No. 25-02581

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IMMIGRANT DEFENDERS LAW CENTER,

Plaintiff-Appellee,

v.

KRISTI NOEM, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Central District of California
No. 2:20-cv-09893 (Hon. Jesus G. Bernal)

PLAINTIFF-APPELLEE IMMIGRANT DEFENDERS LAW CENTER'S OPPOSITION TO DEFENDANT-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

Matthew T. Heartney
Hannah R. Coleman
Daniel S. Shimell
Allyson C. Myers
ARNOLD & PORTER
KAYE SCHOLER LLP
777 South Figueroa Street, 44th Fl.
Los Angeles, CA 90017
(213) 243-4000

Counsel for Plaintiff-Appellee Immigrant Defenders Law Center
(continued on next page)

Steven L. Mayer
Sean M. SeLegue
ARNOLD & PORTER
KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 356-3000

Kathleen X. Weng
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 942-5000

Melissa Crow
CENTER FOR GENDER &
REFUGEE STUDIES
1121 14th Street, NW, Suite 200
Washington, D.C. 20005
(202) 355-4471

Edith Sangueza
CENTER FOR GENDER &
REFUGEE STUDIES
26 Broadway, 3rd Floor
New York, NY 10004
(415) 581-8839

Dulce Rodas
CENTER FOR GENDER &
REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
(415) 581-8843

Stephanie M. Alvarez-Jones
Victoria F. Neilson
NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD
1763 Columbia Rd. NW, Ste. 175 #896645
Washington, D.C. 20009
(202) 470-2082

Stephen W. Manning
Jordan Cunnings
Tess Hellgren
Rosa Saavedra Vanacore
INNOVATION LAW LAB
333 SW 5th Ave, Suite 200
Portland, OR 97204
(503) 922-3042

Counsel for Immigrant Defenders Law Center

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Immigrant Defenders Law Center has no parent corporation, and no publicly traded company owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiff-Appellee Immigrant Defenders Law Center ("ImmDef" or "Plaintiff") provides legal services to noncitizens in and around southern California, including those seeking asylum. The government's reimplementation of the Migrant Protection Protocols ("MPP") would violate ImmDef's right to protected speech as well as its clients' statutory rights to apply for asylum and be represented by counsel during that process. Defendants-Appellants' ("Defendants") Emergency Motion for a Stay Pending Appeal ("Motion"), which focuses mostly on various procedural arguments that the District Court correctly held are unsupported and unsound, fails to show a strong likelihood of success for Defendants.

Defendants also fail to show irreparable injury. As the District Court correctly held, Defendant Department of Homeland Security ("DHS") "neither has the discretionary authority nor legitimate reasons to enforce programs that violate the [C]onstitution or federal law," (ECF No. 413 at 9) and "there is no harm to the government when a court prevents the Government from engaging in unlawful practices." *Id.* (quoting *Castillo v. Barr*, 449 F. Supp. 3d 915, 923 (C.D. Cal. 2020)). DHS has conceded that there are "inherent problems [with MPP] . . . that no amount of resources c[ould] sufficiently fix."[1]

[1] ECF No. 371-5, DHS, Explanation of the Decision to Terminate the Migrant Protection Protocols at 17 (Oct. 29, 2021) ("Explanation Memo"), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf.

Moreover, reimplementation of MPP requires Mexico's consent, and Defendants have produced no evidence that such consent exists. *See* Mot. Tr. at 24:21–25, March 31, 2025 [ECF No. 8.1] (failing to confirm whether Mexico had agreed to accept the return of individuals seeking asylum in the United States). The Motion should be denied.[2]

BACKGROUND

Between January 2019 and February 2021, Defendants implemented MPP 1.0, stranding nearly 70,000 asylum seekers in Mexico under perilous conditions that obstructed their ability to access the U.S. asylum system and obtain legal representation. Noncitizens were returned to areas notorious for high rates of kidnappings, rapes, murders, and other violence,[3] and were forced to live under conditions that were "crowded, unsanitary, and beset by violence."[4] MPP 1.0[5] severely obstructed legal representation for noncitizens subjected to the policy. While 80% of asylum seekers appearing in immigration court had legal representation,[6] only 10% of individuals subjected to MPP 1.0 were able to obtain

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[2] This Opposition replaces the Preliminary Opposition filed on May 9, 2025 [ECF No. 9.1].

[3] ECF No. 371-5, Explanation Memo, at 9 & nn.33, 34.

[4] *Id.* at 6.

[5] MPP 1.0 refers to the 2019 implementation and 2025 reimplementation of MPP.

