

No. 25-2581

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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IMMIGRANT DEFENDERS LAW CENTER,

*Plaintiff-Appellee,*

v.

KRISTI NOEM, et al.,

*Defendants-Appellants.*

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

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**PLAINTIFF-APPELLEE IMMIGRANT DEFENDERS  
LAW CENTER'S ANSWERING BRIEF**

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## INTRODUCTION

The 2019 Migrant Protection Protocols (“MPP 1.0”), also known as “Remain in Mexico,” subjected some 70,000 asylum applicants to brutal and dangerous conditions in Mexico while depriving them of meaningful access to the asylum process. Plaintiff-Appellee Immigrant Defenders Law Center (“ImmDef”) brought this action in 2020 to challenge the implementation of MPP 1.0.

Despite the Department of Homeland Security’s own findings in 2021 that the program was deeply flawed, Defendants chose earlier this year to reimplement MPP 1.0 based on supposed (and unidentified) changes in conditions on the border. ImmDef filed an application to stay the reimplementation pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 705. Section 705 allows a reviewing court to “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” “[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury.”

ImmDef’s application showed that the reimplementation would adversely affect ImmDef’s core mission of ensuring every immigrant in and around southern California has access to counsel, and would violate the right to apply for asylum, the right to be represented by counsel in doing so, and the First Amendment. The district court granted ImmDef’s application and issued a “nationwide” stay of Defendants’

reimplementation of MPP 1.0 pending the conclusion of this litigation. In finding a “nationwide” stay was “necessary and appropriate,” the district court concluded that ImmDef established a likelihood of success on the merits of its claims, a likelihood of irreparable harm in the absence of immediate relief, and that the balance of equities and the public interest tipped sharply in ImmDef’s favor.

Defendants raise a number of supposed barriers to reaching the merits of their appeal, but this Court and the district court have already dispatched those arguments, ruling that (1) ImmDef has organizational standing; (2) reimplementation of MPP 1.0 constitutes final agency action subject to APA review; (3) ImmDef’s claims are ripe; and (4) 8 U.S.C. § 1252(f)(1) does not bar a stay under the APA.<sup>1</sup> In their Opening Brief, Defendants contend that the district court stay goes beyond the scope of ImmDef’s operative 2021 complaint challenging MPP 1.0, ignoring their own concession that they seek to reimplement MPP 1.0 exactly as it was originally adopted. Moreover, the basis for the stay granted by the district court tracks some of the claims in the SAC. On the merits, ImmDef has shown that the reimplementation likely violates the APA by infringing the right to apply for asylum with the assistance

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<sup>1</sup> This Court did not expressly address ripeness in its prior Order granting in part and denying in part Defendants’ motion for a stay pending appeal, but the substance of the Court’s standing analysis unmistakably found ImmDef’s claims ripe. *See* Dkt. 50.1 at 25 (rejecting Defendants’ argument that “ImmDef’s harm is speculative”); *id.* at 26 (“[A] threat to ImmDef’s concrete interest is imminent.” (quoting the district court)).

of counsel as codified in the Immigration and Nationality Act (INA) as well as the First Amendment. Defendants fail to surmount the high hurdle of demonstrating that the district court abused its discretion by granting a stay. Accordingly, this Court should affirm the district court's well-reasoned order.

### **STATEMENT OF JURISDICTION**

Plaintiff previously filed a motion to dismiss the appeal arguing that this Court does not have appellate jurisdiction (Dkt. 9.1), which this Court denied. Dkt. 50.1 at 19.

### **STATEMENT OF THE ISSUES**

1. Did the district court conclude correctly that (a) ImmDef had standing to bring this action, (b) the reimplementing of MPP was a final agency action, (c) ImmDef's claims are ripe, and (d) 8 U.S.C. § 1252(f)(1) did not bar entry of a stay?
2. Did the district court abuse its discretion in issuing the stay?

### **PERTINENT STATUTES AND REGULATIONS**

In addition to the statutes Defendants submitted, Dkt. 52.2, Plaintiff is reproducing 5 U.S.C. § 706 as an addendum.

## STATEMENT OF FACTS

### **A. MPP 1.0 Subjected Asylum Seekers to Dangerous Conditions and Deprived Them of Meaningful Access to the Asylum Process.<sup>2</sup>**

In January 2019, the Department of Homeland Security (DHS) began an unprecedented expansion of its hitherto sparingly used authority, 8 U.S.C. § 1225(b)(2)(C), to return certain migrants to Mexico to await their U.S. immigration court hearings. MPP 1.0 lasted for just over two years, until February 2021. It affected nearly 70,000 asylum seekers who were sent to Mexico. 1-ER-7.<sup>3</sup>

The district court found that “[i]n Mexico, [ImmDef’s] MPP [1.0] clients faced extraordinary risks to their personal safety; some were kidnapped, tortured, raped, sexually and/or physically assaulted, and had no meaningful shelter access while waiting for their hearings.” 1-ER-30. According to a retrospective DHS analysis relied upon by the district court and by this Court in its Order, *see* Dkt. 50.1 at 32-33, MPP 1.0 was characterized by “numerous structural flaws . . . including concerns about the non-refoulement process, fairness and reliability of proceedings,

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<sup>2</sup> As the Court’s prior Order includes a thorough “Background and Procedural History,” Dkt. 50.1 at 9-13, ImmDef here recounts only the most essential facts of this litigation.

<sup>3</sup> *See also* 2-ER-235, DHS’s “Explanation of the Decision to Terminate the Migrant Protection Protocols” (Oct. 29, 2021) (“Explanation Memo”), [https://www.dhs.gov/sites/default/files/publications/21\\_1029\\_mpp-terminationjustification-memo.pdf](https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-terminationjustification-memo.pdf).

notice of hearings, and disparate impact on court appearance rates and outcomes.” 1-ER-27.

Access to and communication with actual or potential MPP 1.0 clients was a particularly acute problem for immigration legal service providers like ImmDef. The district court found that “MPP 1.0 forced noncitizens to remain in Mexico pending their removal hearings in San Diego immigration[] courts; the Government cannot actively facilitate a breakdown in ongoing or potential attorney-client relationships, and then claim no responsibility or control over it.” 1-ER-28. MPP 1.0 severely obstructed legal representation for noncitizens subjected to the policy. While 80% of asylum seekers appearing in immigration court had legal representation,<sup>4</sup> only 10% of individuals subjected to MPP 1.0 were able to obtain representation<sup>5</sup> due to the constraints the policy placed on them and on immigration counsel. During MPP 1.0, the district court found organizations providing legal services to noncitizens, including ImmDef, faced significant barriers to communicating with individuals subjected to MPP 1.0. 1-ER-25.

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<sup>4</sup> 2-ER-188 n.6 (citing TRAC, *Asylum Decisions*, <https://web.archive.org/web/20250101084914/https://trac.syr.edu/phptools/immigration/asylum/> (filters set to “Immigration Court” and “Represented”). This represents the total number of cases in immigration court (including both detained and non-detained cases).

<sup>5</sup> 2-ER-188 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”).

DHS itself later 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.” Explanation Memo at 2-ER-238, 252, 256. The challenges to obtaining counsel were so grave that DHS acknowledged that “[i]nadequate access to counsel cast[] doubt on the reliability of removal proceeding[s]” during MPP 1.0. 2-ER-252.

### **B. ImmDef and Other Plaintiffs Commenced This Action.**

In October 2020, ImmDef and other plaintiffs filed this action challenging the manner in which MPP 1.0 had been implemented. In January 2022, Defendants filed a motion to dismiss on grounds including mootness, jurisdictional bars, lack of standing, and failure to state claims upon which relief could be granted. The district court largely denied the motion on March 15, 2023. 3-ER-295. The court concluded that most of the action was not moot, 3-ER-305–08; no jurisdictional bars applied to Plaintiffs’ claims, 3-ER-308-24; and both organizational plaintiffs had standing, 3-ER-324–27. The court allowed all but one of Plaintiffs’ claims to proceed, and certified an “Inactive MPP 1.0” class as well as three subclasses. 3-ER-327–43, 368.

### **C. The Biden Administration Terminated MPP 1.0 Because of Major Flaws in the Program.**

With a change of administration in January 2021, new enrollments into MPP 1.0 were suspended. *See Biden v. Texas*, 597 U.S. 785, 790-91 (2022). On October 29, 2021, then-DHS Secretary Alejandro Mayorkas issued a 39-page Explanation Memo, which stressed that DHS had returned noncitizens to conditions in Mexico that were crowded, unsanitary, and beset by violence. 2-ER-241. Based on direct and reported evidence of MPP 1.0’s harms, the DHS Secretary concluded that there are “inherent problems with the program—including the vulnerability of migrants to criminal networks, and the challenges associated with accessing counsel and courts across an international border.” 2-ER-238. As discussed in the Explanation Memo, MPP 1.0 hearing outcomes demonstrated that the program effectively denied noncitizens any meaningful opportunity to apply for asylum. 2-ER-255.

Texas and Missouri challenged the Biden administration’s termination of MPP 1.0, culminating in a June 2022 Supreme Court decision, *Biden v. Texas*, 597 U.S. at 785. The Court considered “whether the Government’s rescission of the Migrant Protection Protocols violated the Immigration and Nationality Act and whether the Government’s second [October 2021] termination of the policy was a valid final agency action.” *Id.* at 791. The Court reversed the Fifth Circuit’s determination that MPP 1.0 was mandatory for migrants who could not be detained,

noting the availability of parole for this group.<sup>6</sup> *Id.* at 807. The Court also determined that the decisions below had erred in deeming the Explanation Memo not to be “final agency action.” *Id.* at 807-14. On remand, the district court issued a Section 705 stay of the October 2021 memoranda and decision pending completion of the litigation. *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. Dec. 15, 2022), ECF 178.

