No. 19-15716

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, *et al.*,

Plaintiffs-Appellees,

v.

KEVIN K. MCALEENAN, Acting Secretary of Homeland Security, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California No. 3:19-cv-00807-RS

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CORPORATE DISCLOSURE STATEMENT

Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Appellees.

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INTRODUCTION

On January 28, 2019, Defendants initiated an unprecedented forced return policy under which they have sent thousands of asylum seekers to Mexico, where they are required to remain until the conclusion of their removal proceedings, in fear for their lives and struggling to survive.

Plaintiffs assert, and the district court correctly concluded, that the forced return policy is not statutorily authorized and was promulgated without the required notice-and-comment procedures. Even apart from those flaws, and as the district court further held, the policy fundamentally and unlawfully changes our country's asylum and removal procedures by physically expelling individuals who fear persecution and torture without first affording them a minimally adequate process that satisfies our nonrefoulement obligation.

The government has abdicated its nonrefoulement obligation at a time when Central American migrants are fleeing extreme dangers in their home countries, only to be returned to Mexico where they face similar dangers; a government that is incapable of providing adequate protection; and the additional security that comes from trying to survive in a country where they have no support network. Plaintiffs and other migrants are threatened by "the same gangs" they fled "in their home countries"; abused, kidnapped, and extorted by both criminal groups and Mexican officials; sexually assaulted; discriminated against; subjected to forced

labor; unlawfully deported by Mexican authorities to the countries they just fled; and murdered. U.S. Dep't of State, Mexico 2018 Country Report on Human Rights Practices: Mexico 7, 9, 19-20, 27, 33, 35 (Mar. 13, 2019), https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/mexico/. Such crimes against migrants are almost all "unresolved." *Id.* at 20.

These harms are not hypothetical. One Plaintiff in this case was kidnapped by a cartel in Mexico, who threatened to kill him and burn his body so no one could find him. Another, a minister from Honduras threatened with death because of his religious and political beliefs, was separated from his pregnant wife by Mexican authorities, who then deported her despite her fear of persecution in Honduras. Another was repeatedly detained and robbed by Mexican police, who threatened to jail him if he refused to pay a bribe.

The need to halt the forced return of asylum seekers to these dangerous conditions is increasingly urgent. The U.S. and Mexican governments recently announced that the policy will be expanded "across [the] entire Southern border." U.S. Dep't of State, U.S.-Mexico Joint Declaration, June 7, 2019, https://www.state.gov/u-s-mexico-joint-declaration/. The Mexican government also agreed to deploy its National Guard "throughout Mexico" to "increase

enforcement to curb irregular migration," putting migrants at even greater risk of refoulement to their home countries. *Id.*

Although a motions panel stayed the district court's preliminary injunction, two judges of this Court concluded the policy is unlawful. The Court should affirm the district court's injunction and stop Defendants from unlawfully sending asylum seekers back to danger and destitution.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201-2202.

STATEMENT OF THE ISSUES

1. Whether the forced return policy violates the contiguous-territory-return statute, 8 U.S.C. § 1225(b)(2)(C), because the statute's plain language precludes its application to individuals to whom § 1225(b)(1) "applies," i.e., "arriving aliens" and certain other applicants for admission who are inadmissible solely on the basis of fraud or lack of proper documents.

2. Whether the forced return policy violates Defendants' nonrefoulement obligation under the withholding statute, 8 U.S.C. § 1231(b)(3), because the policy authorizes sending individuals to Mexico without the procedural protections that the statute requires.

3. Whether the forced return policy is arbitrary and capricious because its fear-assessment procedure, established to meet Defendants' nonrefoulement obligation, (a) departs, without acknowledgment or explanation, from the procedures Defendants have previously adopted to satisfy that obligation, and (b) lacks the procedures and safeguards necessary to ensure that individuals who are more likely than not to face persecution or torture in Mexico will not be returned there.

4. Whether Defendants violated the Administrative Procedure Act by implementing a new procedure to comply with their nonrefoulement obligation without complying with the notice-and-comment requirement.

5. Whether the equitable considerations favor injunctive relief, given that the Individual Plaintiffs and other asylum seekers are trapped in Mexico where they fear for their lives, are at risk of unlawful return to their home countries, lack stable shelter and other basic necessities, and cannot meaningfully access the asylum process; Mexico is unable to protect returnees from these harms; the Organizational Plaintiffs are being forced to restructure their operations; and Defendants offer no concrete evidence of harm.

6. Whether the district court acted within its discretion in issuing the injunction and giving it nationwide effect.

STATEMENT OF THE CASE

I. Legal Framework for Asylum Seekers at the Southern Border

Prior to January 2019, asylum seekers at the southern border could present their claims for protection while in the United States, in either expedited removal or full removal proceedings.

As most asylum seekers at the southern border lack valid entry documents, they are subject to removal under the inspection and removal provision set out at § 1225(b)(1).[1] This provision, enacted as part of the Illegal Immigration and Immigrant Responsibility Act of 1996, applies to certain individuals who are inadmissible solely under §§ 1182(a)(6)(C) or (7) for seeking admission by fraud or without proper entry documents. It is often referred to as the "expedited removal statute" because it authorizes summary removal of such individuals without a hearing.

Recognizing that many individuals who lack valid entry documents are bona fide asylum seekers, Congress created an exception to summary removal for those who could establish a credible fear of persecution or torture. Individuals who express a fear of persecution or torture are referred to an asylum officer for a "credible fear" interview to assess whether they have potentially meritorious asylum claims. *See* §§ 1225(b)(1)(A)(i), (ii). If they make that showing—as the

[1] Unless otherwise specified, all statutory citations are to Title 8 of the U.S. Code.

overwhelming majority do, *see* SER405—they are placed into regular removal proceedings under § 1229a. *See* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

The government also has prosecutorial discretion to bypass the credible fear process and place individuals who arrive or enter without proper documents directly into regular removal proceedings. *See, e.g.*, *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-24 (BIA 2011).

II. The Contiguous Territory Return Provision, and Defendants' Forced Return Policy

In December 2018, the Department of Homeland Security ("DHS") announced it would begin implementing the contiguous territory return provision, § 1225(b)(2)(C), "on a large-scale basis," SER318. Under this provision certain individuals "arriving on land … from a foreign territory contiguous to the United States" may be returned "to that territory pending a proceeding under Section 1229a." Enacted in 1996, the provision has never before been implemented systematically.

On January 28, DHS began implementing the new policy, which it labeled the Migrant Protection Protocols ("MPP"). Under this policy, certain individuals seeking asylum at the border, and placed into regular removal proceedings, can be "returned to Mexico for the duration of their immigration proceedings." SER318. The policy applies to nationals of any country except Mexico who arrive in or enter the United States from Mexico "illegally or without prior documentation." *Id.*

It thus creates a forced return policy for asylum seekers who previously would have been entitled to remain in the United States pending their proceedings.

In official memoranda, Defendants stated that the forced return policy must be implemented "consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees ["Refugee Convention"] … and Article 3 of the Convention Against Torture ["CAT"]." ER241, SER320. Nonetheless, the procedure Defendants created for meeting this obligation consists of a single interview by an asylum officer who must determine whether an individual is more likely than not to face persecution or torture in Mexico, which is the *ultimate* standard applied in full § 1229a removal proceedings. ER242. Moreover, individuals will only be referred for that interview if they affirmatively express a fear of return to Mexico during processing; the government does not advise them of this hearing process or even tell them that they will be sent to Mexico if they do not ask for a hearing and prove their case. *Id.* And while the asylum officer's decision "shall be reviewed by a supervisory asylum officer," there is no right to appeal to an immigration judge ("IJ") or the Board of Immigration Appeals ("BIA"). ER243.

Defendants first implemented the new forced return policy at the San Ysidro port of entry. SER315. It is now being applied to families, as well as adults traveling individually; to people who present themselves at several ports of entry;

and to people who cross the border between certain ports. OB16; SER396. As of June 3, more than 8,000 individuals have been returned to Mexico. *See* Sec'y of Foreign Relations, Gov't of Mexico, Position of the Government of Mexico on Migration and Imposition of Tariff Rates, June 3, 2019, https://www.gob.mx/sre/prensa/posicionamiento-del-gobierno-de-mexico-sobre-migracion-e-imposicion-de-tarifas-arancelarias-202603?state=published. On June 7, the U.S. and Mexican governments announced that the policy would be expanded throughout the border. U.S.-Mexico Joint Declaration.