[6] ECF No. 371-7 at 4 n.6 (citing TRAC, A*sylum Decisions*, https://web.archive.org/web/20250101084914/https://trac.syr.edu/phptools/immigration/asylum/ (filters set to "Immigration Court" and "Represented")).

representation due to the constraints the policy placed on them and on immigration counsel.[7]

During MPP 1.0, organizations that provided legal services to noncitizens, including ImmDef, faced significant barriers to communicating with individuals subjected to MPP 1.0. DHS itself has described "the difficulties in accessing counsel" in MPP 1.0 as "endemic to the program's design," including that "[o]pportunities for attorneys to meet with their clients outside of those organized at the hearing locations were limited due to, among other constraints, complications associated with cross-border communication."[8] The challenges to obtaining counsel were so grave that DHS acknowledged: "Inadequate access to counsel cast[] doubt on the reliability of removal proceeding[s]" during MPP 1.0. Indeed, MPP 1.0 hearing outcomes show that the program effectively denied noncitizens any meaningful opportunity to apply for asylum.[9]

In October 2020, the plaintiffs in this case—individual plaintiffs subjected to MPP 1.0, and two organizational plaintiffs including ImmDef—filed a lawsuit in the Central District of California challenging the implementation of MPP 1.0. Plaintiffs alleged that MPP 1.0 violated their rights under the Administrative Procedure Act ("APA"), the Fifth Amendment Due Process Clause, and the First Amendment.

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[7] *See id.* at 4 n.7 (citing TRAC, *Details on MPP (Remain in Mexico)*, https://web.archive.org/web/20211129165045/https://trac.syr.edu/phptools/immigration/mpp/ (filter set to "Hearing Location: All" and "Represented: Represented")).
[8] ECF No. 371-5, Explanation Memo at 3, 17, 21.
[9] *Id.* at 20.

In February 2022, Plaintiffs filed their Second Amended Complaint. ECF No. 200-1 (SAC).

In January 2021, DHS suspended new enrollments into MPP 1.0, and on June 1, 2021, terminated MPP 1.0. *See Biden v. Texas*, 597 U.S. 785, 793 (2022). In response to Texas and Missouri's challenge, the Northern District of Texas vacated the termination and enjoined the government to "enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA" and until the government could detain certain noncitizens subject to mandatory detention. *Id*. at 794. DHS subsequently implemented a different version of MPP—MPP 2.0. *See* ECF No. 261 at 42. After the Supreme Court affirmed the government's authority to end MPP 1.0, *Biden v. Texas*, 597 U.S. at 814, the injunction was vacated, *Texas v. Biden*, No. 2:21-cv-00067-Z, ECF No. 147 (N.D. Tex. Aug. 8, 2022). DHS then ended implementation of MPP.[10]

On March 15, 2023, the District Court in this case denied, in part, Defendants' motion to dismiss and certified a class and three subclasses of individuals subjected to MPP 1.0 who remain outside the United States. The District Court held the organizational plaintiffs, including ImmDef, had standing because MPP 1.0 had "perceptibly impaired their ability to perform the services they were formed to provide." ECF No. 261 at 32.

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[10] ECF No. 371-1 at 7 n.14 (citing Press Release, DHS Statement on U.S. District Court's Decision Regarding MPP (Aug. 8, 2022), https://www.dhs.gov/archive/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp).

On January 20, 2025, President Trump issued an executive order ordering MPP 1.0's reimplementation.[11] The next day, DHS announced that it would "restart[] the [2019] Migrant Protection Protocols (MPP) immediately."[12]

ImmDef moved for emergency relief through an *ex parte* application for a stay of MPP 1.0's reimplementation pending the conclusion of this litigation. ECF No. 371. The District Court granted the application, issuing a nationwide stay under 5 U.S.C. § 705 that postponed the effective date of MPP 1.0's reimplementation during this litigation. ECF No. 405 (the "Order").

Five days after the District Court issued the nationwide stay, Defendants filed an *ex parte* application to stay the District Court's order pending appeal. ECF No. 407. Defendants then filed the instant Motion. ECF No. 8.1.

On May 12, 2025, the District Court denied a stay pending appeal. ECF No. 413. The District Court ruled that reimplementation of MPP 1.0 would lead ImmDef's clients to "once again be subjected to violence, deprived of their ability to access the asylum system, and stripped of their ability to access and communicate with counsel." *Id*. at 10. The District Court concluded that the government faces no irreparable harm to its executive authority because it "neither has the discretionary

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[11] *Id.* at 7 n.15 (citing Exec. Order No. 14,165, Securing Our Borders, 90 Fed. Reg. 8468 (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/).

