) does not say "is applied." The provision exempts anyone "to whom [the

expedited removal statute] applies." And, as discussed, the expedited removal statute applies to the categories of noncitizens that Congress described in § 1225(b)(1)—arriving aliens and recent entrants inadmissible under one of the two enumerated grounds.

B. The Forced Return Policy Violates Defendants' *Nonrefoulement* Obligations Under U.S. And International Law, And Is Arbitrary, Capricious, And Contrary To Law In Violation Of The APA.

1. The Forced Removal Policy Violates Withholding of Removal.

Defendants' forced return policy violates the withholding of removal statute, 8 U.S.C. § 1231(b)(3), and its implementing regulations. *See* 8 C.F.R. §§ 208.16(a), 1208.16(a). Congress enacted the withholding statute to codify the United States' *nonrefoulement* obligation. *See INS v. Stevic*, 467 U.S. 407, 421, 426 n.20 (1984). Defendants acknowledge that they cannot return asylum seekers to situations where they are more likely than not to face persecution or torture. *See, e.g.*, Rodriguez Decl., Ex. A at 3-4; *id*., Ex. H (Unified Agenda of Federal Regulatory and Deregulatory Actions, Return to Territory, 8 C.F.R. § 235.3 (Spring 2017)) (noting directive to the DHS Secretary to implement the contiguous return provision "consistent with the requirements of [the withholding of removal statute,] section 1231 of title 8, United States Code"). However, Defendants' policy fails to provide even a minimally adequate procedure to meet this obligation. For this reason, the policy violates the United States' obligation of *nonrefoulement*, as codified in the withholding statute and related regulations.

The withholding statute and regulations set forth specific procedural requirements before a withholding of removal decision can be made. Defendants' forced return policy violates these procedural requirements in at least two ways.

First, under the forced return policy, an asylum officer is tasked with making the ultimate withholding determination—i.e., whether an individual is "more likely than not" to be persecuted or tortured in Mexico—without any opportunity for review by an IJ or any formal proceedings at all. Rodriguez Decl., Ex. D at 3-4. In stark contrast, the regulations implementing the withholding of removal statute specifically provide that an "asylum officer *shall not decide* whether the exclusion, deportation, or the removal of an alien to a country where the alien's life or freedom would be threatened must be withheld[.]" 8 C.F.R. §§ 208.16(a), 1208.16(a) (emphasis added). Instead, the

ultimate determination of whether persecution is "more likely than not" must be made by an immigration judge in full removal proceedings where noncitizens have the right to counsel, 8 U.S.C. § 1362, 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. § 1240.3, and the right to a "full and fair hearing," *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000), with a "reasonable opportunity" to present, examine, and confront evidence, 8 U.S.C. § 1229a(b)(4)(B).[2] Defendants' procedure is thus unlawful because it authorizes an asylum officer to make withholding determinations and without an adequate process.

Second, the forced return policy does not even provide any of the minimal procedural safeguards afforded as part of the credible fear and reasonable fear screenings that take place in streamlined removal proceedings—screenings which involve a much lower threshold than an ultimate merits determination.[3] For example, the forced return policy does not require an immigration officer to ask about an individual's fear of return to Mexico. Instead, an individual is required to "*affirmatively* state[] a concern that he or she may face a risk of persecution on account of a protected ground or torture upon return to Mexico" in order to be referred for an interview with an asylum officer. Rodriguez Decl., Ex. D at 3 (emphasis added).[4] Yet before a noncitizen is removed pursuant to expedited removal, an asylum officer must ask whether he or she has "any fear

[2] The importance of IJ review of these claims is underscored by the agency's prior retreat from an attempt to limit adjudication of such claims to asylum officers. Regulations proposed in 1987 would have provided a nonadversarial procedure before an asylum officer as the sole method of adjudicating the asylum and withholding claims of all applicants. 52 Fed. Reg. 32,552, 32,561 (1987). The proposed regulations were withdrawn in response to a "substantial number [of comments] objecting to the original proposal . . . ." 53 Fed. Reg. 11,300, 11,300 (1988).

[3] These low threshold screenings were designed to ensure that individuals with potentially meritorious claims are not erroneously removed. Pursuant to the credible fear process, a noncitizen must show only that there is a "significant possibility," 8 U.S.C. § 1225(b)(1)(B)(v), that he or she is eligible for asylum, withholding of removal, or protection under the Convention Against Torture ("CAT"). *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(v); 8 C.F.R. §§ 208.30(e) (3), 235.3(b)(4). Pursuant to the reasonable fear process, which applies to noncitizens with an administrative removal order, *see* 8 U.S.C. § 1228(b), or a reinstated order of removal, *see* 8 U.S.C. 1231(a)(5); 8 C.F.R. § 208.31(a), noncitizens must show only that there is a "reasonable possibility" that he or she will face persecution or torture upon removal. 8 C.F.R. § 208.31(c). Noncitizens who pass these low threshold screenings are then entitled to receive full hearings on their protection claims before IJs, with all the procedural protections those include. *See* 8 C.F.R. §§ 208.30(f), 208.31(e).

