TRACY L. WILKISON
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, General Civil Section
JASON K. AXE (Cal. Bar No. 187101)
MATTHEW J. SMOCK (Cal. Bar No. 293542)
Assistant United States Attorneys
Federal Building, Suite 7516
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-8790/0397
Facsimile: (213) 894-7819
E-mail: Jason.Axe@usdoj.gov
E-mail: Matthew.Smock@usdoj.gov
Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security, et al.,

Defendants.

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

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1) & 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Proposed] Order filed concurrently

Hearing Date: March 22, 2022
Hearing Time: 9:00 a.m.
Ctrm: Riverside, Courtroom 1
Hon. Jesus G. Bernal

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NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT

PLEASE TAKE NOTICE that, on March 22, 2022 at 9:00 am, or as soon thereafter as they may be heard, Defendants will, and hereby do, move this Court for an order dismissing the Second Amended Complaint ("SAC") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This motion will be made in the George E. Brown, Jr. Federal Building and Courthouse before the Honorable Jesus G. Bernal, United States District Judge, located at 3470 Twelfth Street, Riverside, CA 92501.

Defendants bring the motion on the following grounds[1]: (1) the relief Plaintiffs seek conflicts with a nationwide permanent injunction entered by the District Court for the Northern District of Texas; (2) Plaintiffs' claims are moot; (3) the Court lacks jurisdiction over Plaintiffs' claims pursuant to 8 U.S.C. § 1252(b)(9); (4) the Court lacks jurisdiction over Plaintiffs' claims pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii); (5) the Court lacks jurisdiction over Plaintiffs' claims pursuant to 8 U.S.C. § 1252(f)(1); (6) Organizational Plaintiffs lack standing to pursue any of their claims because they are outside of the cited statutes' zones of interest and they have not sufficiently alleged organizational harm; (7) Plaintiffs' First Claim fails because (a) the contiguous-return provision under the Immigration and Nationality Act ("INA") permitted Individual Plaintiffs' return to Mexico, and they have no right to enter the United States to pursue asylum claims here, (b) the INA permits Individual Plaintiffs to pursue reopening of their removal proceedings from abroad and provides a procedure to allow them to "restart" their terminated removal proceedings, and (c) Organizational Plaintiffs do not allege they represent the Individual Plaintiffs or proposed class, or even that they have

[1] As explained in the accompanying Memorandum of Points and Authorities (*see* page 3), the Secretary of Homeland Security issued a new memorandum terminating the Migrant Protection Protocols ("MPP") program, based on a determination that "the benefits of MPP are far outweighed by the costs of continuing to use the program on a programmatic basis, in whatever form." *See* https://www.dhs.gov/publication/migrant-protection-protocols-termination-memo. As a matter of policy, Defendants do not defend MPP or its prior implementation.

any specific plans to do so; (8) Individual Plaintiffs' Second Claim fails because (a) the contiguous-return provision under the INA permitted Individual Plaintiffs' return to Mexico, and Individual Plaintiffs have not alleged any resultant denial of counsel or their right to counsel under the INA and (b) Organizational Plaintiffs do not allege that they seek to represent the Individual Plaintiffs or proposed class, or even have any specific plans to do so; (9) Individual Plaintiffs' Third Claim fails because the constitutional rights they invoke do not extend extraterritorially, Individual Plaintiffs do not allege any denial of their right to counsel under the INA, and Individual Plaintiffs may challenge whether they had a full and fair hearing and were able to present evidence in support of their claims through the petition for review process; (10) Plaintiffs' Fourth Claim fails because Plaintiffs fail to allege any final agency actions; (11) Individual Plaintiffs' Fifth Claim fails because the constitutional rights they invoke do not extend extraterritorially, and Individual Plaintiffs have not alleged any government restrictions on speech or their access to immigration court; and (12) Organizational Plaintiffs' Sixth Claim fails because they do not allege any government restrictions on speech and do not allege that they seek to represent the Individual Plaintiffs or proposed class, or even have any specific plans to do so.

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, and all pleadings, records, and other documents on file with the Court in this action, and upon such oral argument as may be presented at the hearing of this motion.

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This motion is made following the conference of counsel pursuant to Local Rule 7-3 which was held on January 19, 2022.

Dated: January 26, 2022

Respectfully submitted,

TRACY L. WILKISON
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, General Civil Section

/s/ *Matthew J. Smock*
JASON K. AXE
MATTHEW J. SMOCK
Assistant United States Attorneys
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On December 22, 2021, Plaintiffs (twelve Individual Plaintiffs and two Organizational Plaintiffs) filed their Second Amended Complaint, challenging the continued effects of the initial implementation of MPP ("MPP" or "the original MPP") by the prior administration and the current administration's actions in halting its wind down. ECF No. 175 ("SAC"). Plaintiffs assert the following claims for relief: (1) violation of the APA premised on the violation of the right to apply for asylum (all Plaintiffs); (2) violation of the APA premised on access to counsel (all Plaintiffs); (3) violation of the Fifth Amendment Due Process Clause Right to Full and Fair Hearing (Individual Plaintiffs); (4) violation of the APA premised on the unlawful cessation of the MPP wind down (six of the Individual Plaintiffs and the Organizational Plaintiffs); (5) violation of the First Amendment (Individual Plaintiffs); and (6) violation of the First Amendment (Organizational Plaintiffs). *Id.* at 61-75. Claims 1-3 and 5-6 challenge the prior administration's implementation of the original MPP, and Claim 4 challenges the Government's termination of the wind down of MPP. For all claims, Plaintiffs seek recommencement of the wind down through, among other things, the return of the proposed class to the United States. Plaintiffs' SAC is subject to dismissal for the reasons set forth herein.

II. BACKGROUND

On January 20, 2021, Defendant Department of Homeland Security ("DHS") announced the suspension of new enrollments in MPP, effective January 21, 2021.[2] On February 11, 2021, DHS announced that, "[b]eginning on February 19, [DHS] will begin phase one of a program to restore safe and orderly processing at the southwest border. DHS will begin processing people who had been forced to 'remain in Mexico' under the

[2] Press Release, U.S. Dep't of Homeland Security, DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), available at https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

[MPP]."[3] On June 1, 2021, Secretary of Homeland Security Alejandro Mayorkas issued a memorandum terminating MPP.[4]

On August 13, 2021, the District Court for the Northern District of Texas issued a nationwide permanent injunction, enjoining the Government from "implementing or enforcing the June 1 Memorandum" and ordering it to "enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 12[2]5 without releasing any aliens because of a lack of detention resources." *State v. Biden*, ___ F. Supp. 3d ___, 2021 WL 3603341, at *26 (N.D. Tex. Aug. 13, 2021). On August 19, 2021, the United States Court of Appeals for the Fifth Circuit denied the Government's request for a stay of the August 13, 2021 injunction pending appeal. *State v. Biden*, 10 F.4th 538 (5th Cir. 2021). On August 24, 2021, the United States Supreme Court similarly denied the Government's request for a stay of the August 13, 2021 injunction pending appeal. *Biden v. Texas*, ___ S. Ct. ___, 2021 WL 3732667 (2021). On October 29, 2021, after a thorough and extensive review of the program, Secretary of Homeland Security Alejandro Mayorkas issued a new memorandum terminating MPP, along with an explanation of the new decision to terminate MPP.[5] Secretary Mayorkas thoroughly reexamined MPP and concluded that any benefits of MPP were greatly outweighed by its

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[3] Press Release, U.S. Dep't of Homeland Security, DHS Announces Process to Address Individuals in Mexico with Active MPP Cases (Feb. 11, 2021), available at https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases.

[4] Secretary of Homeland Security Alejandro N. Mayorkas, Termination of the Migrant Protection Protocols Program (June 1, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

[5] Secretary of Homeland Security Alejandro N. Mayorkas: Termination of the Migrant Protection Protocols (Oct. 29, 2021) ("Termination Memo"), available at: https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf; U.S. Dep't of Homeland Security, Explanation of the Decision to Terminate the Migrant Protection Protocols (Oct. 29, 2021) ("Explanation Memo"), available at: https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf.

costs, the program suffered endemic flaws and detracted from other high-priority administration goals, and the program should be terminated. *Id.* On December 13, 2021, the United States Court of Appeals for the Fifth Circuit affirmed the injunction on the merits, concluding that the prior June 1 Memorandum violated the APA and 8 U.S.C. § 1225. *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021). On December 29, 2021, the Government filed a petition for *writ of certiorari* with the United States Supreme Court.

