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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, *et al.*,

Plaintiffs,

v.

KRISTI NOEM, *et al.*,

Defendants.

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

PLAINTIFF IMMIGRANT DEFENDERS LAW CENTER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX PARTE* APPLICATION FOR A STAY OF AGENCY ACTION UNDER 5 U.S.C. § 705

Judge: Honorable Jesus G. Bernal
Crtrm: 1

Action Filed: October 28, 2020

[Caption Page Continued - Additional Attorneys for Plaintiffs]

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Plaintiff Immigrant Defenders Law Center (ImmDef or Plaintiff) respectfully moves this Court for emergency relief to stay Defendants' planned reimplementation of the 2019 Migrant Protection Protocols policy (MPP 1.0). Pursuant to 5 U.S.C. § 705, the effective date of reimplementation should be stayed pending the conclusion of this litigation, which challenges the unlawful implementation of the policy that Defendants are restarting "immediately." Defendants' prior implementation of MPP 1.0, beginning in January 2019, violated the First Amendment and the Administrative Procedure Act (APA), causing harm to ImmDef that is the subject of this litigation. Absent an emergency stay, Defendants' reimplementation of MPP 1.0 will cause ImmDef further irreparable harm. It is fair and equitable to maintain the status quo until a determination on the lawfulness of MPP 1.0 can be made on the merits.

I. INTRODUCTION

As this Court has already noted, "Defendants have conceded publicly and in papers filed during this litigation that MPP is indefensible as a matter of policy, in large part because of the burdens it imposed on the right to apply for asylum," including concerns about "the non-refoulement process, fairness and reliability of proceedings, notice of hearings, and disparate impact on court appearance rates and outcomes." ECF 261, Order on Motion to Dismiss (MTD Order) at 34. MPP 1.0 not only placed thousands of asylum seekers in grave danger in Mexico,[1] but also placed significant restrictions on Organizational Plaintiffs', including ImmDef's, ability to advise and counsel potential and existing clients. ECF 261 (MTD Order) at 48.

[1] *See* Adam Isacson, Testimony before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Hearing: "Remain in Mexico" (Jan. 16, 2025), available at https://www.hsgac.senate.gov/wp-content/uploads/Testimony-Isacson-2024-01-16.pdf.

Plaintiff ImmDef is a nonprofit organization whose core work is to represent noncitizens facing removal in and around southern California, seeking to ensure legal representation for all noncitizens in removal proceedings. *See* Declaration of Hannah Coleman (Coleman Decl.) at Exhibit A, Declaration of Lindsay Toczylowski (Toczylowski Decl.) ¶¶ 2, 5; *id.* at Exhibit B, Declaration of Margaret Cargioli (Cargioli Decl.) ¶ 3. MPP 1.0 interfered with ImmDef's ability to carry out its core activities by making its representation of clients much more onerous and costly and by forcing it to reallocate funding and staff to serve people subjected to the 2019 MPP policy, including through the establishment of a new San Diego office. Toczylowski Decl. ¶¶ 6–15; Cargioli Decl. ¶¶ 7–13. Because Defendants severely restricted ImmDef's ability to meet and communicate confidentially with MPP clients and prospective clients in the United States, ImmDef staff were forced to engage in regular cross-border travel that was financially burdensome to the organization and personally dangerous for staff, to provide competent representation. Toczylowski Decl. ¶¶ 10–11, 15; Cargioli Decl. ¶¶ 10–13. And because providing legal services for noncitizens placed in MPP was more expensive and time-consuming than serving clients in the United States, ImmDef had to decrease the number of clients it could represent under its core programs. Toczylowski Decl. ¶¶ 14–15; Cargioli Decl. ¶ 18.

Defendants' reinstatement of MPP 1.0 will once again interfere with Defendants' core activities of providing legal assistance to noncitizens in and around southern California.[2] Toczylowski Decl. ¶¶ 16, 18, 21–26; Cargioli Decl. ¶¶ 15–18.

[2] While Organizational Plaintiff Jewish Family Service of San Diego is still assessing the likely impact of the reinstatement of MPP 1.0 on its core programs, its harms from the initial implementation of MPP 1.0 have been amply described in prior submissions. *See e.g.*, ECF 38, Declaration of Luis Gonzalez; ECF 121-1, Supplemental Declaration of Luis Gonzalez.

Re-engaging in the cross-border representation necessary to competently represent noncitizens in MPP proceedings will cause ImmDef to incur significant financial costs and require its staff to engage in time-consuming, risky travel. Toczylowski Decl. ¶¶ 21–26; Cargioli Decl. ¶¶ 17–18. It will also immediately reduce ImmDef's capacity to serve clients across its existing programs, which currently represent an estimated 3,100 noncitizen clients and assist an estimated additional 33,000 noncitizens each year. Toczylowski Decl. ¶¶ 5, 18, 21–25.