[4] Affirmatively expressing a fear in a way that actually triggers an assessment by an asylum officer appears to be no easy task. Two of the Individual Plaintiffs were cut off or dismissed when they tried to tell a CBP officer that they did not feel safe in Mexico. *See* ECF No. 5-6 (Christopher Doe Decl.) ¶¶ 18-21; ECF No. 5-8 (Frank Doe Decl.) ¶¶ 18-19.

or concern about being returned to [his or her] home country or being removed from the United States." *Id*., Ex. I at 2 (Form I-867AB, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act); 8 C.F.R. § 235.3(b)(2)(i) (requiring immigration officers to use Form I-867AB).

The credible fear and reasonable fear screenings also include other minimum procedural safeguards. Individuals may consult with and bring an attorney to the credible or reasonable fear interview. *See* 8 C.F.R. §§ 208.30(d)(4), 208.31(c). The asylum officer must provide an interpreter when needed. 8 C.F.R. §§ 208.30(d)(5), 208.31(c). The asylum officer must also create a summary of the material facts stated by the applicant, review that summary with the applicant for any corrections, and create a detailed written record of his or her decision. 8 C.F.R. §§ 208.30(d)(6) & (e)(1), 208.31(c). And finally, individuals are entitled to review by an immigration judge of negative credible fear and reasonable fear determinations. 8 C.F.R. §§ 208.30(g), 1208.30(g), 208.31(g). The forced return policy offers none of these protections.[5] *See* Rodriguez Decl., Ex. D at 3-4.

In sum, Defendants' procedures for determining whether a noncitizen who fears return to Mexico is more likely than not to be persecuted or tortured are wholly inadequate to comply with their mandatory withholding obligation. Thus, the forced return policy violates the withholding statute and its implementing regulations. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures").

2. Defendants' Procedure for Making Fear Determinations Is an Unacknowledged Departure from and Inconsistent with Prior Agency Policy, in Violation of the APA.

Furthermore, even apart from violating the withholding statute and its implementing regulations, Defendants' wholly inadequate procedure for making fear determinations is arbitrary and capricious in violation of the APA. The procedure is a dramatic departure from Defendants' established practices for making such determinations—practices that Defendants previously deemed

[5] The "MPP Assessment Notice" given to noncitizens interviewed by an asylum officer to determine whether they are more likely than not to be persecuted or tortured in Mexico is a virtually meaningless document. It contains only the noncitizen's name, alien number, interview location and date, determination date, and four checkboxes for the officer to indicate the outcome of the determination. It is not signed by an asylum officer or a supervisory asylum officer. *See* Second Manning Decl., Ex. A.

necessary to satisfy their *nonrefoulement* obligations. Yet Defendants fail even to acknowledge this departure, let alone provide a reasoned explanation for it. An agency action is arbitrary and capricious if the agency does not acknowledge or cannot show "good reasons" for departing from a prior policy. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In addition, Defendants' new procedures are arbitrary and capricious because they do not remotely achieve their stated goal of preventing the return of individuals to conditions of danger.

The fundamental problem with the forced return policy is that it requires asylum seekers to meet the ultimate more-likely-than-not merits standard in the context of an assessment that lacks any of the procedural safeguards that would be available to them in a removal proceeding where such determinations are typically made. *See* Point I.B., *supra*. Indeed, the procedure lacks even the minimal safeguards required in credible and reasonable fear *screenings* in streamlined removal proceedings. *See id.* Defendants' failure to acknowledge this extraordinary deviation from longstanding procedures, let alone explain it, is enough to hold the forced return policy arbitrary and capricious. *See Fox Television*, 556 U.S. at 515.

The policy is also arbitrary and capricious because it rests on a fear-determination process that is fundamentally inconsistent with the minimum processes for screening withholding and CAT claims that Defendants have previously recognized are necessary to meet our *nonrefoulement* obligations. As discussed, the screening procedures in other streamlined removal contexts require noncitizens to meet a much lower "reasonable fear" standard, which requires proving only a "reasonable possibility" of persecution or torture. 8 C.F.R. § 208.31(c). Defendants' new policy not only dispenses with this standard—replacing it with a requirement that applicants meet the full-blown "more likely than not standard"—but it also eliminates the other minimum procedural protections that were specifically designed "to ensure compliance with U.S. treaty obligations" regarding *nonrefoulement*. *See* Rodriguez Decl., Ex. J at 7 (USCIS, Reasonable Fear of Persecution and Torture Determinations Lesson Plan (Feb. 13, 2017)); Point I.B.1, *supra*. And it does so even though Defendants concede that DHS officers must "act consistent with the *non-refoulement* principles contained in" the 1951 Refugee Convention and the CAT. Rodriguez Decl., Ex. A at 3.