As a matter of policy, Defendants do not defend MPP or its prior implementation. The Government has asked the United States Supreme Court to set aside the Fifth Circuit's decision and the injunction, but the Government remains bound by the injunction and obligated to abide by it at this time. Nonetheless, whether MPP is valid as a policy matter is distinct from whether MPP is lawful, and for the reasons that follow, Plaintiffs' challenge to MPP fails as a matter of law.

III. ARGUMENT

A. The Complaint Should be Dismissed Because it Seeks Relief that Conflicts with the *Texas* Injunction

Plaintiffs seek an injunction that would compel the Government to recommence the wind down of MPP and allow the proposed class to return to the United States. Principles of judicial comity foreclose that request for relief because it would subject the Government to conflicting injunctions. The Government terminated the MPP wind down pursuant to the *Texas* injunction mandating that the Government implement MPP in good faith. *State*, 2021 WL 3603341, at *26. Defendants agree that the *Texas* court's nationwide permanent injunction is erroneous on its merits and its scope. To that end, Defendants appealed to the Fifth Circuit and the Supreme Court to stay the injunction, and they have sought certiorari of the Fifth Circuit's decision affirming the injunction on the merits. But unless and until the injunction is vacated, Defendants remain bound by it.

That injunction, for as long as it stands, counsels against awarding the relief that Plaintiffs seek in this lawsuit. The Supreme Court's "established doctrine" holds "that persons subject to an injunctive order issued by a court with jurisdiction are expected to

obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980) (citations omitted). The Supreme Court has also stated that the remedy for an injunction deemed improper is direct appeal, rather than collateral attack. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (decisions of federal courts are "subject to review only by superior courts in the Article III hierarchy"); *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well-settled."). It follows that, "[w]hen an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases." *Bergh v. State of Wash.*, 535 F.2d 505, 507 (9th Cir. 1976) (affirming dismissal of action seeking to enjoin regulations "promulgated by the State of Washington in response to" a district court decision). And more generally "principles of comity and judicial economy make courts reluctant to exercise jurisdiction over claims involving the orders of coordinate courts." *Zambrana v. Califano*, 651 F.2d 842, 844 (2d Cir. 1981).

Here, Plaintiffs seek the same declaratory and injunctive relief for all six of their claims. *See* SAC at 97-99. But the injunctive and declaratory relief Plaintiffs seek would conflict with the nationwide permanent injunction entered in the Northern District of Texas. *State*, 2021 WL 3603341, at *26; *see* SAC, Prayer for Relief, ¶¶ (c, e-f). Because the Government has been ordered to reimplement MPP in good faith, an order declaring that MPP violated the law, ordering the Government to wind down MPP, and ordering the Government to return persons previously enrolled in MPP to the United States and provide them with an "adequate facility in the United States for legal visitation" could conflict with another federal court's injunction and likely prevent Defendants from complying with both orders. Indeed, a judicial declaration declaring MPP unlawful would render unlawful the Government's efforts to reimplement MPP and make it difficult for Defendants to lawfully comply with the *Texas* injunction. *Cf. Thomas v.*

SmithKline Beecham Corp., 201 F.R.D. 386, 397 (E.D. Pa. 2001) (certifying class because trying the claims of putative class members individually could result in "conflicting declaratory and injunctive relief" that "could make compliance impossible for defendants"). On this basis alone, all of Plaintiffs' claims seeking declaratory or injunctive relief seeking a wind down of MPP should be dismissed.

The threat of conflicting relief is particularly acute in cases in which the Federal Government is the defendant. It would raise significant separation of powers concerns if Article III courts were able to place an Article II Executive Branch agency into a position of peril—*i.e.*, where no matter how the agency acted, it would face a risk of contempt proceedings from at least one Article III tribunal. *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("[T]he separation-of powers doctrine requires that a branch not impair another in the performance of its constitutional duties."). The Government is uniquely susceptible to this danger given its docket: the Government litigates in every District and Circuit in a significant number of cases, many of which raise important public policy issues. *See United States v. Mendoza*, 464 U.S. 154, 159 (1984). The particulars of this case, therefore, further demonstrate why the Court should refrain from issuing conflicting declaratory and injunctive relief. Therefore, the Court should dismiss this action because it seeks relief that conflicts with the *Texas* injunction.

In the SAC, Plaintiffs contend that "[t]he decision to terminate MPP and the Northern District of Texas's injunction only impact *future* placements into MPP 2.0. They do not impact individuals, like Individual Plaintiffs, who were *already* subjected to the prior iteration of MPP and received removal orders or had their cases terminated." SAC ¶ 75. Plaintiffs are incorrect. While it is true that the Individual Plaintiffs and proposed class with removal orders or terminated cases are not *currently* enrolled in MPP, an order requiring their *en masse* return to the United States would place the Government at risk of violating the *Texas v. Biden* injunction.

First, the *Texas* injunction's command to "enforce and implement MPP *in good faith*" would be in tension with an order that requires the Government to continue its

prior efforts to terminate the now defunct MPP policy—which is what Plaintiffs seek here. Second, the *Texas* injunction, as affirmed by the Fifth Circuit, requires implementation of MPP "until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 12[2]5 without releasing any aliens *because of* a lack of detention resources." *Id.* at *27. That holding was premised on the court's finding that, without MPP, the Government would not have sufficient capacity to detain individuals presenting at the Southwest border with asylum claims and would thus need to release them. *Id.* at *8-9, *21-23; *see also Texas*, 20 F.4th at 997-98 (concluding that termination of MPP violated 8 U.S.C. § 1225 because it would require parole of individuals into the United States the Government lacks capacity to detain). The Government vigorously disputes the *Texas* court's and the Fifth Circuit's construction of Section 1225, but it is bound to comply with it. The Government would be at risk of violating the *Texas* injunction were it to bring a large class of applicants for admission, who would generally otherwise be placed into court-ordered MPP, into the United States *en masse* and release them on parole based on a lack of adequate detention capacity. The Government has already begun reimplementing MPP ("court-ordered MPP") in "good faith" and in compliance with the *Texas* injunction.[6] *See Texas v. Biden*, 2:21-cv-00067 (N.D. Tex.), Dkt. 125 at 5 (filed Jan. 20, 2022) (concluding that "Defendants have restarted MPP" and "have addressed Mexico's concerns related to reimplementation"). Individual Plaintiffs and the proposed class should not be permitted to obstruct this court-mandated effort through an order by this Court permitting them to avoid court-ordered MPP and pursue asylum claims from the United States. *Id.* at *26.

B. The SAC Asserts Moot Claims

Claims 1-3 & 5-6 challenge the *prior administration's* past implementation of a

[6] *See generally* DHS, Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols, available at: https://www.dhs.gov/sites/default/files/publications/21_1202_plcy_mpp-policy-guidance_508.pdf.

now defunct version of MPP. *See, e.g.*, SAC ¶¶ 75, 313-315 (defining classes of individuals "subjected to MPP prior to June 1, 2021"), 335, 347 ("The Protocols were also arbitrary and an abuse of discretion . . . ."), 376, 387 ("The Migrant Protection Protocols trapped all potential and existing clients in Mexico . . . . Organizational Plaintiffs were left, at most, with a single hour before court appearances . . . ."). Indeed, Plaintiffs do not challenge the court-ordered MPP that the Government *is* currently implementing in good faith compliance with the *Texas* injunction. This court-ordered MPP is materially different from the now-defunct original MPP: "[K]ey changes include a commitment that proceedings will generally be concluded within six months of an individual's initial return to Mexico; opportunities for enrollees to secure access to, and communicate with, counsel before and during non-refoulement interviews and immigration court hearings; improved non-refoulement procedures; and an increase in the amount and quality of information enrolled individuals receive about MPP."[7] As the Government recently reported to the *Texas* court in its notice of compliance with the *Texas* injunction, for the court-ordered MPP to be reimplemented in good faith, Mexico had to agree to accept the return of individuals, and would not do so until its "humanitarian concerns" were addressed through changes from the original MPP. *Texas v. Biden*, 2:21-cv-00067 (N.D. Tex.), Dkt. 117 at 2 (filed Dec. 2, 2021).