**D. Defendants Decide to Reimplement MPP 1.0, and the District Court Stays that Agency Action.**

Despite the thorough analyses by DHS in the Explanation Memo, and the district court in its motion to dismiss order, on January 21, 2025, Defendants announced their decision to reimplement the exact same MPP 1.0 with one conclusory sentence of explanation: “The situation at the border has changed and the facts on the ground are favorable to resuming implementation of the 2019 MPP Policy.”<sup>7</sup> After the announcement that MPP 1.0 would be “immediately”

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<sup>6</sup> Defendants spend pages of their brief describing their proposed reading of the statute governing expedited removal and immigration officers’ inspection of applicants for admission, which would require mandatory detention in the United States of all noncitizens in removal proceedings under 8 U.S.C. § 1229a. *See* Dkt. 52.1 (“AOB”) at 6-10; 8 U.S.C. § 1225(b). But Defendants’ arguments that Section 1225(b)(2)(A) requires mandatory detention during the pendency of removal proceedings run counter to the Supreme Court’s ruling that in the context of enforcement and arrests, “shall” leaves room for discretion. *United States v. Texas*, 599 U.S. 670, 679 (2023) (the “principle of enforcement discretion over arrests and prosecutions extends to the immigration context”).

<sup>7</sup> U.S. Dep’t of Homeland Security, *DHS Reinstates Migrant Protection Protocols, Allowing Officials to Return Applicants to Neighboring Countries* (Jan. 21, 2025) (“Reimplementation Announcement”), <https://www.dhs.gov/news/2025/01/21/dhs->

reimplemented, Plaintiff ImmDef filed an application to stay that decision. 2-ER-174. On April 16, 2025, the district court granted a stay. 1-ER-2.

The district court again concluded that “the decisionmakers behind MPP 1.0 failed to consider or inadequately weighed the considerable problems Defendants now recognize, or that they used their authority in such a way that conflicted with the legal rights bestowed upon asylum seekers by Congress.” 1-ER-27 (stay order); 3-ER-329 (order denying motion to dismiss); *see also* Dkt. 50.1 at 32 (this Court affirming: “The district court correctly concluded that § 1225(b)(2)(C) . . . does not permit the government to abrogate ‘the legal rights bestowed upon asylum seekers by Congress.’”).

Turning to ImmDef’s access-to-counsel claim, the district court found that ImmDef had

ple[d] with great specificity the ways in which MPP “obstructed legal representation for all individuals . . . blocking it entirely for over 90 percent of impacted individuals.” Among their allegations, Plaintiffs identify deficiencies in the lists of legal service providers akin to those in . . . ; attorney-client consultations limited to an “illusory one-hour window before a scheduled hearing”; lawyers who were forced to meet with their clients in nonconfidential settings; and unrepresented noncitizens who “were prohibited even from approaching legal representatives to discuss possible representation.”

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[reinstates-migrant-protection-protocols](#). *See also Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. Jan. 31, 2025), ECF 211 at 2 (DHS stated that “MPP has been reimplemented and will be operational [within 180 days].”).

1-ER-28 (citations omitted). In its prior order on the motion to dismiss, the district court had noted that “Defendants do not contest these allegations and their impact in ‘hinder[ing] access to counsel.’” 3-ER-331.

Finally, the district court’s stay order concluded that ImmDef had shown a likelihood of success on the merits with respect to its First Amendment claim because of Defendants’ unreasonable restrictions on the provision of legal services, prohibitions on communicating with and advising potential clients while they were in the United States for their hearings, and refusal to allow Know Your Rights presentations in the immigration court building. 1-ER-25.

After Defendants appealed the district court’s stay of MPP 1.0 reimplementaion, this Court on July 18, 2025, stayed that order pending appeal except as to present and future clients of ImmDef; as a result, the district court stay remains in effect as to ImmDef’s present and future clients. This Court emphasized the Explanation Memo’s conclusions to support its determination that “[t]he record at this stage of the proceedings firmly supports Plaintiff’s claims. The burdens imposed upon the right to apply for asylum with the assistance of counsel are severe and have the effect of barring swaths of noncitizens from exercising their statutory right to apply for asylum.” Dkt. 50.1 at 33. MPP 1.0 did and would again impose on ImmDef harms including, in the district court’s words, “impairing [ImmDef’s] 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.” 1-ER-31. This Court affirmed these four harms as “likely [to] outweigh[] the harm to the government and public’s interest in the Executive Branch exercising its contiguous-territory return authority without restriction in the form of the Remain in Mexico policy.” Dkt. 50.1 at 38.

### STANDARD OF REVIEW

Defendants urge the Court to review the district court’s grant of Section 705 relief for abuse of discretion, pointing to the standard for a preliminary injunction, *see* AOB 17-18, even though a Section 705 stay is distinct from a preliminary injunction. Given that “the factors considered in determining whether to postpone agency action pursuant to Section 705 substantially overlap with the *Winter* factors for a preliminary injunction,” Dkt. 50.1 at 20, ImmDef agrees with Defendants regarding the appropriate standard of review.

The Court’s review at this juncture is “narrow,” *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017), and will result in reversal of a legal determination only when the district court’s “application of the [preliminary injunction] standard is illogical, implausible, or without support in inferences that may be drawn from the record.” *Id.*; *see Johnson v. Couturier*, 572 F.3d 1067, 1079 (9th Cir. 2009) (“[a]s long as the district court got the law right, it will not be reversed simply because the appellate

court would have arrived at a different result if it had applied the law to the facts of the case.”) (internal quotation marks and citation omitted).

District court factual determinations underlying a preliminary injunction are reviewed for clear error and may be reversed only if “illogical, implausible, or without support in inferences that may be drawn from the facts in the record.” *American Trucking Ass’ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 395 (9th Cir. 2011), *rev’d on other grounds*, 569 U.S. 641 (2013).

### **SUMMARY OF ARGUMENT**

The Court should reject Defendants’ various procedural arguments raised as barriers to reaching the merits. As this Court has already held, ImmDef has standing to challenge Defendants’ reimplementation of MPP 1.0 because Defendants’ actions “directly affected and interfered with [ImmDef’s] core business activities.” *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 395 (2024); *see also* Dkt. 50.1 at 22. The district court also correctly found that ImmDef’s claims are ripe for judicial review: Defendants’ own statements confirm that MPP 1.0 was set to be reimplemented “immediately” with the same 2019 guidance. Reimplementation Announcement, *supra* note 7; 2-ER-165 n.7.

Similarly, this Court’s findings on final agency action and remedies need not be reconsidered. Defendants’ decision to reimplement MPP 1.0 was final agency action that is judicially reviewable. And Defendants have provided no reason to

disturb this Court's conclusion that 8 U.S.C. § 1252(f)(1) does not bar APA relief under 5 U.S.C. § 705. Every court to consider the issue has found that Section 705 stays are not injunctive for purposes of Section 1252(f)(1). *See infra* Part I.D.

Similarly unavailing is Defendants' assertion that the district court's stay is not within the scope of ImmDef's Second Amended Complaint. As Defendants have confirmed, the 2025 reimplemention adopted the same 2019 MPP 1.0 policy that ImmDef's operative complaint challenges. 2-ER-149, 165 & n.7.

On the merits, ImmDef has repeatedly demonstrated that it is likely to succeed on its claims. Regarding ImmDef's APA claims, the district court correctly concluded that the reimplemention of MPP 1.0 unduly burdens the right to apply for asylum, 8 U.S.C. § 1158(a)(1). Defendants' attempt to reduce that right to the mere filing of an application for asylum enfeebles the right itself. Indeed, DHS itself has acknowledged that MPP 1.0 was "indefensible" in part because of the "burdens it imposed on the right to apply for asylum." 3-ER-328 (citing 3-ER-524). The record confirms that the 2019 implementation of MPP 1.0 foreclosed or severely burdened the opportunity to apply for asylum for many people, and its reimplemention would have the same consequences.

Likewise, the district court was correct in concluding that reimplemention of MPP 1.0 would thwart the statutory right to counsel. MPP 1.0's restrictions on ImmDef's ability to meet and speak with its clients unlawfully restricted

noncitizens' access to counsel in immigration court proceedings. *See* 8 U.S.C. § 1229; *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 565-66 (9th Cir. 1990).

Additionally, the district court correctly concluded that ImmDef is likely to succeed on its First Amendment claim. The strict limitations on the ability of ImmDef and other legal services providers to speak and meet with potential or existing clients—such as the “illusory one-hour window before a scheduled hearing,” 1-ER-28, represent unreasonable restrictions on ImmDef’s speech.

The district court’s determination that the balance of equities and public interest favored a stay should also be upheld. As with the original implementation of MPP 1.0, ImmDef has sufficiently demonstrated that MPP 1.0’s reimplemention will cause it irreparable harm. *See* 1-ER-29; Dkt. 50.1 at 25-26. Conversely, Defendants are not harmed by complying with Constitutional and legal obligations.

Lastly, a “nationwide” stay is appropriate. The cases Defendants rely on are irrelevant because they concern nationwide *injunctions*, not emergency relief to stay federal agency action. Indeed, *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2254 n.10 (2025) does not address whether the APA authorizes federal courts to vacate federal agency action, and Defendants do not cite cases limiting the scope of a stay under Section 705 of the APA. And broad relief is appropriate here: not only does immigration warrant uniformity, but the practical operation of border enforcement and MPP mean that noncitizens could otherwise be moved out of ImmDef’s reach,

and that individuals able to retain ImmDef would likely already be subject to MPP 1.0.

## ARGUMENT

### I. DEFENDANTS' THRESHOLD CHALLENGES LACK MERIT.

Defendants raise a plethora of supposed barriers to reaching the merits, none of which is valid.