Finally, the policy is arbitrary and capricious because it subjects certain asylum seekers to

this deficient fear-determination process based solely on the discretionary decision of an immigration officer to subject the asylum seeker to the forced return policy in the first place. *See Id.*., Ex. G at 1 ("Officers . . . retain discretion to process alien for MPP or under other procedures . . . ."). Thus, it subjects similarly situated individuals to greatly divergent procedures without reason. *See Judulang v. Holder*, 565 U.S. 42, 57-58 (2011) (rejecting as arbitrary an agency rule whose application hinged "on the fortuity of an individual official's decision").

C. The Forced Return Policy Violates The APA's Procedural Requirements.

Defendants also violated the APA by failing to engage in notice-and-comment rulemaking before implementing their new procedure for determining whether migrants face a likelihood of persecution or torture in Mexico that prevents their return. This new nondiscretionary procedure is a legislative rule that warrants notice and comment, a bedrock requirement that ensures the public's involvement in the formulation of governmental policy. *See* 5 U.S.C. §§ 553(b), (c); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

1. Defendants' Nondiscretionary Procedure for Making Fear Determinations is a Legislative Rule That Required Notice-and-Comment Rulemaking.

The APA requires federal agencies to publish in the Federal Register a general notice of proposed rulemaking and to give interested stakeholders an opportunity to submit comments before promulgating a new regulation. 5 U.S.C. § 553(c). The APA's notice-and-comment requirements apply to "legislative" rules, which establish binding legal norms that affect "individual rights and obligations." *Morton*, 415 U.S. at 232; *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1087-88 (9th Cir. 2003). The forced return policy's wholly deficient process for ensuring compliance with the mandatory obligation of *nonrefoulement* is a legislative rule.

"The critical factor to determine whether a directive announcing a new policy constitutes a legislative rule," which is subject to notice and comment, or "a general statement of policy," which is not, "is the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009) (alterations in original) (internal quotations omitted). In addition, "[a]ny rule that effectively amends

a prior legislative rule is legislative and must be promulgated under notice and comment rulemaking." *Serringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004).

The United States' obligation not to return individuals to persecution, torture or death is mandatory, as is the rule that Defendants have established to implement it in their forced return policy. Under that rule, if an individual expresses a fear of persecution or torture in Mexico, a CBP officer "should" refer the individual for an interview with an asylum officer, and the asylum officer "should" determine if it is "more likely than not" that an individual will face persecution or torture in Mexico. *See* Rodriguez Decl., Ex. D. at 3. Agency officials are bound to this process and standard set out in the guidance documents, as are the refugees who are subject to the forced return policy. The policy is thus a legislative rule and subject to notice and comment.

Moreover, the new rule is a marked departure from the procedures set forth in *existing* regulations that the agency has promulgated to implement its *nonrefoulement* obligations. *See* Point I.B, *supra*. The USCIS Policy Guidance notes that the "more likely than not" standard is the "same" legal standard used for making withholding of removal (8 U.S.C. § 1231(b)(3)) and CAT protection determinations. *Id.* at 2 (citing 8 C.F.R. § 208.16(b)(2) & (c)(2); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8,478, 8,480 (1999)). Yet given the absence of procedural safeguards for making this determination, the new rule directly *contradicts* these pre-existing rules. *See* Point I.B., *supra*. For these reasons, notice-and-comment rulemaking is required.

Indeed, even Defendants appear to have believed that their forced return policy required such rulemaking. In Spring 2017, DHS published in the Unified Agenda of Federal Regulatory and Deregulatory Actions a proposed rule entitled "Return to Territory" (RIN 1651-AB). Rodriguez Decl., Ex. H. DHS again included the Return to Territory Rule in the next three Unified Agendas—Fall 2017, Spring 2018, and Fall 2018—all of which indicated that it was at the Final Rule Stage. *Id*., Ex. K (Return to Territory, 8 C.F.R. § 235.3 (Fall 2017)), Ex. L (Return to Territory, 8 C.F.R. § 235.3 (Spring 2018)), & Ex. M (Return to Territory, 8 C.F.R. § 235.3 (Fall 2018). However, when Defendant Nielsen announced the forced return policy on December 20, 2018, she made no mention of the Return to Territory Rule, which DHS subsequently withdrew. *Id*., Ex. N (Office of Information and Regulatory Affairs, Conclusion of E.O. 12866 Regulatory Review (Jan. 29, 2019)).

2. The Significant Public Interest in the Forced Return Policy also Makes Notice and Comment Rulemaking Appropriate.

In evaluating the need for notice and comment rulemaking, many courts have considered the level of public interest in the issue at stake. *See, e.g., Hoctor v. USDA*, 82 F.3d 165, 171 (7th Cir. 1996) ("The greater the public interest in a rule, the greater reason to allow the public to participate in its formation."); *Chamber of Commerce of U.S. v. U.S. Dep't of Labor,* 174 F.3d 206, 212 (D.C. Cir. 1999) (where "thousands of employers" would be affected by a rule, "[t]he value of ensuring that [the agency] is well informed and responsive to public comments" is "considerable").