[12] *Id.* at 7 n.16 (citing Press Release, DHS, DHS Reinstates Migrant Protection Protocols, Allowing Officials to Return Applicants to Neighboring Countries (Jan. 21, 2025), https://www.dhs.gov/news/2025/01/21/dhs-reinstates-migrant-protection-protocols).

authority nor legitimate reasons to enforce programs that violate the [C]onstitution or federal law." *Id*. at 9.

LEGAL STANDARD

As the party requesting a stay pending appeal, Defendants "bear[] the burden of showing that the circumstances justify an exercise" of judicial discretion. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006 (9th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)). In considering whether to exercise that discretion, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (citation omitted). The first two factors are "the most critical." *Al Otro Lado*, 952 F.3d at 1007. "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435.

ARGUMENT

I. DEFENDANTS HAVE NOT MADE A STRONG SHOWING THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

A. The District Court correctly found that ImmDef has standing.

The District Court correctly applied *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), to conclude that "ImmDef has organizational standing to challenge MPP."

Order at 13. ImmDef has not, as Defendants claim, "improperly tried to spend its way into standing." Motion at 3.

Defendants' prior implementation of MPP 1.0 impacted ImmDef's already-existing core activities in critical ways, and MPP's reimplementation would have the same effect. ImmDef's core business activities consist of providing direct representation, counseling, and legal assistance to noncitizens in removal proceedings in and around southern California, with the goal of providing universal representation. *See* ECF No. 379 at 1–3; ECF No. 200-1 ¶¶ 24, 271–72; ECF No. 371-3, Toczylowski Decl. ¶¶ 2, 5 ("Toczylowski Decl."); ECF No. 371-4, Cargioli Decl. ¶¶ 3, 16 ("Cargioli Decl."); Order at 12. ImmDef has alleged "concrete and demonstrable injury" to these core activities, "which remain the same apart from, prior to, and after MPP's implementation." Order at 12–13; *see also* Toczylowski Decl. ¶¶ 21–25 (describing how, because of MPP 1.0, ImmDef had to hire additional staff, engage in cross-border travel, purchase international phone plans, and rent confidential meeting spaces in Mexico); Cargioli Decl. ¶¶ 16–18 (same); SAC ¶¶ 24, 271–72. ImmDef is thus similarly situated to the plaintiff organization in *Havens*, where the defendants' racially discriminatory steering practices "directly affected and interfered with" the plaintiff's "core business activities," *Hippocratic Med.*, 602 U.S. at 395, of facilitating "equal access to housing through counseling and other referral services," *Havens*, 455 U.S. at 379; *see also* Order at 12.

Not once do Defendants acknowledge, let alone engage with, ImmDef's identification of its core activities. Instead, Defendants argue that ImmDef engaged in "voluntary activity" in response to MPP 1.0 by establishing a new program and

processes to represent individuals subjected to MPP. Motion at 12. This argument flatly contradicts the District Court's finding that "the expenditures ImmDef undertook [in response to MPP] were necessary and not voluntary." Order at 13.

ImmDef needed to expand its legal representation across the U.S.-Mexico border to *continue* to carry out its core activities. Prior to MPP, such core activities had never required cross-border work because noncitizens seeking protection were not trapped in Mexico while their removal proceedings were pending. To avoid abandoning a core constituency and undermining its goal of universal representation in and around southern California, ECF No. 261 at 32 (citing *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 664 (9th Cir. 2021) ("*EBSC III*")), ImmDef had to expend resources to counteract and offset the barriers that MPP imposed. Defendants ignore ample record evidence of how their past unlawful actions have thus caused "concrete and demonstrable injury" to ImmDef's core activities, *Havens*, 455 U.S. at 379, which are far more extensive than the "issue-advocacy" work that was insufficient in *Hippocratic Medicine*, 602 U.S. at 395. *See, e.g.*, Toczylowski Decl. ¶¶ 8–15; Cargioli Decl. ¶¶ 7–13; SAC ¶¶ 273–83 (describing the increased time and resources needed to represent individuals in MPP 1.0).

