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17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION**

19 IMMIGRANT DEFENDERS LAW
20 CENTER, *et al.*,

21 Plaintiffs,

22 v.

23 ALEJANDRO MAYORKAS, *et al.*,

24 Defendants.

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

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

Judge: Honorable Jesus G. Bernal
Date: March 21, 2022
Time: 9:00 a.m.
Crtrm: 1

Action Filed: October 28, 2020

1 [Caption Page Continued - Additional Attorneys for Plaintiffs]

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TABLE OF CONTENTS

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

Page

- I. INTRODUCTION 1
- II. BACKGROUND 1
- III. LEGAL STANDARD 3
- IV. ARGUMENT..... 3
 - A. The *Texas* Injunction Does Not Affect the Relief Plaintiffs Seek..... 3
 - B. Plaintiffs’ Claims Are Not Moot..... 7
 - C. This Court Has Jurisdiction Over Plaintiffs’ Claims. 9
 - i. Neither 8 U.S.C. § 1252(d) nor § 1252(b)(9) Precludes Jurisdiction..... 9
 - 1. 8 U.S.C. § 1252(d) Does Not Bar Jurisdiction..... 9
 - 2. 8 U.S.C. § 1252(b)(9) Does Not Bar Jurisdiction. 10
 - ii. 8 U.S.C. § 1252(a)(2)(B)(ii) Does Not Preclude Jurisdiction..... 14
 - iii. 8 U.S.C. § 1252(f)(1) Does Not Preclude Jurisdiction..... 16
 - D. Organizational Plaintiffs Have Standing to Bring Their Claims. 18
 - i. Organizational Plaintiffs Have Sufficiently Alleged Frustration of Mission and Diversion of Resources. 18
 - ii. Organizational Plaintiffs Fall Within the INA’s Zone of Interests..... 20
 - E. Plaintiffs Have Sufficiently Pleaded Their Claims..... 21
 - i. Plaintiffs Have Sufficiently Stated Their First Claim (APA – Right to Apply for Asylum). 21
 - ii. Plaintiffs Have Sufficiently Stated Their Second Claim (APA – Right to Access Counsel). 23

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

- iii. Plaintiffs Have Sufficiently Stated Their Third Claim
(Fifth Amendment – Right to Full and Fair Hearing).24
- iv. Plaintiffs Have Sufficiently Stated Their Fourth Claim
(APA – Unlawful Cessation of MPP Wind Down).....27
- v. Plaintiffs Have Sufficiently Stated Their Fifth Claim
(First Amendment – Individual Plaintiffs).29
- vi. Plaintiffs Have Sufficiently Stated Their Sixth Claim
(First Amendment – Organizational Plaintiffs).....34
- V. CONCLUSION35

TABLE OF AUTHORITIES

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

Page(s)

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300 U.S. 227 (1937)..... 8

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No. 17-CV-02366-BAS-KSC, 2021 WL 3931890 (S.D. Cal. Sept. 2,
2021) 24, 25, 26, 27

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523 U.S. 224 (1998)..... 17

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938 F.3d 1147 (9th Cir. 2019) 8

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788 F.3d 893 (9th Cir. 2015) 26

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520 U.S. 43 (1997)..... 7

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No. SACV 19-815-JGB, 2019 WL 2912848 (C.D. Cal. June 20, 2019) 12, 32

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556 U.S. 662 (2009)..... 3

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137 S. Ct. 1296 (2017)..... 20

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520 U.S. 154 (1997)..... 27, 28

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535 F.2d 505 (9th Cir. 1976) 6, 7

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403 F.3d 1094 (9th Cir. 2005) 27

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 2 326 U.S. 135 (1945)..... 25

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 4 563 U.S. 493 (2011)..... 6

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 6 404 U.S. 508 (1972)..... 33

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 10 306 F. Supp. 3d 1147 (C.D. Cal. 2018)..... 9, 12

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 24 932 F.3d 742 (9th Cir. 2018) 20, 21

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 552 F.3d 1062 (9th Cir. 2009) 30

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 2 206 F.3d 1331 (9th Cir. 2000), *amended on other grounds*, 213 F.3d
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 5 285 F.3d 899 (9th Cir. 2002) 18

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 7 93 F.3d 897 (D.C. Cir. 1996) 21

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 9 879 F.3d 980 (9th Cir. 2018) 14

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 11 508 F.3d 1227 (9th Cir. 2007) 10

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 13 975 F.3d 788 (9th Cir. 2020) 11

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 15 344 F. Supp. 3d 96 (D.D.C. 2018), *aff’d in part, rev’d in part, and*
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17 *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*,
 18 893 F.2d 1012 (9th Cir. 1989) 8, 9

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 20 872 F.3d 976 (9th Cir. 2017) 14, 15, 25

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 22 962 F.3d 1111 (9th Cir. 2020) 32

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 24 No. CV 210395 (FMO), 2021 WL 4295139 (C.D. Cal. July 27, 2021) 20

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 26 No. EDCV 17-2048-PSG, 2018 WL 4998230 (C.D. Cal. Apr. 19,
 27 2018) 13

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 510 U.S. 1301 (1993) (O’Connor, J., in chambers) 21

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 837 F.3d 1026 (9th Cir. 2016) 11

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 2 No. 18-CV-04914-NC, 2020 WL 2562895 (N.D. Cal. Feb. 20, 2020),
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 2020) 6

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 5 138 S. Ct. 830 (2018) (plurality opinion) 11

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 7 342 U.S. 180 (1952)..... 7

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 9 No. 2:20-cv-03512-ODW, 2021 WL 1612087 (C.D. Cal. Apr. 26,
 2021) 17

10 *Knox v. Service Emps. Int’l Union, Local 1000*,
 11 567 U.S. 298 (2012)..... 7

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 13 217 F.3d 1050 (9th Cir. 2000) 31

14 *Lin v. Ashcroft*,
 15 377 F.3d 1014 (9th Cir. 2004) 23

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 17 No. CV 18-5741 (DMG), 2018 WL 7200716 (C.D. Cal. Dec. 27,
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 19 504 U.S. 555 (1992)..... 18

20 *Lujan v. Nat’l Wildlife Fed’n*,
 21 497 U.S. 871 (1990)..... 28

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 23 171 F. Supp. 3d 961 (N.D. Cal. 2016)..... 33

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 25 567 U.S. 209 (2012)..... 20

26 *Mathews v. Eldridge*,
 27 424 U.S. 319 (1976)..... 25

28 *MedImmune, Inc. v. Genentech, Inc.*,
 549 U.S. 118 (2007)..... 8, 9

1 *Milliken v. Bradley*,
 2 418 U.S. 717 (1974)..... 16

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 4 410 F.3d 602 (9th Cir, 2005), *as amended on denial of reh’g* (9th Cir.
 5 July 21, 2005) 30, 31

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 7 463 U.S. 29 (1983)..... 15

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 9 371 U.S. 415 (1963)..... 34, 35

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 11 994 F.2d 583 (9th Cir. 1992), *as amended on denial of reh’g* (June 18,
 12 1993) 33

13 *Nat’l Council of La Raza v. Cegavske*,
 14 800 F.3d 1032 (9th Cir. 2015) 18

15 *Nken v. Holder*,
 16 556 U.S. 418 (2009)..... 22

17 *Nora v. Wolf*,
 18 No. CV 20-0993 (ABJ), 2020 WL 3469670 (D.D.C. June 25, 2020)..... 15, 16

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 20 335 F.3d 874 (9th Cir. 2003) 10

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 22 No. C17-716 RAJ, 2017 WL 3189032 (W.D. Wash. July 27, 2017)..... 34, 35

23 *O’Shea v. Littleton*,
 24 414 U.S. 488 (1974)..... 7

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 26 404 F. Supp. 3d 109 (D.D.C. 2019)..... 21

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 28 150 F.3d 1132 (9th Cir. 1998) 28

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 541 F. Supp. 351 (C.D. Cal. 1982)..... 22

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 2 465 F.3d 977 (9th Cir. 2006) 27, 28, 29

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 4 678 F. 3d 748 (9th Cir. 2012) 3

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 11 436 U.S. 412 (1978)..... 34, 35

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 13 576 U.S. 155 (2015)..... 31

14 *Reno v. Flores*,
 15 507 U.S. 292 (1993)..... 25

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 17 645 F.3d 1073 (9th Cir. 2011) 22

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 19 812 F.2d 1173 (9th Cir. 1987) 3

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 21 591 F.3d 1105 (9th Cir. 2010) 16

22 *Rodriguez v. Marin*,
 23 909 F.3d 252 (9th Cir. 2018) 17, 18

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 25 946 F.3d 564 (9th Cir. 2019) 28

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 27 345 U.S. 206 (1953)..... 25

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 No. 17-CV-06785-LB, 2018 WL 1142202 (N.D. Cal. Mar. 2, 2018) 12

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 929 F.3d 670 (9th Cir. 2019) 27

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 2 658 F.3d 1090 (9th Cir. 2011), *abrogated on other grounds as stated*
 3 *in Richey v. Dahne*, 807 F.3d 1202 (9th Cir. 2015) 33

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 5 499 F.3d 969 (9th Cir. 2007) 10, 11

6 *Singh v. Napolitano*,
 7 649 F.3d 899 (9th Cir. 2011) (per curiam) 10

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 9 720 F.3d 1134 (9th Cir. 2013) 10

10 *Sorrell v. IMS Health Inc.*,
 11 564 U.S. 552 (2011)..... 32, 35

12 *Spencer Enters., Inc. v. United States*,
 13 345 F.3d 683 (9th Cir. 2003) 14, 15

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 15 402 U.S. 1 (1971)..... 6

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 17 305 F. App’x 361 (9th Cir. 2008) (unpub.) 13

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 19 20 F.4th 928 (5th Cir. 2021) 6

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 21 No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021),
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 23 WL 497412 (U.S. Feb. 18, 2022) 2, 5

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 25 789 F.3d 1055 (9th Cir. 2015) 22

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 No. 1:20-cv-00093, 2020 WL 10788713 (S.D. Tex. Oct. 16, 2020) 14

U.S. Army Corps of Eng’rs v. Hawkes Co.,
 578 U.S. 590 (2016)..... 29

1 *United States ex rel. Knauff v. Shaughnessy*,
 2 338 U.S. 537 (1950)..... 26

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 4 147 F.3d 1111 (9th Cir. 1998) 16

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 6 235 F.3d 443 (9th Cir. 2000) 16

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 8 236 U.S. 459 (1915)..... 15

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 494 U.S. 259 (1990)..... 26, 33

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 11 16 F.4th 1299 (9th Cir. 2021) 25, 27

12 *Util. Air Regulatory Grp. v. E.P.A.*,
 13 573 U.S. 302 (2014)..... 15

14 *Vasquez-Rodriguez v. Garland*,
 15 7 F.4th 888 (9th Cir. 2021) 10

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 17 491 U.S. 781 (1989)..... 31

18 *Wong v. United States*,
 373 F.3d 952 (9th Cir. 2004) 14

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 20 533 U.S. 678 (2001)..... 14, 15

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 22 651 F.2d 842 (2d Cir. 1981) 7

23 **Federal Statutes**

24 8 U.S.C. § 1158..... 22, 24

25 8 U.S.C. § 1158(a)(1)..... 22, 26

26 8 U.S.C. § 1158(d)(4) 24, 26

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1 8 U.S.C. § 1229a(b)(4)..... 26

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3 8 U.S.C. § 1252(a)(1)..... 10

4 8 U.S.C. § 1252(a)(2)(B) 14

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7 8 U.S.C. § 1252(d)..... 9, 10

8 8 U.S.C. § 1252(d)(1) 10

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10 8 U.S.C. § 1362..... 24, 26

11

12

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 Pub. L. No. 104-208, 302, 110 Stat. 3009-1, 583 (1996)..... 22

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17 **Rules**

18 Fed. R. Civ. P. 12..... 6

19 Fed. R. Civ. P. 12(b)(1) 3

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21

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<https://bit.ly/31Tc9AZ>; 4

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26 First Amendment*passim*

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1 **I. INTRODUCTION**

2 Plaintiffs have suffered ongoing harm as a result of Defendants’ implementation
3 of the misnamed “Migrant Protection Protocols” (“MPP 1.0” or “Initial Protocols”), a
4 policy that forced asylum-seeking individuals to await their U.S. immigration court
5 hearings in dangerous Mexican border towns. Plaintiffs brought this lawsuit to remedy
6 their ongoing harms from Defendants’ violation, through implementation of the Initial
7 Protocols, of various statutory and constitutional rights.