Defendant Nielsen characterized the forced return policy as a "historic measure[] to bring the illegal immigration crisis under control," Rodriguez Decl., Ex. B at 1, and has emphasized its significance.[6] Had Defendants engaged in notice and comment rulemaking, the Organizational Plaintiffs would have submitted comments explaining why the forced return policy is unlawful and unnecessary. *See* Brown Scott Decl. ¶ 27; Cutlip-Mason Decl. ¶ 19; First Manning Decl. ¶ 26; Sanchez Decl. ¶¶ 38-40; Wolfe-Roubatis Decl. ¶¶ 33-34. Given the potentially far-reaching impact of the policy, its stark departure from longstanding agency practice, and the potentially thousands of migrants to whom the policy applies, many other stakeholders likely would have done the same.

D. The Forced Return Policy Is Arbitrary And Capricious In Violation Of The APA Because It Is Not Rationally Connected To Its Justifications.

Finally, Defendants' forced return policy is arbitrary and capricious because the policy's design is not rationally connected to its purported justifications, many of which are impermissible and belied by the facts. A policy is arbitrary and capricious in violation of the APA where the agency cannot articulate "a rational connection between the facts found and the choice made," "has relied on factors which Congress has not intended it to consider," has "entirely failed to consider an important aspect of the problem," or has "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). All three flaws apply to Defendants'

[6] *See also* Hrg. on Homeland Security Oversight, Immigration & Border Security, Before the House Judiciary Cmte., Wildlife, 115th Cong. (Dec. 20, 2018) (testimony of Kirstjen Nielsen, Sec'y, Dep't Homeland Security) at minute 26:34, https://www.c-span.org/video/?456086-1/homeland-security-department-oversight#.

policy.

1. There is No Rational Connection Between the Policy and Its Purported Justifications.

The asserted justifications for the forced return policy are not rationally connected with the policy's design. *See Judulang*, 565 U.S. at 55 (an agency must further its interests "in some rational way").

First, although the agency has claimed that the purpose of the policy is to reduce the number of noncitizens who do not appear at their immigration court hearings and to deter noncitizens who ultimately will not succeed on their asylum claims, the policy is not designed to further those goals. To be lawful, "agency action must be based on non-arbitrary, relevant factors." *Id.* (internal quotation marks and citation omitted). But under the policy, Defendants do not screen individuals for flight risk or the merit of their asylum claim before deciding whether to return them to Mexico. *See* Rodriguez Decl., Ex. G. Defendants therefore have erected a policy "that neither focuses on nor relates to" an individual's flight risk or asylum claim, and targets individuals for inclusion irrespective of those factors. *See Judulang*, 565 U.S. at 55. That disconnect is especially striking because Defendants already have means by which to account for flight risk and to assess an asylum claim's *bona fides*.[7] Defendants may prefer not to utilize those existing mechanisms,[8] but that cannot justify adoption of a blanket policy that provides no connection between its goals and the individuals subject to it. *Accord E. Bay Sanctuary Covenant v. Trump*, 909 F.3d at 1248 (holding agency rule likely arbitrary and capricious because it "condition[ed] an alien's eligibility for asylum on a criterion that had nothing to do with asylum itself").[9]

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[7] Pursuant to the INA and implementing regulations, asylum seekers who do not pose a flight risk or a danger to the community may be paroled by DHS during the pendency of their immigration cases on a "case-by-case basis for . . . significant public benefit." 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. §212.5(b); *see also* 8 C.F.R. § 235.3(c). And, as discussed above, *see* Point I.A-B, the credible fear process has long been how asylum claims are screened for potential merit.

[8] Indeed, Defendant Nielsen and others have been sued for failing to follow their own Parole Directive. *See, e.g., Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018); Rodriguez Decl., Ex. O (ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009)).

[9] To the extent Defendants' true goal is to deter asylum seekers generally from coming to the United States or to discourage those asylum seekers who have come to give up and go home—including those with *bona fide* claims—the policy is arbitrary and capricious. Discouraging people from pursuing their right to apply for asylum—a right Congress conferred upon them nearly forty years ago—has "no connection to the goals of the deportation process or the rational operation of the

Second, DHS has stated that the policy is intended "to confront the illegal immigration crisis facing the United States" and "to bring the illegal immigration crisis under control." Rodriguez Decl., Ex. B at 1 (internal quotation marks omitted). Yet the policy targets individuals who seek asylum—which is legal "whether or not at a designated port of arrival" and "irrespective of [the applicant's] status," 8 U.S.C. § 1158(a)—and is being applied only to individuals, like the Individual Plaintiffs, who present for inspection at ports of entry. Indeed, the first place the policy was implemented was the San Ysidro port of entry, where asylum seekers have already been required to wait for weeks or even months in Mexico to present for inspection and request asylum. *See* Rodriguez Decl. Ex. D; Isacson Decl. ¶ 12 (discussing backlogs at ports of entry). The policy therefore cannot plausibly be described as an effort to combat "illegal immigration." Rather, by instituting the policy at ports of entry, the agency likely is incentivizing migrants to enter *between* ports of entry.[10]

