UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORA and her minor son, JOSE, *et al*., *Plaintiffs*, v. CHAD F. WOLF, *et al.*, *Defendants*.	No. 1:20-cv-00993-ABJ

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants' response is notable for what it does not say. Defendants do not dispute the extreme dangers in Tamaulipas, dangers of which they were well aware when they decided to begin sending migrants back there under the Migrant Protection Protocols ("MPP"). Nor do they dispute the horrendous abuse to which Plaintiffs have been subjected as a result of the expansion of MPP to Tamaulipas, abuse that is graphically documented in the nonrefoulement interview ("NRI") worksheets attached as exhibits to Defendants' brief. Instead, Defendants' principal argument is that the agency actions Plaintiffs are challenging are not reviewable. Opp. 22-27, 28-30, 35.[1] These arguments reflect a fundamental misunderstanding of both the nature of the agency actions being challenged and the scope of the preclusion statutes invoked. Defendants are wrong that there is "no law to apply" to Plaintiffs' Administrative Procedure Act ("APA") challenges to the expansion of MPP to Tamaulipas ("MPP-Tamaulipas"). Opp. 26. The Immigration and Nationality Act ("INA") and MPP provide standards to guide the Court's review.

Defendants' reliance on § 1252(a)(2)(B)(ii) of the INA is similarly misplaced. That provision applies only to review of discretionary denials of immigration relief, and decisions whether to return individuals to Mexico pending proceedings is not immigration relief. Moreover, the provision applies only to individual decisions, and thus has no applicability to Plaintiffs' challenge to the agency's adoption of MPP-Tamaulipas. Nor would § 1252(a)(2)(B)(ii) bar review of the individual return decisions Plaintiffs challenge. Defendants characterize these decisions as within the "complete discretion" of the agency. Opp. 25. But Defendants concede that such discretion is limited in a critical respect: the agency is "categorically" prohibited from returning to

[1] "Opp." refers to Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction (ECF No. 23-2). "Mot." Refers to Plaintiffs' Memorandum of Law in Support of their Motion for Preliminary Injunction (ECF No. 18-2).

Mexico individuals who are likely to face persecution or torture there. *Id*. at 6. And, of course, Defendants do not have discretion to affirmatively place Plaintiffs in danger, in a way that shocks the conscience.

Defendants' cursory arguments on the merits are equally weak. They mount virtually no defense to Plaintiffs' claim that the agency's decision to expand MPP to Tamaulipas was arbitrary or capricious because the agency failed to consider the extreme dangers facing migrants there. Instead, they seek to sidestep the claim entirely, asserting that because Defendants were exercising statutory authority, their decisions were "rational" and must be upheld. Opp. 27. But Defendants were obligated to consider, when they expanded MPP to Tamaulipas, whether their assurances of safety for migrants returned to Mexico under MPP were even plausibly true as applied to those who would be returned to Tamaulipas. They offer no defense for their failure to do so.

Defendants' actions are also unconstitutional: they have made Plaintiffs more vulnerable to known and obvious dangers through actions that shock the conscience. Defendants claim that only a heightened standard, used to judge state actions in a high-speed chase or prison riot, should apply; that there is no Constitutional interest here; and that they cannot be liable for exposing someone to a harm posed by a third party or for sending someone to a region through which the person had traveled. All these arguments are wrong.

Defendants' response to Plaintiffs' challenge to their individual returns and the nonrefoulement interview decisions on which they are based is to point to the asylum adjudicators' cursory conclusions that none of the Plaintiffs established a likelihood of persecution or torture. But Defendants miss the point. Plaintiffs' claim is that those determinations are the result of Defendants' failure to apply the proper standard and/or to actually consider the evidence presented.

Finally, Defendants' claim that an injunction would open the floodgates is a red herring as the scope of relief is limited to the facts presented by Plaintiffs, 11 asylum-seeking families whose irreparable harm has been extensively documented. The Court has the authority and should issue an injunction based on the specific, irreparable harm reflected in the record.

ARGUMENT

I. Defendants' Decision to Adopt MPP-Tamaulipas Was Arbitrary or Capricious.

Defendants seek to preclude review over their decision to expand MPP to a region known for kidnapping, rape, torture, and death. Their arguments are without merit. The Court can and should review Plaintiffs' claim that the expansion of MPP was arbitrary and capricious.

A. Plaintiffs' Challenge to MPP-Tamaulipas Is Not Foreclosed by the INA.

Defendants begin by invoking 8 U.S.C. § 1252(a)(2)(B)(ii), the second part of an INA provision restricting review of certain discretionary actions. The first part, § 1252(a)(2)(B)(i), applies to "any judgment regarding the granting of relief" under one of five listed statutory provisions. The second part, subsection (B)(ii), reaches "any other decision or action of" the Secretary of the Department of Homeland Security ("DHS") "the authority for which is specified under this subchapter to be in the [Secretary's] discretion," other than asylum. Read in context, subsection (B)(ii) is narrow and applies only to determinations similar to those enumerated in (B)(i). *See Kucana v. Holder*, 558 U.S. 233, 245–48 (2010). The expansion of MPP falls outside this limited reach.

First, § 1252(a)(2)(B)(ii) applies "only when Congress itself set out the [Secretary's] discretionary authority in the statute." *Kucana*, 558 U.S. at 247. It does not apply when discretion is simply implied. *See id.* at 243 n.10; *see generally id.* at 243–45 (decision does not fall under § 1252(a)(2)(B)(ii) when the discretion over such decision is described in a regulation, not a

statute). The provision "speaks of authority 'specified'—not merely assumed or contemplated—to be in the [Secretary's] discretion," *Fogo De Chao Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1138 (D.C. Cir. 2014) (quoting *Kucana*, 558 U.S. at 243 n.10).