Plaintiffs' claims are therefore moot and must be dismissed. "A case becomes moot . . . when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Am. Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019). As the SAC itself recognizes, the original MPP no longer exists, and none of the Individual Plaintiffs or proposed class members are currently in the original MPP. SAC ¶ 75 ("Individual Plaintiffs . . . were *already* subjected to the prior iteration of MPP and received removal orders or had their cases

[7] DHS, DHS, Justice and State Prepare for Court-Ordered Reimplementation of MPP, available at: https://www.dhs.gov/news/2021/12/02/dhs-justice-and-state-prepare-court-ordered-reimplementation-mpp#.

terminated."). As Plaintiffs allege, under the original MPP, individuals were only enrolled for the duration of their removal proceedings, but Plaintiffs do not allege any of the Individual Plaintiffs or class members have any pending removal proceedings. *Id.*, ¶ 58; *see id.*, ¶¶ 13-23.

Plaintiffs also seek a judicial declaration that the original MPP was unlawful. But this requested relief is moot for the same reasons as their claims challenging MPP and because any judgment declaring the original MPP unlawful "would be an advisory opinion, which the Constitution prohibits." *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004); *see Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (dismissing appeal as moot and remanding with instructions to dismiss complaint seeking declaration that repealed legislation was invalid). Accordingly, Claims 1-3 & 5-6 should be dismissed as moot, as should Claim 4 to the extent Plaintiffs seek an order declaring the original MPP unlawful.

C. Plaintiffs' Claims are Jurisdictionally Barred by 8 U.S.C. § 1252

The INA's carefully circumscribed judicial review scheme bars Plaintiffs' claims in this Court and requires them to raise their claims in the courts of appeals in a petition for review of a removal order following exhaustion of administrative remedies.

1. Plaintiffs' Claims Are Barred by 8 U.S.C. § 1252(d)

Generally, when noncitizens are ordered removed from the United States, they may challenge their removal orders by filing a petition for review in the relevant court of appeals within 30 days of the issuance of the final order of removal. 8 U.S.C. § 1252(b). Noncitizens may also move to reopen their removal proceedings within 90 days of entry of the final removal order based on new, material facts that could not have been discovered or presented at the original removal hearing. *Cuenca v. Barr*, 956 F.3d 1079, 1082 (9th Cir. 2020) (citing 8 U.S.C. § 1229a(c)(7)). Noncitizens ordered removed *in absentia* may file a motion to reopen "within 180 days after the date of the order of removal if the [noncitizen] demonstrates that the failure to appear was because of

exceptional circumstances." *Cui v. Garland*, 13 F. 4th 991, 996 (9th Cir. 2021) (citing 8 U.S.C. § 1229a(b)(5)(C)(i)). Noncitizens who can show that they never received notice of their hearings may seek to rescind a removal order entered *in absentia* by filing a motion to reopen "at any time." *Miller v. Sessions*, 889 F.3d 998, 999 (9th Cir. 2018) (citing 8 U.S.C. § 1229a(b)(5)(C)(ii)). Noncitizens can pursue immigration cases, such as a petition for review or a motion to reopen, from abroad, ever after they have been ordered removed. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Toor v. Lynch*, 789 F.3d 1055, 1060 (9th Cir. 2015) ("statutory right to file a motion to reopen and a motion to reconsider is *not* limited by whether the individual has departed the United States").

The INA requires that noncitizens raise challenges to their removal orders to the Board of Immigration Appeals ("Board") before filing any challenge in federal court. 8 U.S.C. § 1252(d). Accordingly, federal courts lack jurisdiction to review any issue not first presented to the Board. *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 893 (9th Cir. 2021); *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (citing *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004)). In addition, where claims could have been raised to the Board through a motion to reopen, but were not, those claims are not exhausted and may not be raised in any court. *See, e.g.*, *Singh v. Holder*, 538 F. App'x 784, 785 (9th Cir. 2013) (citing *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010)); *accord Singh v. Napolitano*, 649 F.3d 899, 903 (9th Cir. 2011) ("Singh did not exhaust his available administrative remedies because he did not first file a motion to reopen with the Board before bringing his habeas petition in district court").[8]

[8] In 2007, the Ninth Circuit held that a noncitizen need not file a motion to reopen with the Board to raise an ineffective assistance claim if that claim arose after issuance of a final order of removal. *See Singh v. Gonzales*, 499 F.3d 969, 975–76 (9th Cir. 2007). However, that decision was premised on the conclusion that a motion to reopen could not be used to raise an ineffective assistance claim based on the law as it existed at the time. *See Singh*, 649 F.3d at 900. In 2011, the Ninth Circuit noted that the Attorney General had subsequently decided that the Board "has jurisdiction to consider deficient performance claims even where they are predicated on lawyer conduct that occurred after a final order of removal has been entered." *Id.* (citing *Matter of Compean*, 24 I. & N. Dec. 710 (2009)). As a result, in 2011, the Ninth Circuit held that to properly exhaust

(footnote cont'd on next page)

Here, the INA forecloses jurisdiction in district court over much of the SAC. With the exception of Plaintiffs Lidia, Antonella, and Rodrigo Does, all other Plaintiffs, in each of their six claims, challenge the effect of their physical location and circumstances in Mexico on their removal orders, whether *in absentia* or in person. Yet not one of these Plaintiffs has alleged he or she filed a motion to reopen or a petition for review after receiving their final orders of removal. *See* SAC ¶¶ 152-268. The INA provides an express means of challenging orders of removal issued *in absentia*: by filing a motion to reopen with the Immigration Judge challenging the underlying order. 8 U.S.C. § 1229a(c)(7); *see Cuenca*, 956 F.3d at 1082. Moreover, even where the alleged injuries complained of arise *after* issuance of a final order of removal, because the motion to reopen process is available, failure to file a motion to reopen means an individual has not exhausted his or her claims. *Singh*, 649 F.3d at 903 ("Singh did not exhaust his available administrative remedies because he did not first file a motion to reopen with the Board before bringing his habeas petition in district court"). Accordingly, Plaintiffs have either failed to exhaust their claims in the correct forum or have failed to file an appeal in the correct forum. Either way, this Court lacks jurisdiction over those claims.

Even if some exception to exhaustion applied, it would not permit suit in *this* Court. Instead, it might allow Plaintiffs to argue *in the court of appeals* on a petition for review that the exception to exhaustion excused Plaintiffs' failure to raise their claims before the Board. *See, e.g.*, *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) (describing narrow exception to exhaustion applicable in the courts of appeals for "constitutional challenges that are not within the competence of administrative agencies to decide" and for arguments that are "so entirely foreclosed ... that no remedies [are] available as of right" from the agency); *Alvarado v. Holder*, 759 F.3d 1121, 1128 (9th Cir. 2014). But under the carefully circumscribed judicial review scheme in the INA, a district court has no authority to provide the relief that Plaintiffs seek in the SAC.

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their administrative remedies before proceeding to court, noncitizens were required to file motions to reopen with the Board. *Singh*, 649 F.3d at 901.

2. Plaintiffs' Claims Are Barred By 8 U.S.C. § 1252(b)(9)

Fundamentally, most Plaintiffs are also claiming that their removal orders were defective because the orders were entered without proper observance of their statutory rights of access to counsel and to apply for asylum, and in violation of their constitutional right to due process. This Court lacks authority to grant relief on those claims because all of those claims could have been, and must be, pursued through a petition for review of a removal order filed in the court of appeals.

8 U.S.C. § 1252(b)(9) states:

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

Section 1252(b)(9) is an "unmistakable zipper clause" that channels judicial review of "all questions of law and fact," including both "constitutional and statutory" challenges of "decisions and actions leading up to or consequent upon final orders of deportation," and "non-final order[s]" into one proceeding exclusively before a court of appeals through a petition for review, following exhaustion of administrative remedies. *Id.*; *Reno v. Am.-Arab Anti Discrim. Comm.*, 525 U.S. 471, 482–83 (1999). Review of a final order of removal "includes all matters on which the validity of the final order is contingent." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1691 (2020) (citing *I.N.S. v. Chadha*, 462 U.S. 919, 938 (1983)). "The rulings that affect the validity of the final order of removal merge into the final order of removal for purposes of judicial review." *Id.* Accordingly, Section 1252(b)(9) means that "a noncitizen's various challenges arising from the removal proceeding must be consolidated in a petition for review and considered by the courts of appeals. By consolidating the issues arising from a final order of removal, eliminating review in the district courts, and supplying direct review in the courts of appeals, the Act expedites judicial review of final orders of removal." *Nasrallah*, 140 S. Ct. at 1690; *see* 8

U.S.C. § 1252(a)(5) ("[n]otwithstanding any other provision of law … petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter"); *Singh*, 499 F.3d at 975–76 ("'review of a final removal order is the only mechanism for reviewing any issue raised in a removal proceeding'" (quoting H.R. Rep. No. 109-72 at 173 (May 3, 2005))).