Defendants are also mistaken that ImmDef's allegations of future harm are too "speculative" to support standing (Motion at 14), because evidence of imminent threat to a plaintiff's concrete interest is sufficient to demonstrate injury in fact. *See Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1154 (9th Cir. 2017); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). ImmDef has submitted evidence establishing imminent irreparable harm to its organization from the

reimplementation of MPP 1.0. *See generally* Toczylowski Decl.; Cargioli Decl. As the District Court recognized, "Defendants' reimplementation of MPP will cause ImmDef . . . irreparable harm," including "impairing its ability to provide meaningful legal representation to clients in removal proceedings; jeopardizing the safety of its staff; threatening its financial stability; and otherwise undermining its core business activities." Order at 30 (citing Toczylowski Decl. ¶¶ 7–15, 21–25).

As the District Court ruled, the fact that MPP 1.0 was reinstated with the same operative guidance is sufficient to find "that a threat to ImmDef's concrete interest is imminent." Order at 13 (cleaned up); *see also* ECF No. 413 at 10 ("Defendants' own statements 'demonstrate [an] immediate threatened injury'" to warrant a stay of MPP's reimplementation because ImmDef is "likely to suffer irreparable harm before a decision on the merits can be rendered.") (quoting *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022–23 (9th Cir. 2016)); *see also O'Shea v. Littleton*, 414 U.S. 488, 496–97 (1974) ("repeated [irreparable] injury" sufficient).

B. The nationwide stay does not violate 8 U.S.C. § 1252(f)(1).

The District Court properly determined that 8 U.S.C. § 1252(f)(1), which limits injunctive relief in district courts to certain individual immigration cases, did not limit the court's authority to issue a nationwide Section 705 stay. Defendants argue erroneously that the District Court's stay is a "coercive" order that constitutes an impermissible injunction under Section 1252(f)(1). Motion at 15. As the District Court noted, a "stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention that has been withheld by lower courts.'" Order at 17 (quoting *Nken*, 556 U.S. at 428–29). While an injunction "tells

someone what to do or not to do," *Garland v. Aleman Gonzalez*, 596 U.S. 543, 549 (2022) (cleaned up), "a stay . . . temporarily suspend[s] the source of authority to act—the order or judgment in question—not by directing an actor's conduct." *Nken*, 556 U.S. at 428–29. Additionally, Section 1252(f)(1) does not prevent courts from granting relief where the relief is directed towards "the implementation of a policy, not the statute itself," which is the case here where Plaintiffs seek to stay the reimplementation of MPP. Order at 18.

Defendants rely on *Aleman Gonzalez*, 596 U.S. 543, but that case involved a class-wide district court injunction, not a Section 705 stay. Defendants also contend that the District Court's Order "bars the agency from exercising its contiguous-territory return authority under 8 U.S.C. § 1252(b)(2)(C)," Motion at 15, but that is false. The Order only stays reimplementation of MPP.

In *Texas v. United States,* 40 F.4th 205 (5th Cir. 2022)—which Defendants repeatedly cite—the Fifth Circuit rejected the government's argument that *Aleman Gonzalez* deprives a lower court of the ability to vacate unlawful agency action. The Fifth Circuit held that "vacatur does nothing but re-establish the status quo absent the unlawful agency action. Apart from the constitutional or statutory basis on which the court invalidated an agency action, vacatur neither compels nor restrains further agency decision-making." *Id.* at 220. Surely if a court may permanently reestablish the status quo through vacatur, it has the authority to maintain the status quo temporarily through a stay pending the conclusion of litigation. Finding the

reasoning in *Texas* persuasive, the District Court properly retained authority to issue a Section 705 stay. Order at 18. No court to consider the issue has ruled otherwise.[13]

Further, citing *Al Otro Lado v. Executive Office for Immigration Review*, 120 F.4th 606, 627–28 (9th Cir. 2024), the District Court explained that several of Defendants' claims do not fall under Section 1252(f)(1) at all. Order at 18–19. The "relief sought here 'directly implicates' constitutional rights." *Id*. Defendants call this ruling "indefensible," *see* Motion at 17, but offer no authority to refute the District Court's reasoning.[14]

Defendants cite *Abbott v. Perez*, 585 U.S. 579 (2018), and other cases for the notion that the Supreme Court adopted a "practical effect" test to determine what constitutes injunctive relief. Motion at 15–16. As explained in ImmDef's motion to dismiss Defendants' appeal, *Abbott* and related cases do not discuss what constitutes an injunction. Rather, they discuss certain statutes that grant appellate courts jurisdiction over interlocutory orders that grant or deny injunctive relief.

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[13] This Court is currently considering this issue in *National TPS Alliance v. Noem*, No. 25-2120. Though the Supreme Court granted the government's stay request, the Order does not address the merits or provide any reasoning. 605 U.S., No. 24A1059 (May 19, 2025).