8 Defendants have acknowledged that MPP 1.0 deprived asylum seekers of
9 fundamental rights and have twice issued memoranda terminating the Initial Protocols.
10 Though Defendants assert that they “do not defend MPP or its prior implementation”
11 as a matter of policy, Defendants’ Motion to Dismiss Second Amended Complaint
12 (“Mot.”) (ECF No. 189) at 3, they raise several unpersuasive arguments about why this
13 Court is barred from hearing Plaintiffs’ claims. For the reasons discussed below, this
14 Court has authority to hear Plaintiffs’ sufficiently alleged claims that MPP 1.0, as
15 implemented, has denied Individual Plaintiffs their right to seek protection in the United
16 States and obstructed Organizational Plaintiffs’ ability to provide legal services.
17 Therefore, the Court should deny Defendants’ motion.

18 **II. BACKGROUND**

19 Between January 2019 and February 2021, Defendants used MPP 1.0 to trap
20 nearly 70,000 asylum seekers in Mexico under perilous conditions that obstructed their
21 ability to access the U.S. asylum system or obtain legal representation. Second
22 Amended Complaint (“SAC”) (ECF No. 175) ¶¶ 1, 57, 60, 61. In February 2021,
23 Defendants suspended MPP 1.0 and began a “wind-down” process for those with active
24 cases. *Id.* ¶ 79. Defendant Mayorkas conceded that MPP 1.0’s “[i]nadequate access to
25 counsel casts doubt on the reliability of removal proceedings.” *Id.* ¶ 61.

26 Under the wind-down, Defendants allowed certain individuals who had been
27 subjected to the Initial Protocols to enter the United States to pursue their asylum claims.
28 *Id.* Beginning in late June 2021, Defendants expanded the wind-down to include

1 individuals with terminated cases and *in absentia* removal orders, but required those
2 with *in absentia* orders to successfully reopen their cases in order to become eligible to
3 enter the United States. *Id.* ¶ 81.

4 Defendants halted the wind-down in August 2021, after the U.S. District Court
5 for the Northern District of Texas ordered the government to restart the Migrant
6 Protection Protocols¹ for certain new arrivals at the U.S.-Mexico border. *Id.* ¶¶ 74–75.
7 At the time Defendants ended the wind-down, thousands of individuals with final orders
8 of removal or terminated cases remained stranded outside the United States. *Id.* ¶ 8.
9 These individuals remain in legal limbo and continue to be deprived of meaningful
10 access to the U.S. asylum system and their rights to counsel, to a full and fair hearing,
11 and to petition the courts. *See id.* ¶¶ 85, 97–102.

12 On December 21, 2021, twelve Individual Plaintiffs and two Organizational
13 Plaintiffs filed a Second Amended Complaint challenging the ongoing effects of MPP
14 1.0’s implementation. Individual Plaintiffs are asylum seekers subjected to MPP 1.0
15 who either had their cases terminated or received final orders of removal. *Id.* ¶¶ 13–23,
16 110–268. They allege that because of Defendants’ implementation of MPP 1.0, they
17 remain stranded in dangerous conditions outside the United States with no viable way
18 to pursue their asylum claims.² *Id.* ¶¶ 86–93. Organizational Plaintiffs allege that the
19 continuing barriers to legal representation for individuals subjected to MPP 1.0 frustrate
20 their missions and require them to expend resources they otherwise would invest in
21 different programs. *Id.* ¶ 270. Together, Individual and Organizational Plaintiffs raise a
22

23 ¹ This action challenges the implementation of MPP 1.0 and does not address
24 Defendants’ new implementation of the Protocols (“MPP 2.0”), which began in
25 December 2021 following the *Texas v. Biden* injunction. *See* SAC ¶ 7; *Texas v. Biden*,
26 No. 2:21-CV-067-Z, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021), *aff’d*, 20 F.4th 928
(5th Cir. 2021), *cert. granted*, No. 21-954, 2022 WL 497412 (U.S. Feb. 18, 2022).

27 ² All Individual Plaintiffs remained outside the United States as of the date of the filing
28 of the SAC. *See* Memorandum of Points and Authorities in Support of Plaintiffs’
Motion for Class Certification (ECF No. 205-1) at 2 n.2 (describing “relation back”
doctrine and citing cases).

1 number of challenges to MPP 1.0 as implemented, including that the Initial Protocols
2 violate their statutory rights to seek asylum and access counsel, their Fifth Amendment
3 right to a full and fair hearing, and their First Amendment rights. *Id.* ¶¶ 329–91. They
4 also challenge Defendants’ cessation of the wind-down. *Id.* ¶¶ 361–72.

5 On January 26, 2022, Defendants filed a Motion to Dismiss the Second Amended
6 Complaint. ECF No. 189.

7 **III. LEGAL STANDARD**

8 Defendants seek to dismiss the SAC for lack of subject matter jurisdiction under
9 Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). In adjudicating a motion
10 to dismiss under Rule 12(b)(1), where “issues of jurisdiction and substance are
11 intertwined,” the “district court assumes the truth of allegations in a complaint . . . unless
12 controverted by undisputed facts in the record.” *Roberts v. Corrothers*, 812 F.2d 1173,
13 1177 (9th Cir. 1987). “To survive a motion to dismiss, [under Rule 12(b)(6)] a
14 complaint must contain sufficient factual material, accepted as true, to state a claim to
15 relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
16 and internal quotation marks omitted). For a Rule 12(b)(6) motion, “all well-pleaded
17 allegations of material fact [are accepted as true] and construe[d] . . . in the light most
18 favorable to the non-moving party.” *Padilla v. Yoo*, 678 F. 3d 748, 757 (9th Cir. 2012)
19 (citation and internal quotation marks omitted).

20 **IV. ARGUMENT**

21 **A. The *Texas* Injunction Does Not Affect the Relief Plaintiffs Seek.**

22 The *Texas* injunction is forward-facing: it prohibits Defendants from
23 implementing the Department of Homeland Security’s (“DHS”) June 1, 2021
24 Memorandum. That memo would have terminated MPP but did not impact the status of
25 individuals with inactive cases, like Individual Plaintiffs, who had already been
26 subjected to MPP 1.0. Plaintiffs seek relief from the ongoing effects of Defendants’ *past*
27 implementation of MPP 1.0. Thus, the *Texas* injunction has no bearing on this case. To
28 the extent Defendants contest Plaintiffs’ requested relief, this Court has broad remedial

1 powers to fashion an appropriate remedy, and such questions are inappropriate to
2 resolve on a motion to dismiss.

3 Defendants claim that the relief sought by Plaintiffs would “make it difficult for
4 Defendants to lawfully comply with the *Texas* injunction” and may conflict with the
5 *Texas* court’s order “to reimplement MPP in good faith.” Mot. at 4. But Plaintiffs were
6 not covered by the termination memo enjoined by the *Texas* case³ because they were no
7 longer even subject to MPP. *See* Defs’ Mot. to Stay (ECF No. 126) at 8 (noting that
8 “individuals who have already [been] ordered removed [are] by definition no longer in
9 MPP”). And, as Defendants concede, Plaintiffs do not challenge the government’s
10 authority to place noncitizens into MPP 2.0. *See* Mot. at 7 (“Plaintiffs do not challenge
11 the court-ordered MPP that the Government is currently implementing.”). Rather,
12 Plaintiffs allege that because Defendants’ implementation of MPP 1.0 violated their
13 rights, this Court should order relief to remedy that harm.

14 Nothing in the *Texas* injunction prevents Defendants from providing redress to
15 Plaintiffs who were denied their rights under MPP 1.0 by allowing them to pursue their
16 claims in the United States. Defendants acknowledge that “the original MPP no longer
17 exists, and none of the Individual Plaintiffs or proposed class members are currently in
18 the original MPP.” *Id.* Rather, Individual Plaintiffs and the putative class are asylum
19 seekers who have been denied meaningful access to the U.S. asylum system, and their
20 rights to counsel, to a full and fair hearing, and to petition the courts because of the prior
21 implementation of the Initial Protocols.

22 Defendants also mistakenly conflate the suspension of future placements in MPP
23 1.0 with the wind-down, which facilitated an “orderly entry into the United States” for
24 some noncitizens subjected to MPP 1.0. Exec. Order No. 14010, 86 Fed. Reg. 8,267,
25 8,269 (Feb. 2, 2021), <https://bit.ly/31Tc9AZ>; *see* Mot. at 5–6. The wind-down—an

27 ³ Memorandum from Secretary Alejandro N. Mayorkas to Acting Heads of CBP, ICE,
28 and USCIS, Termination of the Migrant Protection Protocols Program, at 7 (June 1,
2021), <https://bit.ly/3IQsua5> (“June 1 Termination Directive”).

1 umbrella term describing processing of certain persons previously subjected to MPP 1.0
2 for entry into the United States—began months before the June 1 Termination Directive,
3 underscoring the independent nature of these two distinct processes.⁴ See SAC ¶¶ 78–
4 79. The injunction decision expressly distinguished the wind-down from the
5 termination memo,⁵ yet Defendants incorrectly assert that Plaintiffs want “the
6 Government to continue its prior efforts to terminate the now defunct MPP policy.”
7 Mot. at 5–6. Even the plaintiffs in *Texas* have acknowledged that the wind-down was
8 not before the court in that case.⁶ Neither the injunction nor its subsequent affirmance
9 indicates that it encompasses the wind-down. Indeed, the *Texas* court disclaimed
10 requiring DHS to alter its enforcement actions for individuals no longer part of MPP:
11 “Nothing in this injunction requires DHS to take any immigration or removal action nor
12 withhold its statutory discretion towards any individual that it would not otherwise
13 take.” *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, at *28 (N.D. Tex. Aug.
14 13, 2021).

15 Defendants further raise the specter of conflict with the injunction by pointing to
16 a claimed risk of “en masse” returns to the United States. Mot. at 5. However, the *Texas*
17 injunction covers noncitizens who have been or will be subjected to MPP 2.0. The Fifth
18 Circuit’s concern was that, absent a new version of MPP, the government was
19

20
21 ⁴ Some Individual Plaintiffs would have been covered by the subsequent expansion of
22 the wind-down to include individuals with terminated cases and *in absentia* orders. See,
23 e.g., SAC ¶¶ 81, 83–84, 133, 150, 182, 198, 361–72. However, DHS canceled all
24 aspects of the wind-down following the *Texas* injunction. See *id.* ¶¶ 86–93.

25 ⁵ Memorandum Opinion and Order, *Texas v. Biden*, No. 2:21-CV-067-Z, ¶¶ 124–27
26 (N.D. Tex. Aug. 13, 2021); see also June 1 Termination Directive, at 7 (“The
27 termination of MPP does not impact . . . the phased entry process . . .”).