Individuals returned to Mexico are sent to areas with the some of the highest murder rates in the world. SER236-38. They face extreme dangers—killings, kidnappings, sexual assault, robbery, and other forms of violence—from cartels, the gangs they fled their home countries to escape, corrupt government officials, and an anti-migrant sentiment directed at those from the Northern Triangle that has been fueled by the increased numbers of people who are being returned. *See* State Department 2018 Report 7, 9, 19-20, 27, 33, 35; SER139-40, 162, 175-78, 186-87, 236-40, 266-67, 272-74, 281, 292-97, 424, 439-40, 465-66. In addition, they face the very real fear that Mexican officials will repatriate them to the home countries they fled. *See, e.g.*, SER440 ("the non-refoulement principle is systematically violated in Mexico"), 139, 162, 187. Because asylum seekers are not notified of their right to apply for protection under the policy, many do not know to claim a

fear of return to Mexico, even if they have one. Plaintiff John Doe, for example, who is afraid of being killed in Mexico by narcotraffickers whose crimes he witnessed, did not know he could raise his fear of return because he was not told he would be sent to Mexico until after he was ordered returned. He was never asked if he was afraid to return to Mexico or given any opportunity to say so. SER3-4, 6-9. *See also* SER52, 60-61, 68-69. Those that do claim a fear must prove that they are more likely than not to be persecuted or tortured in Mexico in an interview that occurs within days, if not hours, of their arrest and detention. *See, e.g.*, SER95-99, 105-08. They are provided no orientation and no opportunity to gather evidence or consult with an attorney. *Id.*; SER541.

Returnees also face a daily struggle to survive. They must find places to live, and means of support, in border regions whose few shelters and support services are already well beyond capacity, and where migrants lack any support network of their own. *See, e.g.*, SER80-81, 90. Few have permission to work, and even those who do are often too afraid to go out and seek it. *See, e.g.*, SER19, 29, 62.

III. Procedural History

Plaintiffs are organizations serving migrants, and 11 individuals who fled death threats and violence in their home countries, only to be returned to Mexico when they attempted to seek asylum here.

After Plaintiffs sought injunctive relief, the district court granted a preliminary injunction. The district court found that the Individual Plaintiffs had made an "uncontested" showing that they "fled their homes" to "escape extreme violence, including rape and death threats," and faced "physical and verbal assaults" in Mexico. ER24. It further found that the Organizational Plaintiffs had shown "a likelihood of harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers." *Id.* The district court thus held Plaintiffs were "likely to suffer irreparable harm" if the program continued. *Id.*

The district court delayed the injunction's effect to give Defendants an opportunity to seek a stay pending appeal, ER26, which the Ninth Circuit motions panel granted. The motions panel issued three opinions, including a lengthy opinion from Judge Fletcher concurring in "only in the result." ER74. In their per curiam opinion, Judges O'Scannlain and Watford stated that Plaintiffs were unlikely to prevail on their claim that the forced return policy violates the contiguous-territory-return statute, or on their notice-and-comment claim—the only two claims they said could justify a nationwide injunction "in its present form." ER69-70.

The per curiam opinion did not address Plaintiffs' nonrefoulement claims, and did not contain any legal analysis as to why those claims could not support a

nationwide injunction. The opinion only briefly discussed the balance of hardships, noting that Plaintiffs feared substantial injury in Mexico, but deeming this risk to be "somewhat" reduced by Mexico's apparent "commitment to honor its international-law obligations and to grant humanitarian status and work permits to individuals returned." ER70.

Judge Watford wrote separately to address the nonrefoulement issue. He concluded that the forced return policy's fear-assessment procedures were "so ill-suited to achieving that stated goal [of non-refoulement] as to render them arbitrary and capricious under the [APA]." ER72. In particular, Judge Watford found the fact that "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country" to be a "glaring deficiency" that was "virtually guaranteed to result in … applicants being returned to Mexico in violation of the United States' non-refoulement obligations." ER72-73. He wrote that he "expect[s] that appropriate relief for this arbitrary and capricious aspect of the MPP's implementation will involve (at the very least) an injunction directing DHS to ask applicants for admission whether they fear being returned to Mexico." ER74.

Judge Fletcher wrote separately to express his strong disagreement with the majority's analysis of the contiguous-territory-return provision. He concluded that the government's argument that the forced return policy is authorized by

§ 1225(b)(2)(C) was "[n]ot just arguably wrong, but clearly and flagrantly wrong," ER74, and "based on an unnatural and forced—indeed impossible—reading of the statutory text." ER76. He did not address the nonrefoulement argument.

SUMMARY OF ARGUMENT

The forced return policy is illegal in several respects.

First, the policy violates the contiguous-territory-return statute, § 1225(b)(2)(C), which by its plain language cannot be applied to individuals, like Plaintiffs, to whom § 1225(b)(1) "applies," i.e., "arriving aliens" and certain other applicants for admission who are inadmissible solely on the basis of fraud or lack of proper documents.

Second, the policy violates the government's nonrefoulement obligation by creating a fear-assessment procedure that is wholly inadequate for ensuring that individuals who face persecution or torture in Mexico will not be returned there. The procedure violates the withholding of removal statute, § 1231(b)(3), because it requires individuals to meet the high "more likely than not" standard necessary for an ultimate grant of withholding, but provides none of the procedural safeguards to which applicants for withholding are entitled—including notice of the opportunity to apply for withholding, a full evidentiary hearing before an immigration judge, and the assistance of counsel.

Third, the policy is arbitrary and capricious in violation of the APA because it dramatically departs from the procedures Defendants have previously adopted to satisfy their nonrefoulement obligation, a fact that Defendants do not acknowledge or explain. Moreover, the policy does not contain the basic procedural safeguards that are necessary to ensure compliance with nonrefoulement.

Fourth, the policy's nondiscretionary procedure to assess the likelihood of persecution and torture is a binding rule that was required to go through notice-and-comment procedures. The procedure is a legislative rule: it implements the statutory nonrefoulement obligation through nondiscretionary procedures.

Finally, the equitable considerations favor injunctive relief, as Plaintiffs and the public would face serious harms if the injunction were vacated. The district court did not abuse its discretion in enjoining the forced return policy nationwide, given the absence of any way to provide Plaintiffs full relief absent a nationwide injunction.

STANDARD OF REVIEW

The Court reviews "the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017) (internal quotation marks omitted). This "review is limited and deferential." *Id*. The Court reviews "the district court's legal conclusions *de novo*" and "the factual findings underlying its decision for clear error." *Id.* (internal

quotation marks omitted). The Court's review of "the injunction's scope" is also for "abuse of discretion." *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 969 (9th Cir. 2015) (internal quotation marks omitted).

ARGUMENT

I. THE FORCED RETURN POLICY IS ILLEGAL.

A. The Forced Return Policy Violates the Contiguous-Territory-Return Statute, § 1225(b)(2)(C).

The district court correctly held that Defendants' forced return policy likely violates the contiguous-territory-return statute—the statute Defendants cite as authority for the policy—because the statute's plain language precludes its application to individuals, like Plaintiffs, who are subject to § 1225(b)(1). ER19.

Section 1225(b)(1) applies to arriving aliens and certain recent entrants who are inadmissible solely on the basis of fraud or misrepresentation, or because they lack valid documents that would permit them to enter the United States. The plain language of § 1225(b)(2)(C), read in conjunction with § 1225(b)(2)(B)(ii), makes clear that Congress did not intend the provision to apply to such individuals.

Section 1225(b)(2)(C) applies only to individuals "described in subparagraph (A)" of § 1225(b)(2). That subparagraph, in turn, is expressly limited by § 1225(b)(2)(B)(ii), which states that "Subparagraph (A) *shall not apply*" to an individual to whom § 1225(b)(1) "applies." Yet the forced return

policy applies on its face to the very people to whom § 1225(b)(1) applies. SER322 (Defendants' new policy applies to "individuals entering or seeking admission to the U.S. from Mexico—illegally or without proper documentation"). The policy thus violates §1225(b)(2)(C).

As a threshold matter, this Court is not bound by the motions panel's ruling that Plaintiffs were unlikely to succeed on this claim. The panel opinion's use of markedly tentative language indicates it did not intend to definitively bind the merits panel.[2] *See, e.g.*, ER67 (suggesting it is "*doubtful*" that § 1225(b)(1) "'applies'" to Plaintiffs) (emphasis added); *id.* 65 (Plaintiffs "*seem* to fall within the sweep of" the contiguous territory provision) (emphasis added). Moreover, Judge Fletcher's separate opinion, concurring in the result, made clear his view—which the per curiam opinion did not disavow—that the merits panel could revisit this question. *See* ER89 ("I am hopeful that the regular panel that will ultimately hear the appeal, with the benefit of full briefing and regularly scheduled argument, will" reject Defendants' argument on this issue.).

There is good reason for this panel to adopt Judge Fletcher's view. Defendants' arguments to the contrary "are based on an unnatural and forced – indeed, impossible—reading of the statutory text." ER76.

[2] Defendants have not argued that the motion panel's statutory ruling is binding on the merits panel.