ImmDef seeks an emergency order staying Defendants' reimplementation of MPP 1.0 pending the conclusion of this litigation, which directly challenges the lawfulness of the implementation of the reinstated policy. This relief will prevent imminent, irreparable harm to ImmDef, which is likely to succeed on the merits of its claims, and the balance of hardships and public interest favor ImmDef.

II. FACTUAL BACKGROUND

Between January 2019 and February 2021, Defendants used MPP 1.0 to trap asylum seekers in Mexico under perilous conditions that obstructed their ability to meaningfully access the U.S. asylum system and obtain legal representation.

Starting in January 2019, Defendants rapidly rolled out MPP 1.0 at ports of entry across the U.S.-Mexico border. Through MPP 1.0, the U.S. government returned nearly 70,000 asylum-seeking individuals to border regions of Mexico to await their hearings in U.S. immigration court.[3] Despite returning these asylum seekers to areas notorious for high rates of kidnappings, rapes, murders, and other

[3] *See* Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Security, Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; U.S. Customs and Border Protection, Migrant Protection Protocols Guiding Principles (Jan. 28, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.

violence, *see* ECF 200-1, Second Amended Complaint ("SAC") ¶¶ 53–58, the U.S. government provided them with no resources to ensure their safety, meet their basic needs, or meaningfully participate in their immigration proceedings. In the words of Defendant DHS, MPP 1.0:

> impos[ed] substantial and unjustifiable human costs on migrants who were exposed to harm while waiting in Mexico . . . . Significant evidence indicates that individuals were subject to extreme violence and insecurity at the hands of transnational criminal organizations that profited from putting migrants in harm's way while awaiting their court hearings in Mexico.[4]

In addition to trapping individuals in conditions that were "crowded, unsanitary, and beset by violence,"[5] MPP 1.0 severely obstructed legal representation for all noncitizens in the program. While Executive Office for Immigration Review (EOIR) records indicate that 80% of asylum seekers appearing in immigration court have legal representation,[6] only 10% of individuals subjected to MPP 1.0 were able to obtain counsel due to the constraints the policy placed on them and on immigration counsel.[7] For the few lucky enough to connect in person

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[4] Coleman Decl. at Exhibit C, Administrative Record, *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. Sept. 2, 2022), at AR00005, DHS, "Explanation of the Decision to Terminate the Migrant Protection Protocols" (Oct. 29, 2021) ("Explanation Memo"), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf.

[5] *Id.* at AR00010.

[6] TRAC, *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more* (Oct. 2021), https://web.archive.org/web/20250101084914/https://trac.syr.edu/phptools/immigration/asylum/ (filters set to "Immigration Court" and "Represented").

[7] As of October 2021, only 6,837 (less than 10%) of the 71,039 individuals subjected to MPP 1.0 had legal representation. *See* TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings by Hearing Location and*

(Footnote Cont'd on Following Page)

with counsel, attorney-client consultations were limited to a one-hour window before scheduled hearings and lacked the confidential space or legal resources needed to make the consultation meaningful. Cargioli Decl. ¶¶ 10–11. DHS has described "the difficulties in accessing counsel" in MPP 1.0 as "endemic to the program's design," including that "[o]pportunities for attorneys to meet with their clients outside of those organized at the hearing locations were limited due to, among other constraints, complications associated with cross-border communication."[8]

The challenges to obtaining counsel were so grave that DHS acknowledged that "[i]nadequate access to counsel cast[] doubt on the reliability of removal proceeding[s]"[9] during MPP 1.0. Indeed, the outcomes of MPP 1.0 hearings show that the program effectively denied noncitizens any meaningful opportunity to obtain asylum. Over a 14-month period, 98% of individuals subjected to MPP 1.0 received removal orders.[10] DHS statistics show that only 732 individuals in MPP 1.0 out of a total of 67,694 cases, or 1.1%, were granted relief from removal; in contrast, the

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Attendance, Representation, Nationality, Month and Year of NTA, Outcome, and Current Status (Oct. 2021), https://web.archive.org/web/20211129165045/https://trac.syr.edu/phptools/immigration/mpp/ (filter set to "Hearing Location: All" and "Represented: Represented") (last accessed Nov. 2021).

[8] Exhibit C, Explanation Memo at AR00021.

[9] *Id*.