28 ⁶ Defendants’ Response to Plaintiffs’ Notice of Related Cases, No. 2:22-cv-00014-M
(N.D. Tex.) (Feb. 1, 2022), 10 n.4 (“During the bench trial in *Texas* [*v. Biden*], the Court
asked counsel for Plaintiffs: ‘Isn’t Plaintiffs’ case truly a challenge to the government’s
parole practices and not the termination of MPP?’ To which Plaintiffs’ counsel
responded: ‘No, Your Honor. We’re not challenging, you know, any kind of individual
grant of parole or even the parole policies.’” (citation omitted)).

1 “propos[ing] to parole every [noncitizen] it cannot detain [into the United States].”
2 *Texas v. Biden*, 20 F.4th 928, 997 (5th Cir. 2021). By contrast, the number of individuals
3 in this litigation seeking the injunctive remedy of entry into the United States in order
4 to access the asylum system is limited by the class and subclass definitions and, as
5 explained above, does not include individuals impacted by the *Texas* injunction.

6 Even if this Court were to agree with Defendants’ erroneous interpretation of the
7 *Texas* injunction, Federal Rule of Civil Procedure 12 provides no basis to dismiss a
8 complaint based on the possibility of a conflicting injunction. First, this Court has broad
9 powers to fashion an appropriate remedy at the relevant point in litigation. *See Brown*
10 *v. Plata*, 563 U.S. 493, 526 (2011) (explaining that relevant statute “should not be
11 interpreted to place undue restrictions on the authority of federal courts to fashion
12 practical remedies when confronted with complex and intractable constitutional
13 violations”); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15, 31 (1971)
14 (“Once a right and a violation have been shown, the scope of a district court’s equitable
15 powers to remedy past wrongs is broad, for breadth and flexibility are inherent in
16 equitable remedies.”); *see also* SAC at 97 (requesting that this Court “[g]rant such
17 further relief as this Court deems just and proper”).⁷ Second, at this stage, Plaintiffs are
18 not directly seeking an injunction from this Court, but rather an opportunity to pursue
19 their claims. The fact that *Texas* is still being litigated—and the possibility that the
20 *Texas* injunction may ultimately be vacated—also counsels in favor of allowing this
21 case to proceed to discovery.⁸ Defendants’ own cited authority notes that this Court has
22

23 ⁷ Indeed, other courts have granted similar relief ordering the return of plaintiffs to the
24 United States as an appropriate remedy for Defendants’ violations. *See, e.g., J.L. v.*
25 *Cuccinelli*, No. 18-CV-04914-NC, 2020 WL 2562895, at *3 (N.D. Cal. Feb. 20, 2020),
26 *modified on other grounds*, 2020 WL 2562896 (N.D. Cal. Mar. 27, 2020); *Grace v.*
Whitaker, 344 F. Supp. 3d 96, 105 (D.D.C. 2018), *aff’d in part, rev’d in part, and*
remanded sub nom. Grace v. Barr, 965 F.3d 883 (D.C. Cir. 2020).

27 ⁸ Defendants cite *Bergh v. State of Wash.* to suggest that dismissal of the claims is
28 appropriate, but *Bergh* stated that “issuance of an injunction” on the same issue is rarely

1 discretion to continue exercising jurisdiction over this case. *See Zambrana v. Califano*,
2 651 F.2d 842, 844 (2d Cir. 1981) (“[A]n ample degree of discretion, appropriate for
3 disciplined and experienced judges, must be left to the lower courts.” (quoting *Kerotest*
4 *Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183–84 (1952))). Because the
5 government’s erroneous interpretation of the *Texas* injunction should not preclude
6 review of Plaintiffs’ claims, this Court can and should allow this case to proceed.

7 **B. Plaintiffs’ Claims Are Not Moot.**

8 A case is not moot so long as an “active controversy” is “extant at all stages of
9 review.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). An active
10 controversy exists when plaintiffs demonstrate that they suffer “continuing, present
11 adverse effects” due to the defendants’ past wrongful conduct. *O’Shea v. Littleton*, 414
12 U.S. 488, 495–96 (1974); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1119–20 (9th
13 Cir. 2020) (holding active controversy existed where plaintiffs sought injunctive relief
14 to remedy defendant’s terminated policy because plaintiffs demonstrated continuing
15 harm). A case becomes moot “only when it is impossible for a court to grant any
16 effectual relief whatever to the prevailing party.” *Knox v. Service Emps. Int’l Union*,
17 *Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted). Each of
18 Plaintiffs’ claims seeks redress for the continuing adverse effects of Defendants’
19 unlawful conduct.⁹ Because Plaintiffs suffer ongoing effects, their claims are not moot.

20 Furthermore, this Court can grant “effectual relief” to redress Plaintiffs’ claims.
21 *Id.* Plaintiffs seek an order requiring Defendants to allow Individual Plaintiffs “to return
22

23 appropriate by two federal courts that have “their . . . decisions reviewed by the same
24 Court of Appeals.” 535 F.2d 505, 507 (9th Cir. 1976). The Ninth Circuit acknowledged
25 that this Court has discretion to dismiss a suit “if the same issue is pending in litigation
26 elsewhere.” *Id.* By allowing this case to proceed, this Court will not issue an injunction
on the same issue, need not reach any questions decided by the *Texas* court, and will
not be at risk of creating conflicting decisions within the same circuit.

27 ⁹ *See, e.g.*, SAC ¶¶ 340, 352, 371 (“Defendants’ violation . . . causes ongoing harm to
28 Individual Plaintiffs, similarly situated individuals, and Organizational Plaintiffs.”),
346, 359, 367, 368, 377, 380, 389, 391.

1 to the United States . . . for a period sufficient to enable them to seek legal
2 representation, and pursue their asylum proceedings from inside the United States.”
3 SAC at 96. That order would remedy Individual Plaintiffs’ harms by enabling them to
4 meaningfully access the U.S. asylum system and their rights to counsel, to a full and
5 fair hearing, and to petition the courts. Similarly, it would prevent Organizational
6 Plaintiffs from having to divert additional resources to provide services to individuals
7 subjected to MPP 1.0 who are stranded outside the United States. Because this Court
8 can provide relief to redress Plaintiffs’ continuing, present injuries, Plaintiffs’ claims
9 are not moot.

10 Defendants argue that Claims 1–3 and 5–6 are moot because they “challenge the
11 *prior administration’s* past implementation of a now defunct version of MPP.”
12 Mot. at 6. Defendants fail to explain how the discontinuation of MPP 1.0 alleviates
13 Plaintiffs’ ongoing injuries caused by that policy. A claim is not moot so long as parties
14 retain “a legally cognizable interest in the outcome.” *Am. Diabetes Ass’n v. U.S. Dep’t*
15 *of the Army*, 938 F.3d 1147, 1152 (9th Cir. 2019). Defendants do not dispute that
16 Plaintiffs suffer continuing adverse effects due to Defendants’ implementation of MPP
17 1.0. Because this Court can provide relief for these injuries, Plaintiffs retain a legally
18 cognizable interest in the outcome of this case.

19 Defendants further argue that Plaintiffs’ request for declaratory relief is moot
20 because such a judgment would be an advisory opinion. Mot. at 8. However, a
21 declaratory judgment is not advisory if an “actual controversy” exists, meaning that the
22 dispute is “definite and concrete, touching the legal relations of parties having adverse
23 legal interests.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citing
24 *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)). Declaratory relief is
25 proper when a challenged policy “casts what may well be a substantial adverse effect
26 on the interests of the petitioning parties.” *Headwaters, Inc. v. Bureau of Land Mgmt.*,
27 *Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989).

1 Plaintiffs’ request for declaratory relief is not moot because they have presented
2 a definite and concrete controversy. Plaintiffs seek a declaratory judgment that
3 Defendants’ implementation of MPP 1.0 violated their rights so that Plaintiffs can seek
4 to vindicate those rights. As demonstrated above, Plaintiffs continue to suffer
5 “substantial adverse effect[s]” of Defendants’ conduct. *Headwaters*, 893 F.2d at 1015.
6 Therefore, Plaintiffs’ request for declaratory relief clearly “touch[es] the legal relations
7 of parties having adverse legal interests.” *MedImmune*, 549 U.S. at 127.

8 **C. This Court Has Jurisdiction Over Plaintiffs’ Claims.**

9 **i. Neither 8 U.S.C. § 1252(d) nor § 1252(b)(9) Precludes**
10 **Jurisdiction.**

11 Plaintiffs Chepo Doe, Yesenia Doe, Sofia Doe, Ariana Doe, Francisco Doe,
12 Gabriela Doe, Reina Doe, Carlos Doe, and Dania Doe (“Removal Order Plaintiffs”)
13 challenge Defendants’ implementation of MPP 1.0 on the basis that it has denied them
14 access to the U.S. asylum system. They do not, however, challenge the outcomes of
15 their underlying immigration proceedings; instead, they seek relief from the harms that
16 continue to impede their ability to access the U.S. asylum system. *See Chhoeun v.*
17 *Marin*, 306 F. Supp. 3d 1147, 1159 (C.D. Cal. 2018). Because Plaintiffs do not seek
18 review of their removal proceedings or orders, §§ 1252(d) and (b)(9) do not divest this
19 Court of jurisdiction.¹⁰

20 **1. 8 U.S.C. § 1252(d) Does Not Bar Jurisdiction.**

21 Removal Order Plaintiffs do not ask this Court to review their final orders of
22 removal or reopen their proceedings. *See infra* Section IV.C.i.2. Instead, they request
23 declaratory relief establishing “that MPP as implemented violates federal statutes and
24

25 ¹⁰ Defendants rightly make no effort to argue that §§ 1252(d) and (b)(9) apply to the
26 claims of Organizational Plaintiffs or Individual Plaintiffs representing the Terminated
27 Case Subclass. Mot. at 10, 12. Additionally, Individual Plaintiffs’ challenge to the
28 arbitrary and capricious nature of the termination of the wind-down and First
Amendment claims are entirely independent of removal proceedings and thus beyond
the scope of §§ 1252(d) and (b)(9). SAC ¶¶ 361–72.

1 the [U.S.] Constitution” and injunctive relief allowing them to return to the United
2 States to access the asylum system. SAC at 96. Because § 1252(d) restricts a court’s
3 review of a final order of removal, that provision does not bar jurisdiction in this case.

4 Defendants’ reliance on cases involving petitions for review (“PFRs”) to federal
5 courts of appeals highlights the inapplicability of § 1252(d). *See* Mot. at 8–10. Such
6 petitions seek review of a final order of removal, *see* 8 U.S.C. § 1252(a)(1), and the
7 petitioners in those cases were thus required to comply with § 1252(d)(1)’s
8 administrative exhaustion requirement. *See, e.g., Vasquez-Rodriguez v. Garland*,
9 7 F.4th 888, 893–96 (9th Cir. 2021); *Sola v. Holder*, 720 F.3d 1134, 1136 (9th Cir.
10 2013).¹¹ Because Removal Order Plaintiffs do not seek judicial review of their removal
11 orders, Defendants’ cited cases are inapposite.¹²

12 2. 8 U.S.C. § 1252(b)(9) Does Not Bar Jurisdiction.

13 Section 1252(b)(9) consolidates judicial review of a removal proceeding into a
14 single PFR. *Singh v. Gonzales*, 499 F.3d 969, 976 (9th Cir. 2007). The provision applies
15 only to claims in which plaintiffs seek review of “the decision to detain them,” the
16 decision “to seek removal,” or “any part of the process by which their removability will
17

18 ¹¹ *Singh v. Napolitano*, 649 F.3d 899 (9th Cir. 2011) (per curiam), is also inapposite.
19 There, the court denied a noncitizen’s habeas petition after retroactively applying a new
20 Board of Immigration Appeals (“BIA”) decision clarifying the BIA’s jurisdiction over
21 noncitizens’ ineffective assistance of counsel claims. *Id.* at 902–03. While ineffective
22 assistance of counsel claims address infirmities with the underlying proceedings that
“could have been raised in a motion to reopen,” Mot. at 9, the BIA has no authority to
consider challenges collateral to the final order like the ones raised by Plaintiffs here.