1. Defendants misinterpret the word "applies," as used in § 1225(b)(2)(B)(ii), in a manner contrary to its plain meaning and in direct conflict with the BIA's interpretation. According to Defendants, and the per curiam opinion, whether § 1225(b)(1) "applies" to a given individual turns not on the statutory language setting forth the grounds of inadmissibility that trigger § 1225(b)(1), but on whether an immigration officer decides to "afford them a full removal proceeding, as opposed to placing them into expedited removal under section 1225(b)(1)." OB39, 40. *See also* OB33 (citing ER67) ([S]ection 1225(b)(1) applies "'only to those *actually processed* for expedited removal'") (emphasis in original).

This is wrong for several reasons. First, it is not what the statute says. Section 1225(b)(1) contains no language indicating that an immigration officer's decision whether to place an individual in expedited or in regular removal proceedings is what controls whether § 1225(b)(1) "applies." In contrast, in other immigration provisions Congress used language such as "has applied" or "was applied" to refer to situations in which the agency actually applied a particular provision to an individual or group.[3] Here, the text makes clear that the exempted

[3] *See, e.g.*, § 1182(d)(3)(B)(ii) (directing action by certain Secretaries with respect to individuals "to whom such Secretary *has applied*" a waiver) (emphasis added); § 1182(m)(2)(C) (linking deadline for validity of employer attestation to end date of admission of last individual "to whose admission it *was applied*") (emphasis added).

individuals are those to whom the *statute*, § 1225(b)(1), "applies," not those whom the agency has chosen to process under expedited removal.

Second, Defendants' position to the contrary, reflected also in the *per curiam* opinion, rests on their erroneous assumption that when the government exercises its prosecutorial discretion to initiate regular removal proceedings against individuals subject to expedited removal under § 1225(b)(1), it is processing them under § 1225(b)(2). OB31 (asserting that decision is between placing "alien in expedited removal" or "in regular 'full' removal proceedings *as called for by section 1225(b)(2)(A)*") (emphasis added); ER67 (assuming that placement in § 1229(a) proceedings requires an alien to "be processed under § 1225(b)(2)(A)"). But, as the district court correctly held, "exercising discretion to process an alien under section 1229a [regular removal proceedings] instead of expedited removal under section 1225(b)(1) does not mean the alien is . . . being processed under section 1225(b)(2)." ER16.[4]

Likewise incorrect is Defendants' assertion that § 1225(b)(2)(A) is the only statute that authorizes them to place individuals subject to expedited removal in regular removal proceedings. OB33 ("Section 1225(b)(2)(A) is the only INA

[4] Just as the government's decision not to prosecute someone for shoplifting does not mean that that the shoplifting statute no longer applies to that person, likewise the decision to place someone who is subject to § 1225(b)(1) into regular rather than expedited removal proceedings does not negate the fact that they are an alien to whom § 1225(b)(1) "applies."

provision that refers to placing applicants for admission into section 1229a removal proceedings."). On the contrary, § 1229a(a)(2) authorizes commencement of regular removal proceedings against any noncitizen who is potentially removable for any ground—including noncitizens inadmissible based on the two grounds specified in § 1225(b)(1).

In addition, Defendants' position that individuals who are put into regular removal proceedings necessarily fall under § 1225(b)(2), not § 1225(b)(1), ignores that § 1225(b)(1) itself encompasses individuals who are placed in regular removal proceedings after passing a credible fear interview. *See* § 1225(b)(1)(B)(ii) (individuals who pass credible fear "shall be detained for further consideration of the application for asylum"); 8 C.F.R. §§ 208.30(f) ("further consideration" shall be in the form of full removal proceedings under Section 1229a). *See also Matter of M-S-*, 27 I.&N. Dec. 509, 515 (A.G. 2019) (noncitizens "who are originally placed in expedited proceedings and then transferred to full proceedings after establishing a credible fear," remain part of the class of noncitizens to whom § 1225(b)(1) applies).

Finally, Defendants' position also directly conflicts with the BIA's decision in *Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520 (BIA 2011), which upheld the government's prosecutorial discretion to initiate regular removal proceedings against individuals subject to § 1225(b)(1). *Id.* at 523. Notably, the Board also

stated that individuals who had been placed in regular removal proceedings pursuant to the government's prosecutorial discretion were still individuals to whom § 1225(b)(1) "applies." *Id*. While Defendants cite the decision for the first proposition, OB10, they ignore the latter, as does the per curiam opinion. Indeed, Defendants make no attempt to address this aspect of the BIA's decision, an omission that is particularly striking given that Plaintiffs have repeatedly cited to it in their briefing and the district court's decision relies upon it as well. ER17 ("The [*E-R-M- & L-R-M-*] decision … recognizes that such persons remain among those to whom (b)(1) applies.").

2. In addition to their flawed interpretation of "applies," Defendants interpret § 1225(b)(2)(B) in a way that reads it out of the statute. Section (b)(2)(B) states that § (b)(2)(A) "shall not apply" to three specific classes, that are enumerated in the following paragraphs. One of these classes is individuals to whom § 1225(b)(1) "applies." § 1225(b)(2)(B)(ii). These express qualifications make clear that noncitizens who meet the statutory criteria for § 1225(b)(1) are not within the category of individuals covered by § 1225(b)(2)(A), and thus not subject to contiguous territory return—which applies only to those "described in subparagraph (A)." § 1225(b)(2)(C).[5]

[5] This position is further supported by the language in § 1225(b)(2)(A) which specifically states that the provision is "subject to subparagraph (B).

Both the per curiam opinion and the government, however, offer a wholly different reading of § 1225(b)(2)(B)(ii) that renders it superfluous. They say that all this provision does is clarify that a person placed in expedited removal is not entitled to be placed in removal proceedings under subparagraph (A). OB11 (asserting that Congress included this provision to "'remove any doubt'" that "applicants processed" under expedited removal "are not entitled" to a full removal proceeding) (quoting ER67).

The problem with this argument is that § 1225(b)(1) already makes that clear: Section (b)(1)(A)(i) provides for removal "without further hearing or review" of individuals determined to be inadmissible for one of the specified grounds, except for those who receive a "credible fear" interview; (b)(1)(B)(iii) provides for removal "without further hearing or review" of individuals who are found not to have a credible fear; and (b)(1)(B)(ii), along with its implementing regulations, provides that those who pass a credible fear interview are referred for regular removal proceedings, 8 C.F.R. § 235.6. The statutory scheme is crystal clear as to which individuals subject to § 1225(b)(1) are entitled to regular removal proceedings and which are not. There is no "doubt" to be resolved.

Thus, if Defendants' interpretation of § 1225(b)(2)(B) were correct, the provision would be superfluous. Yet it is a fundamental tenet of statutory construction that a statute, if possible, should be read to give all its provisions

meaning. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The only way to give § 1225(b)(2)(B) meaning is to read it as identifying those classes of noncitizens to whom § 1225(b)(2)(A) does not "apply" and who are therefore not covered by the contiguous territory return provision. This is the most natural reading and the one adopted by the district court, ER14, as well as Judge Fletcher, ER80.

For the same reasons, Defendants' reading of the language in the contiguous-territory-return statute rendering eligible for return "an alien described in subparagraph (A)," *see* § 1225(b)(2)(C), must be rejected. Defendants construe this phrase to include any applicants for admission who are "not clearly and beyond a doubt entitled to be admitted," OB35, including those whom Congress has expressly excluded from subparagraph (A), under § 1225(b)(2)(B). Thus, this interpretation suffers from the same problems as Defendant's interpretation of § 1225(b)(2)(B)—it simply reads the exception out of the statute. In addition, Defendants' expansive reading of subparagraph (A) as covering all applicants for admissions who are inadmissible, including those described under § 1225(b)(1), eviscerates the distinction between §§ (b)(1) and (b)(2), contrary to the language of the statute and the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S.Ct. 830, 837 (2018), which "distinguished between § (b)(1) and § (b)(2) applicants, stating clearly that they fall into two separate categories." ER81.

3. Defendants' arguments are also contrary to legislative intent. Defendants contend that Congress could not have intended to exclude individuals subject to § 1225(b)(1) from contiguous territory return because such individuals are, in Defendants' view, more culpable. OB38. But as Judge Fletcher correctly recognized, the structure and text of § 1225(b), as well as other provisions Congress enacted at the same time, point in the opposite direction: Congress recognized that most asylum seekers would be subject to § 1225(b)(1) because they flee with no documents or with fraudulent documents, and sought to protect them from being returned to danger. ER87-88. *See also Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (recognizing that "a petitioner who fears deportation to his country of origin" may use "false documentation … to gain entry to a safe haven") (citing *Akinmade v. INS*, 196 F.3d 951, 955 (9th Cir. 1999)); *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1249 (9th Cir. 2018).