[10] An order of removal is considered "final" when an individual has either (1) failed to attend their hearing ("in absentia" removal order); (2) waived appeal; (3) reserved but failed to file an appeal within 30 days of the removal order; (4) appealed the removal order but later withdrew their appeal; or (5) had their appeal denied by the Board of Immigration Appeals ("BIA") or Attorney General. 8 C.F.R. § 1241.1. An individual whose appeal is denied by the BIA may file a petition for review in the relevant federal circuit court of appeals, but that individual is considered to have a final order of removal unless and until the order has been vacated by the federal circuit court. *See* 8 U.S.C. § 1252(b).

general "relief-granted rate" for similarly situated Central American asylum seekers not subjected to MPP 1.0 is more than 26 times greater.[11]

On January 20, 2021, DHS announced the suspension of new enrollments into MPP.[12] Although DHS began winding down the program the following month, MPP 1.0 continued until it was terminated by the DHS Secretary in June 2021. Following a legal challenge to this termination, the Northern District of Texas issued an injunction prohibiting Defendants from implementing or enforcing the June 2021 termination memo and requiring it to "implement MPP in good faith." *Texas v. Biden*, 554 F. Supp. 3d 818, 857 (N.D. Tex. 2021). In October 2021, the DHS Secretary issued a second termination memo, again ending MPP 1.0. While challenging the injunction of the first termination, DHS nevertheless complied with that injunction by reimplementing Migrant Protection Protocols – MPP 2.0.[13]

On June 30, 2022, the Supreme Court affirmed Defendants' authority to end MPP. *Biden v. Texas*, 142 S. Ct. 2528, 2538, 2541–48 (2022). Pursuant to that decision, the Northern District of Texas vacated its injunction on August 8, 2022. *Texas v. Biden*, No. 2:21-cv-00067-Z, ECF 147 (N.D. Tex. Aug. 8, 2022). That same day, DHS announced its intent to end "the court-ordered implementation of MPP [2.0] in a quick, and orderly, manner," referencing Secretary Mayorkas' prior

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[11] Exhibit C, Explanation Memo at AR00024–25.

[12] Press Release, DHS, DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), https://www.dhs.gov/archive/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

[13] Robert Silvers, Under Secretary, Office of Strategy, Policy and Plans, DHS, Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols (Dec. 2, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf. The implementation of MPP 2.0 is not at issue in this case.

statements that "MPP has endemic flaws, [and] imposes unjustifiable human costs . . . ."[14] Since then, the *Texas v. Biden* case, which addresses the lawfulness of the termination of MPP 1.0, has proceeded. At no time since 2022, however, has any form of MPP been reimplemented, until now.

On January 20, 2025, in one of the first executive actions of his new term, President Trump ordered the reimplementation of MPP 1.0.[15] The next day, Defendant DHS announced that it would be "restarting the Migrant Protection Protocols (MPP) immediately."[16] The announcement made clear that the "2019 MPP Policy"—would be reimplemented.[17] The agency justified the reinstatement of the MPP 1.0 policy through a single conclusory statement that "[t]he situation at the border has changed and the facts on the ground are favorable to resuming implementation of the 2019 MPP Policy."[18] Since then, Acting Director of the Executive Office for Immigration Review Sirce Owen has issued a policy memorandum rescinding and canceling a prior policy on motions to reopen for

[14] Press Release, DHS, DHS Statement on U.S. District Court's Decision Regarding MPP (Aug. 8, 2022), https://www.dhs.gov/archive/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp.

[15] President Donald J. Trump, Executive Order: Securing Our Borders (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/.

[16] Press Release, DHS, DHS Reinstates Migrant Protection Protocols, Allowing Officials to Return Applicants to Neighboring Countries (Jan. 21, 2025), https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols.

[17] *Id.*

[18] *Id.*

noncitizens subjected to MPP 1.0, noting that the President had "directed DHS to resume MPP, and on January 21, 2025, it did so."[19]

On January 22, 2025, the Northern District of Texas ordered the parties in the ongoing *Texas v. Biden* case to submit joint briefing addressing the impact of Defendants' announcement of the reinstatement of MPP. *Texas v. Biden*, No. 2:21-cv-00067-Z, ECF 207 (N.D. Tex. Jan. 22, 2025). On January 31, 2025, Defendants submitted a joint brief stating plainly that "MPP has been reimplemented and will be operational during [the requested stay period of 180 days]." *Id.* at ECF 21 at 2 (N.D. Tex. Jan. 31, 2025).

Meanwhile, conditions on the ground in northern Mexico remain dangerous. The State Department has issued travel warnings for four out of six Mexican states that border the United States, based on high rates of crime and kidnapping.[20]

III. ARGUMENT

Section 705 of the APA authorizes a court reviewing an agency action to "issue all necessary and appropriate process to postpone the effective date of [the] agency action or to preserve status or rights pending conclusion of the review proceedings" "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705. "The standard of review for relief under 5 U.S.C. § 705 is the same as the standard of review for preliminary injunctions." *Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 45 (D.D.C. 2020).

