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18 UNITED STATES DISTRICT COURT
19 SOUTHERN DISTRICT OF CALIFORNIA

20 E.A.R.R.; G.S.E.R, A MINOR CHILD,
21 by and through his mother and NEXT
22 FRIEND, E.A.R.R; B.A.E.R., A
23 MINOR CHILD, by and through his
24 mother and NEXT FRIEND, E.A.R.R;
25 L.Y.G.; H.A.H.G.; J.A.E.M; Y.J.C.E, A
26 MINOR CHILD, by and through his
27 mother and NEXT FRIEND, J.A.E.M.;
28 S.F.L.; C.J.M.L., A MINOR CHILD, by
and through his mother and NEXT
FRIEND, S.F.L.; Y.M.M.; J.C.M.M., A
MINOR CHILD, by and through her
mother and NEXT FRIEND, Y.M.M.;
G.F.F.; M.Y.J.L.; M.M.G., A MINOR
CHILD, by and through his mother and
NEXT FRIEND, V.A.G.; D.Y.S., A
MINOR CHILD, by and through his
mother and NEXT FRIEND, M.S.S.;
S.M.A., A MINOR CHILD, by and
through her mother and NEXT
FRIEND, K.A.M.; D.G.M.; N.R.R.;
H.H.M.; E.H.M.; C.J.V.C., A MINOR
CHILD, by and through his mother and
NEXT FRIEND, M.C.; La.V.S.O., A

Case No. 3:20-cv-02146-TWR-BGS

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR A
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

Date: April 7, 2021
Time: 1:30 p.m.
Ctrm.: 3A
Judge: Hon. Todd W. Robinson

1 MINOR CHILD, by and through her
2 mother and NEXT FRIEND,
3 A.A.F.S.O; and, AL OTRO LADO, an
4 organization,

5 Plaintiffs,

6 v.

7 U.S. DEPARTMENT OF HOMELAND
8 SECURITY (“DHS”); CHAD WOLF,
9 Acting Secretary of the Department of
10 Homeland Security, in his official
11 capacity; U.S. CUSTOMS AND
12 BORDER PROTECTION (“CBP”); and
13 MARK A. MORGAN, Acting
14 Commissioner of U.S. Customs and
15 Border Protection, in his official
16 capacity,

17 Defendants.

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18 *Attorneys for Plaintiffs*
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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE THAT on April 7, 2021 at 1:30 p.m., or as soon
3 thereafter as the matter may be heard by the Hon. Todd W. Robinson in the United
4 States District Court for the Southern District of California, Edward J. Schwartz
5 United States Courthouse, 221 West Broadway, San Diego, California, Courtroom
6 3A (3rd Floor), Plaintiffs L.Y.G., H.A.H.G., Y.J.C.E., S.F.L., C.J.M.L., Y.M.M.,
7 J.C.M.M., M.Y.J.L., M.M.G., D.Y.S., S.M.A., D.G.M., H.H.M., C.J.V.C., and
8 La.V.S.O., each individually and on behalf of all others similarly situated, pursuant
9 to Federal Rule of Civil Procedure 65, will move this Court to issue a preliminary
10 injunction requiring Defendants to parole such named Plaintiffs and class members
11 into the United States. *See Fed. R. Civ. P. 65(b).*

12 For the reasons set forth more fully in the accompanying Memorandum in
13 Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary
14 Injunction, Plaintiffs are entitled to a temporary restraining order and a preliminary
15 injunction because (1) they can demonstrate a substantial likelihood of success on
16 the merits of their *Accardi* claim that Defendants arbitrarily and capriciously
17 departed from their own policies in violation of the Administrative Procedure Act;
18 (2) they will suffer irreparable harm absent judicial relief, including dangers they
19 face on a daily basis, the exacerbation of their mental and health issues due to
20 unsanitary conditions and lack of medical care, and the barriers to their
21 participation in Section 240 proceedings, all of which increases the likelihood of
22 erroneous removal to countries where Plaintiffs will be persecuted, tortured, or
23 killed; and (3) the balance of interests lies in Plaintiffs' and Class Members' favor,
24 as the public interest is strongly served by ending unlawful agency action, and by
25 preventing unnecessary harm to or death of asylum seekers who suffer from health
26 conditions and disabilities that should preclude them from being subject to the
27 MPP.

28

1 This motion is based upon this notice; the attached memorandum of points
2 and authorities and the evidence cited therein; the pleadings and records on file with
3 the Court in this action; and any argument or additional evidence as may be
4 requested by the Court or presented at the time of hearing.