[14] Defendants also cite *Scripps-Howard Radio v. FCC* to argue that "section 705 does not create a new form of remedy that is distinct from an injunction." *See* Motion at 16 (citing 316 U.S. 4, 16–17 (1942)). But *Scripps-Howard* has nothing to say about Section 705, which was not added to the APA until 1966, more than twenty years after *Scripps-Howard*. *See* 5 U.S.C.A. § 705 (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393). *Scripps-Howard* simply held that (a) the All Writs Act granted federal courts authority to issue stays pending appeal of agency orders, and (b) the Communications Act of 1934 did not remove that power. 316 U.S. at 10 & nn.4, 17.

Courts have extended statutory exceptions to the final-judgment rule to certain non-injunctive orders that have the same practical effect as an injunction and meet other requirements. Those cases do not expand the scope of what *actually* constitutes an injunction. *See* ImmDef's Motion to Dismiss Appeal (filed May 19, 2025).

C. The nationwide stay is justiciable.

Defendants' argument that a Section 705 stay cannot be granted because DHS's policy was already in effect holds no water. Motion at 17–20. Courts, including the Supreme Court, routinely stay already-effective agency action. Order at 19 (collecting cases); 5 U.S.C. § 705 (a "reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action *or* to preserve status or rights pending conclusion of the review proceedings" (emphasis added)). Defendants themselves call their January 2025 decision a "reimplementation." ECF No. 378 at 13. Thus, the Court was well within its authority under Section 705 to restore the status quo to the "the last uncontested status which preceded the pending controversy". *Boardman*, 822 F.3d at 1024; *see also* Order at 19; *West Virginia v. EPA*, 577 U.S. 1126 (2016); *Texas v. Biden*, 646 F. Supp. 3d 753, 770–71 (N.D. Tex. 2022).

Contrary to Defendants' assertion, *see* Motion at 17–18, the 2019 version of MPP 1.0 and its 2025 reimplementation each constituted final agency action. ECF No. 413 at 7–8. The District Court correctly concluded that legal consequences flowed or will flow from MPP's 2019 implementation and its 2025 reimplementation because those actions had "actual or immediately threatened effects on both ImmDef and the population it serves." *Id.* at 8 (citing *Aracely, R. v.*

Nielsen, 319 F. Supp. 3d 110, 139 (D.D.C. 2018) (finding final agency action when a policy had "profound and immediate consequences" for plaintiffs)); *Wagafe v. Trump*, 2017 WL 2671254, at *10 (W.D. Wash. June 21, 2017) (finding final agency action when a policy "affect[ed] the thousands of applicants whose qualified applications [we]re allegedly indefinitely delayed or denied" as a result). The District Court was also correct in concluding that "the implementation of MPP marked the consummation of DHS's decisionmaking process," as "DHS staff were bound to implement MPP across the southern border." ECF No. 413 at 8 (cleaned up); *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1137 (9th Cir. 1998) (citing cases that a final agency action is established by a "conscious decision arrived at by the agency" or a "deliberate decision . . . to act"). Accordingly, MPP 1.0 constitutes final agency action subject to APA review.

D. ImmDef is likely to succeed on the merits of its claims.

The District Court correctly concluded that ImmDef is likely to succeed on the merits of its claims. Order at 20–27. Defendants' argument that the court "offered no coherent basis for enjoining anything," Motion at 20, is itself without merit, as Defendants "mainly repeat arguments that [the District Court] has already considered and rejected," ECF No. 413 at 7.

1. MPP 1.0 infringes on ImmDef's protected speech.

Defendants contend that any restrictions on protected speech are "content-neutral." Motion at 18–19. However, the District Court concluded that even if the

applicable restrictions are content neutral,[15] ImmDef has demonstrated that MPP "burden[s] substantially more speech than necessary to further [the Government's] interests." Order at 24 (citation omitted). Defendants are incorrect that the District Court ignored the government's interest in reimplementing MPP; instead, the Court correctly held that "that compelling interest should and can be vindicated without impermissibly restricting protected speech." *Id.*; *see Arroyo v. DHS*, 2019 WL 2912848, at *21 (C.D. Cal June 20, 2019) (citing *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005)). The District Court concluded that Defendants restricted ImmDef's speech in "at least three meaningful ways": by limiting the time and conditions under which counsel could provide legal services to their clients, by preventing ImmDef from advising potential clients, and by forbidding ImmDef from conducting Know Your Rights presentations. Order at 24. Contrary to Defendants' argument, Motion at 19, Defendants' implementation of MPP 1.0 trapped asylum seekers without adequate technology and resources to communicate with counsel or potential counsel, thereby restricting any meaningful alternative channels of communication. *See* ECF No. 207 at 31–32. Given that MPP 1.0 made it "exponentially more difficult" for ImmDef to consult with clients and prospective clients, the District Court correctly ruled that "[t]he reimplementation of

[15] MPP 1.0's restrictions on speech and conduct are classic content-based restrictions that target a certain form of speech on a specific subject: immigration-related legal advice to noncitizens in removal proceedings. ECF No. 207 at 31.