Thus, § 1252(a)(2)(B)(ii) does not preclude review of Defendants' expansion of MPP to Tamaulipas. The statutory provision on which the decision to return individuals to Mexico is based, 8 U.S.C. § 1225(b)(2)(C) (the "contiguous territory provision"), "does not address, much less specify, any discretion associated with," the Secretary's decision to create or expand MPP, which is a complex scheme regarding which individuals DHS will return, to where, and how, and the requirements once individuals have been returned. *Liu v. Novak*, 509 F. Supp. 2d 1, 7 (D.D.C. 2007) (finding that subsection (B)(ii) does not bar review of claim about application processing delay, even though decision on underlying application would be unreviewable) (citation omitted).

Defendants emphasize the term "may" in the contiguous territory provision, as an indication of discretion. *See* Opp. 22–23. That term, however, refers only to individual return decisions. *See* 8 U.S.C. § 1225(b)(2)(C) ("In the case of *an* alien . . . the [Secretary] may return *the* alien") (emphasis added). And though Defendants attempt to equate the expansion of MPP with individual return decisions, *see* Opp. 22, these agency actions are distinct. *See Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1287 (D.C. Cir. 2016) (recognizing the "well-established" distinction between a challenge to a certain agency action and a challenge to the policy underlying that action). The term "may" thus does not specify discretion to create or expand a complex general scheme like MPP. *See generally Soltane v. Dep't of Justice*, 381 F.3d 143, 147–48 (3d Cir.2004) (Alito, J.) (explaining that "ubiquitous" discretion, such as discretion to interpret an ambiguous statutory term, is not enough to trigger § 1252(a)(2)(B)(ii)). Indeed, in assessing the scope of restrictions on judicial review, courts have routinely distinguished between challenges to

individual decisions and challenges to the generally applicable policies on which they are based. *See, e.g., Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 56 (1993) (statute precluding review over an individual "determination respecting an application for adjustment of status" applied only to review of "such an individual denial" and not generally applicable regulations); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991) (same). This principle holds true with regard to § 1252(a)(2)(B)(ii). *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 327 (D.D.C. 2018).

Defendants' cases do not undermine Plaintiffs' position. *Cruz v. Dep't of Homeland Sec.*, reached the merits of "APA claims concerning the promulgation" of the MPP policy, including claims that MPP, as a whole, was "not rationally connected to any of its stated justifications." Civ. A. No. 19-2727, 2019 WL 8139805, at *6 (D.D.C. Nov. 21, 2019). The other cases Defendants cite simply hold that § 1252(a)(2)(B)(ii) bars review of denials of *individual* claims of a type of relief specifically identified as discretionary in the statute.

Second, § 1252(a)(2)(B)(ii) is not applicable here because it only restricts review of discretionary denials of relief concerning admission or removal, and the expansion of MPP is not a decision of this type. This limitation results from the structure and language of § 1252(a)(2)(B). The provision's title states that it applies to "Denials of discretionary relief," and the judgments specified in subsection (B)(i) are of this type: they "include waivers of inadmissibility based on certain criminal offenses, § 1182(h), or based on fraud or misrepresentation, § 1182(i); cancellation of removal, § 1229b; permission for voluntary departure, § 1229c; and adjustment of status, § 1255." *Kucana*, 558 U.S. at 248. Subsection (B)(ii) is a "catchall" or residual clause that should be interpreted as limited by "the enumerated categories . . . which are recited just before it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001); *accord Kucana*, 558 U.S. at 247. The last clause of subsection (B)(ii) reinforces this reading, as it preserves jurisdiction over "the granting

of relief under [8 U.S.C. §] 1158(a)"—*i.e.*, asylum decisions, another form of substantive, discretionary relief from removal.

The decision to expand MPP plainly is not like the decisions enumerated in subsection (B)(i). It was a decision to adopt a complex, generally applicable scheme and does not represent the determination of any particular individual's circumstance. Moreover, it does not implicate discretionary relief from an adverse admission or removal decision. Even an individual decision to "return" an individual to Mexico during the course of immigration proceedings is not a decision about whether that person can legally be admitted to the country or should be removed. Thus, much like the decisions on whether to reopen proceedings—which the Supreme Court concluded fell outside the scope of subsection (B)(ii)—a decision to return an individual is "adjunct" to the question of whether the "Executive [will] afford the alien substantive relief" in the course of removal proceedings. *Kucana*, 558 U.S. at 248.

Finally, "any lingering doubt about" subsection (B)(ii)'s inapplicability here "would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action." *Id.* at 251. It takes "clear and convincing evidence" to dislodge that presumption. *Id.* at 252 (citation omitted). Defendants have provided no such evidence here. *See also Soltane*, 381 F.3d at 147–48 (noting that "marginally ambiguous statutory language" does not trigger subsection (B)(ii)).

Defendants' reference to the doctrine of consular nonreviewability, Opp. 25, 36, has no bearing on this, or any, of Plaintiffs' claims—for the simple reason that Plaintiffs do not challenge a consular decision. *See Didban v. Pompeo*, No. 19-cv-881 (CRC), --- F. Supp. 3d ----, 2020 WL 224517, at *4 (D.D.C. Jan. 15, 2020) (agreeing with other courts that the doctrine is only triggered

when "a consular officer has made a decision with respect to a particular visa application") (citation omitted). It does not apply to any of the decisions here.

B. Plaintiffs' Challenge to MPP-Tamaulipas Is Reviewable Under the APA.

The APA entitles any person "adversely affected or aggrieved" by final agency actions "to judicial review thereof," 5 U.S.C. § 702, when "there is no other adequate remedy in a court," *id*. § 704. A reviewing court "shall … hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id*. § 706. An agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Defendants point to 5 U.S.C § 701(a)(2), which excludes from judicial review agency actions "committed to agency discretion by law." Opp. 26. But this exception to judicial review applies only in the "rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019) (citation omitted). It does not apply here.