#### A. ImmDef Has Standing.

The district court and this Court correctly concluded that ImmDef has organizational standing to challenge MPP 1.0's reimplementation. *See* 1-ER-11-14; Dkt. 50.1 at 22-26. Contrary to Defendants' arguments, this Court's standing determination is correct.

Defendants misconstrue ImmDef's basis for standing. ImmDef is not relying on a "diversion of resources" theory to prove it has organizational standing. *See* AOB 24-25. Rather, ImmDef has established organizational standing because Defendants' actions "directly affected and interfered with [ImmDef's] core business activities." *Hippocratic Medicine*, 602 U.S. at 395; *see also* Dkt. 50.1 at 22. Contrary to Defendants' assertion, ImmDef's activities do not need to "be assessed as they existed prior to adoption of the challenged policy," AOB 23, because *Hippocratic Medicine* does not require that "core business activities" be "pre-existing."

The “already-existing” and “pre-existing” language on which Defendants rely appears only in *Arizona Alliance for Retired Americans v. Mayes*, which has been vacated by this Court’s decision to rehear that case *en banc*. 117 F.4th 1165 (9th Cir. 2024), *reh’g en banc granted, opinion vacated*, 130 F.4th 1177 (9th Cir. Mar. 18, 2025); *see also* 1-ER-11, 13; 2-ER-110–11. Accordingly, the *Arizona Alliance* decision no longer controls. *See, e.g., United States v. Robinette*, No. 13-CR-0003, 2013 WL 211112, at \*5 (E.D. Cal. Jan. 18, 2013) (“Because the panel opinion was vacated, this Court cannot rely on the decision as controlling.”).

In any event, as the district court and this Court have held, ImmDef has presented sufficient evidence to show that implementation of MPP 1.0 impacted ImmDef’s pre-existing core activities, and that the reimplementing of MPP 1.0 would have the same effect. *See* 1-ER-13; Dkt. 50.1 at 24-26. ImmDef’s core business activities include providing direct representation, counseling, and legal assistance to noncitizens in removal proceedings in and around southern California, with the goal of providing universal representation.<sup>8</sup> 2-ER-124–26; 4-ER-570, 628 (SAC ¶¶ 24, 271-72); 2-ER-214–15 (“Toczyłowski Decl.” ¶¶ 2, 5); 2-ER-227, 233

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<sup>8</sup> ImmDef’s goal of providing “universal representation” to noncitizens in removal proceedings in and around southern California is not a “broad mission statement” that would “leave organizational standing boundless,” as Defendants incorrectly suggest. AOB 26-27. To the contrary, ImmDef’s goal is specific to noncitizens in removal proceedings in a particular geographic area.

(“Cargioli Decl.” ¶¶ 3, 16). ImmDef’s goal is to serve as a “public defender” for asylum seekers. 2-ER-215 (Toczyłowski Decl. ¶ 5).

As this Court has already concluded, in pursuit of that goal, “ImmDef expanded its legal representation across the U.S.-Mexico border to *continue* carrying out its core activities and longstanding mission,” Dkt. 50.1 at 24, not as a “voluntary shift . . . *in response to* MPP,” AOB 25, as Defendants incorrectly suggest. Rather, “[t]o avoid abandoning a core constituency and undermining its mission of universal representation of asylum seekers in [and around southern] California, ImmDef had to expand its reach to counteract and offset the barriers that MPP imposed.” Dkt. 50.1 at 24; *see also* 1-ER-14.

For instance, before MPP 1.0, ImmDef did not represent clients in the San Diego Immigration Court because motions to transfer venue to Los Angeles immigration courts were routinely granted. 2-ER-216–17 (Toczyłowski Decl. ¶ 9). However, such motions in MPP cases were routinely denied, and ImmDef thus expanded its operations to provide legal representation to noncitizens in San Diego whom it would have represented in Los Angeles before MPP 1.0. *Id.* In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), the Supreme Court concluded that the plaintiff organization’s activities to counteract the effects of the defendant’s racial steering practices were sufficient to establish standing. Similarly, here, the

district court found ImmDef's activities to counteract the effects of Defendants' practices sufficient to establish standing. 1-ER-13–14.

Defendants' arguments that ImmDef "engaged in acts beyond its preexisting core business activities," AOB 24, and "voluntarily chose to take on a new line of work," AOB 25 (emphasis omitted), are flat-out wrong. ImmDef took necessary steps to continue representing its target client base: it expanded its office space, established the Cross-Border Initiative, and engaged in cross-border travel to Mexico to continue providing direct representation, counseling, and legal assistance to noncitizens in removal proceedings in and around southern California. *See* 2-ER-114, 124-26; 2-ER-227 (Cargioli Decl. ¶ 3) ("ImmDef believes in providing universal representation so that no immigrant is forced to face removal proceedings without counsel."); 4-ER-570, 628 (SAC ¶¶ 24, 271-72). ImmDef is thus similarly situated to the plaintiff organization that established standing in *Havens*, where the defendants' racially discriminatory steering practices "directly affected and interfered with" the organization's "core business activities," *Hippocratic Medicine*, 602 U.S. at 395, of facilitating "equal access to housing through counseling and other services," *Havens*, 455 U.S. at 379; *see also* Dkt. 50.1 at 25.

Moreover, ImmDef's injuries are not speculative. ImmDef's experience with the MPP 1.0 implementation establishes imminent irreparable harm from MPP's reimplementing. As in 2019, Defendants' reimplementing of MPP will send

ImmDef’s prospective clients to Mexico to await their hearings, and ImmDef will have to hire new staff, engage in cross-border travel, purchase international phone plans, and rent confidential meeting spaces in Mexico to adequately and ethically represent the population ImmDef serves. 2-ER-218, 219, 223-24 (Toczyłowski Decl. ¶¶ 12, 15, 21-25); 4-ER-628–31 (SAC ¶¶ 273-84); *see also* Dkt. 50.1 at 25.

ImmDef will also be impacted by the time limits and other restrictions on when and how its staff can communicate with clients prior to court hearings pursuant to MPP policy guidance. 2-ER-231 (Cargioli Decl. ¶¶ 10-11); *see, e.g.*, 2-ER-251–52 (Explanation Memo). Indeed, “[t]he 2019 directive establishing the one-hour time limit before a court hearing is a component of MPP that Defendants have confirmed is part of the ‘current operative guidance’ for its reimplementaion.” 1-ER-31. As the district court and this Court have concluded, the fact that MPP was reinstated in 2025 using the same operative guidance as the 2019 implementation is sufficient to find that “the irreparable harm ImmDef faces is imminent and not speculative.” 1-ER-30; Dkt. 50.1 at 25; *see also* 2-ER-44 (citing *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) (“[P]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury.”).

Defendants have not contested ImmDef’s standing under the zone of interests doctrine. *See, e.g.*, AOB 22-28. Whether ImmDef’s claims fall within the “zone of

interests” is a “‘prudential’ inquiry that asks ‘whether the statute grants [ImmDef] the cause of action that [it] asserts.’” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 767 (9th Cir. 2018) (“*EBSC I*”) (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)). The zone of interests test “forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue.” *Lexmark*, 572 U.S. at 130 (internal quotation marks and citation omitted). As the district court determined, ImmDef falls squarely within the INA’s zone of interests. 1-ER-14–15; *see also* 2-ER-126–27; *EBSC I*, 932 F.3d at 768.

Accordingly, reimplementing of MPP 1.0 will “directly affect[] and interfere[] with [ImmDef’s] core business activities” by “perceptibly impair[ing] [its] ability to provide counseling” and other services to noncitizens in and around southern California who seek asylum and other protection in the United States. *Hippocratic Medicine*, 602 U.S. at 395 (quoting *Havens*, 455 U.S. at 379). Thus, the district court did not abuse its discretion when concluding that “ImmDef has organizational standing to challenge MPP.” 1-ER-14.

## **B. The Reimplementation Decision Was a Final Agency Action.**

This Court has already determined that the 2025 reimplementation of MPP 1.0 was a discrete and final agency action, Dkt. 50.1 at 29-30.

An agency action is final if it meets two conditions: first, it “must mark the consummation of the agency’s decisionmaking process,” and second, “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). Under these criteria, the government’s decision to restart MPP constitutes final agency action.

*First*, DHS’s decision to reimplement MPP 1.0 “constituted the consummation of DHS’s decisionmaking process as distinguished from the policy decisions of the prior administration’s DHS.” Dkt. 50.1 at 30. As the Supreme Court held, the Biden administration’s October 2021 decision to terminate MPP (like its prior June 2021 decision to do so) was final agency action under the APA. *Biden v. Texas*, 597 U.S. at 808-09. DHS’s decision to terminate, explicated in its October 2021 memoranda, was final agency action because it “*result[ed] in a final determination* of rights or obligations,” even though the agency could not stop implementing MPP while the Texas district court’s injunction remained in effect. *Id.* at 809 n.7 (citing *id.* at 832-44 (Alito, J., dissenting)). Just as the decision to terminate MPP constituted final agency action, the decision to restart it was “a

reversal of the previous final administrative action and was a deliberate decision to reinstitute Remain in Mexico.” Dkt. 50.1 at 30.

*Second*, legal consequences will flow from MPP 1.0’s reimplementation as the reinstated program has an “actual or immediately threatened effect” on ImmDef, the client population it serves, and other parties—including other asylum seekers subject to MPP. Dkt. 50.1 at 29-30 (citing *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 894 (1990)); *Wagafe v. Trump*, No. C17-0094-RAJ, 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).