MPP will again impose these barriers," Order at 24, and will thus violate ImmDef's First Amendment rights.

2. MPP 1.0 violates the right to apply for asylum and the right to counsel codified in the Immigration and Nationality Act (INA).

The District Court correctly concluded that 8 U.S.C. § 1225(b)(2)(C), which provides that an asylum applicant arriving by land from a contiguous country may be returned to that territory, does not permit the government to abrogate "the legal rights bestowed upon asylum seekers by Congress." Order at 25–26. Accordingly, Defendants' argument that because MPP does not "bar [noncitizens] from applying for asylum" there could be no violation of 8 U.S.C. § 1158(a)(1), Motion at 19–20, once again fails. *See* Order at 25–26. "It is the hollowest of rights that [a noncitizen] must be allowed to apply for asylum," when the government has enacted policies such that, irrespective of the merits of their claims for protection, their application has virtually no chance of success. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 771 (9th Cir. 2018) ("*EBSC I*"). Indeed, Defendants themselves have "conceded publicly and in papers filed during this litigation that MPP 1.0 is indefensible as a matter of policy, in large part because of the burdens it imposed on the right to apply for asylum." Order at 26 (citing ECF No. 371-7, Memorandum from DHS Sec'y Mayorkas, Termination of the Migrant Protection Protocols (Oct. 29, 2021) ("Termination Memo")).

Defendants also dispute the District Court's ruling that 8 U.S.C. § 1229 mandates "the right to contact counsel and the time, space, and ability to consult

with counsel safely and confidentially." Order at 27. But they fail to acknowledge the unprecedented difficulty for ImmDef to provide representation in the United States to respondents who are forced to remain outside the country, or that noncitizens' "fundamental" right to counsel "must be respected in substance as well as in name." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (cleaned up). Moreover, as the District Court correctly found, "the Government cannot actively facilitate a breakdown in ongoing or potential attorney-client relationships, and then claim no responsibility or control over it." Order at 27. Defendants' implementation of MPP 1.0 thus violated the INA's right to counsel.

Finally, Defendants' argument that the District Court has made an "effort to read the contiguous-territory return authority out of the INA," Motion at 20, fails. Plaintiffs do not challenge the legality of any provision of the INA—rather, they challenge Defendants' implementation of the MPP *policy* that clearly violates procedural rights enshrined in statute. The District Court correctly concluded that Defendants' authority under 8 U.S.C. § 1225(b)(2)(C) must be exercised in accordance with the INA's other provisions. Order at 25 (citing *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018) (requiring courts to interpret statutes as a "harmonious whole rather than at war with one another")).

II. THE BALANCE OF HARMS STRONGLY FAVORS LEAVING THE COURT'S ORDER IN PLACE.

A. ImmDef will be irreparably harmed by a stay of the Court's Order.

Defendants' argument that ImmDef will not be substantially harmed by a stay, Motion at 22, ignores both their own statements and undisputed record evidence. As

the District Court found, Defendants' public statements in January 2025 that they were resuming implementation of the 2019 MPP policy "'demonstrate [an] immediate threatened injury' to warrant a stay." Order at 29 (quoting *Boardman*, 822 F.3d at 1022–23). As shown above, record evidence and past experience demonstrate that ImmDef will suffer irreparable harm if MPP 1.0 takes effect again. *See* Section I(A), *supra*.

B. Defendants will not be irreparably harmed absent a stay.

Defendants "must [also] show that a stay is necessary to avoid likely irreparable injury to the applicant while the appeal is pending." *Id*. "[P]erceived institutional injury" from pausing a new agency policy "is not 'irreparable,'" and "[s]imply showing some possibility of irreparable injury" is insufficient. *Doe #1 v. Trump*, 957 F.3d 1050, 1058–59 (9th Cir. 2020) (citing *Nken*, 556 U.S. at 434). Rather, Defendants must prove they are likely to suffer irreparable injury "during the period before the appeal is likely to be decided." *Al Otro Lado*, 952 F.3d at 1007. This factor is critical, as "stays must be denied to all petitioners who d[o] not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011). Defendants cannot make the necessary showing, because they cannot suffer harm from complying with the Constitution and with the immigration laws enacted by Congress. *See Lujan*, 504 U.S. at 576 (discussing "the public interest in Government observance of the Constitution and laws").