Generally, agency actions are presumed reviewable, although the presumption reverses for certain types of actions "traditionally . . . regarded as 'committed to agency discretion,'" *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020) (identifying, for example, "a decision not to institute enforcement proceedings" and "allocation of funds from a lump-sum appropriation," as actions "presumed immune from judicial review") (citation omitted).

The burden on the government to rebut the presumption of reviewability is "heavy." *Ramirez v. U.S. Immigration & Customs Enf't*, 338 F. Supp. 3d 1, 37 (D.D.C. 2018) (citation omitted). It can only do so by showing, with "clear and convincing evidence," *id*., that there is "no law to apply" because "courts have no legal norms pursuant to which to evaluate the challenged action," *Physicians*, 956 F.3d at 642–43 (citations and internal quotation marks omitted). "[J]udicially manageable standards" to review agency action "may be found" in a wide range of sources: "formal and informal policy statements and regulations as well as in statutes." *Id*. at 643 (internal quotation marks and citation omitted); *see also Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) ("[T]he agency itself can often provide a basis for judicial review through the promulgation of regulations or announcement of policies.").

Here, Defendants do not argue that Plaintiffs challenge a type of action traditionally regarded as committed to discretion. Instead, Defendants argue that there is no law this Court could apply to the decision to expand MPP to Tamaulipas. *See* Opp. 26. Their cursory argument falls far short of satisfying their heavy burden to rebut the presumption of reviewability.

To start, Defendants misconstrue Plaintiffs' claim by focusing on individual decisions to return Plaintiffs to Tamaulipas. Again, Plaintiffs' first claim challenges the agency's expansion of MPP to Tamaulipas, a distinct agency action. For this reason, Defendants' reliance on the contiguous territory provision and any discretion it gives DHS over individual return decisions, is unavailing.

Moreover, § 701(a)(2) of the APA does not preclude review of agency action simply because the action is discretionary. If it did, as the Supreme Court has explained, it would contradict "the command in § 706(2)(A) that courts set aside any agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Weyerhaeuser Co. v.*

U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018) (quotation omitted). "A court could never determine that an agency abused its discretion if all matters committed to agency discretion were unreviewable." *Id.*

Because Defendants have thus failed to rebut the presumption of reviewability, this Court should address Plaintiffs' challenge to Defendants' expansion of MPP. This challenge is "the sort of routine dispute that federal courts regularly review." *Id.* An agency made a policy decision about how it would treat private parties, and harmed individuals argue that the action was not based on reasoned decisionmaking, including "because the agency did not appropriately consider all of the relevant factors," *id.* at 371. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52–53 (2011); *Grace v. Whitaker*, 344 F. Supp. 3d 96, 140–41 (D.D.C. 2018). Rather than requesting the Court to measure dangerousness, as Defendants suggest, Opp. 26, Plaintiffs ask the Court to apply the familiar arbitrary and capricious standard, under which an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks and citation omitted). In conducting this review, the court "consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (citation omitted).

Further, DHS has provided law to apply to this challenge by indicating considerations to guide the agency's judgment. *Cf. Weyerhaeuser Co.*, 139 S. Ct. at 371 (law to apply found where agency was required to consider "economic and other impacts"); *Clifford v. Pena*, 77 F.3d 1414, 1417 (D.C. Cir. 1996) (discretionary waivers are subject to review when "[t]he agency's policies" "supplied a list of factors to guide" the agency's judgment). For example, DHS has repeatedly asserted that through MPP, the agency will protect vulnerable populations and

maintain a commitment to bona fide asylum seekers, *see* Mot. 5. Similarly, the INA and its implementing regulations specify that individuals who are returned remain in removal proceedings under 8 U.S.C. § 1229a, *see* 8 U.S.C. §§ 1225(b)(2)(A), (C), through which they should be able to seek asylum, *see, e.g.*, 8 C.F.R. § 208.14(c)(1). At the same time, DHS required that returned individuals stay in Mexico during the duration of such proceedings. *See* Mot. 6. These authorities identify safety and the right to seek asylum as relevant considerations, helping guide the Court's assessment whether, in expanding MPP to Tamaulipas, Defendants acted arbitrarily and capriciously in light of the well-known risk of grave harm. *See id*. at 22–24.

C. Defendants Have No Defense for the Adoption of MPP-Tamaulipas.

The APA requires that agencies provide a "reasoned explanation." *Dep't of Commerce*, 139 S. Ct. at 2575. Defendants have not only failed to provide a reasoned explanation, they have not identified any explanation from the time of adoption.

Defendants expanded MPP to Tamaulipas knowing the dire danger that individuals can face in Tamaulipas—cartels targeting innocent people with impunity, street gun battles, and the highest rate of missing or disappeared people in all of Mexico. Mot. 7–12. Defendants thus could not have reasonably concluded that expanding MPP to Tamaulipas would lead to any of their promised outcomes, as Plaintiffs' opening brief explains. In expanding MPP to Tamaulipas, therefore, Defendants made a decision that contradicted their own assertions about MPP and failed to consider a critical factor: the foreseeable harm to migrants. *See id*. at 23.

Defendants do not address any of these points. Instead, they argue that because the statute permits individuals to be returned to "that territory," any return to Tamaulipas pursuant to that statute is reasonable. Opp. 27. But the statute addresses only return to Mexico, not any locations in Mexico without regard to danger. Moreover, Plaintiffs' first claim is about the expansion of

MPP, not individual return provisions. Further, arbitrary and capricious review asks whether the government's action was reasoned at the time it was adopted, not whether counsel can provide some later post-hoc reasonable explanation. *See State Farm*, 463 U.S. at 50. And even Defendants' briefing does not satisfy the standard for reasoned explanation, as it fails to address any facts before the agency. It does not show that Defendants took into account the foreseeable harm in Tamaulipas, reconciled that decision with their MPP goals, or made any other "rational connection" between the harmful conditions in Tamaulipas of which they were aware and their "choice" to expand MPP. *Id.* at 43. Equally unavailing is Defendants' focus on some Plaintiffs failing to identify a different area of Mexico where they would be safe. They suggest that this underscores the rationality of the decision to send them to dangerous conditions in Tamaulipas. Opp. 27–28. This argument is a non sequitur. Defendants made the decision to expand MPP to Tamaulipas *before* deciding to apply MPP-Tamaulipas to Plaintiffs; whatever statements Plaintiffs made to DHS officials did not inform the decision challenged here: the expansion of MPP to Tamaulipas. Moreover, for the purposes of this claim, the safety of other parts of Mexico is beside the point; the claim is about MPP-Tamaulipas, under which DHS began returning migrants to Tamaulipas, without considering the impact on their safety or ability to pursue their asylum claims. Mot. 7–12.