Against this backdrop, Defendants’ argument that DHS’s decision to reimplement MPP 1.0 was “merely a press release” fails. AOB 31. As the Supreme Court explained, the October 2021 decision to terminate MPP was not an “attempt” to end MPP, but rather final agency action, as it was a final determination of agency policy and of its employees’ obligation to carry out that policy. *Biden v. Texas*, 597 U.S. at 809-10 & n.7. Defendants’ recharacterization of the October memoranda as devoid of legal consequences is therefore unsupportable. The DHS memoranda reflected Secretary Mayorkas’s decision to terminate MPP in light of the humanitarian catastrophe that the program created, inadequate access to counsel for people enrolled in MPP, and concerns about failures in the non-refoulement

screening process that resulted in the return of people to possible persecution or torture in Mexico. 2-ER-249–53 (Explanation Memo).

Likewise, Defendants’ claims that MPP was in effect from 2021 until January 2025 and that DHS’s press release was “merely an announcement . . . regarding an on-going program or policy,” AOB 32 (citing *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006)), denies reality. Contrary to Defendants’ assertion, the prior administration did not acquiesce to “keeping the MPP policy in effect,” AOB 32; instead, the prior administration continued litigating *Texas v. Biden* at the district court level. In October 2023, the government filed a supplemental response brief in support of summary judgment arguing, *inter alia*, that restarting MPP was impossible in light of Mexico’s withdrawal of consent and that the plaintiff states could not force the federal government to negotiate with Mexico. *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. Oct. 6, 2023), ECF 205 at 3-4. Plainly, MPP was not in effect at that time.

Even if the Court were to agree with Defendants that MPP 1.0 has been an effective policy since 2021 and thus the Reimplementation Decision is not a final agency action, the district court’s grant of relief under Section 705 was appropriate to suspend operation of the original 2019 decision to implement MPP 1.0. Courts have authority to postpone the effective dates of agency actions that are already in effect when doing so will preserve the status quo. 1-ER-20 (courts “routinely stay

already-effective agency action” (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). Even if MPP had already been implemented, the district 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 (9th Cir. 2016); *see also* 1-ER-20; *Texas v. Biden*, 646 F. Supp. 3d 753, 770-71 (N.D. Tex. 2022). As the district court and this Court concluded, the last uncontested status “was the state of MPP 1.0 prior to the Reinstatement Announcement—i.e., effectively terminated although the October 29 Memoranda remained stayed.” 1-ER-20; *see also* Dkt. 50.1 at 30.

Finally, Defendants’ claim that ImmDef cannot challenge DHS’s reimplementation decision because ImmDef’s claims concern the way MPP operated in the past, AOB 33, also fails. DHS intends to “resum[e] implementation of the 2019 MPP Policy.” *See* 1-ER-10 (citing the Reimplementation Announcement, *supra* note 7). That decision to resume the same policy that grievously harmed both ImmDef and thousands of vulnerable asylum seekers is the agency action ImmDef now challenges. Specifically, the 2019 MPP Policy includes the implementation guidance to relevant officials to force asylum seekers to remain in Mexico, where they were exposed to and experienced severe harm and danger,

were in many cases unable to apply for asylum, and were cut off from access to U.S.-based counsel—all reasons that led DHS to terminate the program in 2021. *See* 2-ER-42 (district court order citing Explanation Memo in explaining why implementation of MPP marked the “consummation” of DHS’s decision-making process, as a result of which DHS staff “were bound to implement” 8 U.S.C. § 1225(b)(2)(C) according to the Protocols); 4-ER-580–84 ¶¶ 57-69 (SAC discussing various directives that determined implementation of the policy).

Defendants’ charge that ImmDef cannot now challenge MPP 1.0, AOB 34, is simply misdirection—this case has always challenged the way MPP, as implemented, violated Plaintiffs’ rights under the INA, the APA, and the Constitution. The reimplementing of MPP threatens ImmDef with those same harms. As the Court has already recognized, Defendants’ arguments about the Supreme Court’s stay of an injunction in another case, raising different claims, have no bearing. Dkt. 50.1 at 10 n.4 (citing *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020)).

### **C. ImmDef’s Claims Are Ripe.**

Defendants’ assertions that ImmDef’s claims are not ripe, AOB 19-20, are contrary to their own statements. On January 31, 2025, nine days after DHS announced that it would restart MPP 1.0 “immediately,” *see* Reimplementation

Announcement (*supra* note 7),<sup>9</sup> Defendants represented to the district court in *Texas v. Biden*, No. 2:21-cv-0067 (N.D. Tex.), that “MPP has been reimplemented and will be operational [within 180 days].” 1-ER-7. Defendants also represented in this case that “MPP [1.0] has been used on a limited basis” since its reimplementation. 4-ER-681.

Had the district court not stayed the reimplementation of MPP 1.0 on April 16, 2025, MPP would have been fully operational on or before July 30, 2025. Given the speed with which Defendants had initially planned to reimplement MPP 1.0 and the fact that they were roughly three months away from their self-imposed 180-day deadline when those plans were blocked, ImmDef reasonably concluded that Defendants would act expeditiously—and forcefully—to ramp up the program.<sup>10</sup>

Defendants also indicated that they would “resum[e] implementation of the 2019 [MPP] policy” with the same “operative guidance.” *See* 2-ER-165 n.7;

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<sup>9</sup> *See also* Executive Order, Securing Our Borders (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/securing-our-borders/>.

<sup>10</sup> As the district court found, Defendants’ past practice demonstrates that they have the potential to ramp up MPP quickly. 1-ER-30 (“Since July [2019], the number of people being placed in the MPP program has almost tripled, from 15,079 as of June 24, [2019] to 40,033 as of September 7, [2019] according to the Mexican National Institute of Migration.” (quoting Human Rights Watch, *US Move Puts More Asylum Seekers at Risk* (Sept. 25, 2019), <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk>)).

Reimplementation Announcement, *supra* note 7. Thus, the district court correctly concluded that “the reimplementation of MPP will irreparably harm [ImmDef’s] core business activities” in much the same way as MPP did during the policy’s initial rollout in 2019, including by obstructing ImmDef’s ability to provide meaningful legal representation to clients in removal proceedings, jeopardizing the safety of its staff, and threatening its financial stability. 1-ER-10, 30-31.<sup>11</sup> Consequently, ImmDef’s alleged harms are “definite and concrete, not hypothetical or abstract,” *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) (citation modified), satisfying constitutional ripeness, which overlaps with the injury-in-fact element of Article III standing. *See Stavrianoudakis v. U.S. Fish & Wildlife Serv.*, 108 F.4th 1128, 1139 (9th Cir. 2024).

The prudential, nonconstitutional prong of the ripeness inquiry requires the court to consider “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Lab ’ys v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). “A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.”

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<sup>11</sup> In addition, the district court noted that certain class members, whose MPP 1.0 cases were terminated and remain inactive, also face immediate or irreparable injury because they “could again be placed in MPP if they approach the U.S.-Mexico border and reattempt to seek asylum.” 1-ER-10.

*Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (internal quotation and citation omitted). In cases against a government agency, relevant considerations include “whether the administrative action is a definitive statement of an agency’s position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms.” *Id.* (internal quotation marks and citation omitted).

Here, DHS’s decision to reimplement MPP 1.0 provides definitive evidence of the agency’s position, and Defendants’ intention to act “immediately” will adversely impact ImmDef’s core business activities for the reasons noted above.<sup>12</sup> The facts regarding the initial implementation of MPP 1.0 are well-developed, *see, e.g.*, 2-ER-236–74, and ImmDef claims that Defendants’ imminent reimplementing of MPP 1.0 will infringe on its legal rights. The Supreme Court has affirmed that APA challenges present issues fit for judicial review, which can occur before a rule has been applied or enforced if it constitutes a formal and definitive statement of agency policy. *Abbott*, 387 U.S. at 149-52. And courts tend

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<sup>12</sup>Defendants simultaneously suggest that MPP 1.0 was already in effect at the time of its announced reimplementing *and* that it is not sufficiently in effect to cause ImmDef harm. AOB 20 (referring to ImmDef’s “predictive, on-the-ground future concerns with a supposedly separate, new agency action”). They cannot have it both ways. As discussed in Part I.A, *supra*, regardless of the extent of MPP 1.0’s reimplementing, a stay is timely and appropriate because ImmDef fears imminent harm as soon as MPP 1.0 goes into effect.

to apply ripeness requirements “less stringently in the context of First Amendment claims.” *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174 (9th Cir. 2022); *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (“[W]e relax the requirements of standing and ripeness to avoid the chilling of protected speech.”).

Accordingly, the district court properly found that ImmDef’s claims were ripe for judicial review and that postponing such review would impose an “immediate, direct, and significant” hardship on ImmDef. 1-ER-17.

**D. The Stay Does Not Violate 8 U.S.C. § 1252(f)(1).**

Defendants assert that 8 U.S.C. § 1252(f)(1) bars the district court’s Section 705 stay.<sup>13</sup> AOB 28-31. They are wrong, as this Court has already held. *See* Dkt. 50.1 at 26-29. In *Garland v. Aleman Gonzalez*, the Supreme Court held that Section 1252(f)(1) “generally prohibits lower courts from entering *injunctions* that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the *specified statutory provisions*.” 596 U.S. 543, 544 (2022) (emphasis added).

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<sup>13</sup> Section 1252(f)(1) provides: “Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated.”

This Court has identified three independent reasons why Section 1252(f)(1) does not bar the district court's stay. "First, there is a 'strong presumption . . . that the actions of federal agencies are reviewable in federal court.'" Dkt. 50.1 at 27 (quoting *KOLA, Inc. v. United States*, 882 F.2d 361, 363 (9th Cir. 1989)). "[O]nly upon a showing of 'clear and convincing' legislative intent should the courts restrict access to judicial review." *Id.* (quoting *Abbott*, 387 U.S. at 141). Second, the Supreme Court has repeatedly indicated that a Section 705 stay is permissible in cases involving the INA provisions covered by Section 1252(f)(1). Dkt. 50.1 at 27 (citing *Biden v. Texas*, 597 U.S. at 800-01; *Nken v. Holder*, 556 U.S. 418, 428-29 (2009) (distinguishing stays from injunctions)); *see also Texas v. United States*, 40 F.4th 205, 219-20 (5th Cir. 2022) (declining to extend *Aleman Gonzalez* to APA vacatur). Third, while Section 1252(f)(1) expressly identifies injunctive relief, it does not mention stays or other forms of APA relief. *See* Dkt. 50.1 at 28.