Notably, at the same time that it enacted the contiguous territory return provision, Congress specifically established a credible fear screening as part of the expedited removal process to ensure there would be "no danger that an alien with a genuine asylum claim will be returned to persecution." *See* H.R. Rep. No. 104-469, pt. 1, at 158 (1996). And the same Congress also enacted a provision allowing asylum seekers to be sent back to another country through which they

traveled to apply for asylum, but only if specified minimum protections are met, including that, pursuant to a bilateral or multilateral agreement with the other country, the asylum seeker would be "[s]afe" in that country and have "access to a full and fair procedure" for asylum claims there. *See* 8 U.S.C. § 1158(a)(2)(A). Section 1225(b)(2)'s express exemption of individuals who meet the § 1225(b)(1) criteria reflects the 1996 Congress's concern that vulnerable asylum seekers not be sent to countries where they face danger.

The situation of Mexican asylum seekers reinforces this conclusion. Nothing in the contiguous-territory-return statute precludes the return of Mexicans to Mexico (or Canadians to Canada). Although Defendants are not currently applying their forced return policy to Mexicans, in 1996 when Congress enacted expedited removal and the contiguous territory return provision, Mexicans comprised the overwhelming majority of individuals seeking admission at the border.[6] It would make no sense for Congress to have provided that Mexican asylum seekers—who are also subject to § 1225(b)(1) by virtue of seeking admission with fraudulent or no documents—could be returned to the very

[6] *See* U.S. Dep't of Justice INS, 1997 Statistical Yearbook of the Immigration and Naturalization Service 174, 201, Oct. 1999, https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_1997.pdf.

country they fled while seeking protection from that very same country. Yet on Defendants' reading of the statute, that would be the result. [7]

B. The Forced Return Policy Violates Defendants' Nonrefoulement Obligation Under U.S. Law, And Is Arbitrary, Capricious, and Contrary to Law In Violation of the APA.

The nonrefoulement obligation is the mandatory duty of the United States not to send someone to any territory where she would be at risk of persecution or torture. It is the cornerstone of the United States' commitment to refugees who seek our protection.

Defendants have acknowledged that the forced return policy must comply with the nonrefoulement obligation. *See* ER147, 241, 247. Defendants are bound to do so by Article 33 of the Refugee Convention[8] and the CAT,[9] as well as the

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[7] Although Defendants attempt to draw support from *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 451 (BIA 1996), that case actually supports Plaintiffs. Defendants suggest that *Sanchez-Avila* motivated Congress to enact contiguous territory return, but the respondent in that case was not an asylum seeker, or even an individual inadmissible for lack of an entry document or a fraudulent document. ER88. Instead, he presented a resident alien commuter card, but was alleged to be inadmissible on controlled substances grounds. Thus, nothing about the case remotely suggests Congress wanted to subject § 1225(b)(1) individuals to return. Further, the specific language the government cites, OB38, does not reflect the Board's reasoning, but rather its recitation of the argument made by the government, whose position the Board rejected. *See Sanchez-Avila*, 21 I. & N. Dec. at 451 (explaining that if choosing between "custodial detention or parole[ ] is the only lawful course of conduct, the ability of this nation to deal with mass migrations" would be severely undermined).

[8] "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular

domestic statutes that implement these treaties. Specifically, Congress enacted the withholding of removal statute, now codified at § 1231(b)(3), as part of the Refugee Act of 1980 to "implement the principles agreed to" in the Refugee Convention, including that the United States not "expel or return" noncitizens to any place where they face the likelihood of persecution. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). And Congress implemented Article 3 of the CAT in the INA, providing that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), Pub. L. No. 105-207, Div. G. Title XXI, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note).

The forced return policy purportedly implements this obligation via a curtailed process for assessing whether potential returnees will face persecution or torture in Mexico. But this procedure is so inadequate that it is "is virtually

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social group or political opinion." Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276 (binding United States to comply with Article 33).

[9] "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' nonrefoulement obligation." ER72.

The policy provides none the protections that the government has previously implemented to ensure compliance with that same obligation. It is thus illegal for two reasons: it violates the withholding-of-removal statute, and is arbitrary and capricious, in violation of the APA.

1. The Forced Return Policy Eliminates Basic Procedural Protections Designed To Ensure Compliance With the Nonrefoulement Obligation.

The forced return policy adopts procedures that are far more truncated than any Defendants have previously adopted to comply with their nonrefoulement obligation. The policy requires asylum seekers to meet—in a short interview with an asylum officer and without any meaningful safeguards—the same more-likely-than-not standard that is required to obtain final relief from persecution in full removal proceedings. ER241 (explaining that the forced return policy applies the "same standard used withholding of removal and CAT protection determinations"). This is in sharp contrast to the minimal procedural protections that Defendants have historically provided to noncitizens in summary proceedings, where asylum seekers have been only required to show that they *may* be able to meet the higher standard if given the opportunity.

Immigration law protects noncitizens against return to persecution or torture in two principal ways.

First, in regular removal proceedings under § 1229a, noncitizens are entitled to withholding of removal and protection under the CAT. An applicant is held to the ultimate statutory standard for protection: a more-likely-than-not chance that they face persecution or torture. 8 C.F.R. §§ 208.16(b), (c). To meet this burden, asylum-seekers are entitled to a full evidentiary hearing before an IJ, as well as notice of their rights, access to counsel, time to prepare, and a right to administrative and judicial review. *See* §§ 1362, 1229a(b)(4)(A), (B); 8 C.F.R. § 1240.3; *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000).

Second, in summary removal processes, noncitizens must be screened for potential entitlement to withholding of removal and CAT protection. These summary removal processes are "expedited removal" under § 1225(b)(1), reinstatement of removal under § 1231(a)(5), and administrative removal under § 1228(b). In each context, Congress has stripped individuals of the right to regular removal proceedings under § 1229a. But critically, to comply with its nonrefoulement obligation in these summary processes, the government provides individuals with threshold fear *screenings* that require them to meet only a low burden of proof by showing there is a *chance* they are eligible for withholding or CAT protection.

Individuals in expedited removal must show a "credible fear." § 1225(b)(1)(A)(ii), 1225(b)(1)(B)(v). Those in administrative removal or reinstatement of removal, a "reasonable fear," § 208.31(c). The credible fear standard requires showing there is a "significant possibility" that they are eligible for protection. *See* 8 C.F.R. §§ 208.30(e)(3), 235.3(b)(4). The reasonable fear standard requires a "reasonable possibility" they are eligible for protection, which means "extensive proof is not needed" as they need only demonstrate a "ten percent chance" of persecution. *Bartolme v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018). If noncitizens pass these low-threshold screenings, they are entitled to present their protection claims in full removal proceedings before IJs, with all the attendant procedural protections. *See* 8 C.F.R. §§ 208.30(f), 208.31(e).

These summary proceedings include basic procedural safeguards, beginning with notice. Before a noncitizen is subjected to expedited removal, an immigration officer must ask whether he or she has "any fear or concern about being returned to [their] home country or being removed from the United States." SER117 (Form I-867AB); 8 C.F.R. § 235.3(b)(2)(i) (requiring immigration officers to use Form I-867AB). *See also* 8 C.F.R. § 238.1(b)(2)(i) (requiring notice to those in administrative removal that they "may request withholding of a removal to a particular country if he or she fears persecution or torture in that country.").

In addition, in all credible and reasonable fear interviews, individuals may consult with and bring an attorney. *See* 8 C.F.R. §§ 208.30(d)(4) (credible fear), 208.31(c) (reasonable fear). Where needed, an interpreter must be provided at the interview, *id.* §§ 208.30(d)(5), 208.31(c). The asylum officer must summarize the material facts stated by the applicant, review that summary with the applicant for any corrections, and create a written record of his or her decision, *id.* §§ 208.30(d)(6) & (e)(1), 208.31(c). Individuals are entitled to review by an IJ of negative credible fear and reasonable fear determinations, *id.* §§ 208.30(g), 1208.30(g), 208.31(g).

In contrast, the forced return policy does not require immigration officers to inform asylum seekers they face the possibility of return to Mexico, ask if they fear return there, or notify them of the available protections. Instead, asylum seekers must "affirmatively state[]" a fear of return to Mexico to obtain an asylum officer interview. ER242.

Then, to escape return to danger, an asylum seeker must meet the same ultimate standard that is required to obtain full withholding and CAT relief. But in lieu of a full hearing before an IJ with multiple procedural safeguards, they must meet this standard in a single interview with an asylum officer that is held just days, if not hours, after they have arrived in the United States, without access to counsel, an opportunity to gather evidence, or a guaranteed interpreter, and without

the ability to present evidence concerning country conditions in Mexico. And if the asylum officer decides that an individual has failed to satisfy this high standard, that is the end: there is no right to appeal, or review by an IJ or any neutral adjudicator.