5 Pursuant to Section III.A.1 of the Court's Standing Order for Civil Cases, the
6 parties met and conferred, including telephonically on December 8 and 22, 2020, in
7 a good faith attempt to resolve the issues raised in this motion.

8 Date: December 23, 2020 Respectfully submitted,

9 /s/ Robert S. Shwartz

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**Pro hac vice application forthcoming*

***Pro hac vice application pending*

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25 CHILD, by and through his mother and
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27 A.A.F.S.O.; and, AL OTRO LADO, an
organization,
28

Case No. 3:20-cv-02146-TWR-BGS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: April 7, 2020
Time: 1:30 P.M.
Ctrm.: 3A
Judge: Hon. Todd W. Robinson

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Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY (“DHS”); CHAD WOLF, Acting Secretary of the Department of Homeland Security, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION (“CBP”); and MARK A. MORGAN, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity,

Defendants.

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Federal Rules of Civil Procedure

F.R.Civ.P. 23(a)24
F.R.Civ.P. 23(b)(2)24

1 **I. INTRODUCTION**

2 This case arises from Defendants’ unlawful actions in returning Plaintiffs and
3 other asylum seekers¹ with physical or mental health issues to Mexico under the
4 Migrant Protection Protocols (“MPP”). By doing so, Defendants violated their own
5 policy (the “Physical/Mental Health Exclusion”) expressly excluding from the MPP
6 people with known physical or mental health issues. Indeed, Plaintiffs often
7 expressly informed Defendants that they should be excluded from MPP because of
8 their physical or mental health issues, and nevertheless Defendants still summarily
9 refused to abide by their own Physical/Mental Health Exclusion. By failing to
10 comply with their own policy, Defendants have violated the Administrative
11 Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, under the *Accardi* doctrine,² which
12 requires governmental agencies to follow their own procedures and policies.

13 As a result, Plaintiffs were left homeless in a country that is foreign to them
14 and where, due to their physical and mental health issues, they face a significant risk
15 of physical harm, as well as a lack of necessary medical care and supports. Further,
16 on-going placement in Mexico makes it extremely difficult for Plaintiffs and others
17 with physical or mental health issues from effectively participating in their
18 immigration proceedings.

19 Defendants’ placement of Plaintiffs into the MPP and their continued refusal
20 to right their error subjects Plaintiffs to ongoing and irreparable harm. The remedy
21 for this harm is to issue a preliminary injunction requiring Defendants to parole into
22 the United States Plaintiffs and class members who were sent to Mexico in violation
23 of the Physical/Mental Health Exclusion and are currently being forced to wait in
24 Mexico.

25
26 _____
27 ¹ In a separate Motion, Plaintiffs seek to certify a class consisting of: All people
28 (1) who have been placed in the MPP, and (2) who have known physical or mental
health issues for purposes of the Physical/Mental Health Exclusion.

² *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

1 **II. BACKGROUND**

2 **A. Section 240 Proceedings**

3 The immigration proceedings applicable to Plaintiffs and others who are
4 placed in the MPP are set forth in Section 240 of the Immigration and Nationality
5 Act (“INA”).³ Pursuant to these proceedings, people seeking admission to the United
6 States are entitled to evidentiary hearings presided over by an immigration judge to
7 attempt to demonstrate that they should be admitted. These proceedings provide
8 immigrants with the opportunity to examine evidence brought against them, to
9 present evidence, and to cross-examine witnesses. 8 U.S.C. § 1229a(b)(4). A
10 respondent who does not appear for a scheduled Section 240 proceeding faces a
11 significant risk that the immigration judge will order their removal. 8 U.S.C.
12 § 1229a(b)(5).

13 **B. The MPP and the Physical/Mental Health Exclusion**

14 The MPP, introduced in December 2018, purports to grant CBP officers the
15 authority to return to Mexico people seeking admission to the United States, pending
16 their Section 240 proceedings.⁴ As of March 2020, Defendants had forcibly returned
17 more than 60,000 people to Mexico pursuant to the MPP.⁵

18 As explained in detail below, people with physical or mental health issues
19 who are returned to Mexico face a number of risks, including increased risk of abuse
20 or crime and lack of medical care and medical equipment.

21 DHS, recognizing that the MPP should not be applied to people with physical
22

23 ³ U.S. DEP’T OF HOMELAND SEC., POLICY GUIDANCE FOR IMPLEMENTATION OF THE
24 MIGRANT PROTECTION PROTOCOLS (Jan. 25, 2019),
25 [https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-
protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf).

26 ⁴ Plaintiffs do not concede that the INA permits CBP to return them to a
contiguous country pending removal proceedings.