Defendants' new arguments fare no better. First, Defendants argue that Section 1252(f)(1) applies because the district court's order was "injunctive in nature" and, unlike a stay, did not operate to suspend a "source of authority." AOB 28. Yet that is precisely the effect of the district court's order, which suspended reimplementing of MPP 1.0 pending the conclusion of this litigation. MPP 1.0 was a source of authority for DHS personnel to, among other things, limit pre-hearing attorney-client consultations to one hour.

Next, Defendants argue that even if the district court’s order is a stay, it is barred by Section 1252(f)(1) because the order “impermissibly ‘restrain[s]’ the operation of the covered statutes.” AOB 29. But the district court noted that even if Section 705 were viewed as implicating injunctive relief, a stay remains permissible because “[t]he relief sought here ‘directly implicates’ constitutional rights, the right to seek asylum and the right to counsel, which are not covered under Section 1252(f)(1).”<sup>14</sup> 1-ER-19–20.

To ImmDef’s knowledge, no court has ever applied Section 1252(f)(1) to a Section 705 stay; rather, several courts have held that Section 1252(f)(1) does not apply to APA relief. *See, e.g., Texas v. United States*, 40 F.4th at 219 (“[A] vacatur does nothing but re-establish the status quo absent the unlawful agency action . . . We decline to extend *Aleman Gonzalez* to such judicial orders.”); *Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 986 (C.D. Cal. 2024) (“[T]he Court can issue declaratory relief—which is not precluded by § 1252(f)—and also vacate and set aside Defendants’ unlawful policies and training materials under the APA[.]”); *see also Nat’l TPS All. v. Noem*, 773 F. Supp. 3d 807, 826-28 (N.D. Cal. 2025) (collecting cases), *appeal docketed*, 25-2120 (9th Cir. Apr. 2, 2025).

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<sup>14</sup> Defendants’ citation to *California v. Grace Brethren Church*, 457 U.S. 383, 408 (1982), is inapposite because it arose outside the immigration context and thus did not implicate Section 1252(f)(1).

Thus, as this Court correctly held, Section “1252(f)(1) does not bar the district court’s stay pursuant to § 705 of the APA.” Dkt. 50.1 at 29.

## **II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING THE STAY.**

### **A. The District Court’s Order Is Within the Scope of ImmDef’s Second Amended Complaint.**

Defendants argue that the district court’s stay was inappropriate because ImmDef did not plead any claims challenging the January 2025 reimplementations of MPP 1.0 in its December 2021 Second Amended Complaint. AOB 34. Defendants waived this argument by not asserting it below. *See Dodd v. Hood River Cnty.*, 59 F.3d 852, 863 (9th Cir. 1995); *see also Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (declining to consider arguments raised for the first time on appeal to prevent the parties from “sandbagging their opponents”). Defendants argued something entirely different in the district court, namely, that ImmDef’s stay application was improper because the certified class is limited to individuals subjected to MPP 1.0 before June 1, 2021. 2-ER-157. That argument had nothing to do with ImmDef’s claim because ImmDef is not a member of the certified class, and the class did not join in ImmDef’s application. Defendants did not argue that their reimplementations of MPP 1.0 themselves exceeded the scope of the complaint, which is about the 2019 policy.

In any event, Defendants’ argument is baseless because they ignore that the policy they are reimplementing is exactly the same one that Plaintiffs challenged in their complaint. By their own admission, Defendants are “resuming implementation” of the 2019 MPP 1.0 policy with the same “operative guidance.” 2-ER-149, 165 & n.7.

The district court correctly held that there is no meaningful difference between the 2019 version of MPP 1.0 and its reimplementing in January 2025. 2-ER-41. Thus, there is a sufficient nexus between the claims raised in support of the stay and those set forth in the SAC. *See Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (holding that “there must be a relationship between the injury claimed in the motion for [preliminary] relief and the conduct asserted in the underlying complaint”). Here, the relief sought through the stay is “of the same character as that which may be granted finally.” *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945).

**B. The District Court Did Not Abuse its Discretion in Concluding that ImmDef Is Likely to Succeed on its APA Claims.**

The district court did not abuse its discretion in concluding that ImmDef is likely to succeed on its APA claims; indeed, this Court has already held independently that ImmDef has shown a strong likelihood of success on the merits of those claims, and for good reason. Dkt. 50.1 at 29-35.

The APA provides for judicial review of agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]” 5 U.S.C. § 706(2)(A) & (C). Agency action is arbitrary and capricious where the agency “relied on factors which Congress has not intended it to consider” or “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The agency must examine relevant data and articulate a satisfactory explanation for its action, including a “rational connection between the facts found and the choice made.” *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The agency must also “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 30 (2020) (citation omitted). In the immigration context, the agency’s “approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.” *Judulang v. Holder*, 565 U.S. 42, 55 (2011). Merely saying something “was considered is not enough to show reasoned analysis.” *Texas v. Biden*, 10 F.4th 538, 555 (5th Cir. 2021).

**1. MPP 1.0 burdens the right to apply for asylum.**

The district court did not abuse its discretion in finding that MPP's reimplementation violates the right to apply for asylum under 8 U.S.C. § 1158(a)(1); here again, this Court has already agreed that ImmDef is likely to prevail on its claim on this basis. Dkt. 50.1 at 33. Indeed, DHS has acknowledged that MPP 1.0 was "indefensible" in part because of the "burdens it imposed on the right to apply for asylum." 3-ER-328 (citing 3-ER-524). The record confirms that the 2019 implementation of MPP 1.0 foreclosed or severely burdened the opportunity to apply for asylum for many people, and its reimplementation would have the same consequences.

The INA establishes a statutory right to apply for asylum. 8 U.S.C. § 1158. This right is violated when the government engages in "a pattern or practice that forecloses the opportunity to apply." *Campos v. Nail*, 43 F.3d 1285, 1288 (9th Cir. 1994) (citing *Orantes-Hernandez*, 919 F.2d at 564). This Court has recognized that exercising the right to apply for asylum requires that an individual in removal proceedings have a meaningful opportunity to present their case to the immigration judge. *Id.* Legal services organizations like ImmDef play an essential role in assisting asylum seekers because the application process is complex and difficult. ImmDef is likely to succeed in establishing that the reimplementation of MPP 1.0

“forecloses” asylum seekers’ “opportunity to apply” by creating obstacles at every step of the application process. *Id.*

Defendants appear to equate the right to apply for asylum with the act of submitting an asylum application. AOB 47. That is wrong. Asylum seekers must attend hearings in immigration court, submit evidence, and testify at merits hearings to succeed in obtaining asylum. MPP 1.0 violated the right to seek asylum by trapping individuals in dangerous, life-threatening conditions in Mexico, obstructing meaningful access to the asylum process.

The government’s own investigations into MPP 1.0 concluded that the policy “impos[ed] substantial and unjustifiable human costs on the individuals who were exposed to harm while waiting in Mexico,” including “extreme violence and insecurity at the hands of transnational criminal organizations.” 2-ER-287–88. These perilous conditions “made it challenging for some to remain in Mexico for the duration of their proceedings.” 2-ER-247. As a result, many individuals subjected to MPP 1.0 were forced to abandon their asylum claims, thwarting ImmDef’s ability to carry out its work. 2-ER-255–56, 230–31 ¶ 9.

Defendants claim that noncitizens had “freedom of movement” in Mexico, and therefore the government had no responsibility for their access to counsel because the government did not control their conditions of confinement. AOB 45-46. This argument ignores the reality that Defendants knew noncitizens subjected to

MPP 1.0 were in dangerous, life-threatening conditions—conditions that Defendants’ actions forced upon them. *See* 2-ER-242–43 (Explanation Memo discussing findings that asylum seekers returned to Mexico largely lacked access to counsel, communication with counsel, and safe housing and protection). The reimplementing of MPP 1.0 is certain to cause future asylum seekers to experience the same dangerous, potentially life-threatening conditions. Thus, as this Court has held, MPP 1.0 “barr[ed] swaths of noncitizens from exercising their statutory right to apply for asylum.” Dkt. 50.1 at 33.

## **2. MPP 1.0 thwarts the statutory right to counsel.**

As this Court has already held, ImmDef is likely to succeed on its claims that the reimplementing of MPP 1.0 unlawfully restricts the statutory right to counsel. *See* Dkt. 50.1 at 34-35. Defendants argue that because the INA “expressly authorizes contiguous territory return . . . the decision to exercise that authority cannot give rise to a separate APA suit for violating a separate INA provision regarding counsel.” AOB 43. But, as the district court correctly concluded, the contiguous-territory provision “does not permit the government to abrogate ‘the legal rights bestowed upon asylum seekers by Congress.’” Dkt. 50.1 at 32 (quoting 1-ER-27).

Defendants make much of the fact that the cases on which ImmDef relies largely arose in the context of restrictions on access to counsel in immigration detention. AOB 45. But this is a logical consequence of the fact that MPP is the

government's first large-scale use of the contiguous-territory provision to return individuals to Mexico, which the district court aptly equated with custody. 3-ER-319. The most analogous cases, therefore, must come from the immigration-detention context. Moreover, Defendants' claim that they "impose[] no restrictions, and ha[ve] no control over, the ability of [noncitizens] in Mexico to communicate with or retain counsel to represent them" is demonstrably false. AOB 46.