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[19] Sirce E. Owen, Acting Director, Executive Office for Immigration Review, "PM 25-05: Cancellation of Policy Memorandum 21-26" at 1 (Jan. 27, 2025), https://www.justice.gov/eoir/media/1386551/dl?inline.

[20] Department of State, Mexico Travel Advisory (Sep. 6, 2024) https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

When moving for a preliminary injunction, a 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." *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1142 (9th Cir. 2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). 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," *Hernandez v. Lynch*, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *20 (C.D. Cal. Nov. 10, 2016) (citation omitted), and a preliminary injunction may issue where the plaintiff raises "serious questions going to the merits," *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted). For the reasons discussed below, Plaintiff meets all these requirements.

A. ImmDef Will Suffer Irreparable Harm in the Absence of Immediate Relief.

Irreparable harm is "harm for which there is no adequate legal remedy." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Where parties cannot recover monetary damages from their injury, as in APA cases, economic harm can be considered irreparable. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) (citing *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018)). "Intangible injuries may also qualify as irreparable harm, because such injuries 'generally lack an adequate legal remedy.'" *Id.* (quoting *Brewer*, 757 F.3d at 1068). ImmDef faces severe organizational and financial harm with the resumption of MPP. The resulting "significant change in [ImmDef's] programs and a concomitant loss of funding" constitute irreparable injuries. *Id.*

During the first implementation of MPP 1.0, ImmDef faced serious impediments to carrying out its core business activities of representing and providing other types of legal services to noncitizens in and around southern California who were facing removal. Toczylowski Decl. ¶ 5; Cargioli Decl. ¶¶ 14–16.[21] To represent asylum seekers forced to remain in Mexico, ImmDef established its Cross-Border Initiative, based in San Diego, to provide direct representation, *pro se* assistance, and advocacy for individuals subjected to MPP whose cases were before the San Diego Immigration Court. Toczylowski Decl. ¶¶ 6–8; Cargioli Decl. ¶¶ 7–8. The necessity of routine travel to Mexico to consult with ImmDef's clients was costly, time-intensive, and detracted from other legal work. Toczylowski Decl. ¶¶ 7–15; Cargioli Decl. ¶¶ 7–13. In representing clients in MPP, ImmDef also faced numerous other obstacles not associated with pro bono legal representation of clients in the United States, including communication barriers, limited time for face-to-face meetings in the United States, and a lack of confidential meeting space. Toczylowski Decl. ¶ 15. Thus, ImmDef had to hire staff in San Diego, purchase international

[21] As this Court has previously held, ImmDef has standing to assert "each of [its] claims" here, because it has shown injury in fact that is fairly traceable to the implementation of MPP 1.0 and redressable by the Court. ECF 261 (MTD Order) at 30. Moreover, Defendants' implementation of MPP 1.0 "directly affected and interfered with [ImmDef's] core business activities" by "perceptibly impair[ing] [ImmDef's] ability to provide counseling" and services to noncitizens subject to MPP through restrictions on ImmDef's ability to communicate with and represent clients, and by forcing ImmDef to travel internationally to meet with its clients. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see infra* Section III.B.1–3. With the reimplementation of MPP 1.0, ImmDef faces the same barriers to its core activities of representing and providing services to noncitizens, quite "apart from [any injury caused by its] response" to MPP 1.0, *Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1170 (9th Cir. 2024), or any "setback to [its] abstract social issues," *All. for Hippocratic Med.*, 602 U.S. at 394.

phone plans, and rent confidential space for client meetings in Mexico. *Id*. ¶¶ 12, 15. And staff who had to travel to northern Mexico often did so at risk of personal danger, given the volatile conditions there. Toczylowski Decl. ¶ 25; Cargioli Decl. ¶¶ 9, 13.

With the cessation of MPP from approximately October 2022 until January 2025, ImmDef has expanded its legal representation programs for adults and children in and around southern California and undertaken several new initiatives. Toczylowski Decl. ¶¶ 16, 18; Cargioli Decl. ¶¶ 14–15. The reinstatement of MPP 1.0 jeopardizes all of this work and will harm ImmDef through increased operational costs, risks to staff, threats to the financial health of the organization, and renewed impediments to ImmDef's representation of its potential and existing clients in and around southern California. Toczylowski Decl. ¶¶ 21–25; Cargioli Decl. ¶¶ 16–18. ImmDef will have to train staff on the complexities of MPP cases; hire additional staff to represent clients and provide information to noncitizens in MPP; fund staff travel, work space, and international communications; and decrease the overall number of clients it can represent. Toczylowski Decl. ¶¶ 21–25; Cargioli Decl. ¶¶ 14–18.