II. Defendants Deprived Plaintiffs of Due Process by Putting Them in Danger.

Defendants sent Plaintiffs to Tamaulipas despite years of warnings about the dangers there, as well as Plaintiffs' own specific warnings of the harms they had faced and feared. *See* Mot. 18–19. Defendants' actions shock the conscience, as they put Plaintiffs in a situation far more dangerous than the one in which Defendants found them.

A. Plaintiffs' Constitutional Claim Is Reviewable.

Though Defendants again invoke 8 U.S.C. § 1252(a)(2)(B)(ii), that statute does not revoke jurisdiction to hear Plaintiffs' constitutional claim. This claim stems both from Defendants' expansion of MPP to Tamaulipas and their individual returns of Plaintiffs to Tamaulipas. As explained in Part I.A, the expansion of MPP does not fall within the reach of § 1252(a)(2)(B)(ii). The same is true of individual return decisions, because even these individual returns are adjunct decisions, not denials of discretionary relief from adverse removal or admission determinations. *See* Part I.A, *supra*. Forcing Plaintiffs to Mexico is an intermediate step before immigration proceedings are resolved and any discretionary relief is determined. And as with review of the arbitrary and capricious claim, strong presumptions in favor of judicial review would resolve any doubts here about the scope of § 1252(a)(2)(B)(ii) or the contiguous territory provision. *See* Part I.A, *supra.* The presumption in favor of review is even stronger where constitutional claims are at issue. *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Defendants' cited cases are not to the contrary: in each, the statute that fell within § 1252(a)(2)(B)(ii) both concerned a discretionary denial of relief concerning admission or removal, and the language specifying the discretion was distinct from the ultimate decision. Opp. 29–30.[2] That is not the case here and, moreover, Defendants have suggested no avenue by which Plaintiffs' constitutional challenges may be heard. *Cf. E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 187 (3d Cir. 2020).

[2] *See Polfliet v. Cuccinelli*, 955 F.3d 377, 379 (4th Cir. 2020) (holding that 8 U.S.C. § 1155 specified discretion where it provided that the Secretary "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition approved by him"); *Jilin Pharmacy USA v. Chertoff*, 447 F.3d 196, 200 (3d Cir. 2006) (same); *Privett v. Sec'y, Dep't of Homeland Sec.*, 865 F.3d 375, 379 (6th Cir. 2017) (exception to a bar on granting a visa petition was committed to the "Secretary's sole and unreviewable discretion"). *Dave v. Ashcroft*, 363 F.3d 649 (7th Cir. 2004) does not involve § 1252(a)(2)(B)(ii).

Even if the contiguous territory statute did specify individual return decisions were within the Secretary's discretion, that still would not bar review of constitutional claims. Plaintiffs do "not seek review of the Attorney General's exercise of discretion" but, rather, review of "the extent of the Attorney General's authority . . . [a]nd the extent of that authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001); *Kwai Fun Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004) ("decisions that violate the Constitution cannot be 'discretionary,' so claims of constitutional violations are not barred by § 1252(a)(2)(B)"). Even *Cruz*, on which Defendants rely, did not find a constitutional claim to be barred by § 1252(a)(2)(B)(ii). 2019 WL 8139805, at *3–*4 (considering "the merits of [a] due process claim"); *see also id.* at *3 (noting that interpreting such a bar on constitutional claims from the statutory scheme would be an "extraordinary step").

B. Expanding MPP to Tamaulipas Violated Plaintiffs' Due Process.

Defendants violated Plaintiffs' rights by applying MPP-Tamaulipas to them, despite stark warnings that applying MPP-Tamaulipas to people would put them in grave danger, *see* Mot. 8–11, 26 n.14, and specific and further warnings from, among other sources, Plaintiffs themselves—who warned Defendants of harms that they had already suffered included having been raped repeatedly, kidnapped, and tormented in front of their children. *Id*. at 18. Plaintiffs showed that Defendants further put them in harm's way by forcing them to appear as early as 4:30 a.m. to wait for hearings, by returning them to known prime kidnapping sites, and by forcing them to repeat this dangerous process multiple times. *Id*. at 12–13.

Plaintiffs' claims are within the heart of the substantive due process doctrine articulated by the D.C. Circuit: the government cannot "render[]citizens more vulnerable to danger" by actions that shock the conscience. Mot. 25 (citing *Butera v. District of Columbia*, 235 F.3d 637, 649 (D.C.

Cir. 2001)). Defendants nevertheless contend that only an *intent* to harm would shock the conscience; that there is no Constitutional interest raised in this case; and that they cannot be liable for exposing someone to a harm posed by a third party. Opp. 31–35. All three arguments are wrong.