Third, and critically, the agency cannot articulate a rational connection between its assertion that it wishes to "assist legitimate asylum-seekers and individuals fleeing persecution," *see* Rodriguez Decl., Ex. C at 4, and its decision to implement the policy despite the ample evidence before it of the dangerous conditions currently facing migrants in Mexico, especially in border towns.[11] Asylum seekers, including the Individual Plaintiffs, face extreme danger in Mexico. Asylum seekers who are forced to return to Mexico live in fear of violence and other conditions of hardship that compound the barriers they face in exercising their right to counsel and preparing their cases. *See* Point II, *infra.*; ECF No. 1 (Compl.) ¶¶ 115-119. Congress provided more than forty years ago that noncitizens who arrive in the United States "may apply for asylum," 8 U.S.C. § 1158(a)(1),

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immigration laws." *Judulang*, 565 U.S. at 58; *see also* 8 U.S.C. § 1158(a)(1). Furthermore, there is no evidence that a policy requiring asylum seekers to remain in Mexico while litigating their asylum claims will actually deter those fleeing violence from journeying to the United States. *See* Menjivar Decl. ¶¶ 12-20.

[10] *See, e.g.*, Rodriguez Decl., Ex. P (Geneva Sands & Catherine E. Shoichet, *Border Patrol union chief: New Trump administration policy is 'incentivizing illegal immigration,'* CNN, Jan. 25, 2019) (quoting the National Border Patrol Council president as stating, "This is attacking the legal process, because it's discouraging people from following the law. We are incentivizing illegal immigration and punishing legal immigration.").

[11] *See, e.g.*, Rodriguez Decl., Ex. Q at 21 (U.S. Dep't of State, *Mexico 2017 Human Rights Report*) (noting "victimization of migrants" by criminal groups, police, immigration officers, and customs officials; threats against migrants in Mexico by Central American gangs; and risk of forced return by Mexican authorities); *see also* Point II, *infra*.

but Defendants' application of the forced return policy in the current context arbitrarily deprives asylum seekers of any way to meaningfully exercise that right.

2. The Agency Relied on Factors Congress Did Not Intend for It to Consider.

DHS has justified the forced return policy in part by pointing to "[m]isguided court decisions and outdated laws [that] have made it easier for illegal aliens to enter and remain in the U.S.," especially "adults who arrive with children, unaccompanied alien children, or individuals who fraudulently claim asylum." Rodriguez Decl., Ex. C at 2. Defendants may not like these court decisions and laws, but that does not change the fact that they are bound to follow them. Circumvention of court decisions and duly enacted statutes surely was not a factor that Congress intended the agency to consider when deciding to implement § 1225(b)(2)(C). Agency action intended to serve as an end run around courts and Congress is arbitrary and capricious. *Cf. Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 935 (D.C. Cir. 2008) ("To maintain two irreconcilable policies, one of which . . . apparently enables the agency . . . to circumvent the other . . . is arbitrary and capricious agency action.").

3. The Agency's Justifications for the Policy are Based on False Premises.

Finally, DHS's key justifications offered to explain the challenged policy are based on false premises and are inconsistent with the evidence before the agency.

First, the agency explained that it is instituting the forced return policy because "many" asylum seekers "disappear[] into the country before a judge denies their claim and simply become fugitives." Rodriguez Decl., Ex. C at 2. That explanation is at odds with the facts before the agency. Data from EOIR shows that between FY 2008 and FY 2018, asylum seekers who passed a credible fear interview showed up for their immigration court hearings approximately 87.5 percent of the time. *See* Reichlin-Melnick Decl. ¶ 9 (discussing EOIR data).

Second, the agency explained that it is instituting the policy because of an "unprecedented number of . . . fraudulent asylum claims." Rodriguez Decl., Ex. C at 1 (internal quotation marks omitted). But the assertions marshaled in support of this justification are incorrect. Asylum seekers from El Salvador, Guatemala, and Honduras were granted asylum or otherwise permitted to remain

in the United States in FY 2018 at more than twice the rate claimed by DHS.[12] These countries also gave rise to the second, third, and fourth most asylum grants in FY16 and FY17, and more than 15,000 individuals from those countries were granted asylum between FY14 and FY17.[13] DHS's claim that "nine out of ten asylum claims are not granted by a federal judge" likewise is false. *See* Rodriguez Decl., Ex. B at 2 (emphasis omitted). In fact, 41 percent of the cases that involved an asylum application in FY 2017 were denied on the merits, while 25 percent were granted and 34 percent were resolved without a decision on the merits. *See* Reichlin-Melnick Decl. ¶ 14 n.4; *see also id.* ¶ 16 (discussing grant rates for asylum applications from nationals of El Salvador, Honduras, and Guatemala). Furthermore, grant rates are an imperfect metric for determining the number of individuals with legitimate asylum claims. A number of factors separate and apart from whether an individual has a genuine fear of persecution or torture can affect an asylum seeker's ability to win asylum, among them, access to counsel and whether an individual is detained at the time of his or her removal proceedings. *Id.* ¶¶ 19-24 & n.7.