2. The Forced Return Policy Violates The Withholding of Removal Statute, § 1231(b)(3).

The withholding statute, § 1231(b)(3), states that the "Attorney General may not remove an alien to a country" where their "life of freedom" would be threatened on a protected ground. Because the forced return policy requires potential returnees to meet the more-likely-than-not standard for an ultimate grant of withholding under the statute, while denying them the procedures that accompany that burden, it violates § 1231(b)(3). Defendants offer two conclusory arguments in response. Both are wrong.

First, Defendants assert that the withholding statute "codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable," OB41 (emphasis in original). Defendants thereby imply that the withholding statute is inapplicable to the forced return policy because noncitizens are returned *before* a decision on removability is made. But this position, if accepted, would gut the withholding statute. Congress's unequivocal, mandatory directive that the "Attorney General may not remove" refugees to persecution, § 1231(b)(3), would mean nothing if the government could circumvent it by

choosing to "return" a person to persecution before a decision is made to "remove" that person. *See King v. Burwell*, 135 S.Ct. 2480, 2493 (2015) ("We cannot interpret federal statutes to negate their own stated purposes.").

Defendants' suggestion that the withholding statute does not apply to "returns" is also at odds with statutory history and legislative intent. Congress enacted the withholding provision to comply with the United States' nonrefoulement obligation under the Refugee Convention, which expressly extends its protections to "returns": "No Contracting State shall *expel or return* ('refouler') a refugee . . . ." SER514. Accordingly, the withholding statute originally forbade the government from "deport[ing] or return[ing]" an individual to persecution. INA § 243(h) (1980). In 1996, when Congress consolidated deportation and exclusion proceedings into unitary "removal" proceedings, the phrase "deport or return" was replaced with "remove" to make it consistent with the new removal proceedings. *Cf. Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1063 (9th Cir. 2010) (IIRIRA "eliminated the distinction between deportation and exclusion proceedings, replacing them with a new, consolidated category—removal"). The term "remove" was clearly intended to cover both "deportation" and "returns."

Further, in enacting the contiguous-territory-return statute in 1996, Congress gave no indication that it intended to exempt such returns from existing withholding protections. Even where Congress has elsewhere specified that certain

individuals are "not eligible and may not apply for any relief"—as it did in the provision authorizing reinstatement of removal orders against individuals who reenter the country illegally, § 1231(a)(5)—the agency and this Court both recognized that this language did not eliminate the statutory right to withholding. *See* 8 C.F.R. § 208.31; *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1080 (9th Cir. 2016).

Defendants' second argument is that, even assuming the withholding statute applies to "returns," "there is no reason why the same [withholding] procedures would apply" to "returns" as apply to "removals." OB41. But the reason is that such procedures are necessary to guard against refoulement. The fact that individuals are "returned" rather than "removed" is legally and practically immaterial. In either case, an individual is sent back against her will to a place where she may face persecution or torture.

There is no indication that the contiguous-territory-return provision displaces either the withholding statute or the manner in which that statute's protections have been consistently implemented. Since the withholding statute's enactment in 1980, the agency has *always* required that the ultimate decision on a withholding claim for asylum seekers like those subject to forced returns be made in full removal proceedings, before an IJ, with the narrow exception of individuals

who are inadmissible on national security or terrorism grounds.[10] *See* 8 C.F.R. §§ 208.1, 208.3(b), 208.10(e)-(f) (1980); 208.2(b), 208.3(b) (1990); 208.2(b), 208.3(b) (1994); 208.2(b)(1), 208.3(b) (1997); 208.2(b)(1), 208.3(b) (1999). The unbroken regulatory interpretation of the withholding statute is "persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986). *See also Andrus v. Shell Oil Co.*, 446 U.S. 657, 667–68 (1980) (interpreting statute consistent with "administrative practice, begun immediately upon the passage [of the act]").

At bottom, Congress did not create a statutory "entitlement" to withholding, *INS v. Stevic*, 467 U.S. 408, 426 (1984), simply to render it meaningless by denying asylum-seekers the most basic procedural rights: notice of their right to apply, a meaningful opportunity to be heard, and an impartial adjudicator. "[T]he protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated." *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). The "basic dictates of due process must be met … where, as here, mandatory statutory relief" is at issue. *Khouzam v. Attorney General*, 549 F.3d 235, 256-257 (3d Cir. 2008) (finding that,

[10] Such terrorism cases, which fall under Section 1225(c) ("removal of aliens inadmissible on security and related grounds") are "only a few each year" and "involve highly sensitive issues and adjudication based on classified information" that the agency believed required special procedures. 64 Fed. Reg. 8478, 8480 (1999).

in absence of specified procedures, CAT protection required notice, "reasonable opportunity to present evidence," and "neutral and impartial" decisionmaker). The forced return policy denies the bare minimum of procedures necessary to effectuate the intent of the statute.[11]

3. The Forced Return Policy's Protection Procedure is Arbitrary and Capricious.

Even if the withholding statute does not regulate returns, Defendants' policy is nonetheless arbitrary and capricious. Defendants have themselves set out that the return policy should be implemented "consistent[ly]" with their nonrefoulement obligation. ER142-43. But the process Defendants have adopted is a dramatic departure from established practices for making such determinations—practices that Defendants previously deemed necessary to satisfy this same obligation.

Defendants' failure to acknowledge this departure, let alone provide "good reasons" for their change in course, violates the APA's requirement of reasoned

[11] To comport with due process, the statute requires, at a minimum: (1) "timely and adequate notice" and an "opportunity to be heard," which includes the opportunity to gather and present evidence. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). *See also Andriasian v. INS*, 180 F.3d 1033 (9th Cir.1999) (finding due process violation where IJ changed country of removal without providing opportunity to apply for withholding of removal from that country); (2) a neutral adjudicator. *See, e.g.*, *Peters v. Kiff*, 407 U.S. 493, 501 (1972); (3) the right to assistance of counsel to "help delineate the issues, present the factual contentions in an orderly manner . . . and generally safeguard the interests" of the applicant. *Goldberg*, 397 U.S. at 270-71; and (4) trained and competent interpretation. *See Perez-Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000).

and reasonable policy-making. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The procedures also violate the APA because they are not "reasonably related" to the agency's stated goal of nonrefoulement. *Bangor Hydro-Elec. Co. v. F.E.R.C.*, 78 F.3d 659, 663 (D.C. Cir. 1996).

a. The Forced Return Policy Is An Unexplained and Unjustified Departure from Consistent Agency Practice.

Whether measured against the procedures available in full removal proceedings, or summary proceedings, the forced return policy's protections against refoulement clearly fall short. *See supra* at I.B.1 (comparing procedures). Defendants have never acknowledged their decision to modify the existing procedures, much less provided reasons for such a decision.

Instead, Defendants maintain there is no departure to explain because the agency has never before created procedures to comply with their nonrefoulement obligation in the context of contiguous-territory returns specifically.[12] OB42. But this misses the point: Defendants have previously created procedures to comply with precisely the same nonrefoulement obligation. *See supra* at I.B.1. *See also* INS, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999) (providing that "claim to protection under the [CAT] will be raised and considered … during removal proceedings before an [IJ]"); *id.* 8485

[12] Defendants rely on the fact that *Congress* did not include notice requirements, e.g., in the expedited removal statute. But the focus of the APA claim is how the *agency* has developed their policies in service of the nonrefoulement obligation.

(reasonable fear process "intended to provide for the fair resolution of claims to withholding under section 241(b)(3) of the Act, and to protection under the [CAT]"); *id.* 8484 (providing credible fear process "for protection under Article 3 as well as … [statutory] withholding"); SER540, 318, 546 (reasonable fear process designed "to ensure compliance with U.S. treaty obligations" regarding nonrefoulement).

The forced return policy explicitly applies the same test, and the "same standard" for protection as does the Refugee Convention, the withholding of removal statute, and CAT. ER241. There can be no dispute that the forced return policy deviates from the agency's existing policy implementing these obligations.

b. The Forced Return Policy Does Not Rationally Further the End of Nonrefoulement.

In addition, the forced return policy is "so ill-suited to achieving [their] stated goal as to render them arbitrary and capricious under the Administrative Procedure Act." ER 72. *See Judulang v. Holder*, 565 U.S. 42, 53 (2011) (an agency must "exercise its discretion in a reasoned manner"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1267 (D.C. Cir. 1994) (holding that the "agency's approach" is "inconsistent with the agency's own stated intentions"); *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 253 F.3d 732, 736 (D.C. Cir. 2001) (en banc) (same).

Defendants advance a host of unpersuasive rationales for why their policy is not "so irrational as to be arbitrary and capricious." [13] OB53. They argue, first, that there is "less reason to be concerned about a risk of persecution or torture" of noncitizens returned to a third country rather than to their home, OB49-50, in part because the dangers they face are of "random acts of crime or generalized violence," *id.*at 47-48. But it is obvious that individuals can face persecution in more countries than their own—and clearly that is the case for Central American asylum seekers in Mexico, where the State Department's own country report identifies human rights abuses against migrants as a significant problem. *See* SER 412, 419, 423-24, 429-36, 439-40, 465-66; State Department 2018 Report 7, 9, 19-20, 27, 33, 35.