Given that clear purpose, "Section 1252(b)(9) . . . swallows up virtually all claims that are tied to removal proceedings." *J.E.F.M.*, 837 F.3d at 1031; *see also Aguilar v. U.S. Immigr. & Customs Enf't Div.*, 510 F.3d 1, 9 (1st Cir. 2007) ("By its terms, the provision aims to consolidate *all* questions of law and fact that arise from either an action or a proceeding brought in connection with the removal of [a noncitizen]." (internal quotations omitted)). That includes claims by noncitizens, however framed, that challenge the procedure and substance of an agency determination that is "inextricably linked" to the order of removal. *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (citing 8 U.S.C. § 1252(a)(5)). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue – *whether legal or factual* – arising from any removal-related activity can be reviewed only through the [petition for review] process." *J.E.F.M.*, 837 F.3d at 1031 (emphasis added).

Given the foregoing, with the exception of Lidia, Antonella, and Rodrigo Does, Plaintiffs' claims are all subject to Section 1252(b)(9). Each of their claims alleges that their being enrolled in MPP impacted their removal proceedings, including their ability to apply for asylum, to access counsel, and to receive a fair hearing. To start, Plaintiffs allege a purported interference with their right to access counsel and ability to apply for asylum during their removal proceedings. Those claims are "part and parcel," *J.E.F.M.*, 837 F.3d at 1033, "of the process by which their removability will be determined," *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018), and can accordingly only be raised in a petition for review. *J.E.F.M.*, 837 F.3d at 1033 ("[C]ounsel claims are not independent or ancillary to the removal proceedings. Rather these claims are bound up in

and an inextricable part of the administrative process."); *see also Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1048–49 (N.D. Cal. 2018) (noting that it does not require "an expansive interpretation of § 1252(b)(9)'s 'arising from' language to find that" "issues related to legal representation during removal proceedings" "fall squarely within the purview of the provision"). Right-to-counsel claims are "routinely" raised in petitions for review. *Id.*; *see Mevlyudov v. Barr*, 821 F. App'x 737, 739 (9th Cir. 2020) (addressing claims related to asylum applications and fundamental fairness of a proceeding in a petition for review); *Zetino v. Holder*, 622 F.3d 1007, 1009 (9th Cir. 2010); *Larita-Martinez v. I.N.S.*, 220 F.3d 1092, 1095 (9th Cir. 2000) (reviewing whether hearing was fundamentally fair). The statutory provisions on which Plaintiffs base their claims explicitly tie the right to counsel to removal proceedings and claims for relief or protections from removal. *See, e.g.*, 8 U.S.C. § 1362 ("In any removal proceedings before an [IJ] . . . the person concerned shall have the privilege of being represented . . . by such counsel . . . as he shall choose.").

As in *J.E.F.M.*, Plaintiffs are not alleging that they were denied access to their own counsel. *See* SAC ¶ 298 (alleging all Individual Plaintiffs were "*pro se*"). Instead, Plaintiffs allege claims related to their inability to retain counsel, and the impact of that on their removal proceedings. SAC ¶¶ 104 ("Being stranded outside the United States obstructs Individual Plaintiffs' ability to identify, retain, and consult with legal representatives familiar with U.S. immigration law."), 105-109. Plaintiffs' allegation—that their right to counsel is being infringed because their final removal orders were impacted by their inability to retain counsel and they are not permitted to return to the United States to move to reopen their cases to then pursue their claims for asylum—thus "possesses a direct link to, and is inextricably intertwined with, the administrative process that Congress so painstakingly fashioned." *Aguilar*, 510 F.3d at 13; *see also Skurtu v. Mukasey*, 552 F.3d 651, 658 (8th Cir. 2008) ("Skurtu's claims that he was denied his right to counsel and a fair hearing are a direct result of the removal proceedings before the IJ."); *Arroyo v. U.S. Dep't of Homeland Security*, 2019 WL

2912848, at *13 (C.D. Cal. 2019) (claims of denial of access to counsel by unrepresented noncitizen plaintiffs were inextricably intertwined with the administrative process).

Moreover, the INA provides an explicit and mandatory mechanism for moving to reopen cases, *see* 8 U.S.C. § 1229a(c)(7), and the "statutory right to file a motion to reopen and a motion to reconsider is not limited by whether the individual has departed the United States." *Toor*, 789 F.3d at 1060. The fact that Plaintiffs are not in the United States does not excuse them from filing a motion to reopen and seeking review of their claims in the appropriate court of appeals. Indeed, other courts of appeals reviewing removal orders issued to individuals subject to MPP, including those issued *in absentia*, have done so without issue. *See, e.g.*, *Luna-Garcia v. Barr*, 932 F.3d 285, 287 (5th Cir. 2019) (reviewing whether the plaintiff was entitled to reopen her removal proceedings based on claims that MPP impeded her ability to participate in her removal proceedings). Similarly, Plaintiffs' claims of infringement of their ability to apply for asylum directly affect the outcome of their removal proceedings and must also be raised in a petition for review. *See, e.g.*, *Zamorano v. Garland*, 2 F.4th 1213, 1223 (9th Cir. 2021) (addressing in a petition for review whether an IJ erred in failing to advise the petitioner of the right to apply for asylum). And, as explained, it is no answer to contend that some exception to section 1252(b)(9) might apply. That is for the courts of appeals to determine in the first instance. *See supra* Section III.C.1. Therefore, this Court lacks jurisdiction over these claims pursuant to 8 U.S.C. § 1252(b)(9). *See J.E.F.M.*, 837 F.3d at 1033–34; *E.O.H.C. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177, 187–88 (3d Cir. 2020).

3. Plaintiffs' Claims are Barred by 8 U.S.C. § 1252(a)(2)(B)(ii)

Under 8 U.S.C. § 1252(a)(2)(B)(ii), this Court lacks jurisdiction to review Plaintiffs' claims for which they seek an order requiring that they be permitted to enter the United States to pursue reopening of their removal proceedings or otherwise pursue asylum claims. Section 1252(a)(2)(B)(ii) provides that, "[n]otwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to review

. . . any . . . decision or action of the . . . Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the . . . Secretary of Homeland Security . . . ." 8 U.S.C. § 1252(a)(2)(B)(ii). Both the decision to initially return an individual to Mexico in the first place and the decision to permit an individual to enter the United States are subject to this provision.

Section 1225(b)(2)(C) provides that DHS "*may* return" a noncitizen to a contiguous country. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). "The word 'may' clearly connotes discretion." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 103 (2016). Indeed, the return authority does not provide any statutory standard to apply to return decisions or determinations of who is subject to MPP; it instead calls for the exercise of "expertise and judgment unfettered by any statutory standard whatsoever." *Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005). Therefore, return decisions pursuant to Section 1225(b)(2)(C)—and the procedures or process by which the agencies choose to implement those decisions—are squarely in the discretion of the Secretary and therefore unreviewable. *See Poursina v. United States Citizenship & Immigr. Servs.*, 936 F.3d 868, 871 (9th Cir. 2019); *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018); *see, e.g.*, *Bourdon v. U.S. Dep't of Homeland Sec.*, 940 F.3d 537, 542 (11th Cir. 2019) (collecting cases); *Bremer v. Johnson*, 834 F.3d 925, 930 (8th Cir. 2016); *Lee v. U.S. Citizenship & Immigr. Servs.*, 592 F.3d 612, 620 (4th Cir. 2010); *Am. Soc'y of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 452 (7th Cir. 2002); *cf. Struniak v. Lynch*, 159 F. Supp. 3d 643, 654 (E.D. Va. 2016) (holding that provision precluding "jurisdiction to review [] the ultimate decision" also bars review of "the steps that are a necessary and ancillary part of reaching the ultimate decision").