* * *

For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their claims that the forced return policy violates 8 U.S.C. § 1225(b)(2)(C), the statute that purportedly authorizes it; violates the withholding of removal statute and regulations, and rests on a fear-determination procedure that is arbitrary, capricious, and contrary to law; was unlawfully issued absent notice and comment; and is arbitrary and capricious because the justifications offered in support of the policy are not rationally connected to the policy's design, are impermissible, and are inconsistent with the evidence.

[12] *Compare* Reichlin-Melnick Decl. ¶¶ 14-15 (explaining that in FY 2018, over 25 percent of nationals of El Salvador, Honduras, and Guatemala whose cases were decided that year were granted asylum or otherwise permitted to remain in the United States) *with* Rodriguez Decl., Ex. B at 2 (claiming that "approximately 9 out of 10 asylum claims from [those] countries are ultimately found non-meritorious by federal immigration judges") (emphasis omitted).

[13] Rodriguez Decl., Ex. R at 29 (EOIR, *Statistics Yearbook: Fiscal Year 2017* (2018)); *id*., Ex. S (DHS, Tbl. 17. Individuals Granted Asylum Affirmative By Region and Country of Nationality: Fiscal Years 2014 to 2016); *id*., Ex. T (DHS, Tbl. 19. Individuals Granted Asylum Defensively By Region and Country of Nationality: Fiscal Years 2014 to 2016).

II. THE REMAINING FACTORS TIP DECIDEDLY IN FAVOR OF GRANTING A TRO AND PRESERVING THE STATUS QUO

A. Plaintiffs Are Suffering Irreparable Harm.

Plaintiffs have experienced irreparable harm and are at significant risk of suffering additional harms as a result of Defendants' forced return policy. In Mexico, the Individual Plaintiffs have already endured physical attacks and threats at the hands of members of the Mexican government and organized criminal groups due in large part to their status as migrants. For example, members of the brutal Mexican Zetas cartel kidnapped Plaintiff Howard Doe in Chiapas and threatened to kill him and "burn" his body. ECF No. 5-10 (Howard Doe Decl.) ¶ 20. Mexican police have detained Plaintiff Ian Doe on multiple occasions, threatening a month ago to "take [him] to jail unless [he] paid a bribe." ECF No. 5-11 (Ian Doe Decl.) ¶ 24. Other Individual Plaintiffs have also been assaulted and harmed in Mexico. *See* ECF No. 5-5 (Alex Doe Decl.) ¶ 28 ("a group of Mexicans threw stones at us and more people were gathering with sticks and other weapons to try to hurt us [a group of asylum seekers]"); ECF No. 5-6 (Christopher Doe Decl.) ¶ 12 ("I have also been robbed and assaulted by Mexican citizens."); ECF No. 5-8 (Frank Doe Decl.) ¶ 24 ("I have been treated badly by many people [in Mexico], and I don't feel safe going to the police.").

The Individual Plaintiffs continue to face these risks to bodily integrity and safety daily. Human rights groups have extensively documented migrants' vulnerability to physical attacks, kidnapping, murder, sexual assault, and other mistreatment in Mexico. *See* Slack Decl. ¶¶ 11-20; Isacson Decl. ¶¶ 13-19; Rodriguez Decl., Ex. U at 18-22 (Amnesty Int'l., *Overlooked, Under Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum* (2018)). Women and LGBT migrants face unique risks of sexual violence and discrimination. *See, e.g.*, Shepherd Decl. ¶¶ 14-17 (recounting multiple instances of sexual violence against migrant women and girls); Ramos Decl. ¶ 32 (discussing violence against LGBT migrants in Mexico); Burgi-Palomino Decl. ¶ 10 (women and LGBT persons face additional challenges to finding shelter). Plaintiff Bianca Doe is a lesbian and has been forced to try to hide her sexual orientation in Mexico to avoid harm. ECF No. 5-3 (Bianca Doe Decl.) ¶ 11 (people in Mexico "say that gay people like me are less than human, and that it is okay to hurt us because we don't matter").