Defendants next argue that asking about a fear of return to Mexico would generate "a huge number of false-positive answers." OB52. Nothing in the record supports this speculative, *post hoc* assertion. But more importantly, the purpose of the nonrefoulement obligation is to protect those who will face such persecution; that false positives *may* arise is irrelevant. The government can allocate resources to cope with an increase of fear claims, but there is no remedy for someone who is returned to their persecution or death.

[13] Notably, Defendants do not even attempt to defend their denial of an independent, neutral adjudicator to review claims for protections.

Defendants also assert that those with a well-founded basis to fear persecution in Mexico will raise that claim the moment they are told they will be returned. OB44-45. This assertion finds no basis in the administrative record, and the evidence demonstrates otherwise. Some individuals often do not understand that they are being returned to Mexico until after their return is underway and it is too late to get an interview with an asylum officer. *See, e.g.*, SER7, 18, 52, 60-61. Furthermore, because those who are subject to return came to the United States to seek asylum from their home countries, they are often unaware that they can even claim protection from a third country. *See, e.g.*, SER17-18, 52-54, 60-62.

Defendants also suggest the failure to require questioning about fear is cured by the fact that returnees can raise a claim of fear "at any time." OB51. But this is at best misleading. Individuals who have been returned to Mexico can raise a claim of fear only when they are allowed back to the United States for their removal proceedings. For many, it is months between hearings, during which time they must remain vulnerable to harm. The point of nonrefoulement is to prevent the return to persecution and torture *before* it occurs.[14]

[14] Defendants further claim that "[t]he agency was entitled to make a predictive judgment, based on its experience," that individuals who face a genuine risk will assert it without being questioned. OB52 (citing to *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011). But there is nothing in the administrative record to support that supposed judgment. Moreover, there is no reason to expect those fleeing persecution in their home countries to expect their return to a third country where they also face injury. In any event, Defendants do

Defendants claim that returnees have no need to consult with and be assisted by counsel in the forced return policy's fear interview because the interview process is non-adversarial. But both the credible and reasonable fear interview processes are also non-adversarial, yet individuals may consult with and bring an attorney to these interviews. Moreover, the informality of the interview is not sufficient to ensure that an asylum seeker can testify completely, especially given their detention, lack of time to prepare, or even rest. *Cf. Ming Zhang v. Holder*, 585 F.3d 715, 723-25 (2d Cir. 2009) ("an alien appearing at a credible fear interview [is] likely to be more unprepared, more vulnerable, and more wary of government officials than an asylum applicant who appears for an interview before immigration authorities well after arrival"). *See accord.* SER93-101, 104-09 (describing the impediments Plaintiffs faced in their forced return interviews).

4. At a Minimum, Defendants Must Adopt a Threshold Fear Screening Standard and Provide Basic Procedural Safeguards.

This Court should reject Defendants' attempt to evade *any* review of their policy. Defendants argue that whatever procedures they provide—no matter how lacking—are satisfactory because "no statute or international obligation requires … any … specific procedure" and that international law leaves "what procedure to

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not explain why, if this was the agency's expert opinion, they chose to require affirmative questioning in expedited removal, and required that individuals in administrative removal be provided with notice of the right to apply for withholding and CAT.

use to assess refoulement … to each contracting state." OB50, 51(citation and internal quotations omitted).[15] But the withholding-of-removal statute applies to their policy, and requires that the ultimate determination of whether persecution is more likely than not be made in formal proceedings before a neutral adjudicator. And the APA requires Defendants to acknowledge and explain their departure from their prior implementation of their nonrefoulement obligation, and why the procedures they have chosen are a rational end to the protection requirements that bind them.

If Defendants seek to hold returnees to the ultimate standard imposed by the withholding statute—that they are "more likely than not" to be persecuted or tortured in Mexico—then they must provide procedures that are commensurate with the statutory burden. They must, at a minimum, pass the APA's test for reasonable policymaking.

The proper remedy for either violation at this stage is to enjoin the policies until they are revised by Defendants. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 50-57 (1983) (where agency fails to provide reasoned explanation, reviewing court may remand to agency for further

[15] Defendants cite *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc), to argue that their procedures adequately implement their nonrefoulement obligation. OB40. But *Trinidad* does not address the APA's prohibition on arbitrary departures from agency policy, nor does it address what procedures are necessary under the withholding-of-removal statute.

proceedings); *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 585-86 (9th Cir. 2002) (remanding "to afford the Board the opportunity either to articulate a reasoned explanation for its rule, or to adopt a different rule with a reasoned explanation that supports it").

Defendants may—as they have in the past—seek to condition access to full § 1229a removal proceedings by creating a screening standard. But if they do so, they must use a lower standard of proof and provide procedural protections that are commensurate with what they provide in other summary proceedings.

C. The Forced Return Policy Established A New, Binding Fear-Assessment Process Without Notice and Comment.

The district court was correct that the forced return policy's fear-assessment procedures likely violate the APA, 5 U.S.C. §§ 553(b), (c), because they are a legislative rule that was not promulgated through notice-and-comment procedures. ER23.[16]

Plaintiffs do not dispute that immigration officers have discretion under the forced return policy to select individuals who may be eligible for return to Mexico.

[16] The motions panel did not address the notice-and-comment claim that Plaintiffs raised, which is whether the nonrefoulement process alone is a legislative rule subject to the APA's notice-and-comment requirements, particularly as an application of the withholding statute. The per curiam opinion reasoned only that the policy as a whole "qualifies as a general statement of policy because immigration officers designate applicants for return on a discretionary case-by-case basis." ER69. That decision does not control Plaintiffs' claim here. *See United States v. Luong*, 627 F.3d 1306, 1310 (9th Cir. 2010).

Instead, Plaintiffs challenge the nondiscretionary nonrefoulement process that applies on a *mandatory* basis to individuals who express a fear of return to Mexico, includes *mandatory* procedures and criteria that bind both noncitizens and officials, and imposes a *mandatory* prohibition on the return of individuals who demonstrate that they are more likely than not to be persecuted in Mexico. This process is a legislative rule: it does not leave immigration officers "free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

Furthermore, the applicability of the withholding statute and FARRA § 2242(a) to contiguous-territory returns requires the policy's nonrefoulement procedures undergo notice-and-comment rulemaking. These mandatory legislative prohibitions have consistently been implemented through formal rulemaking. *See, e.g.*, 62 Fed. Reg. 444, 461-463 (1997); 62 Fed. Reg. 10312, 10337-13046 (1997); 63 Fed. Reg. 31945, 31949-31950 (1998); 64 Fed. Reg. 8,478, 8,450 (1999). And as the district court recognized, the forced return policy departs from the rules governing agency determinations of the ultimate standard for protection. *See* ER23; *see also Hemp Industries Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1088 (9th Cir. 2003) ("when an agency does not hold out a rule as having the force of law, it may still be legislative if it is inconsistent with a prior rule having the force of law").

II. THE EQUITIES STRONGLY FAVOR PLAINTIFFS.

Plaintiffs are experiencing irreparable harm because of the forced return policy, and the balance of equities tips sharply in their favor.[17]

A. Plaintiffs Are Suffering Irreparable Harm

The Individual Plaintiffs have been forced to return to Mexico, where they have been physically assaulted, subjected to death threats, and forced into hiding to evade harm. *See, e.g.*, SER98 (members of the brutal Mexican Zetas cartel kidnapped Howard Doe for fifteen days and threatened to kill him and burn his body); SER54 ("a group of Mexicans threw stones at us and more people were gathering with sticks and other weapons to try to hurt us"); SER24 (to avoid harm in Mexico, Bianca Doe hides her sexual orientation). Plaintiffs live under precarious conditions, at risk of homelessness, struggling to meet basic needs, and fearful that the persecutors they fled at home will find them in Mexico. *See, e.g.*, SER37 (Dennis Doe saw members of the gang that threatened him in Honduras in Mexico searching for individuals who defied them), 81, 90, 290-93. They also fear

[17] The Court is not bound by the motions panel's balancing of the equities. The standards for whether to stay an injunction and whether to grant preliminary injunctive relief are not "one and the same." *Nken v. Holder*, 556 U.S. 418, 434 (2009). *Compare Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc) (review of a preliminary injunction order is "deferential") (citation omitted) *with Nken*, 556 U.S. at 434 (appellate court deciding on stay evaluates harms without deference to lower court's balancing).

that Mexico will unlawfully deport them to their home countries before their asylum claims are adjudicated. *See* SER84 (Mexican officials separated Kevin Doe from his wife and deported her despite being pregnant and explicitly stating fear of return); SER440 ("the non-refoulement principle is systematically violated in Mexico"); SER139, 162, 187 (same). These concerns are not only anecdotal; there is extensive evidence of the widespread abuse of migrants in Mexico. SER175-79 (Amnesty International); SER291-97 (Dr. Jeremy Slack); SER430-36, 439-40 (Medecins Sans Frontieres); SER465-66 (Congressional Research Service); *see also* SER236-39, 272-74, 281, 412, 419, 423-24.[18]

Defendants erroneously assert that Mexico's "commitment" to abide by its international obligations cures any risk of harm to Plaintiffs. OB52-53. But these assurances speak only to Mexico's *willingness* to try to protect them, not its *ability* to do so. *See Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013). Plaintiffs' experiences and the administrative record confirm that Mexico is incapable of offering asylum seekers adequate protection and has mistreated migrants. *See, e.g.*, SER423 ("migrants and refugees are preyed upon by criminal organizations, sometimes with the tacit approval or complicity of national authorities"); SER465 ("Corrupt Mexican officials" found "complicit" in abuses against migrants.);

[18] Courts may, and regularly do, consider evidence outside the administrative record in support of non-merits injunction factors. *See, e.g., Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24-26 (2008).