23 ¹² 8 U.S.C. § 1252(d) requires only exhaustion of administrative remedies “available . .
24 . as of right.” *See Vasquez-Rodriguez*, 7 F.4th at 896 (cleaned up). Despite Defendants’
25 repeated references to the availability of a motion to reopen for the Removal Order
26 Plaintiffs, motions to reopen are not remedies available “as of right.” *See Noriega-Lopez*
27 *v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003). Because Plaintiffs do not challenge their
28 underlying removal orders, § 1252(d)’s exhaustion requirement does not apply. And
although Defendants again cite several cases in which courts required prudential
exhaustion, which is discretionary, they do not explain why the prudential exhaustion
factors should apply here—and they should not. *See* Mot. at 8–9; *Gonzales v. DHS*, 508
F.3d 1227, 1234 (9th Cir. 2007).

1 be determined.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion);
2 *see DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020); *Singh*, 499
3 F.3d at 978. It does not reach claims “that are independent of or collateral to the removal
4 process.” *Gonzalez v. U.S. Immigr. & Customs Enf’t*, 975 F.3d 788, 810 (9th Cir. 2020).
5 And it cannot be applied to preclude “any meaningful chance for judicial review.”
6 *Jennings*, 138 S. Ct. at 840. Because Removal Order Plaintiffs challenge how the
7 implementation of MPP 1.0 has prevented them from meaningfully accessing the
8 removal process itself, rather than the processes by which their removability was
9 determined, § 1252(b)(9) does not bar their claims.

10 First, Removal Order Plaintiffs seek only to enter the United States so they can
11 meaningfully access the asylum system through their removal proceedings, the very
12 process of direct review Defendants insist they must use under 8 U.S.C. § 1252(b)(9).
13 *See* SAC ¶¶ 213, 223, 237–38. In contrast to *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038
14 (9th Cir. 2016), which held that § 1252(b)(9) barred right-to-counsel claims in part
15 because class members could bring such challenges in their ongoing removal
16 proceedings, Removal Order Plaintiffs here have no such option.¹³ The implementation
17 of MPP 1.0 has prevented them from “forming an[] attorney-client relationship to begin
18 with,” *Torres v. DHS*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019), and has imposed
19 significant obstacles to confidential communication for those with representation. These
20 barriers, in turn, have prevented Removal Order Plaintiffs from accessing both the PFR
21 and motion to reopen processes.¹⁴ Importantly, these harms transcend the removal
22

23 ¹³ Notably, *J.E.F.M.* pre-dated the Supreme Court’s decision in *Jennings*, which
24 adopted a narrower reading of § 1252(b)(9). *See Jennings*, 138 S. Ct. at 840–41. The
25 issue in *J.E.F.M.* was whether conducting removal proceedings for minors without
26 court-appointed counsel violated their constitutional and statutory rights. 837 F.3d at
27 1029. Plaintiffs here challenge only harms arising from DHS’s implementation of MPP
28 1.0, an issue independent of the conduct of their removal proceedings.

¹⁴ While Defendants assert that other people subjected to MPP have availed themselves
of the PFR process, Mot. at 14, the proposed class and subclass definitions in this case

1 process, resulting in Removal Order Plaintiffs’ inability to access counsel or the asylum
2 process. *See, e.g.*, SAC ¶¶ 64, 213. Plaintiffs’ claims are thus distinct from those found
3 to be barred by § 1252(b)(9) in *Arroyo v. DHS*, No. SACV 19-815-JGB, 2019 WL
4 2912848 (C.D. Cal. June 20, 2019) (Bernal, J.). In *Arroyo*, the plaintiffs alleged that
5 separation from family members implicated their rights to present evidence and have a
6 full and fair hearing in their removal processes. Because these rights could not “be
7 violated without reference to the underlying fairness of the removal process,” this Court
8 found that they fell within § 1252(b)(9). *Id.* at *14. In contrast, Removal Order Plaintiffs
9 allege harms resulting from the implementation of MPP 1.0, “without looking to the
10 effect of th[e harm] on the underlying removal proceedings.” *Id.* at *13. Moreover,
11 *Arroyo* explicitly recognized that individuals who have final orders of removal, with no
12 PFR pending, and who challenge harms separate from the conduct of their removal
13 process—like Removal Order Plaintiffs—“are beyond the reach of [§ 1252(b)(9)].” *Id.*
14 at *16.

15 By seeking an order allowing them to enter the United States to meaningfully
16 access the asylum system, Plaintiffs “do not directly challenge the bases for their orders
17 of removal” but instead seek to “avail themselves of the administrative system that
18 exists to litigate meritorious motions to reopen.” *Chhoeun*, 306 F. Supp. 3d at 1159.
19 Section 1252(b)(9) allows such relief: courts in the Ninth Circuit have held that
20 challenges to barriers to filing appeals or motions to reopen are not barred by
21 § 1252(b)(9). *See Poghosyan v. Wolf*, No. 5:20-CV-02295-ODW, 2020 WL 7347858,
22 at *3 (C.D. Cal. Nov. 6, 2020) (Section 1252(b)(9) did not bar district court review of
23 due process violations preventing plaintiff from filing motion to reopen); *Sied v.*
24 *Nielsen*, No. 17-CV-06785-LB, 2018 WL 1142202, at *14–15 (N.D. Cal. Mar. 2, 2018)

25
26 _____
27 explicitly exclude individuals with final orders who have currently pending petitions
28 for review. *See* SAC ¶¶ 315–16. Thus, the proposed classes include only those
individuals who have been fully shut out of the normal appellate process contemplated
by 8 U.S.C. § 1252(b)(9).

1 (same); *see also* *Tapia–Fierro v. Mukasey*, 305 F. App’x 361, 363 (9th Cir. 2008)
2 (unpub.) (habeas claim challenging failure of immigration judge (“IJ”) to inform
3 petitioner of his right to appeal not barred by § 1252(b)(9) because that failure led to a
4 “deprivation of an opportunity for direct review in the court of appeals”).

5 Second, Plaintiffs’ inability to reopen removal proceedings arises from a broadly
6 applicable DHS policy, rather than the conduct of any specific removal proceeding. *See*
7 *Torres*, 411 F. Supp. 3d at 1048–49 (finding § 1252(b)(9) inapplicable in challenge to
8 “detention conditions . . . set by [DHS’s] global policies” that did “not hinge on case-
9 by-case determinations”). In seeking entry into the United States, Removal Order
10 Plaintiffs’ claims are akin to a challenge to collateral detention conditions denying them
11 a full and fair hearing, which is permissible under § 1252(b)(9). *See id.*; *cf.* Order
12 Denying Plaintiffs’ Emergency Motion for Preliminary Injunction (ECF No. 135), at 10
13 (noting that people subject to MPP “are legally in the custody of the United States while
14 in Mexico”).

15 Third, the relief Plaintiffs seek is unavailable in removal proceedings, which
16 illustrates that Plaintiffs’ claims are independent of the removal process. When
17 adjudicators in removal proceedings would be “powerless to remedy the conditions
18 alleged,” § 1252(b)(9) does not bar review. *Torres*, 411 F. Supp. 3d at 1049; *see also*
19 *Inland Empire – Immigrant Youth Collective v. Nielsen*, No. EDCV 17-2048-PSG, 2018
20 WL 4998230, at *14 (C.D. Cal. Apr. 19, 2018) (holding that § 1252(b)(9) does not apply
21 when the IJ has no authority to order the requested relief). Adjudicators in removal
22 proceedings do not have the authority to declare MPP 1.0 unlawful as implemented or
23 order Plaintiffs’ return to the United States.¹⁵ This Court, in contrast, can issue such
24 relief. *See E.O.H.C. v. DHS*, 950 F.3d 177, 195 (3d Cir. 2020) (finding district court
25

26 ¹⁵ The only avenue to obtain release from MPP 1.0 and return to the United States was
27 passing a non-refoulement interview with DHS. *See* SAC ¶ 59, n.24: ICE,
28 Memorandum from Ronald D. Vitiello, Deputy Director and Senior Official Performing
the Duties of the Director, Implementation of the Migrant Protection Protocols (Feb.
12, 2019), <https://bit.ly/33JY89D>.

1 had ability to hear plaintiffs’ MPP 1.0 claims seeking to prevent their return to Mexico);
2 *cf. Turcios v. Wolf*, No. 1:20-cv-00093, 2020 WL 10788713, at *5 (S.D. Tex. Oct. 16,
3 2020) (ordering plaintiffs subjected to MPP 1.0 released into the United States). And
4 doing so will not affect the outcome of Plaintiffs’ underlying removal proceedings.
5 Once Plaintiffs are able to enter the United States in order to pursue their claims in
6 removal proceedings, their applications for relief will be decided solely on the merits
7 of those claims. *See Torres*, 411 F. Supp. 3d at 1048–49 (Section 1252(b)(9)
8 inapplicable when plaintiffs “assert rights that can be violated without reference to the
9 effect on their underlying removal proceedings”).

10 **ii. 8 U.S.C. § 1252(a)(2)(B)(ii) Does Not Preclude Jurisdiction.**

11 Although 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of purely
12 discretionary decisions specified in the statute, federal courts retain jurisdiction to
13 decide questions of law. *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017). And
14 “[e]ven if a statute gives the [executive] discretion, . . . the courts retain jurisdiction to
15 review whether a particular decision is *ultra vires* the statute in question.” *Spencer*
16 *Enters., Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003). The Ninth Circuit has
17 cautioned that § 1252(a)(2)(B) “is not to be expanded beyond its precise language.”
18 *Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004).

19 Defendants cite *Poursina v. United States Citizenship & Immigration Services*,
20 936 F.3d 868, 871 (9th Cir. 2019); *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir.
21 2018); and various out-of-circuit cases to argue that return decisions under
22 § 1225(b)(2)(C) “are squarely in the discretion of the Secretary and therefore
23 unreviewable.” But contrary to Defendants’ arguments, *see* Mot. at 14–15, Plaintiffs do
24 not seek review of discretionary decisions made under § 1225(b)(2)(C). Instead,
25 Plaintiffs’ claims challenging MPP 1.0’s implementation raise the threshold legal issue
26 of whether Defendants have the authority to apply § 1225(b)(2)(C) in a manner that
27 violates Plaintiffs’ rights under the INA, the APA, and the Constitution. As in *Zadvydas*
28 *v. Davis*, Plaintiffs “do not seek review of [DHS’s] exercise of discretion; rather, they

1 challenge the extent of [DHS’s] authority under the . . . statute.” 533 U.S. 678, 688
2 (2001). Plaintiffs’ claim challenging the cessation of the wind-down similarly does not
3 address Defendants’ discretionary parole power, but rather their arbitrary and capricious
4 elimination of a program provided to facilitate the return to the United States of people
5 subjected to MPP 1.0. *See DHS v. Regents*, 140 S. Ct. at 1906 (concluding that the
6 rescission of an immigration relief program “is an action [that] provides a focus for
7 judicial review”) (internal quotation marks omitted); *Motor Vehicle Mfrs. Ass’n of U.S.,*
8 *Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (emphasizing that “an
9 agency changing its course must supply a reasoned analysis”). Plaintiffs’ challenge
10 therefore falls squarely within the federal courts’ jurisdiction to review questions of
11 law. *See Hernandez*, 872 F.3d at 988; *Spencer*, 345 F.3d at 689.