When ImmDef sought to speak with noncitizens enrolled in MPP 1.0 while they were in the United States for their court hearings, Defendants limited ImmDef's meetings with its clients to one hour before its clients' scheduled hearings and required that those meetings take place in non-confidential public settings. 2-ER-279, 231, 165. These restrictions are similar to those previously found to unlawfully restrict access to counsel in detention. *See, e.g., Orantes-Hernandez*, 919 F.2d at 565-66 (limited attorney visitation hours, "inadequate efforts to ensure" conversational privacy, and limitations on phone access justified an injunction requiring access to counsel from immigration detention).

**3. Section 1225(b)(2)(C) does not abrogate the rest of the INA, including the statutory right to counsel.**

Defendants claim that "[t]he INA expressly authorizes contiguous territory return; thus, the decision to exercise that authority cannot give rise to an APA suit for violating a separate INA provision regarding counsel." AOB 43. By this

argument, Defendants ask the Court to hold that 8 U.S.C. § 1225(b)(2)(C) somehow trumps the statutory right to be represented by counsel in seeking asylum.

This argument violates the basic principle, as articulated by the district court, that immigration statutes must be read as a “harmonious whole” and that the contiguous-territory return authority must be read to cohere with, not conflict with, the right to apply for asylum. 3-ER-323; *see also* 1-ER-27 (Section 1225(b)(2)(C) does not permit the government to abrogate “the legal rights bestowed upon asylum seekers by Congress”); *accord Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018) (“It is this Court’s duty to interpret Congress’s statutes as a harmonious whole rather than at war with one another.”).<sup>15</sup>

**4. ImmDef was not required to assert its claims through a petition for review (8 U.S.C. §§ 1252(a)(5) and (b)(9)).**

Defendants argue that ImmDef had to assert its claims through a petition for review rather than an APA challenge, pointing to 8 U.S.C. §§ 1252(a)(5) and (b)(9). AOB 40-43. These statutes have no bearing on this case. ImmDef does not seek review of an order of removal, so the jurisdictional bars of Section 1252 (titled “Judicial review of *orders of removal*” (emphasis added)) do not apply.

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<sup>15</sup> Defendants chide ImmDef for “not challeng[ing] any aspect of [DHS’s] finding that “[t]he situation on the border has changed” or that “the facts on the ground are favorable” to the operation of MPP.” AOB 33. But DHS has not identified any facts to support these conclusions either at the time it decided to reimplement MPP 1.0 or in the district court.

Defendants cite *Martinez v. Napolitano* for the proposition that Section 1252(a)(5) bars claims that are “inextricably linked” to an order of removal. AOB 41. In that case, however, a noncitizen was barred from directly challenging a Board of Immigration Appeals’ decision denying his application for asylum, withholding of removal, and relief under the Convention Against Torture (in other words, an order of removal). 704 F.3d 620, 621 (9th Cir. 2012). Here, there is no removal order at issue and indeed ImmDef as an organization could not be the subject of such an order. Instead, ImmDef challenges the reimplementing of MPP 1.0 and the concomitant harms to its core business activities.

Similarly, while Section 1252(b)(9) may indeed be “breathtaking in scope,” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016), its reach is nonetheless limited to challenges to orders of removal. *Singh v. Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007) (“By virtue of their explicit language, both Sections 1252(a)(5) and 1252(b)(9) apply *only* to those claims seeking judicial review of orders of removal.” (emphasis added)). Indeed, all of the cases Defendants cite include claims brought by noncitizen plaintiffs challenging orders of removal. *See id.* at 971, 980; *Aguilar v. U.S. Immigr. & Customs Enf’t Div. of Dep’t of Homeland Sec.*, 510 F.3d 1, 9 (1st Cir. 2007).

The Supreme Court has held that Section 1252(b)(9) presents no jurisdictional bar where plaintiffs “are not asking for review of an order of removal; they are not

challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined.” *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (plurality opinion). In any case, ImmDef has *no* way to channel review of its claims through the petition for review process because, as an organization, it cannot be subject to an order of removal. Thus, finding Section 1252(b)(9) to bar jurisdiction would be both nonsensical and contrary to “Congress’s clear intention to channel, rather than bar, judicial review” under the statute. *See Aguilar*, 510 F.3d at 11.

**C. The District Court Did Not Abuse its Discretion in Concluding that ImmDef Is Likely to Succeed on its First Amendment Claim.**

Because, as discussed earlier, the district court correctly determined that ImmDef is likely to prevail on its APA claims, this Court need not reach ImmDef’s First Amendment claim to affirm the district court’s stay. Nevertheless, the district court did not abuse its discretion in concluding that ImmDef is likely to succeed on the merits of its First Amendment claim that Defendants’ reimplementation of MPP 1.0 interferes with its right to advise existing and potential clients. 1-ER-24.

During the implementation of MPP 1.0, Defendants imposed strict limits on ImmDef and other legal service providers’ ability to consult with existing clients prior to their hearings, prevented them from communicating with or advising potential clients in the immigration courts, and prohibited them from conducting “know your rights” presentations for individuals subjected to MPP 1.0 while they

were in the United States for their hearings.<sup>16</sup> 1-ER-25. These factual findings, which are reviewed for clear error, *see E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 668 (9th Cir. 2021), support the district court’s conclusion that ImmDef is likely to show that MPP’s implementation violated its First Amendment rights. 3-ER-342 (citing SAC ¶¶ 62-63, 156-57, 279-81, 297-99, 387-88). Contrary to Defendants’ arguments, AOB 38, ImmDef did not allege the opposite in its complaint; ImmDef alleged it conducted Know Your Rights presentations virtually during the COVID-19 pandemic and resumed-in person sessions in Tijuana, Mexico in September 2021. 4-ER-628 ¶ 273; 4-ER-631 ¶ 282.

The First Amendment protects legal service providers from government interference when they are “advocating lawful means of vindicating legal rights.” *NAACP v. Button*, 371 U.S. 415, 437 (1963). Accordingly, legal service providers have the right to advise potential clients because “the efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants.” *In re Primus*, 436 U.S. 412, 431 (1978);

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<sup>16</sup> Jewish Family Services of San Diego, the other organizational plaintiff in this case, tried repeatedly to formalize a Know Your Rights program for MPP-enrolled individuals at the San Diego immigration court; Defendant ICE, and the Executive Office for Immigration Review denied their requests. 4-ER-634 (SAC ¶¶ 297-98). ImmDef did not formally request to hold such presentations, but Defendants’ officers prevented its attorneys from communicating with individuals who were not already their clients, 4-ER-630 (SAC ¶ 281), thus thwarting any Know Your Rights presentations.

*accord United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580 (1971) (First Amendment protected a union’s ability to give legal advice or counsel to an injured worker or his family concerning a claim). These rights also apply to immigration legal service providers. *See Nw. Immigrant Rts. Project v. Sessions*, No. C17-716-RAJ, 2017 WL 3189032, at \*3 (W.D. Wash. July 27, 2017) (organizations’ rights to provide free legal assistance to immigrants in removal proceedings “may ‘fall[] neatly within the precedent set by the Supreme Court in *Button* and its progeny”). In short, attorneys advising, assisting, and consulting with asylum-seeking clients are engaging in the “creation and dissemination” of legal information, which constitutes speech the First Amendment protects. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

The district court declined to decide whether the government’s restrictions on ImmDef’s speech were content-neutral or content-based. 1-ER-25. Assuming the restrictions are content-neutral and thus subject to intermediate scrutiny, *see Mothershed v. Justices of Sup. Ct.*, 410 F.3d 602, 610 (9th Cir. 2005), the district court correctly found that MPP 1.0 “burden[s] substantially more speech than necessary to further [the government’s] interests.” 1-ER-23 (citation modified) (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997)). In particular, Defendants’ strict time limits on ImmDef’s attorney-client meetings prior to immigration court hearings and Defendants’ refusal to allow attorneys to

communicate with potential clients in the immigration court were unreasonable time, place, and manner restrictions because they were not “narrowly tailored to serve a significant governmental interest” and did not “leave open ample alternative channels for communication of the information.” *Mothershed*, 410 F.3d at 611 (internal quotation marks omitted).

A “narrowly tailored” restriction “promotes a substantial government interest that would be achieved less effectively absent the regulation” and must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). To analyze whether the restrictions leave open ample alternative channels, the Ninth Circuit considers factors that include whether a speaker can still reach the intended audience, *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990); whether the location of the activity is part of the expressive message, *Galvin v. Hay*, 374 F.3d 739, 756 (9th Cir. 2004); the opportunity for spontaneity, *N.A.A.C.P. W. Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984); and the cost and convenience of alternatives, *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994).

Defendants placed specific and direct restrictions on ImmDef’s speech that impeded their communication with existing clients and prevented them from consulting with potential clients in the United States for their immigration court

hearings.<sup>17</sup> As the district court found, “attorney-client consultations [were] limited to an ‘illusory one-hour window before a scheduled hearing,’” “lawyers . . . were forced to meet with their clients in nonconfidential settings,” and “unrepresented noncitizens . . . ‘were prohibited even from approaching legal representatives to discuss possible representation.’” 1-ER-28 (citations omitted); *see also* 2-ER-231 (Cargioli Decl. ¶ 10). These restrictions involved unreasonable time, place, and manner restrictions because the immigration court building was the only accessible safe space where ImmDef could meet with MPP-enrolled clients.<sup>18</sup> As this Court already has found, upon reimplementation of MPP 1.0, ImmDef will have to contend with the time limits and restrictions on when and how its staff can communicate with its clients (and potential clients) prior to court hearings. Dkt. 50.1 at 37. Those

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<sup>17</sup> DHS regulations provide that individuals returned to Mexico under INA § 235(b)(2)(C) “shall be considered detained for a proceeding within the meaning of Section 235(b) of the [INA] and may be ordered removed in absentia by an immigration judge if the [noncitizen] fails to appear for the hearing.” 8 C.F.R. § 235.3(d); *see also* 4-ER-581 (SAC), ¶ 60 n.23 (citing MPP 1.0 implementation guidance).