First, as *Butera* explained, even outside of the context of government custody, the government "owes a duty of protection when its agents create or increase the danger to an individual." 235 F.3d at 652. That danger-creation is precisely what Plaintiffs have shown here. And for a danger-creation claim, just like a claim by a person in custody, when "actual deliberation is practical," the appropriate standard to apply is deliberate indifference to a known or obvious danger. *Id.* (specifically applying deliberate indifference to plaintiff not in custody). The higher standard that Defendants suggest, intent to harm, would apply only when "unforeseen circumstances demand an officer's instant judgment," and when "decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

Here, actual deliberation by Defendants, before expanding MPP to Tamaulipas, and then before applying to each of the Plaintiffs, was practical. For years, Defendants have not returned individuals to Tamaulipas while their immigration cases are heard; and, even after they adopted MPP, they had months before they decided to expand to Tamaulipas. Mot. 6–7. Defendants ignored ample warnings in expanding MPP to Tamaulipas, they then continued returning people despite further warnings, and they returned Plaintiffs despite being informed of the dangers each one faces. *Id.* at 25–27. Defendants' actions are thus well within what *Butera* considered an appropriate application of the deliberate indifference standard. In that case, police met an informant and carried out an undercover operation that same day; even then, the court concluded "actual deliberation [was] possible." 235 F.3d at 652. Courts regularly apply deliberate

indifference in circumstances similar to those here, and to decision-making made even within a shorter time frame, including where police directed people leaving a rally into the path of counter-protestors, *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018), impounded a car in a traffic stop and left a passenger to fend for herself, *Wood v. Ostrander*, 879 F.2d 583, 586 (9th Cir. 1989), and expelled someone from a bar into the cold, *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1084 (9th Cir. 2000); *Kneipp v. Tedder*, 95 F.3d 1199, 1201 (3d Cir. 1996). In arguing that only "an intent to harm" standard would apply, Opp. 33, Defendants rely on inapposite circumstances: "instant judgment," *Lewis*, 523 U.S. at 853, such as decisions made in a 75-second police chase, *id.* at 837, or during a prison riot, *id.* at 853.[3]

Second, Defendants attack a straw man when they claim that "the real liberty interest [Plaintiffs] claim is a purported right to enter the United States." Opp. 31. In fact, Plaintiffs' substantive due process claim is that the state cannot, in a conscience-shocking way, increase their risk to deadly harm. Mot. 25. Defendants fare no better when they claim migrants have no right to invoke here, and cite cases addressing *procedural* rather than *substantive* due process rights. *See* Opp. 31 (citing *Mathews v. Eldridge* , 424 U.S. 319 (1976) and other procedural due process cases).

For example, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), cited in Opp. 31, addresses the "narrow question of the scope of procedural rights available in the admissions process," *Kwai Fun Wong*, 373 F.3d at 971–72, and did so in a factual context that implicated national security, *see Mezei*, 345 U.S. at 216. *Mezei* does not hold that such people lack due process rights altogether, particularly not substantive due process rights. *Mezei*'s limits are also clear in light of *Zadvydas*, in which seven justices agreed that even noncitizens who have been

[3] *Fraternal Order of Police Dep't of Corr. Labor Comm. v. Williams*, which Defendants cite, Opp. 32–33, 34, found no heightened obligation toward the police officers because of their decision to work in the conditions they claimed were dangerous. 375 F.3d 1141, 1146 (D.C. Cir. 2004).

ordered removed have substantive due process rights. 533 U.S. at 690; *id*. at 718 (Kennedy, J., joined by Roberts, C.J., dissenting); *see also Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials."); *accord Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003) (en banc); *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999).

Third, Defendants' argument that they "did not create the dangers Plaintiffs claim to face" because the dangers already existed, Opp. 32, misses the point: Defendants *put Plaintiffs in danger*. Defendants misapprehend the state-created danger doctrine and "would render [it] meaningless": "by its very nature, the doctrine only applies in situations where the plaintiff was directly harmed *by a third party*—a danger that, in every case, could be said to have 'already existed.'" *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012). For example, if police release a person into a freezing night, it is no defense to state-created danger to say that the person had previously been outside in that cold. *See, e.g.*, *Munger*, 227 F.3d at 1084; *Kneipp*, 95 F.3d at 1208–11.

Defendants ignore that the government's actions exposed Plaintiffs to harms that they clearly would not otherwise face. These actions include not only returning Plaintiffs to a region known for its extraordinary levels of danger, but also requiring Plaintiffs to show up at the border before dawn—a time of day so dangerous that the government has a curfew for its employees, Mot. 13; returning them to Mexico via Tamaulipas bridges that are known to be prime kidnapping sites, *id*.; and forcing them to spend time in Tamaulipas—either living or traveling there, and in either case exposed to danger—over the course of the months it takes to adjudicate cases. *Id*. at 13–14; *see also Briscoe v. Potter*, 355 F. Supp. 2d 30, 33, 44–45 (D.D.C. 2004) (noting additional

acts by defendants that further exposed people to harm independently gave rise to a state-created danger claim).[4] Plaintiffs would not have been in danger but for Defendants' actions.

For similar reasons, Defendants cannot defeat Plaintiffs' substantive due process claim by contending that Plaintiffs chose to travel through Tamaulipas. Plaintiffs are not voluntarily choosing to remain for months in Tamaulipas: they are fleeing persecution in their home countries. Passing through a dangerous area on one's journey to intended safety in the United States is not the same as remaining there for an extended period; it does not mean that one acquiesces to being forced to live amidst the dangers there. *See, e.g.*, *Wood*, 879 F.2d at 589–90 (travel through high crime area did not defeat state-created danger claim when police forced plaintiff to walk home).

C. Defendants' Individual Decisions to Return the Plaintiffs Shocks the Conscience.

Defendants' nonrefoulement documentation confirms that Plaintiffs had already endured harms and told Defendants about them. ECF Nos. 23-7 through 23-12, 23-14 through 23-17 (hereinafter "Pl. NRIs"); *see also* Mot. 19–20. Plaintiffs explained their fears to interviewers. Pl. NRIs. And yet all were still returned to danger, often after questioning that revealed asylum officers chose to set apart past harms and ignore the obvious future dangers. For example, Plaintiff Nora was found credible by her interviewer. ECF No. 23-7 at 10. She detailed her kidnapping and rape in front of her son, and her concerns that her rapists had [redacted]. *Id.* at 3–6. Nonetheless, the interviewer pivoted to asking repeatedly about any "other problems," *id.* at 4, 6, and returned her to Matamoros, the place where she had been kidnapped and gang-raped. Armando described "forced slavery" by cartel members [redacted]

[4] As Plaintiff Armando noted, even if he could leave Tamaulipas, travel outside the state is potentially deadly. ECF No. 23-16 at 11. The U.S. State Department's warning concurs. Mot. 8–9. Plus he would need to return for each hearing. It is thus hard to see how Defendants asking Plaintiffs whether other regions in Mexico could be safer, Opp. 28, 35, in any way mitigates their decision to expose Plaintiffs to harm.