Furthermore, ImmDef will be harmed because its core work of providing legal representation in removal proceedings to clients in and around southern California will once again be "perceptibly impaired" by Defendants' reimplementation of MPP 1.0, particularly by Defendants' restrictions on ImmDef's ability to communicate and consult with potential and existing clients. *All. for Hippocratic Med.*, 602 U.S. at 395; *see infra* Section III.B.1.

B. ImmDef Is Likely to Succeed on the Merits of its Claims.

1. Violation of First Amendment Rights to Advise Potential and Existing Clients

ImmDef is likely to succeed on the merits of its First Amendment claim that Defendants' reimplementation of MPP 1.0 interferes with its right to advise existing and potential clients. During the implementation of MPP 1.0, Defendants (1) imposed strict limits on the time allotted for ImmDef and other legal service providers to consult with existing clients prior to their hearings, (2) prevented them from communicating with or advising potential clients in the immigration courts, and (3) prohibited them from conducting "know your rights" presentations for individuals subjected to MPP 1.0 while they were in the United States for their hearings. ECF 261 (MTD Order) at 48.

The First Amendment protects legal service providers from government interference when they are "advocating lawful means of vindicating legal rights." *NAACP v. Button*, 371 U.S. 415, 437 (1963). Accordingly, legal service providers have the right to advise potential clients, based on the recognition that "the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *In re Primus*, 436 U.S. 412, 431 (1978). Organizations' rights to provide pro bono legal assistance to immigrants subject to removal proceedings "may 'fall[] neatly within the precedent set by the Supreme Court in *Button* and its progeny." ECF 261 (MTD Order) at 49 (quoting *Nw. Immigrant Rts. Project v. Sessions*, 2017 WL 3189032, at *3 (W.D. Wash. July 27, 2017)). In short, attorneys advising, assisting, and consulting with asylum-seeking clients are engaging in the "creation and dissemination" of legal information, which constitutes protected speech within the meaning of the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

After stranding ImmDef's clients in Mexico under MPP 1.0, Defendants placed specific and direct restrictions on ImmDef's and other legal service providers' speech. SAC ¶¶ 63, 278–84; ECF 261 (MTD Order) at 48–49. These restrictions included a one-hour limit for counsel to meet with clients prior to their hearings while they were physically located in the United States and a requirement that attorney-client consultations take place in non-confidential settings. *See, e.g.*, Exhibit C, Explanation Memo at AR00021; Cargioli Decl. ¶¶ 10–11. In some instances, attorney consultations had to take place in a room with ICE officers present. *See, e.g.*, Cargioli Decl. ¶ 10.

Defendants also restricted the ability of ImmDef and other legal service providers to advise potential clients. Only asylum seekers who had arranged to be represented by counsel prior to their hearings were permitted to speak to counsel while in the U.S. for their immigration court proceedings. Cargioli Decl. ¶¶ 11, 13. In some instances, attorneys, including ImmDef attorneys, were outright prohibited from speaking with pro se asylum seekers while they were in the United States for hearings. *See* Exhibit D, DHS00000691 at 694–95 (Human Rights Watch Report); Cargioli Decl. ¶¶ 12–13. The only way for ImmDef to exercise its First Amendment rights to advise potential clients and to provide legal advice to existing clients subjected to MPP 1.0 was by paying for staff to travel to and rent safe meeting spaces in Mexico. Toczylowski Decl. ¶ 15; Cargioli Decl. ¶¶ 10–11. Additionally, because the costs of representing clients in Mexico were so high, ImmDef was forced to decrease the number of clients it could represent through its other projects. Toczylowski Decl. ¶¶14–15.

The reimplementation of MPP 1.0 will again impose barriers on ImmDef's ability to consult with clients and potential clients in Mexico. Toczylowski Decl. ¶¶ 21–22. Thus, Plaintiff is likely to succeed on its claim that Defendants'

reimplementation of MPP 1.0 violates the First Amendment right to advise potential and existing clients.