<sup>18</sup> ICE’s Enforcement and Removal Operations (ERO) maintained “physical custody of the individual [enrolled in MPP 1.0] during transportation and while at the immigration court, primarily using contract guards.” *Complaints Related to the Implementation of the Migrant Protection Protocols (MPP)*, DHS Office for Civil Rights and Civil Liberties (Jan. 29, 2021), <https://www.dhs.gov/sites/default/files/publications/mpp-redacted-recommendation-memo-01-29-21.pdf>.

restrictions include the one-hour time limit, which Defendants have confirmed “is part of the current operative guidance for its reimplementation.” Dkt. 50.1 at 25.

Defendants argue that MPP 1.0 serves the government’s “compelling interest in securing the border,” AOB 37, but do not explain how their restrictions on attorney-client/potential client interactions were “narrowly tailored” to further that interest. Defendants argue that communication was not overly impaired because “all channels for communication *other* than in-person communication inside the United States” remain open to individuals subject to MPP. *Id.* (emphases added and omitted). But the barriers to attorney-client/potential client communication extend beyond those in immigration court: ample record evidence and the district court’s findings regarding barriers to ImmDef’s communication with individuals in Mexico belie Defendants’ breezy assertion. *See* 1-ER-23 (per the district court, “[t]he only way for ImmDef to exercise its First Amendment rights to advise potential clients and to provide legal advice to existing clients subjected to MPP was by paying for staff to travel to and rent safe meeting spaces in Mexico”).

While Defendants argue that restrictions on access to clients in courtrooms and courthouses are “common,” AOB 38, that does not justify the unlawful restrictions on ImmDef’s First Amendment rights. As Defendants point out, the government “‘may reserve [a] forum’ like an immigration court ‘for its intended purposes’” *Reza v. Pearce*, 806 F.3d 497, 503 (9th Cir. 2015); what Defendants elide

is that the intended purpose of an immigration court includes ensuring the respondent's right to meaningful representation by counsel (and counsel's corresponding First Amendment right to provide legal advice to current and potential clients).

**D. The District Court Did Not Abuse its Discretion in Concluding that the Balance of Harms Strongly Favored Granting the Section 705 Stay.**

**1. ImmDef would be irreparably harmed absent a stay of MPP 1.0.**

Defendants repeat their hollow assertion that ImmDef would not be irreparably harmed absent a Section 705 stay, sidestepping record evidence of ImmDef's harm from the implementation of MPP 1.0, which will recur if MPP once again goes into effect. ImmDef has submitted declarations demonstrating that—as with the original implementation of MPP 1.0—the reimplementing of MPP 1.0 will impair ImmDef's ability to provide meaningful legal representation to clients in removal proceedings, endanger the safety of its staff, and threaten its financial stability. Dkt. 50.1 at 36-38.

Defendants assert that this is harm “from the past.” AOB 52. But Defendants ignore that such harm is evidence of the likelihood that the same harm will result from the reimplementing of MPP 1.0. *See* 1-ER-29; *see also Littleton*, 414 U.S. at 496-97 (“[P]ast wrongs [from similar challenged conduct or policies] are evidence bearing on whether there is a real and immediate threat of repeated injury.”).

Similarly here, ImmDef’s imminent harm is not speculative, as this Court has already held. Dkt. 50.1 at 25-26 (rejecting contention that ImmDef’s harm is speculative).

Defendants myopically point to the absence of “*current* examples of individuals impacted by MPP” (AOB 52 (emphasis added)), but that is only because the government is not currently reimplementing MPP 1.0 due to the district court’s existing stay. At oral argument, Defendants’ counsel could not provide any information about enrollments in MPP or about the supposedly changed situation that led to its reimplementation. *See* Dkt. 50.1 at 17. And, to Plaintiff’s knowledge, Defendants have yet to restart MPP 1.0 despite this Court’s partial lifting of the stay. ImmDef has shown that reimplementation of MPP 1.0—if and once it begins—will irreparably harm the organization. *See supra* Part I.A.

**2. Defendants would not be irreparably harmed by a stay of MPP 1.0.**

Defendants argue that the district court’s order interferes with the government’s ability to use a policy tool to address immigration challenges at the southern border. However, “[i]t is well established that the mere existence of the Executive Branch’s desire to enact a policy is not sufficient to satisfy the irreparable harm prong.” Dkt. 50.1 at 17. And as this Court has already explained, Defendants have been “unable . . . to articulate concrete evidence of irreparable harm to the government.” *Id.* at 18. Defendants repeat their argument that the government

“suffers a form of irreparable injury” “[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people.” AOB 51 (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). But the Ninth Circuit has rejected the argument that “there is ‘irreparable harm’ whenever a government cannot enforce its own laws.” *Sierra Club v. Trump*, 963 F.3d 874, 897 n.17 (9th Cir. 2020) (defendants’ reliance on *Maryland v. King* was “unconvinc[ing]”), *vacated and remanded on other grounds sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021). Defendants 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”); *see also* 2-ER-43 (Defendants faced no irreparable harm because the government “neither has the discretionary authority nor legitimate reasons to enforce programs that violate the [C]onstitution or federal law”).

Citing the Reimplementation Announcement, Defendants assert that “MPP re-calibrates incentives” and “provides a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims.” AOB 50-51. But there is nothing “safer and more orderly” about MPP. Indeed, the Government found in its Explanation Memo that any purported benefits of MPP 1.0 “do not justify the costs”—human costs that are “substantial and unjustifiable.” 2-ER-287–88. “Significant evidence” indicates that MPP 1.0 subjected asylum seekers

“to extreme violence and insecurity” in Mexico, 2-ER-237, and Defendants have conceded that MPP 1.0 is “indefensible as a matter of policy.” 1-ER-27 (district court citing Explanation Memo). It is hard to fathom how Defendants could be harmed by an inability to carry out a policy that they themselves have condemned so unequivocally.

Defendants assert that “[t]he Supreme Court has already evaluated the equitable factors” at issue in granting a stay of a previous attempt to suspend MPP 1.0 and “necessarily concluded that the Government is irreparably harmed absent a stay.” AOB 50. But Defendants ignore critical differences between the injunction that was stayed in *Wolf v. Innovation Law Lab* and the postponement of the reimplementing of MPP 1.0 that the district court ordered here. First, *Innovation Law Lab v. Nielsen* challenged MPP’s legal validity, and the plaintiffs there sought to enjoin MPP 1.0 itself. 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019). Defendants themselves have conceded that the present case is “unlike *Innovation Law Lab*” because Plaintiffs do not challenge Defendants’ authority under the contiguous-territory return provision to issue the MPP 1.0 policy. SER-15. Thus, the Supreme Court’s prior order has no bearing on this case. *See Nken*, 556 U.S. at 433 (Supreme Court’s evaluation of the “stay factors” is “dependent upon the circumstances of the particular case”). Second, the Supreme Court’s order granting the stay in *Innovation*

*Law Lab* did not address whether or how the Court “evaluated the equitable factors.” AOB 50; *see Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020) (mem.).

Defendants also allege that the district court’s order interferes with the Executive’s authority over immigration or the conduct of foreign policy. AOB 51-52. But the Constitution vests Congress—not the Executive—with “plenary power over immigration.” *Sec. & Exch. Comm’n v. Jarkesy*, 603 U.S. 109, 129 (2024). The contiguous-territory return provision of 8 U.S.C. § 1225(b)(2)(C) “must be read within the context of a broader statutory scheme” that includes the right to apply for asylum and the right to counsel. 1-ER-26–27. The President does not have “conclusive and preclusive” power over immigration that permits him to disregard immigration statutes. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). And Defendants do not provide any explanation of how the district court’s order could possibly interfere with foreign policy. *See* AOB 52.

Finally, Defendants’ reliance on *Trump v. CASA, Inc.* is inapposite. AOB 51. The Supreme Court’s decision in *CASA* limiting the availability of “universal” injunctions does not apply to relief under the APA. 606 U.S. ---, 145 S. Ct. 2540, 2554 (2025) (“Nothing [the Court] say[s] today resolves the distinct question whether the [APA] authorizes federal courts to vacate federal agency action.”); *see also id.* at 2567 (Kavanaugh, J., concurring). Further, even though the district court

referred to the relief as “nationwide” in scope, because the policy only impacts the southern border, the order only “affects the government’s actions” in four states: California, Arizona, New Mexico, and Texas. *See* Dkt. 41.1 (citing *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 985-86 (9th Cir. 2020)). For these reasons, the Supreme Court’s statutory interpretation in *CASA* is irrelevant here, where the stay granted by the district court was expressly authorized by the APA. *See* Part II.E.2, *infra*.

This Court has already found that Defendants’ “evidence of concrete and irreparable harm is relatively scant.” Dkt. 50.1 at 17. Defendants’ Opening Brief is likewise devoid of any details demonstrating irreparable harm on behalf of the government. AOB 50-51. In short, Defendants fail to articulate *any* concrete evidence of irreparable harm.