[redacted]. ECF No. 23-16 at 9. The asylum officer found him credible, yet his questions reflect that only a completed physical assault would be viewed as "harm." *See id.* at 9–10 (Armando described being "enslaved" by his kidnappers, officer noted "they have never harmed you in the past"). Armando was returned despite telling the asylum officer his kidnappers have continued to call him and know how to find him. *Id.* at 10. Ernesto described ongoing extortion by a cartel, was found credible, yet still was returned, and subsequently was [redacted]. ECF No. 23-11 at 3 of Second Interview. These returns are shocking, came after the practical opportunity to deliberate, and are unconstitutional. In addition to the unconscionability of the decision to create MPP-Tamaulipas itself, the specific return decisions were, independently, conscience-shocking.

III. Defendants Violated Their Own Nonrefoulement Rules in Returning Plaintiffs to Mexico, and Their Decisions Were Arbitrary, Capricious, or Contrary to Law.

As set forth in Plaintiffs' opening brief, Defendants violated their own binding rules in failing to provide Plaintiff Diana with an NRI, even though she expressed a fear of being returned to Mexico. Mot. 31–32. With respect to the rest of the Plaintiffs, Defendants violated their rules by failing to adjudicate the Plaintiffs' nonrefoulement claims under the proper standards. These nonrefoulement decisions—which resulted in the Plaintiffs being returned to Tamaulipas, notwithstanding the persecution and torture they had already suffered there—were arbitrary, capricious, or contrary to law.

A. Plaintiffs' Claims Are Reviewable.

The government invokes Section 1252(a)(2)(B)(ii), along with a passing reference to the doctrine of consular nonreviewability, Opp. 35–36, but neither applies to the decisions at issue here. As explained, *see* Part I.A at 6–7, the doctrine of consular nonreviewability has no bearing here. Moreover, as set out in Part I.A and Part II.A, Section 1252(a)(2)(B)(ii), does not apply to

returns under contiguous territory statute. Even if it did, the Court would still have jurisdiction to review Plaintiffs' third claim because individual MPP decisions are *not* in the agency's "complete discretion." *See* Opp. 25. As Defendants acknowledge, the agency is "categorically" prohibited from returning individuals likely to face persecution or torture. *See id*. at 5. Thus, (B)(ii) does not bar Plaintiffs' challenge to the nondiscretionary nonrefoulement decisions.

Subsection (B)(ii) does not bar review of nondiscretionary constraints on the agency's discretion, see Part II.A at 12–13 (citing *Zadvydas*, 533 U.S. at 688 (finding jurisdiction because petitioners did "not seek review of the Attorney General's exercise of discretion" but instead"the extent of the Attorney General's authority . . . [a]nd the extent of that authority is not a matter of discretion.")). Courts, including this one, have regularly applied the same principle where the constraint on agency discretion comes from binding sub-statutory requirements, as is the case here. *See, e.g.*, *Sharkey v. Quarantillo*, 541 F.3d 75, 86 (2d Cir. 2008) (finding reviewable a claim that the agency failed to follow mandatory procedures applying to rescission of legal status); *Damus*, 313 F. Supp. 3d at 327–28 (INA did not preclude review over claim that agency was "as a matter of general course, not complying with the policies and procedures" set forth in a directive).[5]

B. Defendants Failed to Adjudicate Plaintiffs' NRIs Under the Applicable Standards.

The agency's rules for adjudicating individual nonrefoulement requests, set forth the nonrefoulement standards that, if met, make an individual ineligible for MPP. *See* Mot. 32.[6] Under these standards, Plaintiffs should have been found ineligible. *Id.* at 37. Defendants argue that the standards set forth in the withholding and Convention Against Torture ("CAT") rules are

[5] *Cruz* cites to *Damus*, noting § 1252(a)(2)(B)(ii) is "inapposite [where] the plaintiffs were not challenging the outcome of ICE's decisionmaking but the method by which parole is currently being granted or denied." 2019 WL 8139805, at *3.

[6] Mot. 32 cites to Boggs Decl., Ex. 5, but the cite should be to Boggs Decl., Ex. 2 (now docketed as ECF No. 18-15).

"expressly inapplicable to MPP," and thus Plaintiffs' arguments for why they have established persecution or torture under these standards must fail. Opp. 37. Defendants also argue that the asylum officer's nonrefoulement decisions were correct. *Id.* at 40. Both arguments are wrong.[7]

First, MPP nonrefoulement determinations are subject to the persecution and torture standards that govern withholding and CAT determinations. In suggesting otherwise, Defendants ignore their MPP rules, ECF No. 18-15 ("USCIS Memo") at 2, as well as the NRI worksheets submitted with their brief. *See e.g.*, ECF No. 23-7. The USCIS Memo, one of several documents reflecting MPP's terms, *see* Mot. 32, states that the MPP nonrefoulement standard is "the same" as that governing withholding and CAT determinations, and references the withholding and CAT regulations. ECF No. 18-15 at 2. Defendants cite to language from the same memo stating that the "process or procedures" in these regulations do not apply. Opp. 37 (citing ECF No. 18-15 at 3). But "process and procedures" and "standards" are distinct and Plaintiffs have never claimed that the *process* for MPP fear determinations is the same as for withholding and CAT determinations.