SER109 (Mexican police detained Ian Doe on multiple occasions, threatening to "take [him] to jail unless [he] paid a bribe"); SER412, 419, 430-36, 440. And in light of the Mexican government's recent agreement to "take unprecedented steps," including the deployment of its National Guard "throughout Mexico," to "increase enforcement to curb irregular migration," U.S.-Mexico Joint Declaration, Central American migrants are now in even greater danger of refoulement to their home countries without the required process.

Defendants also point to Mexico's stated commitment to allowing returned individuals to "apply for a work permit," OB53 (quoting ER164). The motions panel assumed the Mexican government had committed to "grant" work permits and relied on that assumption as a basis to negate the risk of harm. ER70. But the opportunity to apply has not translated to actual authorization for Plaintiffs. *See, e.g.*, SER8 (Plaintiff told he does not have permission to work), 89. Even if Plaintiffs could apply for authorization, and Mexico were regularly granting permits, that would not change that they rarely can go out in public because of the dangers they face. *See* SER19, 62.

Defendants also erroneously contend that Plaintiffs' "voluntary" travel through Mexico and their "significant time" spent in the country "undermine" their fear. OB53. This distorts reality. To seek asylum in the United States, Plaintiffs had to pass through Mexico, where they encountered dangers that prolonged their

journey. Defendants' metering policy then forced them to wait for several weeks in Mexico before they were permitted to present at a port of entry. *See, e.g.*, SER13-14, 24, 36, 95, 98.

The Plaintiff Organizations are also suffering injuries sufficient to justify injunctive relief. They have diverted significant resources to restructuring their programs, which impair their ability to carry out their core objectives of providing comprehensive, high volume representation to asylum seekers. *See, e.g.*, SER13-14, 24, 36, 95. For example, representing just one returned individual saddles the Organizations with over $3,000 in additional costs, *see* SER213, and increases attorney time expended by as much as forty percent, *see* SER203-04. The policy puts the Organizations at risk of losing substantial grants that only cover representation of individuals in the United States. *See, e.g.*, SER247, 261, 206. The rapid expansion of the policy has compounded these injuries. As this Court has recognized, being "forced to divert substantial resources to [a policy's] implementation" may constitute irreparable harm and tip the balance of hardships. *East Bay*, 909 F.3d at 1255; *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018-19, 1029 (9th Cir. 2013).

The district court was well within its discretion in finding that "there is no real question" Plaintiffs are likely to face irreparable injury sufficient to warrant interim relief. ER 24.

B. The Public Interest and Balance of Equities Weigh Heavily in Favor of Injunctive Relief.

Defendants do not identify a single credible harm that would result from an injunction requiring them to conform the forced return policy with their nonrefoulement obligation. They assert that providing notice of a right to seek protection would yield "false-positive answers" and "slow down … processing." OB45. But that unfounded supposition cannot overcome the public interest in complying with our nonrefoulement obligation, even if doing so requires reallocating resources. *See Nken*, 556 U.S. at 436 ("there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm").

Defendants also fail to demonstrate that enjoining the forced return policy as a whole would result in the harms they identify. Defendants argue, without any evidence, that the forced return policy "re-calibrates incentives" for noncitizens to seek asylum in the United States. OB52. But Central American migration is driven primarily by "the powerful push factors of poverty and violence" in the region, not the specifics of U.S. policy. SER477 (former DHS Secretary Johnson); SER427-30 (report explaining that migrants leave Central America primarily because of "unprecedented levels of violence," extortion, and forced recruitment attempts by gangs); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 189-90 (D.D.C. 2015).

With respect to the government's interest in deterring unlawful entry, OB52, this Court rejected a nearly identical argument in *East Bay*, explaining that "vague assertions that the [policy] may 'deter' this conduct are insufficient" particularly where the Government has tools including criminal prosecution to "combat[] illegal entry[.]" 909 F.3d at 1254.[19] Moreover, the policy applies even to those who apply for asylum at a port of entry, and do not unlawfully enter the United States.

Defendants also mistakenly claim that the forced return policy is necessitated by increasing numbers of meritless asylum applications by individuals who are unlikely to appear for their immigration court hearings if released from detention. OB1, 51-52. But the forced return policy is not tailored to address this problem; it targets individuals without regard to the merits of their asylum claims or their flight risk. The public has no interest in deterring bona fide asylum seekers. Indeed, "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102.

Moreover, the data do not support the government's suggestion that many individuals have bad-faith claims. The government cites low grant rates for cases that began with a credible-fear claim and were completed in FY2018, *see* OB51-

[19] Additionally, as this Court noted in *East Bay*, "there is evidence … suggesting that the Government itself is undermining its own goal of channeling asylum-seekers to lawful entry by turning them away upon their arrival at our ports of entry." 909 F.3d at 1254.

52, but a large proportion of those cases are still pending, making it impossible to determine the total grant rate. *See* SER330 (203,569 credible-fear-origin cases filed between FY 2008 and FY 2018 still pending as of November 2, 2018). Those cases that have already been decided are disproportionately denials, which tend to be issued more quickly than asylum grants.[20] Furthermore, many denials are on some technical legal basis—not because applicants lack a good faith and well-founded fear of harm.

Defendants also misrepresent the failure-to-appear rates of asylum seekers. The vast majority of asylum seekers show up for their hearings. *See* SER406 (89% of asylum seekers appeared at their hearings in FY2017); *compare* Executive Office for Immigration Review, Adjudication Statistics: *Rates of Asylum Filings in Cases Originating with a Credible Fear Claim* (Nov. 2, 2018), https://www.justice.gov/eoir/page/file/1062971/download (345,356 cases referred to EOIR following a credible fear claim between FY 2008 and FY 2018), *with* Executive Office for Immigration Review, *In Absentia Removal Orders in Cases Originating with a Credible Fear Claim* (Apr. 23, 2019), https://www.justice.gov/eoir/page/file/1116666/download (from FY 2008 to FY

[20] That is because denials can often be issued without individual merits hearings, and because detained cases move more quickly than non-detained cases and are disproportionately more likely to result in denials.

2018, immigration judges issued 44,269 *in absentia* removal orders, less than 13% of the cases referred).

Defendants further assert that an injunction would undermine ongoing U.S.-Mexico negotiations regarding the southern border. OB51. But such negotiations cannot insulate a policy from an injunction if the object of the negotiations is unlawful. The public interest is served when the government complies with the law. *See, e.g.*, *Ariz. Dream Act. Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

Moreover, all cross-border policies necessarily involve engagement with another country. Defendant's position would effectively insulate from scrutiny any number of policies touching on contiguous-territory return, refugee resettlement, and visa waivers. *Cf. Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (rejecting a broad application of the foreign-affairs exception "even though immigration matters typically implicate foreign affairs"). And any suggestion that the preliminary injunction undermines the separation of powers, *see* OB50-51, must be rejected, as this Court has made clear that any such injury is not irreparable because "the Government may pursue and vindicate its interests in the full course of [the] litigation." *East Bay*, 909 F.3d at 1254.

Plaintiffs do not dispute that the public has an interest in "the efficient administration of immigration laws at the border." OB24. However, the forced

return policy has undermined this interest by causing confusion and chaos. *See*, *e.g.*, SER183-96, 223-24, 232. More importantly, Defendants cannot advance this interest at the expense of affording asylum seekers a meaningful opportunity to present their claims for protection, *see Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam) (considering "the public's interest in ensuring that we do not deliver aliens into the hands of their persecutors") and in ensuring that statutes are not "imperiled by executive fiat." *East Bay*, 909 F.3d at 1255 (citing *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)).