27 ⁵ *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRANSACTIONAL
28 RECS. ACCESS CLEARINGHOUSE, <https://trac.syr.edu/phptools/immigration/mpp/>
(last visited Nov. 20, 2020).

1 or mental health conditions, has expressly excluded such persons from the MPP in
2 its Physical/Mental Health Exclusion. *See* Decl. of Elizabeth Jordan, Exs. A-C.
3 Among other places, the Physical/Mental Health Exclusion is set forth on a DHS
4 webpage entitled “Migrant Protection Protocols,” which explicitly states that people
5 with “[k]nown physical/mental health issues” are excluded from the MPP. *Id.*; Ex.
6 A. On several other occasions—including in a brief to the Ninth Circuit and a
7 statement of “Guiding Principles” applicable to the MPP at all ports of entry—DHS
8 and CBP have made it clear that the MPP should not be applied to people with
9 known physical or mental health issues. *Id.*; Exs. B, C. Nevertheless, CBP continues
10 to apply the MPP to people with known physical or mental health issues, returning
11 numerous such persons—including Plaintiffs—to Mexico. Compl. ¶ 58.⁶

12 For example, Defendants returned each of the Plaintiffs to Mexico despite the
13 fact that Plaintiffs or their family members informed Defendants of their conditions,
14 and many Plaintiffs’ conditions are obvious. *See generally* Mem. of P. & A. in Supp.
15 of Pls. Mot. For Class Certification § III. In one case in San Ysidro-Tijuana,
16 Defendants themselves diagnosed Plaintiff Y.J.C.E. with a heart murmur yet refused
17 to exempt him and his family, including Plaintiff J.A.E.M., from the MPP. Decl. of
18 J.A.E.M. ¶ 8. Meanwhile, in El Paso-Juarez, Plaintiff La.V.S.O.’s mother repeatedly
19 informed Defendants of La.V.S.O.’s serious neurologic conditions, including by
20 presenting medical evidence, before and after the family was placed in the MPP.
21 Decl. of A.A.F.S.O. ¶¶ 9-11, 14, 17, 22. Plaintiffs H.A.H.G., Y.M.M., and S.F.L.
22 each explained their conditions and, for Y.M.M. and S.F.L., those of their children
23 to Defendants, and Defendants still did not exempt them from the MPP. Decl. of
24 H.A.H.G. ¶¶ 6-7, 9; Decl. of Y.M.M. ¶ 13; Decl. of S.F.L. ¶ 9. Plaintiff D.Y.S.’s
25 mother informed Defendants of his conditions, and in fact D.Y.S. was hospitalized
26

27 ⁶ *See also* Zolan Kanno-Youngs, ‘He Turned Purple’: U.S. Overlooks Ill Asylum
28 *Seekers*, N.Y. TIMES (Feb. 22, 2020), <https://www.nytimes.com/2020/02/22/us/politics/trump-asylum-remain-in-mexico.html>.

1 in Defendants’ custody, and yet Defendants still returned him and his family to
2 Mexico. *Id.* ¶¶ 17-18, 22-23.

3 These examples make clear that Defendants did not put into place an effective
4 mechanism to carry out their Physical/Mental Health Exclusion, including
5 mechanisms ensuring that CBP agents (i) identified people with medical or mental
6 health issues; and (ii) exempted them from being placed in the MPP and returned to
7 Mexico.

8 Furthermore, on December 7, 2020, Defendants issued “Supplemental Policy
9 Guidance for Additional Improvement of the Migration Protection Protocols,”
10 setting out principles that implicitly alter the Physical/Mental Health Exclusion from
11 categorical exclusion of people with known physical and mental health issues to a
12 discretionary case-by-case process. As discussed below, informally raising the bar
13 for exclusions neither forecloses Plaintiffs’ relief for violation of their already-
14 violated rights nor remedies the systemic issues in this suit.

15 C. Conditions in Mexico

16 The State Department has issued a “Do Not Travel” notice for the Mexican
17 border state of Tamaulipas, warning that “[o]rganized crime activity—including gun
18 battles, murder, armed robbery, carjacking, kidnapping, forced disappearances,
19 extortion, and sexual assault—is common along the northern border. . . . In these
20 areas, local law enforcement has limited capability to respond to crime incidents.”⁷
21 For the border state of Baja California the State Department has advised the
22 “exercise of increased caution due to crime. . . . Particularly notable is the number
23 of homicides in non-tourist areas of Tijuana. Most homicides appeared to be
24 targeted; however, criminal organization assassinations and turf battles can result in
25 bystanders being injured or killed.”⁸

26 _____
27 ⁷ U.S. DEP’T OF STATE, MEXICO TRAVEL ADVISORY (Aug. 6, 2020),
28 <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