Courts have applied Section 1252(a)(2)(B)(ii) to bar analogous claims challenging individual return decisions under MPP and the consequences of those return decisions on noncitizens. For example, in *Nora v. Wolf*, 2020 WL 3469670, at *7–10 (D.D.C. June 25, 2020), the district court held that claims which challenged "individual, discretionary determinations" regarding returning an individual to Mexico under MPP, including

claims that returning noncitizens to Mexico placed them in danger, were unreviewable under Section 1252(a)(2)(B)(ii). *See also Cruz v. Dep't of Homeland Sec.*, 2019 WL 8139805, at *6 (D.D.C. Nov. 21, 2019) (holding that court could not review a specific challenge to the Secretary's discretionary choice to return the plaintiff back to Mexico under the statute).

Although Plaintiffs demand that they be paroled into the United States (that is, demand this Court order rescission or reversal of the Secretary's decision to return them to Mexico), any procedures and processes used to implement the contiguous return decision are likewise discretionary. Therefore, Plaintiffs' claims seeking parole into the United States are barred by Section 1252(a)(2)(B)(ii). As inadmissible noncitizens who have been returned to Mexico, their sole basis for reentry and release into the United States is through parole under 8 U.S.C. § 1182(d)(5)(A)—which itself provides that such determination is "in the discretion of the . . . Secretary of Homeland Security . . . ." 8 U.S.C. § 1252(a)(2)(B)(ii). That section provides that the Secretary of DHS "*may* . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any [noncitizen] applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A) (emphasis added). As such, only the Secretary, and not a federal court, has the authority to exercise that discretionary parole authority. *See Torres v. Barr*, 976 F.3d 918, 931–32 (9th Cir. 2020) ("parole authority . . . is delegated solely to the Secretary of Homeland Security"); *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) ("parole process is purely discretionary"). Indeed, long-settled precedent firmly establishes that the decision to admit a particular noncitizen into the United States is a matter assigned by the Constitution and statute to the Executive Branch. *See U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (power to admit or exclude is a sovereign prerogative vested in the political branches, and "it is not within the province of any court, unless expressly authorized by law, to review [that] determination"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (control of movement across

the borders and determinations as to which persons may enter the United States implicate foreign relations, which are "exclusively entrusted to the political branches of government"); *Jean v. Nelson*, 727 F.2d 957, 977 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985) ("Congress has delegated remarkably broad discretion to executive officials under the INA, and these grants of statutory authority are particularly sweeping in the context of parole."); *accord Kleindienst v. Mandel*, 408 U.S. 753, 765–66 & n.6 (1972).

These authorities foreclose Plaintiffs' claims. In Claims 1-3, 5-6, Plaintiffs allege that the former Secretary's return decisions frustrated their ability to apply for asylum, access counsel, and have a full and fair hearing. SAC ¶¶ 329-360, 373-391. All of Plaintiffs' claims seek review of the unreviewable "determination" to return Plaintiffs to Mexico. And in Claim 4, Plaintiffs challenge the "method" for deciding not to parole any of them back into the United States. *Bourdon*, 940 F.3d at 542.[9]

Because the statutory source of DHS's contiguous return and parole authority expressly provides for the Secretary to exercise discretion, this Court lacks jurisdiction to review any claim seeking to challenge that discretion or the exercise of discretion to not allow Plaintiffs to enter the United States, and therefore all six claims should be dismissed.

4. Plaintiffs' Claims for Injunctive Relief Are Barred Under 8 U.S.C. § 1252(f)(1)

The injunctive relief Plaintiffs seek is barred by 8 U.S.C. Section 1252(f)(1):

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV [Sections 1221-1232] of this subchapter, as amended by

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

> the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

Here, Individual Plaintiffs and the proposed class are all individuals who are now outside the United States pursuant to a return decision, and most of them are also subject to final removal orders. By seeking an injunction to "[a]llow each of the Individual Plaintiffs and class members to return to the United States," SAC, Prayer For Relief, Plaintiffs seek to "enjoin or restrain the operation of part IV of [Subchapter II]," namely, 8 U.S.C. § 1225(b)(2)(C) (providing for return of noncitizens to contiguous territory), and 8 U.S.C. §§ 1229, 1229a, and 1231 (providing for removal proceedings and removal of noncitizens subject to orders of removal). 8 U.S.C. § 1252(f). Put differently, the injunctive relief Plaintiffs seek would prevent the Government from relying on the return authority that is statutorily authorized and from executing valid removal orders. Yet, none of the Individual Plaintiffs or persons in the proposed class are "an individual alien against whom proceedings under [Section 1221-1232] have been initiated"; rather, as Plaintiffs allege, they seek to represent classes of noncitizens who have either been ordered removed or had their removal proceedings terminated (and therefore not currently in removal proceedings). *See Padilla v. Immigr. and Customs Enf't*, 953 F.3d 1134, 1151 (9th Cir. 2020), *vacated on other grounds*, 141 S. Ct. 1041 (2021) (recognizing availability of classwide injunctive relief in the narrow circumstance where "the class is composed of individual noncitizens, each of whom *is in removal proceedings and facing an immediate violation of their rights*").[10] And Organizational Plaintiffs may not seek injunctive relief to restrain the operation of Sections 1221-1232 at all. *See id.* at 1150 ("Congress adopted § 1252(f)(1) after a period in which organizations and classes of persons, many of whom were not themselves in

[10] The Government anticipates that the Supreme Court will further interpret Section 1252(f)(1) as it relates to class actions in its forthcoming opinion in *Garland v. Gonzales*, No. 20-322.

proceedings, brought preemptive challenges to the enforcement of certain immigration statutes.").[11] Therefore, Plaintiffs' claims should be dismissed insofar as they each request return to the United States.

D. Organizational Plaintiffs Lack Standing to Pursue their Claims

1. Organizational Plaintiffs Are Outside the Zone of Interests

The Organizational Plaintiffs' First, Second, and Fourth claims are brought pursuant to the APA for alleged violations of 8 U.S.C. §§ 1158(a)(1), 1158(d)(4), 1229a(b)(4), 1229a(b)(5)(C), 1229a(c)(5), 1229a(c)(7), & 1362. But the Organizational Plaintiffs' APA claims fail because they lack standing to assert them, and they are outside the zone of interests for these statutory provisions.

To establish standing, a plaintiff must have suffered an "injury in fact." *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* Here, the Organizational Plaintiffs have "no judicially cognizable interest" in the "enforcement of the immigration laws," in preventing the Government from applying the law to third parties, or in immigration courts granting asylum to a higher percentage of applicants. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The INA confers no "legally protected interests" on advocacy organizations in the scheduling or other aspects of third-party noncitizens' hearings in immigration court. In fact, it does the opposite. The INA channels review of all removal-

[11] Plaintiffs may not avoid this jurisdictional bar by arguing that they challenge conduct unauthorized by statute. *See, e.g.*, *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003) (where litigant seeks to enjoin "conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated"). Plaintiffs do not allege that § 1225(b)(2)(C) did not authorize the Individual Plaintiffs' and proposed class's return. And Plaintiffs cannot identify any statute the Government is violating by declining to parole the proposed class into the United States. Similarly, Section 1158(a)(1) could not be violated here because it explicitly provides that noncitizens can apply for asylum either under the procedures laid out in 1158 "or, where applicable, section 1225(b)," that is, after being returned to a contiguous territory. 8 U.S.C. §§ 1158(a)(1), 1225(b)(2)(C).

related claims into removal proceedings, appeals to the BIA, and then to the federal courts of appeals—in claims brought by individual noncitizens. *See* 8 U.S.C. §§ 1252(a)(5), (b)(9).

Even if Organizational Plaintiffs could adequately establish an "injury in fact," the APA does not "allow suit by every person suffering injury in fact." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 395 (1987). It provides a cause of action only to one "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. To be "aggrieved," "the interest sought to be protected" must "be arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Clarke,* 479 U.S. at 396 (modifications omitted). "[O]n any given claim the injury that supplies constitutional standing must be the same as the injury within the requisite 'zone of interests.'" *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996). Organizational Plaintiffs identify no such interest here.