12 Plaintiffs do not dispute that § 1225(b)(2)(C) conveys discretion upon
13 Defendants. *See Mot.* at 16. However, that discretion does not permit Defendants to act
14 in violation of law. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915)
15 (“The Constitution does not confer upon [the Executive] any power to . . . suspend or
16 repeal such [laws] as the Congress enacts.”); *Util. Air Regulatory Grp. v. E.P.A.*, 573
17 U.S. 302, 327 (2014) (power to execute the laws does not “include a power to revise
18 clear statutory terms that turn out not to work in practice”). As Defendants recognize,
19 statutes must be read as a “harmonious whole,” and any authority to return individuals
20 to Mexico pursuant to § 1225(b)(2)(C) must “cohere with, not conflict with, the general
21 right to apply for asylum.” *Mot.* at 24. Defendants have no discretion to adopt a policy
22 under § 1225(b)(2)(C) that violates other provisions of the INA, the APA, or the
23 Constitution. As a result, 8 U.S.C. § 1252(a)(2)(B)(ii) does not bar judicial review.

24 Contrary to Defendants’ arguments, *Nora v. Wolf* and *Cruz v. DHS* did not
25 “appl[y] Section 1252(a)(2)(B)(ii) to analogous claims.” *Mot.* at 15–16. Both decisions
26 found that § 1252(a)(2)(B)(ii) did not bar claims concerning “whether the government
27 complied with its legal obligations in promulgating the MPP rather than the substantive
28 exercise of the Attorney General’s discretion.” *Cruz v. DHS*, No. 19-CV-2727, 2019

1 WL 8139805, at *4 (D.D.C. Nov. 21, 2019); *see Nora v. Wolf*, No. CV 20-0993 (ABJ),
2 2020 WL 3469670, at *7 (D.D.C. June 25, 2020).

3 Defendants also conflate Plaintiffs’ claims, which challenge Defendants’
4 unlawful conduct, with their prayer for relief, which requests that this Court grant
5 appropriate and proportionate injunctive relief, including (but not limited to) return to
6 the United States. *See* Mot. at 16–17. Section 1252(a)(2)(B)(ii) applies to the scope of
7 judicial review; it does not restrict this Court’s equitable power. *See* 8 U.S.C.
8 § 1252(a)(2)(B)(ii) (limiting judicial review over any discretionary “decision or action
9 of the Attorney General”); *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (“[T]he scope
10 of the remedy is determined by the nature and extent of the constitutional violation”).

11 **iii. 8 U.S.C. § 1252(f)(1) Does Not Preclude Jurisdiction.**

12 This Court has already rejected Defendants’ argument that 8 U.S.C. § 1252(f)(1)
13 bars Plaintiffs’ claims for injunctive relief. ECF No. 135 at 5–6. Under the law of the
14 case doctrine, “a court is generally precluded from reconsidering an issue previously
15 decided by the same court, or a higher court in the identical case.” *United States v.*
16 *Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). Courts may depart from the
17 law of the case if: “1) the first decision was clearly erroneous; 2) an intervening change
18 in the law has occurred; 3) the evidence on remand is substantially different; 4) other
19 changed circumstances exist; or 5) a manifest injustice would otherwise result.” *United*
20 *States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998) (emphasis omitted). Defendants’
21 motion to dismiss neither acknowledges the Court’s prior holding nor provides any
22 compelling reason why the Court should reconsider it. As such, the Court should reject
23 the government’s argument.

24 As this Court recognized in the Preliminary Injunction Order, “the Ninth Circuit
25 has made clear” that “where a litigant ‘seeks to enjoin conduct that allegedly is not even
26 authorized by the statute, the court is not enjoining the operation of [any covered
27 provision], and § 1252(f)(1) therefore is not implicated.” ECF No. 135 at 6 (quoting
28 *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)). This rule applies both to

1 conduct that conflicts with specific provisions of the INA, as well as to conduct that is
2 not authorized by the INA because it is unconstitutional and therefore beyond the
3 government’s authority. *See Torres*, 411 F. Supp. 3d at 1050 (holding that § 1252(f)(1)
4 does not bar an order enjoining conduct that violates the government’s own detention
5 standards); *Kidd v. Mayorkas*, No. 2:20-cv-03512-ODW, 2021 WL 1612087, at *5
6 (C.D. Cal. Apr. 26, 2021) (holding that § 1252(f)(1) does not apply to challenges that
7 ICE conduct is unconstitutional and therefore not authorized by the INA); *cf.*
8 *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) (courts assume that
9 Congress “legislates in the light of constitutional limitations”). Here, Plaintiffs’ First
10 and Second claims allege that MPP 1.0 as implemented violates Plaintiffs’ statutory
11 rights under the INA. *See* SAC ¶¶ 329–41, 342–53. Plaintiffs’ Third, Fifth, and Sixth
12 claims allege that MPP 1.0 as implemented violates Plaintiffs’ Fifth Amendment and
13 First Amendment rights. *See id.* ¶¶ 354–60, 373–80, 381–91. And Plaintiffs’ Fourth
14 claim alleges that the MPP 1.0 wind-down was arbitrary and capricious and therefore
15 outside the government’s authority. *See id.* ¶¶ 361–72. Because each of these claims
16 alleges action outside the government’s statutory or constitutional authority, none is
17 barred by § 1252(f)(1).

18 Even if § 1252(f)(1) would otherwise bar the relief Plaintiffs seek (which it does
19 not), it still does not apply to the claims raised by Individual Plaintiffs due to the
20 exception under § 1252(f)(1), as all putative class members are “individual
21 [noncitizens] against whom proceedings . . . have been initiated.” 8 U.S.C. 1252(f)(1);
22 *see Torres*, 411 F. Supp. 3d at 1050 (citing *Rodriguez v. Marin*, 909 F.3d 252, 256–57
23 (9th Cir. 2018)). It is of no consequence that all Individual Plaintiffs have been ordered
24 removed or had their removal proceedings terminated, as Defendants note. Mot. at 18.
25 As this Court has recognized, this exception to § 1252(f)(1) “[does] not require that
26 every detainee in the class still be in removal proceedings . . . but rather that proceedings
27 have been initiated.” *Torres*, 411 F. Supp. 3d at 1050 (cleaned up).

1 Finally, Defendants do not contest that, even if § 1252(f)(1) does not allow class-
2 wide injunctive relief, it does not bar class-wide declaratory relief. *See Rodriguez*, 909
3 F.3d at 256.

4 **D. Organizational Plaintiffs Have Standing to Bring Their Claims.**

5 To establish standing, a “plaintiff must have suffered an injury in fact—an
6 invasion of a legally protected interest which is (a) concrete and particularized and (b)
7 actual or imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S.
8 555, 560 (1992) (cleaned up). Here, Organizational Plaintiffs Immigrant Defenders Law
9 Center (“ImmDef”) and Jewish Family Service of San Diego (“Jewish Family Service”)
10 have standing because they (i) have sufficiently alleged organizational harm that is a
11 direct result of Defendants’ actions, and (ii) fall within the zone of interests of the INA.

12 **i. Organizational Plaintiffs Have Sufficiently Alleged**
13 **Frustration of Mission and Diversion of Resources.**

14 An organization may establish standing on its own behalf if Defendants’ actions
15 have frustrated its mission and caused a resulting diversion of resources. *E. Bay*
16 *Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) (“*EBSC III*”) (citing
17 *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). Allegations that an
18 organization “expended additional resources that they would not otherwise have
19 expended, and in ways that they would have not expended them” are sufficient to
20 establish organizational standing. *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032,
21 1040 (9th Cir. 2015).

22 Organizational Plaintiffs are non-profit organizations that provide legal and other
23 services to detained and non-detained noncitizens in California. SAC ¶ 269. The Initial
24 Protocols have frustrated their missions by stranding asylum seekers in Mexico and
25 severely impeding their ability to provide legal services to clients and potential clients.
26 In response to these challenges, Organizational Plaintiffs have been required to divert
27 resources in order to serve their target populations. In particular, ImmDef has, *inter alia*,
28 diverted resources to projects established to provide representation and other assistance

1 to individuals subjected to MPP 1.0 and devoted increased staff time to meeting the
2 special challenges related to the representation of those individuals, as well as
3 responding to inquiries from individuals denied processing during the MPP 1.0 wind-
4 down. *Id.* ¶¶ 273–87. ImmDef has spent at least \$400,000 on costs associated with
5 representation of MPP 1.0 clients; this diversion of resources is ongoing
6 notwithstanding the discontinuation of MPP 1.0. *Id.* ¶¶ 277, 283. Jewish Family Service
7 has, *inter alia*, diverted resources and staff time from existing programs in order to
8 provide legal services to individuals and families subjected to MPP 1.0 and dedicated
9 additional resources to facilitate cross-border travel to meet with clients subjected to
10 MPP 1.0. *Id.* ¶¶ 289–310. Thus, both Jewish Family Service and ImmDef have been
11 forced to divert resources due MPP 1.0’s implementation.

12 Defendants allege that Organizational Plaintiffs’ missions were not frustrated
13 because they did not previously provide significant legal services to assist noncitizens
14 in Mexico and chose to alter their activities following the implementation of MPP 1.0.
15 Mot. at 22–23. However, as the Ninth Circuit has held, where a non-profit legal services
16 organization would lose clients had it not diverted resources, that diversion is sufficient
17 to establish injury-in-fact. *EBSC III*, 993 F.3d at 664. Here, the Organizational Plaintiffs
18 were forced to overhaul their programs to adhere to their missions. Defendants
19 incorrectly argue that the organizations’ missions are “not impaired by th[e] modest and
20 unspecified MPP workload.” Mot. at 23. The Ninth Circuit has made clear that
21 “plaintiffs who suffer concrete, redressable harms that amount to pennies are still
22 entitled to relief.” *EBSC III*, 993 F.3d at 664.

23 Finally, Defendants’ argument that “neither organization alleges that the
24 termination of the wind-down of MPP affected them in any way,” Mot. at 23, is
25 factually incorrect. As alleged in the SAC, following the discontinuation of MPP 1.0,
26 ImmDef has continued to divert resources to serve individuals outside the United States,
27 including those who were subjected to MPP 1.0. Similarly, Jewish Family Service
28 alleged that they have continued to represent and advise individuals subjected to MPP

1 1.0, including by responding to MPP-related inquiries from individuals who received
2 final orders of removal or had their cases terminated. SAC ¶¶ 283, 305.

3 **ii. Organizational Plaintiffs Fall Within the INA’s Zone of**
4 **Interests.**

5 The zone-of-interests test “is a ‘prudential’ inquiry that asks ‘whether the statute
6 grants the plaintiff the cause of action that he asserts.’” *See E. Bay Sanctuary Covenant*
7 *v. Trump*, 932 F.3d 742, 767–69 (9th Cir. 2018) (“*EBSC I*”) (quoting *Bank of Am. Corp.*
8 *v. City of Miami*, 137 S. Ct. 1296, 1302 (2017)). The Ninth Circuit has found that
9 “[w]ithin the asylum statute, Congress took steps to ensure that pro bono legal services
10 of the type that the [plaintiff legal service] Organizations provide are available to
11 asylum seekers” and “other provisions in the INA give institutions like the
12 Organizations a role in helping immigrants navigate the immigration process.” *EBSC I*,
13 932 F.3d at 768–69. For these reasons, the court concluded that the organizational
14 plaintiffs’ interests were plainly “sufficient for the Court’s lenient APA test.” *EBSC III*,
15 993 F.3d at 668 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v.*
16 *Patchak*, 567 U.S. 209, 224–25 (2012)).

17 So too here. Organizational Plaintiffs are non-profit organizations that provide
18 legal services to noncitizens. SAC ¶¶ 24, 25, 271, 288. The implementation of MPP 1.0
19 has frustrated their missions by forcing a significant number of people they otherwise
20 would have served to await their immigration court hearings in Mexico and forced
21 Organizational Plaintiffs to overhaul their programs in response. *Id.* ¶¶ 329–53, 361–
22 72, 381–91. Organizational Plaintiffs have “more than met their burden to show that
23 their interests are, at a minimum, ‘marginally related to’ and ‘arguably within’ the scope
24 of the relevant statutes.” *See Immigrant Defs. Law Ctr. v. DHS*, No. CV 210395 (FMO)
25 (RAOx), 2021 WL 4295139, at *6 (C.D. Cal. July 27, 2021) (quoting *EBSC III*, 993
26 F.3d at 668).