Defendants nonetheless claim they will be harmed by an inability to "effectuat[e]" the contiguous territory return provision of 8 U.S.C. § 1225(b)(2)(C),

Motion at 21 (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)), but—as the District Court found—that provision of the INA "must be read within the context of a broader statutory scheme" that includes the right to apply for asylum and the right to counsel. Order at 25–26. These parts of the INA, too, were enacted by Congress and must be given effect.

Nor are Defendants harmed by any improper intrusion into the Executive's authority. The Constitution vests Congress—not the Executive—with "plenary power over immigration." *SEC v. Jarkesy*, 603 U.S. 109, 129 (2024). "Where Congress has acted, the regulation of immigration is an area in which Congress exercises plenary power." *Proposed Interdiction of Haitian Flag Vessels*, 5 Op. O.L.C. 242, 244 (1981). Defendants rely on *United States ex rel. Knauff v. Shaughnessy*, Motion at 21, but that case concerned the narrower issue of the power to exclude noncitizens during wartime—which the Supreme Court located within *both* the legislative and executive branches—and not the entirety of the immigration system, which is governed by statutes Congress enacts. 338 U.S. 537, 542–43 (1950). Defendants' citation to *Trump v. Hawaii* regarding an entirely different statutory provision is likewise inapposite, since 8 U.S.C. § 1182(f) was not and is not at issue here, and Defendants never invoked § 1182(f) when implementing MPP 1.0. Motion at 21 (citing 585 U.S. 667, 684 (2018)).

Finally, Defendants have conceded that MPP is "indefensible as a matter of policy." Order at 26 (citing Termination Memo). It is hard to fathom how Defendants could be harmed by an inability to carry out an unlawful policy that they themselves have condemned so unequivocally. *See* ECF No. 413 at 9; *Castillo*, 449

F. Supp. 3d at 923 ("[T]here is no harm to the government when a court prevents the Government from engaging in unlawful practices.").

C. A stay would injure other interested parties.

Staying the District Court's Order would mean that asylum seekers could once again be subjected to upheaval and violence in Mexico, deprived of their ability to access the asylum system, and stripped of their ability to access and communicate with counsel. And as the District Court noted, some class members face the threat of immediate or irreparable injury should they approach the U.S. border to seek asylum, as they could again be placed in MPP. *See* Order at 9.

D. The public interest favors a continued stay of the MPP 1.0 reimplementation.

The public interest is served by a stay that ensures that individuals are not subjected to dangerous conditions in Mexico without access to counsel and meaningful access to the asylum system. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (the "public interest benefits" when "individuals are not deprived of their liberty" by a "likely unconstitutional process"); *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 734 (D.C. Cir. 2022) (recognizing the benefit of sparing individuals "extreme violence"); *see also Nken*, 556 U.S. at 436; *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1093–94 (9th Cir. 2020). MPP imposed "substantial and unjustifiable human costs" on asylum seekers forced to wait in Mexico. ECF No. 371-7 (Termination Memo) at 2. In the context of another policy that restricted asylum access under 42 U.S.C. § 265, the D.C. Circuit noted "stomach-churning evidence of death, torture, and rape" in Mexico. *Huisha-Huisha*, 27 F.4th at 733.

The public interest cannot support the deliberate and unlawful mistreatment of asylum seekers.

III. THE DISTRICT COURT'S ORDER IS NOT OVERBROAD.

The Court should reject Defendants' unsupported arguments to narrow the scope of the District Court's nationwide stay. Motion at 22. As a preliminary matter, Defendants argue that "all injunctions—even ones involving national policies[, like MPP,]—must be 'narrowly tailored to remedy the specific harm shown.'" *Id.* (citing *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) ("*EBSC II*")). However, ImmDef did not seek a nationwide *injunction*. ImmDef sought nationwide "emergency relief to stay Defendants' planned reimplementation of" MPP 1.0. ECF No. 371-1 at 1; *see Nat'l TPS All. v. Noem*, --- F. Supp. 3d ---, 2025 WL 957677, at *45 (N.D. Cal. Mar. 31, 2025) ("postpon[ing] or set[ting] aside agency actions, and vacatur of agency action is not the same thing as an injunction"), *application for stay granted*, 605 U.S., No. 24A1059 (May 19, 2025); *Nken*, 556 U.S. at 428–29 (unlike an injunction, a stay can "prevent[] some action before the legality of that action has been conclusively determined" by "temporarily suspending the source of authority to act . . . not by directing an actor's conduct").