None of the provisions cited by Organizational Plaintiffs as forming the basis for their claims suggest that they protect the interests of "legal service providers" who seek to assist noncitizens who have already been ordered removed or have terminated removal proceedings.[12] SAC ¶ 2. These provisions neither regulate the Organizational Plaintiffs' conduct nor create any benefits for which the organizations are eligible.

Courts have recognized that immigration statutes are directed at noncitizens, not the organizations advocating for them. When confronted with a similar argument by

[12] 8 U.S.C. Section 1158(a) provides the circumstances under which noncitizens may apply for asylum; Section 1229a(b)(4)(B) provides that noncitizens in removal proceedings shall have a reasonable opportunity to examine the evidence against them, present evidence, and cross-examine witnesses presented by the Government; Section 1229a(b)(4)(C) provides that a complete record shall be kept of the removal proceedings; Sections 1158(d)(4), 1362, and 1229a(b)(4)(A) provide for the right to counsel at no expense to the Government in removal proceedings and in connection with asylum applications; Section 1229a(b)(5)(C) provides the circumstances under which noncitizens may move to reopen removal proceedings based on *in absentia* removal orders; Section 1229a(c)(5) provides that an immigration judge shall inform a noncitizen of his right to appeal a removal decision; and Section 1229a(c)(7) provides the circumstances under which noncitizens may move to reopen removal proceedings more generally.

"organizations that provide legal help to immigrants," Justice O'Connor explained that the Immigration Reform and Control Act "was clearly meant to protect the interests of undocumented aliens, not the interests of [such] organizations," and the fact that a "regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect." *I.N.S. v. Legalization Assistance Project of Los Angeles Cty.*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). Courts have thus held that immigrant advocacy organizations are outside the immigration statutes' zone of interests. *See, e.g.*, *Fed'n for Am. Immigration Reform, Inc. (FAIR) v. Reno*, 93 F.3d 897, 900-04 (D.C. Cir. 1996) (organizations challenging parole decisions outside the INA's zone of interests); *Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding that organizational plaintiff could not challenge INS policies "that bear on an alien's right to legalization").

That reasoning fully applies here. Organizational Plaintiffs are not applying for asylum; they seek to help others do so. While they allege, with minimal detail, that they "continue[] to represent and advise individuals subjected to MPP" since the wind down was halted, SAC ¶¶ 286-87, 305-09, nothing in "the relevant provisions [can] be fairly read to implicate Organizational Plaintiffs' interest in the efficient use of resources." *Nw. Immigrant Rights Project v. United States Citizenship & Immigr. Servs.*, 325 F.R.D. 671, 688 (W.D. Wash. 2016); *Situ v. Leavitt*, 2006 WL 3734373, at *10 (N.D. Cal. 2006) ("[T]he organizational plaintiffs in this case fail to satisfy the zone of interests test because they have failed to rebut Defendant's argument that the Medicare statutory scheme is intended to protect individuals, not advocacy organizations."). Therefore, the Organizational Plaintiffs' APA claims (First, Second, and Fourth Claims) must be dismissed.

2. Organizational Plaintiffs Have Not Sufficiently Alleged Organizational Harm

In the SAC, Organizational Plaintiffs allege, providing minimal detail, that they continue to provide services to individuals who were subjected to MPP. But they do not

sufficiently allege any present or future harm related to the original MPP, as challenged in their First, Second, and Sixth Claims, and they do not even allege that the termination of the MPP wind down, as challenged in their Fourth Claim, affected them at all. SAC ¶¶ 286-87, 305-09. As such, they have failed to allege any cognizable organizational harm.

An organization may assert standing on its own behalf without invoking the rights of third-party individuals. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) ("*EBSC II*"). But in order to do so, it must show that a defendant's behavior has "frustrated its mission and caused it to divert resources in response to that frustration of purpose." *Id.* (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). An organizational plaintiff must also show it has been "perceptibly impaired" in its ability to perform its services in order to prevail on its burden to prove standing. *EBSC II*, 950 F.3d at 1265. However, organizations cannot "manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Id.* at 1265-66 (citation omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *Am. Soc. For Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011).

Here, the Organizational Plaintiffs have failed to adequately allege that MPP directly affected their existing missions. They do not allege that, prior to the implementation of MPP, they focused on asylum applications or engaged in any significant legal services to assist noncitizens in Mexico. SAC ¶¶ 272, 289.[13] Because

[13] Immigrant Defenders Law Center's ("ImmDef's") "primary focus was on detained and non-detained individuals in immigration court proceedings in the Greater Los Angeles and Orange County areas (including the Inland Empire), but not generally focused on the San Diego border area." SAC ¶ 272. Jewish Family Service of San Diego's ("Jewish Family Service") mission was to provide "holistic, culturally competent, trauma-informed, quality legal and other supportive services to immigrants in San Diego and Imperial Counties." *Id.* ¶ 288. After the implementation of MPP, ImmDef alleges that it established the Cross-Border initiative, and Jewish Family Service alleges that it dedicated "75 hours of staff time" to prepare MPP educational materials, provided some representation to individuals in MPP, provided "Know Your Rights" presentations and created a hotline. *Id.* ¶¶ 273-74, 294-297.

both entities made decisions to change their activities following the implementation of MPP, they do not and cannot allege that their existing missions were perceptibly impaired, and their daily operations inhibited, by the implementation of MPP. *EBSC II*, 950 F.3d at 1265-66 (organizations cannot "manufacture the injury").; *see, e.g.*, *Turlock Irr. Dist. v. F.E.R.C.*, 786 F.3d 18, 24 (D.C. Cir. 2015) (decision by organization to expend more of its resources to participate in administrative licensing proceedings).

In addition to the fact that they decided to change their activities, the Organizational Plaintiffs do not allege sufficient facts demonstrating that the prior implementation of MPP is *currently* impairing their mission, and no facts demonstrating that the original MPP will do so in the future. Jewish Family Service alleges in conclusory fashion that it "has continued to represent and advise individuals subjected to MPP," and has "fielded dozens of MPP-related inquiries, including from individuals who received final orders of removal or had their cases terminated." SAC ¶ 305. As an organization that serves tens of thousands of clients each year, Jewish Family Service's mission could not plausibly be impaired due to work spent on just "dozens of MPP-related inquires" and some unspecified number of times representation or advice was given to individuals who were previously enrolled MPP. Similarly, ImmDef alleges only that some unspecified number of its large staff "spend several hours per week engaging on issues pertaining to MPP, including responding to inquiries from attorneys and organizers regarding various border-related issues and fielding inquiries from asylum seekers subjected to MPP . . . ." *Id.*, ¶ 287. ImmDef does not even specify what, if any, of this work relates to MPP. ImmDef's mission is not impaired by this modest and unspecified MPP workload. Given their insufficient allegations of current harm and lack of allegations concerning future harm, the Organizational Plaintiffs lack standing to seek the injunctive relief they request. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

Finally, neither organization alleges that the termination of the wind down of MPP affected them in any way. Their allegations concerning their recent and current activities

do not explain what the nexus is, if any, between their current work and the termination of the wind down of MPP. For these reasons, all of the Organizational Plaintiffs' claims (Claims 1, 2, 4, and 6) must be dismissed.

E. Plaintiffs' First Claim (APA – Right to Apply for Asylum) Fails

The INA provides that any noncitizen who is "physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), may apply for asylum." 8 U.S.C. § 1158(a)(1). But Section 1158 does not state or guarantee that any person who indicates an intention to apply for asylum or who applies for asylum *must* be allowed to remain in—or allowed to return to—the United States pending adjudication of that application. At issue here is Section 1225(b)(2)(C), which explicitly provides that the Secretary "may return" certain noncitizens to a foreign territory contiguous to the United States "pending a proceeding under section 1229a"—a proceeding in which the noncitizen's asylum application will be adjudicated. 8 U.S.C. § 1225(b)(2)(C). Plaintiffs' return to a contiguous foreign territory in compliance with Section 1225(b)(2)(C) cannot violate a statutory right to asylum, when it is a *statute* that expressly authorized their return to Mexico. Indeed, Section 1158(a)(1) explicitly provides that noncitizens can apply for asylum either under the procedures laid out in 1158 "or, where applicable, section 1225(b)." 8 U.S.C. § 1158(a)(1).