27 Defendants incorrectly assert that “[t]he INA confers ‘no legally protected
28 interests’ on advocacy organizations in the scheduling or other aspects of third-party

1 noncitizens’ hearings in immigration court.” Mot. at 19. They rely exclusively on out-
2 of-circuit precedent, *id.* at 21,¹⁶ while ignoring the Ninth Circuit’s holding that the
3 interests of legal services organizations fall squarely within the INA’s zone of interests.
4 *See, e.g., EBSC III*, 993 F.3d at 668 (finding that organizations representing asylum
5 applicants fell within the INA’s zone of interests where the challenged policy affected
6 migrants’ access to the asylum process and “[t]he Organizations’ purpose [wa]s to help
7 individuals apply for and obtain asylum”).

8 **E. Plaintiffs Have Sufficiently Pleaded Their Claims.**

9 **i. Plaintiffs Have Sufficiently Stated Their First Claim**
10 **(APA – Right to Apply for Asylum).**

11 Plaintiffs agree with Defendants that any authority granted by § 1225(b)(2)(C)
12 “must be read to cohere with, not conflict with, the general right to apply for asylum.”
13 Mot. at 24. Plaintiffs do not challenge the authority conveyed by Congress in
14 § 1225(b)(2)(C) or the possibility of lawful contiguous-territory return, *see* Mot. at 25;
15 they challenge the implementation of Defendants’ policies that have exceeded that
16 authority in violation of law. Nothing in the INA suggests that Congress, through
17 § 1225(b)(2)(C), intended to authorize violations of the right to apply for asylum or to
18
19

20
21 ¹⁶ Defendants’ citation to *Federation for American Immigration Reform, Inc. v. Reno*,
22 93 F.3d 897, 900–01 (D.C. Cir. 1996), is both unhelpful and misleading. *See* Mot. at
23 21. There, the D.C. Circuit rejected arguments made by an *anti-immigrant* advocacy
24 group that their members’ interests in reducing immigration fell within the INA’s zone
25 of interests. The D.C. District Court later considered this decision “inapposite” when
26 finding that immigration legal services organizations fell within the INA’s zone of
27 interests. *O.A. v. Trump*, 404 F. Supp. 3d 109, 145 n.14 (D.D.C. 2019). Further, while
28 Defendants rely on Justice O’Connor’s opinion in *INS v. Legalization Assistance
Project of L.A. Cnty.*, 510 U.S. 1301, 1305 (1993) (O’Connor, J., in chambers), the
Ninth Circuit has characterized that opinion as “not only . . . non-binding and
concededly ‘speculative,’ . . . but the interest asserted by the organization in that case—
conserving organizational resources to better serve *nonimmigrants*—is markedly
different from the interest in aiding immigrants” alleged here. *EBSC I*, 932 F.3d at 769
n.10 (citation omitted).

1 undermine the principle of uniform treatment of asylum applications. But Defendants’
2 implementation of MPP 1.0 did both. *See, e.g.*, SAC ¶¶ 333–34, 336–38.

3 To the extent that Defendants argue that their authority under § 1225(b)(2)(C) is
4 not bound by § 1158(a)(1), *see* Mot. at 24, they are incorrect. Section 1225(b)(2)(C)
5 does not reference the right to apply for asylum, and nothing in the statutory scheme
6 suggests Congress intended to subvert that right or the uniformity principle. It would be
7 strikingly odd for Congress to amend the “historic” purpose of the Refugee Act without
8 mentioning or referencing the asylum statute. *See* Refugee Act of 1980, Pub. L. No. 96-
9 212, § 101(a), 94 Stat. 102 (1980).¹⁷ Whatever latitude Defendants have in
10 implementing § 1225(b)(2)(C), they cannot do so in a manner that subverts § 1158 or
11 the uniformity principle.

12 Defendants also misconstrue the uniformity principle, with a myopic focus on
13 adjudication of asylum applications in immigration court. *See* Mot. at 25. The Refugee
14 Act requires the U.S. government to “establish a uniform procedure for passing upon
15 an asylum application.” S. Rep. No. 96-256, at 9 (1980), reprinted in 1980 U.S.C.C.A.N.
16 141, 149. However, Defendants implemented the Initial Protocols in a manner that has
17 deprived Plaintiffs of uniform, nondiscriminatory access to the asylum system. *See*
18 *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 375 (C.D. Cal. 1982). As a result,
19 Individual Plaintiffs were prevented from understanding, preparing for, and in many
20 cases even attending their asylum proceedings.¹⁸ *See* SAC ¶¶ 58, 60, 94, 103–05, 116,
21

22 ¹⁷ The contiguous territory provision at § 1225(b)(2)(C) was added to the INA in 1996,
23 sixteen years after passage of the Refugee Act, and makes no reference to asylum
24 seekers. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996,
Pub. L. No. 104-208, 302, 110 Stat. 3009-1, 583 (1996).

25 ¹⁸ Defendants’ argument that other noncitizens may be able to pursue their immigration
26 cases from abroad is inapposite. *See* Mot. at 25 n.14. The cases they cite establish that
27 certain noncitizens are *entitled*, not required, to pursue their cases from outside the
28 United States. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *Toor v. Lynch*, 789 F.3d
1055, 1057 (9th Cir. 2015); *Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir.
2011). Moreover, all three cases involve noncitizens who were able to initially access

1 118, 129, 144, 162–64, 172–74, 190–93, 210, 219–22. Defendants’ implementation of
2 MPP 1.0 has also deprived Individual Plaintiffs of meaningful access to counsel and the
3 motion to reopen process. As a result, none of the Plaintiffs with final orders have been
4 able to submit motions to reopen their proceedings despite their desire to do so. *See id.*
5 ¶¶ 119, 183, 194, 213, 223–24, 238, 253. Finally, as discussed *supra* at Section IV.D.i–
6 ii, Organizational Plaintiffs have standing to bring this claim. Defendants’ argument
7 that Organizational Plaintiffs “do not allege any existing attorney-client relationship
8 with the Individual Plaintiffs or proposed class or even any specific plans to represent
9 them” (Mot. at 26) is factually incorrect. Indeed, Organizational Plaintiffs allege just
10 that ImmDef represents Chepo Doe and provides direct representation to other
11 individuals subjected to MPP 1.0 through its Cross Border Initiative, while Jewish
12 Family Service has continued to represent individuals subjected to MPP 1.0 since
13 Defendants halted the wind-down. SAC ¶¶ 159, 273, 305.

14 **ii. Plaintiffs Have Sufficiently Stated Their Second Claim (APA –**
15 **Right to Access Counsel).**

16 Defendants have acknowledged that the government’s past implementation of the
17 Protocols violated the INA’s right to access counsel. *See* Mot. at 26 (citing Explanation
18 Memo at 16–18). Importantly, while contiguous territory return is specified under
19 § 1225(b)(2)(C), the terms of the Protocols are not.

20 The statutory right to counsel is far broader than “merely” advising individuals
21 of the possibility of representation and supplying a list of pro bono legal services. *See*
22 Mot. at 26–27. The INA mandates that asylum seekers have meaningful access to
23 counsel, including the right to contact counsel and the time, space, and ability to consult
24 with counsel safely and confidentially. *See, e.g.*, SAC ¶¶ 37, 40, 345; *Torres*, 411 F.
25 Supp. 3d at 1060–61, 1063–65; *see also Lin v. Ashcroft*, 377 F.3d 1014, 1023, 1025 (9th

26
27 the asylum process inside the United States. Here, by contrast, Plaintiffs were forced to
28 remain outside the United States as a result of a policy that fundamentally undermined
their ability to prepare and present their claims for relief.

1 Cir. 2004); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000), *amended on*
2 *other grounds*, 213 F.3d 1221 (9th Cir. 2000) (affirming right to meet counsel in a
3 manner that does not put client or attorney in danger and enables trust-building).
4 Defendants’ implementation of MPP 1.0 unlawfully deprived Individual Plaintiffs of
5 access to counsel at critical stages in their asylum proceedings. Defendants do not
6 contest that Plaintiffs have amply alleged the ways in which Defendants have actively
7 obstructed access to counsel, including by limiting access to attorneys present in
8 immigration court.¹⁹ *See* SAC ¶¶ 61–63, 156–57.

9 Moreover, Organizational Plaintiffs have standing to bring this claim because,
10 contrary to Defendants’ assertions (Mot. at 27 n.15) and as outlined *supra*,
11 Organizational Plaintiffs continue to represent individuals subjected to MPP 1.0.

12 **iii. Plaintiffs Have Sufficiently Stated Their Third Claim (Fifth**
13 **Amendment – Right to Full and Fair Hearing).**

14 Defendants argue that Plaintiffs are not entitled to constitutional protections
15 because they are currently outside the United States. *See* Mot. at 27–29. Not so. “[T]he
16 Fifth Amendment applies to conduct that occurs on American soil and therefore applies
17 here,” where Defendants’ return of Plaintiffs from the United States to Mexico has
18 violated Plaintiffs’ due process rights. *Al Otro Lado, Inc. v. Mayorkas*, No. 17-CV-
19 02366-BAS-KSC, 2021 WL 3931890, at *20 (S.D. Cal. Sept. 2, 2021). Furthermore,
20 many of the violations that Plaintiffs experienced while subjected to the Initial
21 Protocols, including of their right to apply for asylum and their right to access counsel,
22 occurred while they were physically in the United States. *See* SAC ¶¶ 63, 125–26, 156–
23 57, 168, 186–87, 202, 217, 221, 227, 241, 249.

24
25 ¹⁹ Defendants argue that § 1158 does not create a private right of action. Mot. at 27. But
26 Plaintiffs raise an APA claim alleging that MPP 1.0 as implemented violated the right
27 to access counsel that is codified throughout the INA. SAC ¶ 345 (citing 8 U.S.C.
28 §§ 1158(d)(4), 1229a(b)(4)(A), 1362); *see, e.g., Torres*, 411 F. Supp. 3d at 1058 n.8
(declining to consider private right of action concerns where “Plaintiffs invoke the APA
as a vehicle” for access to counsel claims under INA).

1 Defendants’ argument that the “entry fiction” eliminates Plaintiffs’ due process
2 rights is equally without merit. *See* Mot. at 27–28. “It is well established that the Fifth
3 Amendment entitles [noncitizens] to due process of law in deportation proceedings.”
4 *Reno v. Flores*, 507 U.S. 292, 306 (1993); *see also Usubakunov v. Garland*, 16 F.4th
5 1299, 1303 (9th Cir. 2021) (“Meticulous care must be exercised lest the procedure by
6 which [the noncitizen] is deprived of . . . liberty not meet the essential standards of
7 fairness.”) (citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)); *Mathews v. Eldridge*,
8 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the
9 opportunity to be heard at a meaningful time and in a meaningful manner.” (internal
10 quotation marks omitted)).