The Individual Plaintiffs also fear that persecutors from their home countries will track them

down in Mexico where they cannot expect any protection from the Mexican government. *See* Shepherd Decl. ¶ 8 (describing the presence of Central American gangs in Mexico); Slack Decl. ¶ 10 (same); *id*. ¶¶ 16, 18 (describing the lack of police protection for migrants in Mexico); Isacson Decl. ¶ 18 (same). In Mexico, for example, Plaintiff Christopher Doe believes he saw "one of the armed men who was monitoring [his] house in Honduras." ECF No. 5-6 (Christopher Doe Decl.) ¶ 21. Plaintiff Dennis Doe has also seen members of MS-13, which threatened to kill him in Honduras, in Mexico searching for individuals who defied the gang. *See* ECF No. 5-4 (Dennis Doe Decl.) ¶ 11; *see also* ECF No. 5-2 (Gregory Doe Decl.) ¶ 36 (expressing fear the Honduran government that previously threatened him for his political activities will "track [him] down" in Mexico).

Living in precarious conditions, the Individual Plaintiffs constantly fear for their survival and ability to meet basic needs. The Individual Plaintiffs are unsure whether they are authorized to work in Mexico; for example, a Mexican immigration officer told Plaintiff John Doe he could not work. *See* ECF No. 5-1 (John Doe Decl.) ¶ 27. Moreover, migrants face difficulty finding employment. *See* Burgi-Palomino Decl. ¶ 10. Even if permitted and able to find work, owing to their fear, the Individual Plaintiffs essentially live under house arrest, rarely venturing in public. *See, e.g.*, ECF No. 5-2 (Gregory Doe Decl.) ¶ 35 ("I almost never go outside . . . in order to avoid problems and possible violence"); ECF No. 5-4 (Dennis Doe Decl.) ¶ 26 ("I don't feel safe in public."); ECF No. 5-6 (Christopher Doe Decl.) ¶ 28 ("I don't know if I have the right to work here or not, but either way, I am too afraid to work."). As migrant shelters are stretched to capacity, the Individual Plaintiffs face continual risk of homelessness. *See* ECF No. 5-8 (Frank Doe Decl.) ¶ 26 (stating the shelter told him it "no longer has space"); Slack Decl. ¶ 19 ("I am certain that few migrants will find either short- or long-term secure shelter in Mexico while they await their hearings"); Shepherd Decl. ¶ 23 (noting the dearth of migrant shelters in Mexico).

In addition, the Individual Plaintiffs face obstacles to meaningful participation in the asylum process. The Individual Plaintiffs cannot adequately prepare their claims from Mexico without access to attorneys or available support networks, particularly crucial for individuals like Plaintiffs who have recently escaped incredibly traumatic events and must still endure the psychological strains of navigating an unfamiliar, dangerous environment while struggling to find a secure place to

live. *See* Burgi-Palomino Decl. ¶ 9 (recounting difficulties asylum seekers face navigating their claims); Schulman Decl. ¶¶ 12-15 (describing how the policy will drastically reduce the pool of private pro bono attorneys and inhibit client communication); Wolfe-Roubatis Decl. ¶ 27 (describing how the cost alone will be prohibitive for non-profit attorneys); Rodriguez Decl., Ex. V at 7-8 (Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico* (Feb. 2019) (describing barriers asylum seekers in Mexico will face preparing and presenting their claims in the United States). Even if the Individual Plaintiffs are all able to secure legal representation, they will encounter nearly insurmountable difficulties working with their attorneys to prepare their testimony and gather evidence to meet the onerous standards for protection under U.S. law. *See, e.g.*, Sanchez Decl. ¶ 30 (describing limitations to remote representation); Schulman Decl. ¶ 11 (same); Cutlip-Mason Decl. ¶ 18(g) (describing challenges to securing necessary expert testimony that is often critical to establishing eligibility for protection); Wolfe-Roubatis Decl. ¶ 23 (same); Rodriguez Decl., Ex. V at 7. These obstacles curtail due process and put the Individual Plaintiffs at risk of wrongful return by the United States to countries where they fear persecution or torture.

The Individual Plaintiffs are also in danger of *refoulement* by the Mexican government. Mexico has issued only short-term visas to the Individual Plaintiffs. *See, e.g.*, ECF No. 5-3 (Bianca Doe Decl.) ¶ 42; ECF No. 5-4 (Dennis Doe Decl.) ¶ 24; ECF No. 5-8 (Frank Doe Decl.) ¶ 23; ECF No. 5-9 (Kevin Doe Decl.) ¶ 17. The Mexican government has no adequate process for screening individuals for fear before deporting them, and the unlawful deportation of asylum seekers like Individual Plaintiffs from Mexico is well-documented. *See* Rodriguez Decl., Ex. Q at 21; Ex. U at 5; *id*., Ex. V at 5. Indeed, the Individual Plaintiffs have first-hand experience with the inadequacies of the Mexican immigration system. For example, before Plaintiff Kevin Doe presented at the U.S. port of entry, Mexican officials apprehended him along with his wife who was deported despite being pregnant and explicitly stating her fear of return. ECF No. 5-9 (Kevin Doe Decl.) ¶ 2. On a previous attempt to flee Honduras, Mexican immigration officials apprehended Plaintiff Dennis Doe and deported him "without asking [him] any questions at all." ECF No. 5-4 (Dennis Doe Decl.) ¶ 28. Hailing from one of the world's most violent regions, the Individual Plaintiffs face extreme risks in

El Salvador, Guatemala, and Honduras if returned. *See* Menjivar Decl. ¶¶ 14-18.