#### **E. The District Court Did Not Abuse its Discretion in Analyzing Equitable Considerations.**

##### **1. The balance of equities and public interest favor a border-wide stay.**

Defendants assert that the balance of equities and public interest favors them because “the district court’s order interferes with the Government’s enforcement of federal immigration law.” AOB 4. However, this Court disagreed, holding that “the substantial and concrete harm that ImmDef will likely suffer upon reimplementaion of the Remain in Mexico policy likely outweighs the harm to the government and

public's interest in the Executive Branch exercising its contiguous-territory return authority without restriction in the form of the Remain in Mexico policy." Dkt. 50.1 at 38. Contrary to Defendants' assertion that "ImmDef failed to demonstrate any irreparable harm," AOB 4, this Court confirmed that ImmDef articulated facts demonstrating its severe and imminent risk of grave harm due to the reimplementing of MPP 1.0. Dkt. 50.1 at 36-38.

Protecting ImmDef's rights unquestionably serves the public interest by ensuring that individuals are not sent to dangerous conditions in Mexico without access to counsel. *See 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 (recognizing the public interest in preventing wrongful removal of individuals, "particularly to countries where they are likely to face substantial harm"). Defendants have already agreed that MPP 1.0 imposed "substantial and unjustifiable human costs" on asylum seekers forced to wait in Mexico. 2-ER-287. The public interest cannot support such mistreatment of asylum seekers trying to avail themselves of their rights under the immigration laws enacted by Congress.

**2. The district court did not abuse its discretion in issuing a border-wide stay.**

Defendants cite to *CASA*, 145 S. Ct. 2540, and *East Bay Sanctuary Covenant v. Barr*, 934 F.3d at 1029, to argue that the district court “erred in assessing the appropriate scope of equitable relief.” AOB 52-53. Neither of these cases controls, as both are limited to nationwide *injunctions*—not the “emergency relief to stay Defendants’ planned reimplementations of” MPP 1.0. 2-ER-185; see *Nat’l TPS All.*, 773 F. Supp. 3d at 866 (“postpon[ing] or set[ting] aside agency actions . . . is not the same thing as an injunction”); *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”).

In *CASA*, the Supreme Court took care to limit its decision to nationwide injunctions stemming from “the statutory authority that federal courts possess under the Judiciary Act of 1789.” 145 S. Ct. at 2550 n.4. The Court drew a bright line separating the APA from the reach of its holding. *Id.* at 2254 n.10. As such, *CASA* places no limits on the scope of relief available in this case.

Defendants cite to no APA case holding that the imposition of a nationwide or border-wide<sup>19</sup> stay of agency action under Section 705 is universally improper. They rely on *Starbucks Corp. v. Mckinney*, 602 U.S. 339 (2024), *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4 (1942), and *Sampson v. Murray*, 415 U.S. 61 (1974), but none of these decisions support Defendants' position. *Starbucks* considered the propriety of a preliminary injunction issued pursuant to a section of the labor code statute, 29 U.S.C. § 160(j). 602 U.S. at 345-46. *Starbucks* thus relates to a distinct form of relief under an unrelated statutory provision that has no bearing on the appropriate scope of a stay of an agency action under Section 705 of the APA.

*Scripps-Howard*, which Defendants correctly note predates the APA (AOB 54), does not support Defendants' argument. There, the Court considered the power of appellate courts to stay the execution of a Federal Communications Commission order. 316 U.S. at 6. Finding Congress had not spoken on whether courts are authorized to stay Commission decisions, the Court held such a stay was authorized by the "customary power [of the Court of Appeals] to stay orders under review." *Id.* at 11.

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<sup>19</sup> As explained above, *supra* Part II.D.2, even though the district court referred to the relief as "nationwide" in scope, the stay is, in practice, only border-wide since the policy only impacts the southern land border.

Defendants urge a narrow reading of the scope of Section 705 based on an out-of-context footnote in *Sampson*, 415 U.S. at 68 n.15. The issue in that case was whether and to what extent a district court has “authority to grant interim injunctive relief to a discharged Government employee,” which would restore the employee-plaintiff to his prior position. 415 U.S. at 63. In a footnote, the Court considered whether Section 705 of the APA authorized such a stay, concluding that it did not. *Id.* at 68 n.15. In the face of a line of pre-APA decisions, which created a “well-established principle that a court of equity will not . . . restrain an executive officer from making a wrongful removal of a subordinate employee,” *id.* at 71 (internal quotation marks and citation omitted), the Court reasoned that Section 705 did not “fashion new rules of intervention” that would permit a district court to restore the position of a discharged civil-service employee. *Id.* at 68 n.15. The Court had no occasion to consider in *Sampson* the proper scope of a stay under Section 705 outside the context of a civil service-employment dispute, so the Court’s brief consideration of Section 705 does not apply here.

Contrary to Defendants’ position, a border-wide stay under Section 705 is both an available remedy and a warranted one in this case. “[W]here agency action is challenged as a violation of the APA, nationwide relief is commonplace.” *Nat’l TPS All.*, 773 F. Supp. 3d at 866-67 (citing *E. Bay Sanctuary Covenant*, 993 F.3d at 680-81); see *Cabrera v. U.S. Dep’t of Lab.*, No. 25-CV-1909, 2025 WL 2092026, at

\*8 (D.D.C. July 25, 2025) (granting nationwide stay under Section 705 post-*CASA*, noting “just as vacatur under § 706 is not a party-specific remedy ... neither is a stay under § 705 [as] [b]oth provisions specify what courts are authorized to do with respect to *agency actions*, not parties” (emphasis in original)); *District of Columbia v. USDA*, 444 F. Supp. 3d 1, 48 (D.D.C. 2020) (vacatur under the APA is “ordinarily read as an instruction to vacate, *wherever applicable*, unlawful agency rules”; accordingly, Section “705 must be read to authorize relief from agency action for any person otherwise subject to the action, *not just as to plaintiffs*” (emphases added)).

Particularly in the immigration context, “broad relief is appropriate” to “ensure uniformity and consistency in enforcement.” *Texas v. Biden*, 646 F. Supp. 3d at 781. Moreover, “[t]he text and history of the APA authorize vacatur”—and stay—of agency action universally. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 829 (2024) (Kavanaugh, J., concurring). Here, a stay limited to ImmDef’s current and future clients would not remove the barriers created by MPP 1.0 that prevent ImmDef from interacting with and being retained by prospective clients in the first instance. *See* 1-ER-30–31. ImmDef encountered individuals in MPP 1.0 in three primary ways: (1) when staff conducted clinics in Tijuana and Mexicali, (2) when staff were approached by noncitizens in MPP 1.0 in the San Diego immigration court, and (3) when ImmDef received a referral. *See*

SER-51 ¶¶ 15-18 (Cargioli Decl.). And the barriers inherent in the MPP 1.0 policy mean that, as before, ImmDef is much more likely to encounter future clients after they have been enrolled in MPP 1.0 and gone through some, or even all, of their immigration proceedings. *Id.* ¶ 17 (explaining that because MPP 1.0 policies restricted communication with attorneys while in immigration court, ImmDef staff had to “follow up with [pro se MPP respondents] via email or phone because DHS officers do not permit [ImmDef staff] to speak privately with them at the court and sometimes do not allow [ImmDef staff] to speak with pro se respondents at all,” even “during the so-called one-hour window”). ImmDef is therefore impeded in forming attorney-client relationships in a timely manner and adequately representing persons in their immigration proceedings. *See* SER-39 ¶¶ 19, 27 (Cargioli Decl.).

Nor would a stay limited geographically to the Ninth Circuit or to the Central District of California “remedy ImmDef’s inability to meet with potential clients, who would be located outside th[e] [Central] District.” 2-ER-44. Either type of limitation would be impractical and thwart the purpose of Section 705 to maintain the “relevant status quo.” The practical reality is that Defendants use regular lateral transfers of noncitizens from one Border Patrol sector to another, such that individuals may be processed (and therefore enrolled into MPP) in a different part of the border than where they originally crossed. *See* Dkt. 41.1 at 7-11 (explaining lateral transfers along the U.S.-Mexico border and its impact on MPP enrollments). Therefore, a

geographically-limited stay leaves Defendants free to craft an end-run around any restriction: an individual who crosses in the Ninth Circuit may well be processed elsewhere along the border beyond the reach of a stay and enrolled into MPP; a noncitizen who crosses outside the region covered by the stay, but who would have otherwise been transferred to southern California (and able to access ImmDef's services) could instead be kept out of ImmDef's reach.

Finally, Defendants' argument that the "Government is now subject to conflicting stays that prevent DHS both from *using* MPP and from *ending* it" lacks merit. AOB 56. *Texas v. Biden* does not prevent Defendants from terminating MPP 1.0 by means of a different agency action or from addressing past harms resulting from its implementation. Rather, *Texas v. Biden* concerns a particular, past agency action—the government's attempt to end MPP 1.0 through the October 29, 2021, Explanation Memo, which the Court found legally defective. Defendants have not identified any specific "conflict" between the *Texas* case, in which Defendants themselves jointly requested an abeyance until September 30, 2025, and this case. *Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. Aug. 1, 2025), ECF 215, 216. And nothing about *Texas v. Biden* conflicts with the district court's stay order here because that stay has nothing to do with the October 2021 attempt to rescind MPP 1.0.

Thus, the district court did not abuse its discretion in issuing a border-wide stay.

### CONCLUSION

For the foregoing reasons, the district court's Section 705 stay order should be affirmed.

Respectfully submitted,

Dated: August 4, 2025

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32 and Circuit Rule 32-1 because the brief contains 13,829 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.

Dated: August 4, 2025

*/s/ Hannah R. Coleman*

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Hannah R. Coleman

**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6(c), I certify that there are no cases currently pending before the Court that raise issues that are the same as, or closely related to, those presented in this case.

Dated: August 4, 2025

*/s/ Hannah R. Coleman*

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Hannah R. Coleman

**CERTIFICATE OF SERVICE**

I certify that on August 4, 2025, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system. I further certify that all participants in the case are registered ACMS users and that service will be accomplished through that system.

Dated: August 4, 2025

*/s/ Hannah R. Coleman*

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Hannah R. Coleman