11 None of Defendants’ authorities hold otherwise. Defendants’ reliance on
12 *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and its progeny is
13 inapposite. Mot. at 27–29. Because these decisions concern the procedural rights
14 governing admission or exclusion of noncitizens, they do not affect Plaintiffs’
15 procedural due process claims arising from MPP 1.0. *See Lucas R. v. Azar*, No. CV 18-
16 5741 (DMG), 2018 WL 7200716, at *10 (C.D. Cal. Dec. 27, 2018); *see also Hernandez*,
17 872 F.3d at 990 n.17 (“[I]t is well-established that the Due Process Clause stands as a
18 significant constraint on the manner in which the political branches may exercise their
19 plenary authority.” (internal citation omitted)). The applicable rule is the functional
20 approach to due process established in *Boumediene v. Bush*, under which a court
21 considering whether the Fifth Amendment applies must consider the “particular
22 circumstances, the practical necessities, and the possible alternatives which Congress
23 had before it and, in particular, whether judicial enforcement of the provision would be
24 impracticable and anomalous.” 553 U.S. 723, 759 (2008) (citation and internal
25 quotation marks omitted). Courts applying *Boumediene* have held that the Fifth
26 Amendment applies to conduct that occurs on U.S. soil. *See, e.g., Al Otro Lado*, 2021
27 WL 3931890, at *20. Because Defendants’ decision to return Plaintiffs to Mexico was
28

1 made after they were processed into the United States, Mot. at 3, the repercussions of
2 this decision must accord with Plaintiffs’ due process rights.

3 Defendants’ reliance on *Thuraissigiam*, where the plaintiff sought habeas review
4 of a credible fear determination, is misplaced. As Defendants note, in *Thuraissigiam*
5 the Supreme Court reiterated that “[w]hatever the procedure authorized by Congress is,
6 it is due process as far as [a noncitizen] denied entry is concerned.” Mot. at 28; *DHS v.*
7 *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (quoting *United States ex rel. Knauff v.*
8 *Shaughnessy*, 338 U.S. 537, 544 (1950)). *Thuraissigiam* did not address the process due
9 during immigration court proceedings authorized by Congress; rather, it addressed the
10 expedited removal system, a summary removal process not at issue in this case. For
11 people like Individual Plaintiffs who were placed into regular removal proceedings,
12 Congress has conferred additional statutory rights, and additional due process
13 protections also apply.²⁰ See *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (“[A
14 noncitizen] who faces deportation is entitled to a full and fair hearing of his claims and
15 a reasonable opportunity to present evidence on his behalf.”); 8 U.S.C. §§ 1158(a)(1),
16 (d)(4), 1229a(b)(4), 1362 (enshrining right to apply for asylum, right to counsel, and
17 other procedural rights). Notably, following *Thuraissigiam*, courts have allowed
18 procedural due process claims to proceed for plaintiffs seeking admission when the
19 challenged conduct also violated statutory rights.²¹ See e.g., *Al Otro Lado*, 2021 WL

20 *United States v. Verdugo-Urquidez*, a non-immigration case addressing U.S.
21 authorities’ search of a foreign national’s residence outside the United States, does not
22 hold otherwise. Defendants’ citation to the case is misleading; the full quotation is:
23 “*These cases, however, establish only that [noncitizens] receive constitutional*
24 *protections when they have come within the territory of the United States and developed*
substantial connections with this country.” 494 U.S. 259, 271 (1990) (emphasis added).

25 ²¹ Defendants’ reliance on *Angov v. Lynch*, a case narrowly focused on admissibility of
26 documentary evidence in removal proceedings, is misplaced. *Angov* did not address the
27 issue of what “minimum due process” is afforded to asylum applicants, as the court
28 noted that the petitioner “was clearly given fair *access* to all his statutory rights.” See
Angov v. Lynch, 788 F.3d 893, 898 n.3 (9th Cir. 2015) (emphasis in original). The same
is not true here, as Individual Plaintiffs were squarely denied the due process that

1 3931890, at *20 (“Because Defendants’ turning back of asylum seekers unlawfully
2 withholds their duties under statute, it violates the process due to class members.”).

3 Defendants’ argument that Plaintiffs’ due process claim is duplicative of their
4 access to counsel claim also fails. *See* Mot. at 29. Plaintiffs’ constitutional claim is
5 independent of their APA claims. *Sierra Club v. Trump*, 929 F.3d 670, 699 (9th Cir.
6 2019) (Ninth Circuit law “clearly contemplate[s] that claims challenging agency
7 actions—particularly constitutional claims—may exist wholly apart from the APA”).
8 This remains true even if Plaintiffs’ rights under the Due Process Clause are coextensive
9 with their statutory rights under the INA. *See, e.g., Al Otro Lado*, 2021 WL 3931890,
10 at *20. Defendants argue that *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005) does
11 not apply because Plaintiffs have not alleged facts constituting denial of counsel. *See*
12 Mot. at 29. However, as discussed in Section IV.E.ii, *supra*, Plaintiffs have amply
13 alleged how implementation of the Initial Protocols has violated Plaintiffs’ right to
14 access counsel and thereby infringed their statutory and constitutional due process
15 rights.²² *See, e.g., SAC ¶¶ 61–63, 156–57, 355–57.*

16 **iv. Plaintiffs Have Sufficiently Stated Their Fourth Claim (APA –**
17 **Unlawful Cessation of MPP Wind Down).**

18 An agency action is “final” when (1) it “mark[s] the ‘consummation’ of the
19 agency’s decision-making process” and (2) as a result of the action, “‘rights or
20 obligations have been determined,’ or . . . ‘legal consequences will flow.’” *Bennett v.*
21 *Spear*, 520 U.S. 154, 177–78 (1997). Courts interpret finality in a “pragmatic and
22 flexible manner,” “focus[ing] on the practical and legal effects of the agency action.”
23 *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). For
24

25 _____
26 Congress has explicitly afforded to asylum seekers through the INA. *See, e.g.,*
27 *Usubakunov*, 16 F.4th at 1303 (recognizing “right to counsel in removal proceedings”
28 as “[r]ooted in the Due Process Clause and codified [in the INA]”).

²² For the reasons articulated *supra* at note 27, Defendants’ arguments that other noncitizens pursue their claims from abroad are wholly unavailing. *See* Mot. at 29.

1 the reasons discussed below, Defendants’ termination of the wind-down is a “final
2 agency action” under § 706(2).

3 An agency action satisfies the finality test’s first prong when it reflects a
4 “conscious” and “deliberate” decision, *ONRC Action v. Bureau of Land Mgmt.*, 150
5 F.3d 1132, 1137 (9th Cir. 1998), and is not “merely tentative or interlocutory [in]
6 nature,” *Bennett*, 520 U.S. at 178. Here, Defendants’ termination of the wind-down
7 represents a deliberate response to the *Texas* injunction based on their erroneous
8 interpretation of its terms. Mot. at 30; *see supra* Section IV.A (explaining that the *Texas*
9 injunction did not compel Defendants to cease processing some Plaintiffs into the
10 United States). Because the termination of the wind-down represents the
11 “consummation” of DHS’s flawed response to the *Texas* injunction, it satisfies the first
12 prong of the finality test. *Bennett*, 520 U.S. at 177–78; *see also San Francisco Herring*
13 *Ass’n v. Dep’t of the Interior*, 946 F.3d 564, 578 (9th Cir. 2019) (finding final agency
14 action where agency had “arrived at a definitive position”).

15 The second prong of the finality test focuses “on the practical and legal effects”
16 of the *challenged* agency action: DHS’s unexplained termination of the wind-down.²³
17 *Oregon Nat. Desert Ass’n*, 465 F.3d at 982. The legal consequences of Defendants’
18 termination of the wind-down are both profound and immediate: people previously
19 eligible for processing into the United States under the wind-down now have no viable
20 avenue to vindicate their rights to access counsel and seek asylum. *See Lujan v. Nat’l*
21 *Wildlife Fed’n*, 497 U.S. 871, 894 (1990) (explaining that a “final agency action” is
22 reviewable where it “has an actual or immediately threatened effect”); SAC ¶¶ 366–67,
23 369. In terminating the wind-down, Defendants failed to consider the reliance interests
24 of individuals with terminated cases and *in absentia* orders who chose to remain in
25 harm’s way believing that they would ultimately be allowed to access the U.S. asylum
26

27 ²³ Though Plaintiffs do not concede, as Defendants suggest, that the wind-down did not
28 create legal rights and consequences—it did—that question is not before the Court. *See*
SAC ¶¶ 78–79, 81–85; *cf.* Mot. at 30–31.

1 system; instead, they are still stranded in danger outside the United States, and their
2 cases remain in legal limbo. *See DHS v. Regents*, 140 S. Ct. at 1913 (“When an agency
3 changes course, . . . it must be cognizant that longstanding policies may have
4 engendered serious reliance interests that must be taken into account.” (citing *Encino*
5 *Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (cleaned up))); SAC ¶¶ 366–
6 67, 369. Nor did Defendants adequately consider Organizational Plaintiffs’ reliance
7 interests, who diverted substantial resources and restructured their programming in
8 reliance on the wind-down process, and whose core missions have been frustrated by
9 the abrupt cessation of the wind-down. *See* SAC ¶¶ 364, 368.

10 Defendants’ speculative assertion that the wind-down will be re-implemented
11 after a judicial decision vacating the *Texas* injunction does not transform the agency’s
12 final decision to terminate the wind-down into a temporary, inconsequential action,
13 Mot. at 30; nor does the possibility that DHS might reverse its termination of the wind-
14 down at some future point alter its finality. *See U.S. Army Corps of Eng’rs v. Hawkes*
15 *Co.*, 578 U.S. 590, 598 (2016) (observing that the possibility that an agency action will
16 be revised “is a common characteristic of agency action, and does not make an
17 otherwise definitive decision nonfinal”). For now, the termination of the wind-down is
18 Defendants’ “last word on the matter,” opening its decision to judicial review. *See Or.*
19 *Nat. Desert Ass’n*, 465 F.3d at 984.

20 **v. Plaintiffs Have Sufficiently Stated Their Fifth Claim (First**
21 **Amendment – Individual Plaintiffs).**

22 Contrary to Defendants’ assertions, *see* Mot. at 31, Plaintiffs allege that, in
23 implementing MPP 1.0, Defendants placed specific and direct restrictions on their
24 speech that impeded their communication with retained and prospective counsel. *See*
25 *generally* SAC ¶¶ 376–79, 387–90. First, Defendants restricted respondents in MPP 1.0
26 to only one hour (and, in practice, much less) to consult with counsel while they were
27 in the United States for their MPP 1.0 hearings – and that minimal amount of
28 consultation was allowed only in non-confidential settings. *See* SAC ¶¶ 62–63, 156–57,

1 279–81, 299. Defendants implemented this restriction so as to allow only represented
2 individuals to utilize that hour to consult with previously retained counsel. *See id.*
3 Second, Defendants prohibited individuals from speaking with counsel outside of that
4 hour. *See id.* The effect was that Defendants severely restricted represented individuals’
5 consultation with counsel to only one hour in a non-confidential setting, and effectively
6 prohibited unrepresented people from consulting with potential counsel or trying to
7 secure counsel at all while they were in the United States.

8 Because of these restrictions, Individual Plaintiffs had no choice but to attempt
9 to communicate virtually from Mexico with counsel and potential counsel. However,
10 because Defendants’ implementation of MPP 1.0 left them stranded in precarious
11 conditions in Mexico, Individual Plaintiffs lacked sufficient resources and/or adequate
12 technology to enable meaningful communication with counsel and potential counsel in
13 the United States. *See SAC ¶¶ 60, 104–08, 130, 178, 194, 251, 282, 295, 300, 302, 307.*

14 While Defendants provided Individual Plaintiffs with a list of potential counsel
15 in the United States whom they could ostensibly contact from Mexico, most of the legal
16 service providers on that list were unwilling to take MPP 1.0 cases, making the time
17 they spent in the United States for their hearings particularly critical to identify and
18 secure counsel. However, by prohibiting unrepresented individuals from speaking with
19 counsel at all during their time in the United States, Defendants effectively prevented
20 them from consulting with or retaining counsel. *See SAC ¶¶ 62, 63, 113–14, 125, 128,*
21 *139–40, 154, 156–57, 190–92, 204–05, 219–20, 222, 229–30, 244–46, 259–60.*

22 Defendants do not contest that the First Amendment protects Individual
23 Plaintiffs’ rights to hire and consult with counsel.²⁴ While Defendants suggest that MPP
24

25 ²⁴ Nor can they, for that right is well established. *See, e.g., Mothershed v. Justices of*
26 *Supreme Court*, 410 F.3d 602, 611 (9th Cir, 2005), *as amended on denial of reh’g* (9th
27 Cir. July 21, 2005) (“the ‘right to hire and consult an attorney is protected by the First
28 Amendment’s guarantee of freedom of speech, association and petition.’”) (quoting
Denius v. Dunlap, 209 F.3d 944, 953 (7th Cir. 2000)); *Eng v. Coolev*, 552 F.3d 1062,
1069 (9th Cir. 2009) (courts have “long-recognized [the] First Amendment right to hire
and consult an attorney”).