III. A NATIONWIDE INJUNCTION IS NECESSARY TO REDRESS PLAINTIFFS' INJURIES.

The district court did not abuse its discretion by issuing a nationwide injunction. A narrower injunction would result in a fractured immigration policy and fail to redress the Organizations' concrete injuries, which easily fall within the INA's zone of interests. The injunction interferes no more than necessary with Defendants' asserted interests, as the district court specifically tailored it to not require the release of any individual into the United States. But if the Court finds the injunction to be overbroad, it may tailor the injunction to address the unlawful aspects of the policy it identifies.

A. The Organizations Have Standing and Are Within the INA's Zone of Interests.

Much of Defendants' complaint about the scope of the injunction relies on their argument that the Organizations lack standing to challenge the Forced Return Policy. OB55-57. But under this Court's precedent, the Organization's ability to raise this challenge cannot reasonably be questioned.[21]

1. The Organizations Have Article III Standing.

Defendants acknowledge that they are bound by this Court's holding in *East Bay* that organizations can have standing to challenge policies targeting immigrants based on the diversion of their resources and the frustration of their mission. OB56 (citing 909 F.3d at 1241-43). They argue that "MPP does not alter the ability of any alien to seek asylum or to receive representation from the Plaintiff organizations." OB56. But, as the district court found, "it is manifestly more difficult to represent clients who are returned to Mexico, as opposed to being held or released into the United States." ER 12. The Organizations' missions are frustrated by the forced return of their clients and other asylum seekers to Mexico, and the Organizations are being forced to restructure their operations in response. *See East Bay*, 909 F.3d at 1241-42.

[21] Defendants do not challenge the Individual Plaintiffs' standing.

2. The Organizations Fall Within the Zone of Interests.

That Organizations' claims fall within the INA's zone of interests is established by *East Bay*, which held that organizations' "interest in provid[ing] the [asylum] services [they were] formed to provide falls within the zone of interests protected by the INA." 909 F.3d at 1244 (internal quotation marks omitted).

The zone-of-interests test "'forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with'" a statutory scheme that Congress could not have intended to allow the suit. *Id.* (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)). The Organizations easily satisfy that standard. Several "provisions in the INA give institutions like the Organizations a role in helping immigrants navigate the immigration process." *Id.* at 1245. These provisions "directly rely on institutions like the Organizations to aid immigrants" and "are a sufficient indicator that the plaintiff[s] [are] peculiarly suitable challenger[s]." *Id.* (internal quotation marks omitted).

Defendants assert that this case involves a different statutory provision than *East Bay*, where the plaintiffs alleged a violation of § 1158. *See* OB57 n.8. But *East Bay* assessed whether the plaintiff organizations were within the zone of interests by looking to the INA as a whole. *See* 909 F.3d at 1243-45; *id.* at 1244 n.9 ("[W]e are not limited to considering the [specific] statute under which [plaintiffs] sued, but may consider any provision that helps us to understand Congress' overall

purposes in the [INA].") (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987)). That analysis yields the same result here.

The Organizations themselves need not be subject to the forced return policy or regulated by § 1225(b). *See* OB57. The "contested provision need not directly regulate the Organizations." *East Bay*, 909 F.3d at 1244. *See also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012); *id.* at 225 n.7.[22]

B. The District Court's Nationwide Injunction is Necessary and Appropriate to Address Plaintiffs' Injuries.

The nationwide injunction here is consistent with injunctions this Court has endorsed in similar cases, is necessary to temporarily redress Plaintiffs' complex injuries, and is tailored to avoid unnecessary interference in Defendants' immigration operations.

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[22] Defendants invoke Justice O'Connor's single-Justice opinion in *INS v. Legalization Assistance Project*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers), *see* OB57, but Justice O'Connor later recognized that a majority of the Court rejected her view. *See Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 505 (1998) (O'Connor, J., dissenting) ("The Court adopts a quite different approach to the zone-of-interests test today, eschewing any assessment of whether the [statute] was intended to protect [plaintiffs'] interest."); *see also id*. at 493 & n.6 (majority opinion) (plaintiffs within zone of interests even though Congress had no goal of helping them). *East Bay* declined to rely on Justice O'Connor's "non-binding and concededly 'speculative'" opinion, which involved "markedly different" interests than "aiding immigrants." 909 F.3d at 1245 n.10 (quoting *Legalization Assistance Project*, 510 U.S. at 1304). *Fed'n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996) is similarly inapposite, as it involved only a generalized interest in limiting immigration.

"In immigration matters," this Court has "consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *East Bay*, 909 F.3d at 1255. There is a special "need for uniformity in immigration policy," *Regents of the Univ. of Cal. v. Dep't of Homeland Sec*., 908 F.3d 476, 511 (9th Cir. 2018), where "fragment[ation] … run[s] afoul of the constitutional and statutory requirement for uniform immigration law and policy," *Washington v. Trump*, 847 F.3d 1151, 1166–67 (9th Cir. 2017) (citing *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015)). Indeed, the Supreme Court recently declined to stay part of a nationwide injunction against another immigration policy designed to limit the entry of certain noncitizens into the United States. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

Defendants nonetheless argue that the district court's injunction is overbroad because it is not limited to "the individual plaintiffs" and Organizational Plaintiffs' "bona fide clients … who were processed under MPP." OB54. Such an injunction would be unworkable, and this Court rejected a nearly identical argument in *East Bay*, 909 F.3d at 1255-56. There, as here, "the Government fail[ed] to explain how the district court could have crafted a narrower [remedy] that would have provided complete relief to the Organizations." *Id*. at 1256 (internal quotation marks omitted); *see also* ER 26 ("[D]efendants have not shown the injunction in this case can be limited geographically.").

Relief limited to the Organizations' "bona fide clients," OB54, would leave the Organizations' geographically and programmatically complex injuries unredressed. *See East Bay Sanctuary Covenant v. Trump*, 354 F.Supp.3d 1094, 1121 (N.D. Cal. 2018) ("[T]he Organizations' harms are not limited to their ability to provide services to their current clients, but extend to their ability to pursue their programs writ large, including the loss of funding for future clients"); SER221, 228-29, 247, 213.[23]

The injunction also avoids interfering any more than necessary with Defendants' operations. The district court's order does not address whether non-plaintiffs "should be offered the opportunity to re-enter the United States pending conclusion of their section 1229a proceedings" and does not "require that any person be paroled into the country." ER26.

Finally, because Plaintiffs are likely to prevail on an APA challenge, relief is necessarily programmatic. "In this context, '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" *Regents of the Univ. of Cal.*, 908 F.3d at 511 (quoting *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). Here, the defect

[23] Unlike in *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), and *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018), *see* OB54, the Organizations do not operate within neat geographic bounds, and their harms cannot be disentangled from the operation of the Forced Return Policy as a whole.

"consist[s] of a rule of broad applicability" and "the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual." *Id*. (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting but "apparently expressing the view of all nine Justices on this question")). Under these circumstances even "a single plaintiff … may obtain 'programmatic' relief that affects the rights of parties not before the court." *Id*.

Even if this Court determines that Plaintiffs are only likely to succeed on the merits because of shortcomings in Defendants' fear assessment procedures, that alone would warrant a nationwide injunction preventing the forced return policy from being implemented until Defendants design lawful procedures. The procedures are an integral part of the forced return policy; indeed, they are the only feature of the policy that allegedly protect against refoulement, an obligation imposed by treaties, statute, and Defendants' own commitment. So long as Defendants' fear screening procedures continue to be unlawful, an injunction against the forced return policy as a whole thus remains appropriate.

C. In The Alternative, the Court May Tailor the Injunction to Address the Illegal Harms the Court Identifies in the Forced Return Policy.

If the Court finds that the unlawful aspects of the forced return policy do not justify the current injunction, the Court can use its authority to conform the

injunction to the legal violations it finds. 28 U.S.C. § 2106 (providing authority to "modify" order).

For example, an injunction based solely on the invalidity of the nonrefoulement process could lend itself to tailoring that still would involve a nationwide remedy. Such tailoring is within this Court's "broad equitable powers" to "use novel and flexible methods to mold its decree to fit the necessities of a specific case and effectuate the intent of Congress." *United States v. BNS Inc.*, 858 F.2d 456, 466 (9th Cir. 1988); *see id*. at 458, 466 (affirming injunction "while extensively modifying" it because "the court's concerns could have been addressed in an order more narrow in scope").

Given the life-or-death stakes in this case, immediately reinstituting a narrowed injunction would be more equitable than the delay involved in a remand to the district court to fashion a new injunction.

CONCLUSION

The preliminary injunction should be affirmed.

Dated: June 19, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs-Appellees knows of no related cases, as defined by Ninth Circuit Rule 28-2.6, pending before this Court.

/s/ Judy Rabinovitz
Judy Rabinovitz
Dated: June 19, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Judy Rabinovitz
Judy Rabinovitz
Dated: June 19, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 13,294 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Judy Rabinovitz
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Dated: June 19, 2019

General Information

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