2. Administrative Procedure Act, 5 U.S.C. § 706(2) – Violation of the Right to Apply for Asylum, 8 U.S.C. § 1158(a)(1)

ImmDef is likely to succeed on the merits of its claim that the reimplementation of MPP 1.0 violates the right to apply for asylum. *See* SAC ¶¶ 329–41. The Immigration and Nationality Act ("INA") establishes the statutory right to apply for asylum. 8 U.S.C. § 1158. This right is violated when the government engages in "a pattern or practice that forecloses the opportunity to apply." *Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994) (citing *Orantes–Hernandez v. Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990)). Legal services organizations play an essential role in assisting people who are seeking asylum because the application process is complex and difficult. Studies have shown that represented noncitizens are vastly more likely to succeed in their immigration cases than those who appear *pro se*.[22]

ImmDef is likely to succeed in establishing that the reimplementation of MPP 1.0 "forecloses" asylum seekers' "opportunity to apply," *Campos*, 43 F.3d at 1288, because it creates obstacles at every step of the application process. DHS has already acknowledged that MPP was "indefensible" in part because of the "burdens it imposed on the right to apply for asylum." ECF 261 (MTD Order) at 34 (citing ECF 189 at 3). The record in this case confirms that the 2019 implementation of MPP 1.0 foreclosed the opportunity to apply for asylum, and its reimplementation will have the same consequences, including for ImmDef's clients. For the reasons discussed *infra*, Section III.B.1, MPP 1.0 impeded the ability of individuals seeking asylum to

[22] *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 9 (Dec. 2015).

retain and consult with counsel, including ImmDef. MPP 1.0 further violated the right to apply for asylum in the following ways.

First, MPP 1.0 trapped individuals in a foreign country under dangerous conditions in a manner that obstructed meaningful access to all aspects of the U.S. asylum system. The government's own investigations into MPP 1.0 concluded that the policy "impos[ed] substantial and unjustifiable human costs on the individuals who were exposed to harm while waiting in Mexico," including "extreme violence and insecurity at the hands of transnational criminal organizations." Exhibit E, Administrative Record, *Texas v. Biden*, No. 2:21-cv-00067-Z (N.D. Tex. Sept. 2, 2022), at AR00001, DHS, "Termination of the Migrant Protection Protocols" (Oct. 29, 2021) at 2–3; *see also* Cargioli Decl. ¶ 9 (ImmDef's clients "were kidnapped, tortured, or assaulted in Mexico while waiting for their hearings"). Conditions in northern Mexico remain dangerous.[23] The re-implementation of MPP 1.0 will only exacerbate these conditions by creating a concentration of vulnerable individuals who are easy targets of crime in northern Mexico.[24]

These perilous conditions "made it challenging for some to remain in Mexico for the duration of their proceedings." Exhibit C, Explanation Memo at AR00016.

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[23] *See, e.g.*, U.S. Dep't of State, Bureau of Consular Affairs, "Mexico Travel Advisory," https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (Sept. 6, 2024) ("Violent crime – such as homicide, kidnapping, carjacking, and robbery – is widespread and common in Mexico.").

[24] *See* Testimony of Adam Isaacson Before the U.S. Senate Committee on Homeland Security and Governmental Affairs at 6, https://www.hsgac.senate.gov/wp-content/uploads/Testimony-Isacson-2024-01-16.pdf (Jan. 16, 2025) ("[K]idnappers and extortionists were waiting every day for MPP returnees to arrive at their daily drop-off points near ports of entry, after attending hearings or being added to the program"); *id.* at 9 ("Kidnappers specifically sought out people with Remain in Mexico hearings because they had a strong motivation to pay more.").

As a result, many individuals subjected to MPP 1.0 were forced to abandon their asylum claims, thwarting ImmDef's ability to carry out its work. *Id.* at AR00024-25; Cargioli Decl. ¶ 9. Indeed, ImmDef client and Individual Plaintiff Chepo Doe and his daughter were compelled to return to El Salvador and abandon their asylum claims when his daughter contracted a life-threatening illness that Mexican doctors refused to treat. ECF 157-6, Declaration of Chepo Doe ¶ 3. Because "the United States has limited ability to fix these issues," Exhibit C, Explanation Memo at AR00016, this obstruction of the right to apply for asylum is inherent in any implementation of MPP 1.0. The reimplementation of MPP 1.0 is certain to cause future asylum seekers to experience the same dangerous, potentially life-threatening conditions.

Second, for the small number of individuals stranded in Mexico who were able to obtain counsel, MPP 1.0 precluded meaningful consultation. Individuals subjected to MPP 1.0 frequently lacked access to telephones or other means of communicating across the border. Exhibit C, Explanation Memo at AR00021. And due to the host of safety concerns outlined above, many legal organizations had policies preventing attorneys from meeting with their clients in Mexico. *Id.* Ultimately, these deficiencies in the asylum process led to drastically worse outcomes in removal proceedings for individuals subject to MPP 1.0, as compared with individuals seeking asylum from within the United States. *See, e.g.*, *id.* at AR00022 (individuals in MPP 1.0 "were substantially more likely to receive *in absentia* removal orders than comparable noncitizens who were not placed in MPP during the relevant time period").