1 1.0 constitutes merely a “policy of general applicability” with an “incidental effect” on
2 speech, Plaintiffs have alleged that Defendants’ implementation of MPP 1.0 included
3 far-reaching restrictions on protected speech. Indeed, Defendants’ prohibition on
4 unrepresented people communicating with counsel during their time in the United
5 States is a classic content-based restriction, which targets a certain form of speech on a
6 specific subject: immigration-related legal advice to unrepresented noncitizens in
7 removal proceedings. Such a restriction “cannot be justified without reference to the
8 content of the regulated speech” and is subject to strict scrutiny. *Reed v. Town of*
9 *Gilbert, Arizona*, 576 U.S. 155, 164 (2015) (internal quotation marks omitted).

10 Even if viewed as content-neutral, Defendants’ restrictions on all MPP 1.0
11 respondents’ communications with counsel, whether represented or not, are
12 unreasonable time, place, and manner restrictions. Time, place, and manner restrictions
13 are reasonable only if they are “justified without reference to the content of the regulated
14 speech,” are “narrowly tailored to serve a significant governmental interest,” and “leave
15 open ample alternative channels for communication of the information.”²⁵ *Mothershed*,
16 410 F.3d at 611 (internal quotation marks omitted). Defendants’ speech restrictions
17 cannot be considered narrowly tailored. While Individual Plaintiffs were inside the
18 United States, Defendants’ implementation of MPP 1.0 entirely restricted all
19 communication by unrepresented individuals with potential counsel and severely
20 limited communication by represented individuals with counsel, both in time and place.
21 *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (“narrowly tailored”
22 regulations must “promote[] a substantial government interest that would be achieved
23 less effectively absent the regulation,” and must not “burden substantially more speech
24 than is necessary to further the government’s legitimate interests”) (citation and internal
25 quotation marks omitted). Such restrictions on speech do not serve any government
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28 ²⁵ The government bears the burden of making this showing. *See, e.g., Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000) (collecting cases).

1 interest, and Defendants do not claim otherwise. And, when Individual Plaintiffs were
2 sent back to Mexico, Defendants’ implementation of MPP 1.0 trapped them in
3 circumstances where they lacked adequate technology or resources to communicate
4 with counsel or potential counsel. Defendants’ restrictions thus did not allow for any
5 meaningful alternative channels for communicating with counsel, let alone “ample”
6 alternative channels.

7 Because Individual Plaintiffs have alleged that Defendants placed specific, direct
8 restrictions on their protected speech, Defendants’ reliance on *Arroyo v. DHS* is
9 misplaced.²⁶ In *Arroyo*, this Court found that the effects of detention center transfers
10 alone did not trigger First Amendment protections, reasoning that the transfers were
11 “silent as to any expressive conduct” and noting that the plaintiffs had offered “no
12 argument as to how the prospective transfers constitute[d] speech regulation, either
13 content-based or content-neutral.” 2019 WL 2912848 at *21. Not so here. Defendants’
14 restrictions are explicit restrictions on protected expressive conduct: they regulate who
15 may seek a particular kind of speech—legal advice for noncitizens—when, where, and
16 for how long. While the effects of these restrictions are heightened because of
17 Defendants’ decision to strand Individual Plaintiffs outside the United States without
18 adequate means of communication with counsel or potential counsel, Defendants’
19 explicit restrictions on their speech in the United States are the root of the problem.

20 Finally, Defendants’ suggestion that the First Amendment right of access to the
21 courts may not apply in immigration proceedings is unsupported and incorrect. *See Mot.*
22 *at 32.* The Ninth Circuit has recognized that “the First Amendment extends to the right
23

24 _____
25 ²⁶ The cases Defendants cite for basic propositions of First Amendment law are
26 unavailing, *see Mot. at 31*, as Defendants’ implementation of MPP 1.0 did not regulate
27 merely nonexpressive conduct. Rather, Defendants directly restricted protected speech,
28 and imposed much more than “incidental” burdens on that speech. Indeed, Defendants’
restrictions on protected speech here are strikingly similar in their effects to the
restrictions overturned in the cases Defendants cite. *See Sorrell v. IMS Health Inc.*, 564
U.S. 552, 567 (2011); *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020).

1 to petition an administrative agency.” *Nat’l Ass’n of Radiation Survivors v. Derwinski*,
2 994 F.2d 583, 595 (9th Cir. 1992), *as amended on denial of reh’g* (June 18, 1993) (citing
3 *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). And at
4 least one court in this circuit has applied this right explicitly in immigration
5 proceedings. *See Lyon v. U.S. Immig. & Customs Enf’t*, 171 F. Supp. 3d 961, 994 (N.D.
6 Cal. 2016). Contrary to Defendants’ claim that MPP 1.0 “d[id] not regulate court access
7 at all,” Mot. at 32, Individual Plaintiffs have sufficiently pleaded that Defendants’
8 restrictions denied them meaningful access to the asylum process. *See, e.g.*, SAC ¶¶ 60,
9 62, 63, 97, 104–08, 113–14, 128, 130, 139–40, 154, 156–57, 162–64, 178, 190–92, 194,
10 204–05, 219–20, 222, 229–32, 244–46, 251, 259–65, 282, 295, 300, 302, 307; *Silva v.*
11 *Di Vittorio*, 658 F.3d 1090, 1101–02 (9th Cir. 2011), *abrogated on other grounds as*
12 *stated in Richey v. Dahne*, 807 F.3d 1202, 1209 n.6 (9th Cir. 2015) (recognizing the
13 right requires “meaningful access” to the courts).

14 While MPP 1.0 has ended, Defendants’ restrictions cause ongoing harm to
15 Individual Plaintiffs. *See, e.g.*, SAC ¶¶ 119, 129–30, 134, 145–46, 150, 183, 194, 213,
16 222–24, 238, 251, 253, 265, 380. For example, because Defendants’ restrictions have
17 prevented them from communicating with and/or retaining potential counsel, Removal
18 Order Plaintiffs have not been able to submit motions to reopen their proceedings,
19 despite their desire to do so. *See* SAC ¶¶ 119, 183, 194, 213, 223–24, 238, 253.

20 For the same reasons described above, *see supra* Section IV.E.iii, Defendants’
21 extraterritoriality arguments fail as to Plaintiffs’ First Amendment claims.²⁷

22
23
24 ²⁷ Additionally, Defendants do not explain how the cases they cite in discussing
25 extraterritoriality regarding the Fifth Amendment apply in the First Amendment
26 context. Further, *Verdugo-Urquidez* depends on particular language in the Fourth
27 Amendment, which the Court reads as limiting its reach to “the people.” 494 U.S. at
28 265. The First Amendment’s Speech Clause has no such limitation, rendering *Verdugo-*
Urquidez’s application to this case unclear at best. Fundamentally, none of the cases
Defendants cite regarding extraterritoriality addresses the violation of noncitizens’ First
Amendment rights by U.S. government officials on U.S. soil.

1 **vi. Plaintiffs Have Sufficiently Stated Their Sixth Claim (First**
2 **Amendment – Organizational Plaintiffs).**

3 Defendants’ arguments against Organizational Plaintiffs’ First Amendment
4 claims are unavailing. Organizational Plaintiffs have pleaded that they represent certain
5 Individual Plaintiffs, *see* SAC ¶¶ 159, 273, 290, 291, 294, and that they continue to
6 provide legal services to putative class members, *see id.* ¶¶ 283, 285, 305.

7 The same analysis governing Individual Plaintiffs’ First Amendment claims
8 applies to Defendants’ restrictions of Organizational Plaintiffs’ protected speech. In
9 their implementation of MPP 1.0, Defendants placed explicit restrictions on
10 Organizational Plaintiffs’ protected speech in the United States, including by (1) strictly
11 limiting the time they were allowed to provide legal services to existing clients, *see*
12 SAC ¶¶ 62–63, 156–57, 279–81, 299, 387–88, (2) prohibiting them from
13 communicating with or advising potential clients, *see id.*, and (3) forbidding them from
14 conducting “know your rights” presentations for MPP 1.0 respondents, *see id.* ¶¶ 297–
15 98. Thus, like Individual Plaintiffs, Organizational Plaintiffs challenge the ways in
16 which Defendants’ particular implementation of MPP 1.0 specifically restricted their
17 protected speech—not the constitutionality of § 1225(b)(2)(C).

18 Contrary to Defendants’ assertion that there is “no general right to ‘advise
19 potential clients,’” Mot. at 32, the First Amendment rights of legal services providers
20 like Organizational Plaintiffs are longstanding and well-established—by the very cases
21 Defendants cite. The Supreme Court has long recognized that the First Amendment
22 protects legal service providers from government interference when they are
23 “advocating lawful means of vindicating legal rights.” *NAACP v. Button*, 371 U.S. 415,
24 437 (1963). The Court has acknowledged such organizations’ right to solicit potential
25 clients, concluding that the “efficacy of litigation as a means of advancing the cause of
26 civil liberties often depends on the ability to make legal assistance available to suitable
27 litigants.” *In re Primus*, 436 U.S. 412, 431 (1978). Further, as the district court found
28 in *Northwest Immigrant Rights Project v. Sessions*, pro bono legal assistance to

1 noncitizens in removal proceedings “falls neatly within the precedent set by the
2 Supreme Court in *Button* and its progeny.” No. C17-716 RAJ, 2017 WL 3189032, at
3 *3 (W.D. Wash. July 27, 2017). Moreover, by advising, assisting, and consulting with
4 existing and potential clients, attorneys disseminate important legal information, which
5 is protected. *See Sorrell*, 564 U.S. at 570 (“creation and dissemination of information
6 are speech within the meaning of the First Amendment.”).

7 Similar to the legal service providers in *NAACP* and *Primus*, Organizational
8 Plaintiffs are seeking to engage in pro bono legal advocacy for the rights of an
9 “unpopular minority”—noncitizens seeking asylum at the southern border who were
10 subjected to MPP 1.0. *Button*, 371 U.S. at 434; *see* SAC ¶¶ 271–73, 278, 288–90, 294,
11 297–98. The legal services Organizational Plaintiffs provide are part of their broader
12 efforts to promote immigrant rights. *See, e.g.,* SAC ¶¶ 271–73, 278, 288–90, 294. By
13 specifically restricting Organizational Plaintiffs’ ability to conduct know-your-rights
14 sessions and to consult with potential and existing clients, Defendants’ implementation
15 of MPP 1.0 has limited Organizational Plaintiffs’ ability to engage in such advocacy,
16 and thereby infringed on their First Amendment rights. *See, e.g., id.* ¶¶ 62–63, 156–57,
17 279–81, 297–300, 302, 307, 387–88. Though MPP 1.0 has ended, Organizational
18 Plaintiffs—like Individual Plaintiffs—continue to suffer harm from Defendants’
19 unlawful policies. *See id.* ¶¶ 282, 283–87, 307–10, 389, 391.

20 **V. CONCLUSION**

21 For the foregoing reasons, the Court should deny Defendants’ Motion to Dismiss.
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1 Dated: February 23, 2022

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