Moreover, Defendants' NRI worksheets belie their assertions that the standards are different: these worksheets ask the interviewer to assess whether the applicant "suffered past persecution in Mexico and the presumption that the applicant's life or freedom would be threatened in Mexico is not rebutted." *See, e.g.*, ECF No. 23-7 at 11. This is the same standard in the withholding regulations that Plaintiffs argue should apply. *See* 8 C.F.R. § 208.16(b)(1). Likewise, the worksheets track the regulations' torture standard. *Compare* ECF No. 23-7 at 11 (asking if applicant would be subject to "severe physical or mental pain or suffering" where a "public

[7] Defendants violated their own rules in failing to provide Plaintiff Diana with an NRI. Mot. 31-32. Defendants' response is that their records contain no evidence of her expressing a fear. Opp. 37. Because the agency is now on notice of her fear, this factual dispute need not be resolved. If this Court does not order her returned to the United States, Defendants are obligated by their rules to provide her with such an interview. Mot. 31–32.

official" would consent or acquiesce) *with* 8 C.F.R. § 208.18(a)(1) (same definition), *cited in* § 208.16(c)(1).

Second, even though the NRI worksheets properly cited the persecution and torture standards, Defendants' material makes clear that they misapplied these standards in finding that Plaintiffs did not meet them.[8] Because all but one of the Plaintiffs were found to be credible,[9] there is no dispute about the harms they have suffered, which are often described in great detail in the worksheets.[10] The only issue is a legal one: whether the harms to which they were subjected satisfy the other conditions necessary to make out a claim of persecution or torture.

A requirement for establishing persecution is showing a "nexus," that the feared harm is on account of a protected ground: race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1231(b)(3)(A). The officers' line of questioning in the NRI's—reinforced by Defendants' briefing on the issue—makes clear that Plaintiffs' NRI decisions were based on misapplication of this requirement.[11] Defendants concede that "asylum officers

[8] To avoid delaying a decision on their request for a preliminary injunction, Plaintiffs are not challenging the completeness and accuracy of the administrative record that was provided by Defendants. However, Plaintiffs reserve the right to do so in the future.

[9] Defendants claim that two Plaintiffs, Emilia and Henry, were found not credible. Opp. 40. But Emilia was found credible in her second, most recent interview, in which she repeated the prior incidents of harm she reported in the first. ECF No. 23-9 at 11 of Second Interview. In his declaration, Henry explains how he was confused during one interview because of interpretation problems and in the other he had a hostile interviewer. ECF 3-2 (Henry Decl.). Notably, none of these three interviews appear to have been reviewed by a supervisory officer, as required by the MPP rules, *see e.g.*, ECF No. 18-15 at 4.

[10] Given that in all other cases the Plaintiffs were found credible, Defendants' argument that NRI decisions are inappropriate for review because they involve assessments that can only be made in "real-time," Opp. 25, has no bearing on these cases.

[11] The consequences of asylum officers' misapplication of the nexus standard are far reaching. In the absence of nexus to a protected ground, the harm that Plaintiffs have suffered, no matter how egregious, does not constitute persecution. As a result, the presumption of persecution that follows from a finding of past persecution becomes irrelevant, as does the relaxed burden of proof that follows from a pattern or practice of persecution.

determined that the fears articulated by several Plaintiffs stemmed [. . .] from the fact that Plaintiffs were immigrants." Opp. 40–41 (citing ECF Nos. 23-7, 23-8, 23-9, 23-10, 23-12, 23-14, 23-16). But without citing any law, they claim that the targeting of non-Mexican migrants because they are "immigrants" does not constitute persecution on account of nationality. Opp. 41 ("Immigrant status is plainly distinct from nationality."). But this is a distinction without a difference. *Cf. Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004), *as amended* (Nov. 2, 2004). Moreover, nexus can be met even if there is a mixed motive for the targeting. Thus, as long as non-Mexican nationality is "a reason" for the targeting, as here, that is sufficient. *See* 8 U.S.C. § 1231(b)(3)(A); *cf. Ayala v. Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2017) ("extortion, plus the threat of violence, on the basis of a protected characteristic can constitute persecution").[12]

Plaintiffs' NRI worksheets also show that asylum officers misapplied the torture standard governing NRIs. Again, Defendants do not contest that at least some Plaintiffs' harms rise to the level of torture. Opp. 42. They question, however, whether these were "instigated by, consented to or acquiesced to by a public official." *Id.*; *see also Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) ("[T]orture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it."). Despite overwhelming evidence that government employees in Tamaulipas are complicit with the organized groups that target migrants, Mot. 9–10 (collecting State Department reports documenting targeting), including

[12] Even if Defendants and their officers were correct that the targeting of Plaintiffs for being non-Mexican migrants does not establish persecution on account of nationality, a significant subset of the Plaintiffs established by their uncontested testimony a nexus between the harm they suffered and other protected grounds that meet the persecution standard. *See, e.g.*, ECF No. 23-11 (Plaintiff targeted because of sexual orientation); *Doe v. Atty. Gen. of the U.S.*, 956 F.3d 135, 151–55 (3d Cir. 2020) (recognizing sexual orientation-based claim); ECF Nos. 23-7, 23-9, 23-17 (Plaintiffs targeted because of gender). *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020) (recognizing sex as defining characteristic of social group).

undisputed testimony by Plaintiffs in their NRIs, *see* ECF No. 23-7 at 8-9 ([redacted] 23-8 at 6 ([redacted]), 23-9 at 8 ([redacted]), 23-16 at 12 ([redacted]), asylum officers found that the harms experienced by Plaintiffs were not torture.

Because Defendants and their officers failed to apply the proper standards in adjudicating Plaintiffs' NRIs, the decisions were arbitrary, capricious and in violation of law.