Courts interpret Congress's statutes as a "harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Id.* (citation omitted). Therefore, the more specific authority to return certain noncitizens to Mexico pending removal proceedings must be read to cohere with, not conflict with, the general right to apply for asylum. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–47 (2012) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)); *see also HCSC–Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) (the specific governs the

general "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]").

Furthermore, Plaintiffs' claim that Defendants have violated a right to "uniform method" to apply for asylum under the Refugee Act fails. SAC ¶ 332. Plaintiffs do not challenge the manner in which asylum applications are adjudicated. Those applications are decided by Immigration Judges in immigration courts, applying the substantive law at 8 U.S.C. § 1158 and its implementing regulations. The standards for deciding those asylum applications are the same for all applicants, including those who were enrolled in MPP, and Plaintiffs have not alleged otherwise.[14]

Because it was Congress that authorized contiguous-territory return for certain "applicants for admission" arriving on land from Mexico, DHS's decision to exercise that statutory authorization cannot be enjoined through the APA on the ground that it conflicts with a requirement to establish "a uniform method" of adjudicating asylum applications. *See Cazun v. Att'y Gen. United States*, 856 F.3d 249, 258 (3d Cir. 2017) (describing statute as requiring "a uniform" procedure for a noncitizen to apply for asylum "irrespective of such [noncitizen's] status"). Therefore, Plaintiffs' claim that contiguous-territory return violates their right to apply for asylum fails.

Plaintiffs also allege that the prior implementation of MPP has made it difficult for Individual Plaintiffs to apply to reopen or "restart" their removal proceedings from outside the United States after receiving in-person orders of removal, *in absentia* removal orders, and termination of removal proceedings, and that it "interferes with Organizational Plaintiffs' ability to deliver meaningful legal assistance to individuals seeking to reopen their cases as provided for under the INA." SAC ¶¶ 335-37. However, noncitizens do not have a right to be paroled into the United States to pursue motions to reopen. Instead, while noncitizens have the ability to move, subject to one exception, to

[14] In any event, Plaintiffs' geographic location is not unique or non-"uniform." Other noncitizens without any ties to MPP may be required to pursue their immigration cases from abroad. *See Nken*, 556 U.S. at 435; *Toor*, 789 F.3d at 1060; *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011).

reopen their removal proceedings from abroad, the statutory provision permitting individuals to move to reopen does not provide for individuals' return to the United States in order to do so. *See* 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(d); *Toor*, 789 F.3d at 1060. Also, for those Individual Plaintiffs whose removal proceedings were terminated, there is a procedure available for them in the INA to "restart" the asylum process that would not first require the Government to exercise its discretion to parole them into the United States. *See* 8 U.S.C. §§ 1158, 1225(b)(1), 1229a.

The Organizational Plaintiffs' claim likewise fails because they do not allege any existing attorney-client relationship with the Individual Plaintiffs or proposed class or even any specific plans to represent them. SAC ¶¶ 286-87, 308-310. In fact, ImmDef alleges just the opposite; that it has been in contact with members of the proposed class, but "does not have the financial or staff resources to reach the significant number of people in this situation." *Id.* ¶ 286. Similarly, Jewish Family Services alleges that in June 2021, it "assisted [an unspecified number] of individuals with *in absentia* orders who filed joint motions to reopen" in connection with the now-defunct MPP wind down, *id.* ¶ 307, but alleges no assistance provided specifically to the Individual Plaintiffs or proposed class since that time or since the termination of the wind down. Because Organizational Plaintiffs have not alleged any harms applicable to *them*, they lack standing to bring this claim.

F. Plaintiffs' Second Claim (APA – Access to Counsel) Fails

As stated above, the Secretary of Homeland Security has expressed concerns that MPP, as previously implemented, hindered access to counsel, given among other considerations, the limited opportunities to meet with counsel. And as a matter of *policy*, he has significant concerns about the practical obstacles to interacting with counsel across an international boundary. (*See* Explanation Memo at 16-18.) Nonetheless, the underlying statutory provision, 8 U.S.C. § 1158(d)(4), merely provides that at the time that noncitizens file applications for asylum, they are to be advised of the privilege of being represented by counsel and provided a list of persons who have indicated their

availability to represent noncitizens in asylum proceedings on a pro bono basis. Plaintiffs have not alleged Defendants failed to perform the acts required by this statute. Indeed, 8 U.S.C. § 1158(d)(7) provides that Section 1158 does not create a private right of action or enforceable procedural rights that are legally enforceable against the United States, its agencies, or officers. Therefore, Plaintiffs claim they have been denied a right to access counsel under Section 1158(d)(4) fails.

Sections 1229a(b)(4)(A) and 1362 also do not create a right that is violated by Congress's authorization of contiguous-territory return. They simply provide that noncitizens have "the privilege of being represented, at no expense to the Government, by counsel." Therefore, while there are good reasons to be concerned about the prior implementation of MPP (as laid out by the Secretary of Homeland Security in his Explanation Memo), the Government's decision to exercise that authority cannot give rise to an APA suit for violating a separate statutory right regarding counsel.[15]

G. Plaintiffs' Third Claim (5th Am. Due Process – Indiv. Plaintiffs) Fails

Plaintiffs allege that contiguous-territory return violated their rights under the Due Process Clause of the Fifth Amendment to a "full and fair hearing" in their removal proceedings by "obstructing their meaningful access to legal representation." SAC ¶¶ 355, 357. Plaintiffs' Third Claim fails for a number of reasons.

First, Individual Plaintiffs, who have never entered the United States, cannot assert constitutional claims from abroad alleging constitutional violations occurring abroad. The Supreme Court has recognized that "our immigration laws have long made a distinction between those noncitizens who have come to our shores seeking admission

[15] Organizational Plaintiffs allege that the original MPP has "interfered with Organizational Plaintiffs' ability to deliver meaningful legal assistance to individuals seeking to apply for asylum, including, where relevant, individuals seeking to restart or reopen their asylum proceedings." SAC ¶ 349. But, as with their First Claim, the Organizational Plaintiffs do not allege any existing attorney-client relationship with the Individual Plaintiffs or proposed class or any specific plans to represent them, and therefore lack standing for this claim.

. . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance, the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)); *see also Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (a "noncitizen who is detained shortly after unlawful entry cannot be said to have 'effected an entry'" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001))). Noncitizens "inside the U.S., regardless of whether their presence here is temporary or unlawful, are entitled to certain constitutional protections unavailable to those outside our borders." *Kwai Fun Wong v. United States*, 373 F.3d 952, 970 (9th Cir. 2004) (citing *Zadvydas*, 533 U.S. at 693; *Xi v. U.S. I.N.S.*, 298 F.3d 832, 837 (9th Cir. 2002)). But for those noncitizens who have neither acquired domicile or residence in the United States nor been lawfully admitted, "'[w]hatever the procedure authorized by Congress is, it is due process as far as [a noncitizen] denied entry is concerned.'" *Thuraissigiam*, 140 S. Ct. at 1982 (quoting *Mezei*, 345 U.S. at 212) (applying rule to noncitizen who had made it 25 yards onto U.S. soil before being apprehended). "This principle has given rise to the 'entry fiction,' a legal concept which holds that 'excludable[16] [noncitizens],' '[e]ven if physically in this country, . . . are legally detained at the border' and treated as if they have not entered the country." *Padilla v. U.S. Immigr. & Customs Enf't*, 354 F. Supp. 3d 1218, 1225 (W.D. Wash. 2018) (quoting *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985)). "Applying this legal fiction, *Mezei* held that the procedural due process rights of [a noncitizen] detained on Ellis Island were not violated when he was excluded without a hearing." *Kwai Fun Wong*, 373 F.3d at 971 (citing *Mezei*, 345 U.S. at 214); *see Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015) ("[The noncitizen] has no . . . right [to procedural due

[16] In 1996, Congress replaced excludable/exclusion with inadmissible/removal, so that an "excludable alien" is the same as an "inadmissible alien." Substantively, both terms refer to noncitizens within one or more of the categories of noncitizens described in section 1182(a) of the Act.

process]. He presented himself at the San Ysidro port of entry without valid entry documents and sought asylum . . . . [T]hose, like [the noncitizen], who have never technically 'entered' the United States have no such rights." (emphasis added)).