These deficiencies severely obstructed ImmDef's ability to provide legal services to its asylum-seeking clients and required ImmDef to fund staff travel to Mexico, rent space for confidential meetings with clients, and pay for international

phone plans for its staff. *See* Toczylowski Decl. ¶¶ 10, 14–15. The re-implementation of MPP 1.0 will impede ImmDef's core activities, impair its legal representation efforts, and place its staff at risk of physical harm. *Id.* ¶¶ 21–25. Accordingly, ImmDef is likely to prevail on its claim that Defendants' reimplementation of MPP 1.0 violates the right to apply for asylum.

3. Administrative Procedure Act, 5 U.S.C. § 706(2) – Violation of the Right to Access Counsel, 8 U.S.C. §§ 1158(d)(4), 1229a(b)(4)(A), 1362

ImmDef is also likely to succeed on the merits of its claim that Defendants' reimplementation of MPP 1.0—just like their 2019 implementation—violates the right to access counsel under the INA. *See* 8 U.S.C. §§ 1158(d)(4), 1229a(b)(4)(A), and 1362. Even assuming *arguendo* that Defendants have authority under 8 U.S.C § 1225(b)(2)(C) to "return" individuals to contiguous territory, such returns must be implemented in a manner that does not impede the right to access counsel in immigration proceedings. *See* ECF 261 (MTD Order) at 29 ("immigration statutes must be read as a 'harmonious whole'" (citations omitted)); *see also, e.g.*, *U.S. West Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000) (where provisions "form part of the same Act, the duty to harmonize them is particularly acute," as "individual sections of a single statute should be construed together" (citation omitted)).

The INA mandates that asylum seekers have meaningful access to counsel. *See Torres v. United States Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1060–61 (C.D. Cal. 2019); *Lin v. Ashcroft*, 377 F.3d 1014, 1023, 1025 (9th Cir. 2004). "[M]eaningful access to counsel" requires "reasonable time to locate counsel and permit counsel to prepare for the hearing," and effective assistance in "reasonably presenting [one's] case." ECF 261 (MTD Order) at 37 (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1098–99 (9th Cir. 2005), and *Lopez v. I.N.S*, 775 F.2d 1015, 1017

(9th Cir. 1985)). Defendants must do more than "merely" advise individuals of the possibility of representation and provide a list of pro bono legal service providers—especially when those providers are not located near the place "where the [noncitizen] [is] being detained." *See* ECF 261 (MTD Order) at 37 (rejecting Defendants' argument to the contrary); *Orantes-Hernandez*, 919 F.2d at 565. Individuals must also have access to telephones to communicate with their counsel. *Id.* at 566; *see also Usubakunov v. Garland*, 16 F.4th 1299, 1305 (9th Cir. 2021). And they must be able to meet face-to-face with counsel and communicate confidentially about their cases. *Torres*, 411 F. Supp. 3d at 1060; *Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019). When individuals are subjected to "numerous obstacles, the cumulative effect of which [is] to prevent [them] from contacting counsel and receiving any legal advice," their right to counsel is violated. *Orantes-Hernandez*, 919 F.2d at 565.

Defendants' implementation of MPP 1.0 trapped individuals in conditions that obstructed their access to legal representation and imposed systemic obstacles to the ability to access legal representation, the cumulative effect of which is tantamount to a denial of counsel. As a result, asylum seekers returned to Mexico under MPP 1.0 are generally unable to exercise their right to appeal or seek reopening of their asylum proceedings. Defendants conceded that they had "significant concerns about the practical obstacles to interacting with counsel across an international boundary." ECF 189 (Defs.' Mot. to Dismiss) at 26 (citing Exhibit C, Explanation Memo at AR00020–22); ECF 261 (MTD Order) at 36–37 (referring to this "substantial concession").

Thus, ImmDef is likely to succeed on its claim that Defendants' reimplementation of MPP 1.0 violates the right to access counsel.

C. The Balance of Hardships and Public Interest Factors Tip Sharply in ImmDef's Favor.

ImmDef's hardships outweigh any potential inconvenience to the government. Simply stated, the reimplementation of MPP 1.0 will unlawfully deprive ImmDef of its First Amendment rights to advise potential and existing clients and will contravene the APA. *See supra* Section III.B. Moreover, as explained above, because MPP 1.0 as implemented was unlawful and the government has made clear that it intends to reimplement the same unlawful "2019 MPP Policy," *supra* n.17, the relief requested would not harm the government. *Castillo v. Barr*, 449 F. Supp. 3d 915, 923 (C.D. Cal. 2020) ("[T]here is no harm to the Government when a court prevents the Government from engaging in unlawful practices.").