IV. The Remaining Preliminary Injunction Factors Strongly Favor Plaintiffs.

Defendants nowhere deny Plaintiffs' basis for their fear of remaining in Tamaulipas and the strong likelihood they will be harmed again. Opp. 43–44. Defendants claim delay, Opp. 43, but "a delay in filing is not a proper basis for denial of a preliminary injunction" in the face of uncontested evidence of harm. *Gordon v. Holder*, 632 F.3d 722, 724–25 (D.C. Cir. 2011). And any delay is fully explicable: the legality of MPP has been subject to constant challenge and flux, and Plaintiffs moved speedily upon the Supreme Court's March 11 stay of the nationwide injunction against MPP in *Innovation Law Lab v. Wolf*, 140 S. Ct. 1564 (2020) (U.S. 2020). *See Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 32 (D.D.C. 2018) (plaintiffs "filed suit shortly after" their alternative relief was exhausted). The brief gap between the complaint and motion for preliminary injunction was due to the COVID-19 crisis and difficulties communicating with those sent to Tamaulipas. Mot. 16; ECF No. 18-4 (Gilman Decl.) ¶¶ 70–71.[13]

[13] Two weeks does not demonstrate undue delay. *See, e.g.*, *Fund for Animals v. Frizzell*, 530 F.2d 982, 987–88 (D.C. Cir. 1975) (delay rendered preliminary injunction "all but futile' where harm "was admitted to be 'pretty well over'"); *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (delay of 36 days followed by a 95-day extension). Counsel explained the need to finalize psychiatric evaluations. Defendants' claim the evaluations were

Plaintiffs have experienced rape, sexual assault, beatings, kidnapping, and death threats in Tamaulipas, Mot. 17–20, fear similar harm in the future, *id*. at 38–39, and continue to suffer tremendous harm in a region where they are not safe, *id*. at 39–42. Plaintiffs' expert declarations corroborate the "chronic psychological and medical issues" faced by Plaintiffs, *id*. at 40–41, and the harm to traumatized children Plaintiffs, *id*. at 41–42. Defendants assert, in passing, the management of migrant flows. Opp. 44. Not only is this insufficient, *see Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 64–65 (D.D.C. 2019), it is also factually irrelevant given the effective shutdown of the border, including the continual postponement of MPP hearings,[14] and functional end to NRIs.[15] Defendants raise the COVID-19 pandemic, but Plaintiffs have requested return "with appropriate public health measures." ECF No. 3 at 6 (Complaint). Plaintiffs have identified potential sponsors with housing in the United States, ECF No. 3-2, and the Court can impose such appropriate measures, as other courts across the country have done when considering the release of individuals from immigration detention. *See, e.g.*, *Essien v. Barr*, No. 1:20-cv-1034-WJM, --- F. Supp. 3d ----, 2020 WL 1974761, at *9–*10 (D. Colo. Apr. 24, 2020). A limited order for the return of 26 asylum seekers is manageable from a public health standpoint, and would address the specific, irreparable harm that Plaintiffs have shown.[16]

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conducted before March 20, Opp. 43, is incorrect. The psychiatrists interviewed Plaintiffs prior to the complaint filed April 16, but the experts—working low or pro bono and on top of their continuing work with other patients—needed to verify facts with Plaintiffs, who are living in hiding and limited communication. The motion for preliminary injunction within hours after receiving the last psychiatric evaluation. ECF No. 17-4 at 14 (signed May 1, 2020); *see also* ECF No. 17-11 at 25 (signed April 29, 2020); ECF No. 17-12 at 9 (signed Apr. 30, 2020).

[14] Declaration of Boggs ("Boggs Decl."), Ex. 1 at 1 (Dep't of Homeland Sec., Off. of Public Affairs, Joint DHS/EOIR Statement on the Rescheduling of MPP Hearings, May 10, 2020).

[15] Boggs Decl., Ex. 2 at 3 (Human Rights First, *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger*, May 2020).

[16] In fact, just yesterday, another federal district court ordered the return of five individuals subject to MPP upon finding irreparable harm, similar to the harm presented by Plaintiffs here. *Bollat Vazquez v. Wolf*, No. 1:20-cv-10566-IT, 2020 WL 2490040, at *11–*12 (D. Mass. May 14, 2020).

V. Plaintiffs' Request Relief Is Appropriately Tailored.

Allowing Plaintiffs to pursue their removal proceedings from within the United States is specifically tailored to protect Plaintiffs from harm in Tamaulipas until final adjudication on the merits. *See, e.g.*, *Ass'n of Reptile Keepers, Inc. v. Jewell*, 106 F. Supp. 3d 125, 128–29 (D.D.C. 2015) (granting preliminary injunction in APA case and barring defendants from giving effect to the rule as to plaintiffs); *Grace*, 344 F. Supp. 3d at 146 (granting return following unlawful removal where plaintiffs feared violence and death in countries to which they had been removed); *Bollat Vazquez*, No. 1:20-cv-10566-IT, 2020 WL 2490040, at *12 (ordering "re-entry into the United States" of plaintiffs unlawfully subject to MPP, "for the pendency of their immigration removal proceedings"). A new non-refoulement interview for a single plaintiff, Opp. 45, does not address the irreparable harm to her or *all* Plaintiffs. Mot. 44–45.[17] Defendants request that any relief be stayed pending appellate review because protecting these individuals will lead others to seek similar relief. Opp. 45. But a stay pending appeal is "extraordinary relief," and Defendants have not shown they meet the test. *Citizens for Responsibility & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1017 (D.C. Cir. 2018). That other individuals subject to MPP-Tamaulipas might seek relief does not meet the rigorous standard. A preliminary injunction in *this* case for *these* plaintiffs—given the uncontested harm—cannot be stayed on this basis.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

[17] Plaintiffs seek new NRIs under the correct standard as an alternative should the Court find a likelihood of success on the *Accardi* claim, but not on their challenges to MPP-Tamaulipas under the APA, their due process claim, *and* the arbitrary or capricious challenges to the individual NRI decisions. Mot. 45 n.24.

Dated: May 15, 2020

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