As with procedural due process, noncitizens who have not entered the United States are afforded limited constitutional protections more generally. "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990). And as a corollary to this limitation, constitutional rights do not generally apply extraterritorially. *See id.* at 269, 274–75.

Second, this claim merely duplicates Plaintiffs' Second Claim (access to counsel), and it fails for the same reasons. And third, through a petition for review, courts of appeals may consider whether a noncitizen with a final order of removal received a full and fair hearing and was able to present evidence in support of his or her claims. *Arroyo*, 2019 WL 2912848, at *16 (citing *Colmenar v. I.N.S.*, 210 F.3d 967, 968 (9th Cir. 2000)).

Plaintiffs' citation to *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005), does not support their claim for relief here. In *Biwot*, the Ninth Circuit held that where noncitizens are being diligent in their efforts to obtain counsel, the denial of a *continuance* so that they may secure counsel was an abuse of discretion because it was "tantamount to denial of counsel." *Id.* at 1100 (emphasis added). Here, Plaintiffs have not alleged facts constituting government action similar to that in *Biwot* that would constitute a "denial of counsel." And, as in *Biwot* itself, Plaintiffs must pursue constitutional challenges to the adequacy of the procedures afforded through the petition for review process. *Id.* at 1097-99 (considering access to counsel claim on petition for review, and only after determining noncitizen had exhausted administrative remedies). Moreover, as noted above, noncitizens in other circumstances are required to pursue their immigration cases from abroad, just as Plaintiffs are so required here. *See Nken*, 556 U.S. at 435; *Toor*, 789 F.3d at 1060; *Reyes-Torres*, 645 F.3d at 1077. Therefore, Plaintiffs' claim that contiguous-territory return violates their right to access to counsel fails.

For these reasons, Plaintiffs' Third Claim is subject to dismissal.

H. Plaintiffs' Fourth Claim (APA – Unlawful Cessation of MPP Wind Down) Fails[17]

Plaintiffs' Fourth Claim is subject to dismissal because Plaintiffs have failed to allege any final agency action. "[T]wo conditions must be satisfied for an agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Plaintiffs point to no such action in the SAC, but instead allege that, "[u]pon information and belief, Defendants [stopped processing Individual Plaintiffs and similarly situated individuals into the United States] in a mistaken belief that the *Texas v. Biden* injunction required cessation of processing of these individuals." SAC ¶ 364. Plaintiffs cannot show that merely following a court's order constitutes a final agency action. That is particularly true given that Plaintiffs themselves allege that Secretary Mayorkas "issued a second termination memo" for MPP following the *Texas v. Biden* injunction. *Id.* ¶ 76. That memorandum states that "the termination of MPP will be implemented as soon as practicable after a final judicial decision to vacate the *Texas* injunction."[18] In other words, DHS's termination of the wind down and also its implementation of the *Texas* court's order is precisely the type of "merely tentative or interlocutory" agency decision-making that fails the *Bennett* test. *Bennett*, 520 U.S. at 177-78. Moreover, Plaintiffs fail to meet the second condition of the *Bennett* test. The Government's prior efforts to wind down MPP did not create any

[17] As noted previously in Section III.A, this claim rests on the incorrect premise that the *Texas v. Biden* injunction does not apply to the relief the Individual Plaintiffs and proposed class seeks. Plaintiffs' Fourth Claim should be dismissed for this reason alone.

[18] Secretary of Homeland Security Alejandro N. Mayorkas, Termination of the Migrant Protection Protocols (Oct. 29, 2021), available at: https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf.

"rights or obligations" in the first instance, such that "rights or obligations" are determined or "legal consequences will flow" from a subsequent change of course. *Id.* Accordingly, Plaintiffs' Fourth Claim should be dismissed.

I. Plaintiffs' Fifth Claim (First Amendment – Indiv. Plaintiffs) Fails

For their Fifth Claim, Individual Plaintiffs allege that the original MPP "interfere[s] with and obstruct[s] Individual Plaintiffs' and proposed class members' First Amendment rights to hire and consult an attorney and petition the courts." SAC ¶ 374. Plaintiffs allege that this policy necessitates that nearly all legal communication occur while Individual Plaintiffs are outside the United States, where they allege that meaningful legal communication is functionally impossible. *Id.* ¶ 378. Plaintiffs do not allege that the now-defunct original MPP placed restrictions on speech or that any currently operative government action places restrictions on their speech; rather, they allege that the prior implementation of MPP places limitations on their ability to be paroled into the United States, which, in turn simply makes attorney client-communication and ability to move to reopen more difficult. *See* SAC ¶ 373-80.

Individual Plaintiffs' Fifth Claim is essentially a challenge to their current presence outside the United States, which fails for the reasons previously stated. *See supra* Sections III.A, C. This claim also fails for the same reason their Fifth Amendment claim does: constitutional rights generally do not extend extraterritorially. The SAC also is devoid of any allegations showing Government interference with Individual Plaintiffs' communications with their attorneys or potential attorneys—aside from the fact that they are currently outside of the United States. "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). "[A] law of general applicability does not 'offend the First Amendment simply because its enforcement' may have an 'incidental effect' on speech." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020). Limitations on

consideration for parole into the United States are not even restrictions on conduct, and they certainly do not "constitute speech regulation, either content-based or content-neutral." *Arroyo*, 2019 WL 2912848, at *21 ("the Court is unpersuaded that Attorney Plaintiffs' First Amendment rights are implicated at all" from detention transfers that allegedly impeded ability of attorneys to communicate with clients).

Moreover, as it relates to the alleged violation of the right to access the courts, "[i]t is unclear whether [the] right of access extends to immigration proceedings such as a claim for asylum." *United States v. Heredia-Oliva*, 2008 WL 205574, at *2 (D. Ariz. Jan. 23, 2008); *see Lewis v. Casey*, 518 U.S. 343, 355 (1996) (suggesting that the constitutional right of access to the courts may be limited to direct criminal appeals, habeas corpus proceedings, and § 1983 actions). Even if it were to extend to immigration, Plaintiffs cannot establish that it extends to the circumstances presented here: non-detained individuals who do not identify any direct and deliberate Government obstruction of access to courts, but rather challenge a policy that does not regulate court access at all and, at best, only affects it incidentally. *Cf. Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (recognizing as actionable "[d]eliberate retaliation" by state actors for a non-detained individual's exercise of his right to access the courts).

J. Plaintiffs' Sixth Claim (First Amendment – Org. Plaintiffs) Fails

Organizational Plaintiffs allege that the continuing effects of the prior implementation of MPP "have continued to restrict Organizational Plaintiffs' ability to meaningfully communicate with potential and existing clients" who are outside the United States. SAC ¶¶ 389. This claim fails because they have not alleged any restrictions on speech. It also fails because Organizational Plaintiffs do not allege any existing attorney-client relationship with the Individual Plaintiffs or proposed class or any plans to represent them in connection with reopening their removal proceedings or seeking review of removal orders. Even if they had done so, there is no general right to "advise potential clients," and any burden is not analogous to laws that placed substantial

and direct restrictions on such communications. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 424-45 (1963) (law making it a crime for an organization to retain an attorney to represent a client); *In re Primus*, 436 U.S. 412, 414 (1978) (state bar discipline of attorney for advising a lay person of her legal rights and disclosing in a letter that free legal assistance was available from his organization). If Plaintiffs' theory were accepted, the First Amendment would be violated in virtually every, if not every, instance in which Section 1225(b)(2)(C) is used. Yet, Plaintiffs do not challenge the constitutionality of that section, and no court has ever concluded that it violates the First Amendment.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this motion and dismiss Plaintiffs' SAC.

Dated: January 26, 2022

Respectfully submitted,

TRACY L. WILKISON
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, General Civil Section

/s/ *Matthew J. Smock*
JASON K. AXE
MATTHEW J. SMOCK
Assistant United States Attorneys
Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

ALEJANDRO MAYORKAS, Secretary, Department of Homeland Security, in his official capacity, et al.,

Defendants.

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

[PROPOSED] ORDER

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss the Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) & 12(b)(6) is GRANTED. The Court hereby DISMISSES the Second Amended Complaint with prejudice.

Dated: _____

HONORABLE JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

TRACY L. WILKISON
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, General Civil Section

/s/ *Matthew J. Smock*
JASON K. AXE
MATTHEW J. SMOCK
Assistant United States Attorneys
Attorneys for Defendants