ImmDef has articulated facts demonstrating the severe and imminent risk of grave harm it faces due to the reimplementation of MPP 1.0, and its specific hardships weigh heavily in favor of granting a stay under Section 705 of the APA. Following the Trump Administration's announcement that it intended to resume MPP 1.0, ImmDef started planning to reallocate resources from other programs to ensure it can provide legal services to noncitizens subjected to MPP. Toczylowski Decl. ¶¶ 19–25. Based on the 2019 implementation, ImmDef expects that the reimplementation of MPP 1.0 will require them to spend "more staff time and more funds to provide representation in MPP proceedings" than is typically required for immigration court proceedings where the noncitizen resides in the United States and is available for in-person meetings with ImmDef staff. *Id.* ¶ 21. The reimplementation will require ImmDef to "refocus much of its time" on legal consultations, representation, and Know Your Rights presentations for individuals enrolled in MPP 1.0, and training new attorneys on the complexities of MPP cases.

Id. ¶ 23. ImmDef will also need to hire more staff, including attorneys, legal support, and administrative staff, and to seek additional sources of funding, and its representation of potential and existing clients will be much more onerous due to the difficulties inherent in providing legal representation internationally to clients at risk of torture, kidnapping, and other severe harm. *Id.* ¶¶ 22–23; *see supra* Section III.A. A stay of reimplementation of the MPP 1.0 policy is essential to avert these harms.

Protecting ImmDef's rights is unquestionably in the public interest. *See Torres v. U.S. Dep't of Homeland Sec.*, No. EDCV 18-2604 JGB (SHKx), 2020 WL 3124216, at *9 (C.D. Cal. Apr. 11, 2020) ("As a general rule, 'it is always in the public interest to prevent the violation of a party's constitutional rights.'" (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012))). As this Court has previously held, "the public has an interest in the orderly administration of justice and in preventing needless administrative appeals, delay, and expense produced by the denial of access to counsel and by non-adherence to statutory and constitutional rights." *Id.* And Defendants have no legitimate reason to violate the Constitution, *see United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring), or federal law, *see Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013).

For these reasons, the balance of hardships and public interest factors tips sharply in favor of Plaintiff.

D. No Procedural Issues Preclude this Court's Review or the Requested Relief.

1. ImmDef Has Standing.

As this Court has previously held, ImmDef has standing to assert "each of [its] claims" here, because it has shown injury in fact, fairly traceable to the implementation of MPP, and redressable by the Court. ECF 261 (MTD Order) at 30.

The implementation of MPP "directly affected and interfered with [ImmDef's] core business activities" by "'perceptibly impair[ing] [ImmDef's] ability to provide counseling'" and services to noncitizens subject to MPP through Defendants' restrictions on ImmDef's ability to communicate with and represent clients. *All. for Hippocratic Med.*, 602 U.S. at 395 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see supra* Section III.B. And in order to represent its clients competently and serve asylum seekers subjected to MPP, ImmDef had to reallocate staff time, expend significant time and financial resources, send its staff to Mexico, and a rent a new office, all at the expense of its core programs. *See supra* Section III.A. ImmDef therefore suffered more than a "setback to [its] abstract social interests," *All. for Hippocratic Med.*, 602 U.S. at 394, and the reimplementation of MPP will cause significant financial and organizational harm to ImmDef. *See supra* Section III.A.

2. Section 1252(f)(1) Does Not Preclude a Stay.

Garland v. Aleman Gonzalez, 596 U.S. 543 (2022) does not affect the availability of a stay of the effective date of the reimplementation of the 2019 MPP policy which is a "different form[] of relief" than an injunction. *See Washington v. United States Dep't of Homeland Sec.*, 408 F. Supp. 3d 1191, 1212 (E.D. Wash. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 428 (2009)). An injunction "is directed at someone, and governs that party's conduct." *Nken*, 556 U.S. at 428. "By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.*; *see also Texas v. Biden*, 646 F. Supp. 3d 753, 768 (N.D. Tex. 2022) ("Section 1252(f)(1) does not prohibit issuance of a 'stay' under Section 705 [of the APA].").

IV. CONCLUSION

For the foregoing reasons, ImmDef respectfully requests that this Court stay the reimplementation of MPP 1.0 pending the conclusion of this litigation.

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CERTIFICATE OF COMPLIANCE PURSUANT TO L.R. 11-6.2

The undersigned, counsel of record for Plaintiffs, certifies that this brief contains 6,283 words, which complies with the word limit of L.R. 11-6.1.

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