Defendants' policy will also cause substantial harm to the Organizational Plaintiffs. Plaintiffs have already been required to divert resources away from advancing their core missions—which center on providing high quality, comprehensive representation to asylum seekers in the United States—to counter the policy's frustration of their missions and threats to their organizations' activities. *See, e.g.*, First Manning Decl. ¶ 13. They have had to restructure critical aspects of their programming and models of service delivery, consuming significant human resources. *See, e.g.*, Ramos Decl. ¶ 7 (the new policy has stretched the organization's capacity "beyond its breaking point"). In effect, Defendants are forcing Plaintiffs to expend significant, unexpected, and unfunded resources to respond to this manufactured crisis. *See, e.g.*, Sanchez Decl. ¶ 22; Wolfe-Roubatis Decl. ¶¶ 25-27.

The Organizational Plaintiffs will also face extraordinary funding losses that could threaten their very existence. Substantial funding streams received by the Organizational Plaintiffs require that the asylum seekers served reside in a specific city or area in the United States. If increasing numbers of asylum seekers are returned to Mexico and the Organizational Plaintiffs cannot meet the grant deliverables, they will lose the funding, which will force them to reduce staff and potentially cease operations altogether. *See, e.g.*, Brown Scott Decl. ¶ 23 ("the clinic would cease to exist in a few years due to our inability to receive funding"); Cutlip-Mason Decl. ¶ 20 (the policy "jeopardize some of [the organization's] funding streams"); Sanchez Decl. ¶ 22 (describing funding restrictions that prevent the organization from using grant to serve asylum seekers living in Mexico). The diversion of resources and likely shuttering of key service providers will leave numerous vulnerable asylum seekers to represent themselves in court, having a ripple effect on the system as a whole and in turn on all of the Organizational Plaintiffs' clients, whether subject to the policy or not. *See, e.g.*, Wolfe-Roubatis ¶¶ 21-23 (stating how the policy will significantly reduce the number of asylum cases the organization takes on).

Moreover, enactment of the new policy in violation of the APA's procedural protections to which Plaintiffs are "entitled" presents further irreparable harm. *See, e.g.*, *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002). Had Defendants adhered to

notice-and-comment requirements before putting the policy into effect, the Organizational Plaintiffs would have had the opportunity to inform Defendants of their serious concerns regarding the considerable dangers faced by their clients and their own organizations' capacities to serve their target populations. *See* Brown Scott Decl. ¶ 27; Cutlip-Mason Decl. ¶ 19; First Manning Decl. ¶ 26; Sanchez Decl. ¶ 34; Wolfe-Roubatis Decl. ¶ 33.

B. The Public Interest and Balance of Equities Weigh Heavily in Favor of a TRO.

The remaining factors strongly favor enjoining the forced return policy. In cases against the government, the government's interest and public interest factors "merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). As explained above, there is no urgent need to have the new policy in effect immediately. *See* Point I.D., *supra*. But if it remains in effect, the Individual Plaintiffs will be at risk of serious, if not fatal, harm in Mexico and their home countries where they are likely to be *refouled*. *See Nken v. Holder*, 556 U.S. 418, 436 (2009) ("Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm.").

The forced return policy in fact already has undermined the public interest "in efficient administration of the immigration laws at the border," causing confusion and chaos in violation of such laws. *E. Bay Sanctuary Covenant*, 909 F.3d at 1255 (internal quotation marks omitted); *see also* Rodriguez Decl., Ex. V at 5-7; Ramos Decl. ¶ 17; First Manning Decl. ¶ 22. The policy has endangered the Individual Plaintiffs' lives and eviscerated their access to protections Congress has recognized are in the public interest to afford to those seeking safe haven on our shores. *See* Point I.B., *supra*. The public has an interest "in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *E. Bay Sanctuary Covenant*, 909 F.3d at 1255 (internal quotation marks and alterations omitted).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a TRO should be granted.

Dated: February 20, 2019

Respectfully submitted,

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**Admitted pro hac vice*
***Application for pro hac vice pending*
****Pro hac vice application forthcoming*
***** Application for admission forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2019, I caused a PDF version of the foregoing document to be electronically transmitted to the Clerk of the Court, using the CM/ECF system for filing and mailed courtesy copies to all necessary parties using certified mail.

Dated: February 20, 2019

/s/ Jennifer Chang Newell
Jennifer Chang Newell
Attorney for Plaintiffs