The nationwide scope of the Order was not an abuse of discretion. First, "where agency action is challenged as a violation of the APA, nationwide relief is commonplace." *Nat'l TPS All.*, 2025 WL 957677, at *45 (citing *EBSC III*, 993 F.3d at 680–81). Second, "broad relief is appropriate" in the immigration context "to ensure uniformity and consistency in enforcement." *Texas v. Biden*, 646 F. Supp. 3d at 781. A stay limited to the Central District of California would "not remedy

ImmDef's inability to meet with potential clients, who would be located outside th[e] [Central] District." ECF No. 413 at 10. Further, a geographically limited stay would allow Defendants to circumvent the Order by moving ImmDef's potential clients out of California and changing the venue of their MPP proceedings to other jurisdictions along the U.S.-Mexico border.[16] Third, any such limitation would defeat the purpose of a Section 705 stay—to maintain the "relevant status quo," which would not be achieved by a "piecemeal approach." Order at 31–32 (quoting *Texas v. Biden*, 646 F. Supp. 3d at 781); ECF No. 413 at 10.[17]

Lastly, the District Court's stay of MPP 1.0's reimplementation is not "in tension with" the proceedings in *Texas v. Biden*, 646 F. Supp. 3d at 764, 781, which concern the October 29, 2021 Termination Memorandum. *See* Motion at 22; *cf.* ECF No. 371-1 at 1; Order at 28–30 (analyzing the harm caused by the reimplementation of the *2019* MPP policy). Unlike this case, those proceedings, which are in abeyance until July 2025 and currently administratively closed, neither address past implementation harms of MPP 1.0, nor appear to be currently justiciable as both sides now want MPP to be reimplemented. *See* Order at 6; ECF No. 413 at 8; Order, *Texas v. Biden*, No. 2:21-cv-0067-Z (N.D. Tex. Feb. 5, 2025), ECF No. 213. Indeed, the District Court has made clear that reimplementation of MPP 1.0 and the prior

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[16] *See, e.g.*, American Immigration Council, *The "Migrant Protection Protocols": An Explanation of the Remain in Mexico Program*, at 3 (Feb. 2025), https://shorturl.at/NkQZ5.

[17] Defendants have also pointed to recent Supreme Court cases on the propriety of nationwide injunctions. ECF No. 407 at 12. However, these cases relate to injunctions—not stays. *See EBSC III*, 993 F.3d at 680–81.

administration's MPP termination memorandum are separate agency actions, and "it is unclear whether there even remains a case or controversy in [*Texas v. Biden*]." ECF No. 413 at 8. Thus, there is no conflict with *Texas v. Biden* here.

CONCLUSION

Defendants' Motion should be denied.

Respectfully submitted,

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By: */s/ Matthew T. Heartney*

Matthew T. Heartney
Hannah R. Coleman
Daniel S. Shimell
Allyson C. Meyers
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Fl.
Los Angeles, CA 90017
(213) 243-4000

Steven L. Mayer
Sean M. SeLegue
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 356-3000

Kathleen X. Weng
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 942-5000

Melissa Crow
CENTER FOR GENDER & REFUGEE STUDIES
1121 14th Street, NW, Suite 200
Washington, D.C. 20005
(202) 355-4471

Edith Sangueza
CENTER FOR GENDER & REFUGEE STUDIES
26 Broadway, 3rd Floor
New York, NY 10004
(415) 581-8839

Dulce Rodas
CENTER FOR GENDER & REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
(415) 581-8843

Stephanie M. Alvarez-Jones
Victoria F. Neilson
NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD
1201 Connecticut Ave. NW
Suite 531 #896645
Washington, D.C. 20036
(202) 470-2082

Stephen W. Manning
Jordan Cunnings
Kelsey Provo
Tess Hellgren
Rosa Saavedra Vanacore
INNOVATION LAW LAB
333 SW 5th Ave, Suite 200
Portland, OR 97204
(503) 922-3042
Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2025, I caused the foregoing brief to be electronically filed using the CM/ECF system. I certify that counsel for the parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 19, 2025

/s/ Matthew T. Heartney
Matthew T. Heartney

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 28.1-1 because the brief contains 5,593 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

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/s/ Matthew T. Heartney
Matthew T. Heartney