⁸ *Id.*

1 As of March 2020, Defendants had forcibly returned approximately 60,000
2 asylum seekers and migrants to Mexico,⁹ with at least 25,000 remaining in camps
3 and shelters pursuant to the MPP.¹⁰ At its height, over 2,500 people lived in a
4 makeshift camp in tents at the port of entry across from Brownsville while others
5 survive in overcrowded shelters.¹¹

6 The living environment for those returned to Mexico, including in
7 overcrowded shelters or makeshift tent encampments, exacerbates any existing
8 health conditions and puts these individuals at risk for developing infectious
9 diseases.¹² There is heightened inaccessibility to health care due to the violence in
10 the northern Mexico border cities and a lack of basic services, including medical
11 supplies, provided by over-burdened and under-funded non-governmental
12 organizations.¹³

13 Most of the shelters and facilities available to those returned to Mexico are
14 inaccessible to persons with physical or mental health issues and lack the necessary
15 resources for such persons. Many asylum seekers are fearful of leaving the shelters
16 to seek care.¹⁴

17 Apart from these shelters and facilities, those who must live in tent
18 encampments face even more inaccessibility issues. For example, at a tent
19 encampment in Matamoros, Tamaulipas, Mexico, which at its height held 2,500

20 ⁹ See Miriam Jordan, *Appeals Court Allows 'Remain in Mexico' Policy to Continue*
21 *Blocking Migrants at the Border*, N.Y. TIMES (Mar. 4, 2020), [https://www.](https://www.nytimes.com/2020/03/04/us/migrants-border-remain-in-mexico-mpp-court.html)
22 [nytimes.com/2020/03/04/us/migrants-border-remain-in-mexico-mpp-court.html](https://www.nytimes.com/2020/03/04/us/migrants-border-remain-in-mexico-mpp-court.html).

23 ¹⁰ See *Innovation Law Lab v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020).

24 ¹¹ Erin Sheridan, *Asylum seekers await fate amid virus*, VALLEY MORNING STAR
(June 20, 2020), [https://www.valleymorningstar.com/2020/06/20/asylum-seekers-](https://www.valleymorningstar.com/2020/06/20/asylum-seekers-await-fate-amid-virus/)
25 [await-fate-amid-virus/](https://www.valleymorningstar.com/2020/06/20/asylum-seekers-await-fate-amid-virus/).

26 ¹² Megan Diamond, et al., *A Population in Peril: A Health Crisis Among Asylum*
Seekers on the Northern Border of Mexico, HARV. GLOB. HEALTH INST. & B.C.
27 SCH. SOC. WORK 1 (2020), [https://globalhealth.harvard.edu/wp-content/uploads/](https://globalhealth.harvard.edu/wp-content/uploads/2020/07/A_Population_in_Peril.pdf)
28 [2020/07/A_Population_in_Peril.pdf](https://globalhealth.harvard.edu/wp-content/uploads/2020/07/A_Population_in_Peril.pdf).

¹³ *Id.* at 4.

¹⁴ *Id.* at 5.

1 people, there are only a handful of outdoor showers. There is also a limited number
2 of portable toilets, which at times have overflowed with human waste. Insufficient
3 access to potable water frequently leads to chronic dehydration and heat stroke.¹⁵

4 The routine confiscation of asylum seekers' medications by CBP agents
5 exacerbates Plaintiffs' physical or mental health issues.¹⁶ It can take weeks to secure
6 new prescriptions in Mexico. Individuals also commonly report chronic conditions
7 being undiagnosed and left untreated, as well as inconsistent initial medical
8 screening protocols performed by the Mexican government. In particular, the
9 Mexican government provided insufficient information to those returned to Mexico
10 with physical or mental health issues regarding how they could access healthcare.¹⁷

11 Being returned to Mexico can be a "catastrophic stressor on health" for
12 asylum seekers due to the stress from waiting in a dangerous living environment and
13 trauma from their experiences in migration.¹⁸

14 Minors are especially vulnerable to exacerbated mental health issues. Despite
15 the high need for mental health and psychosocial services for asylum seekers placed
16 in the MPP, those with psychiatric conditions face a lack of care.¹⁹

17 Generally, Mexico does not have enough health care resources particularly in
18 the border cities where Defendants have forcibly sent Plaintiffs. In three border
19 states, the physician to population ratio is approximately 0.6 to 1,000, and compared
20 to other nations, exhibits poor performance on quality of care indicators, including
21 amputations on diabetic patients and avoidable hospital admission. As a result,
22 under-funded and over-burdened faith-based and nonprofit organizations fill the
23 gaps in health care services and supplies for those returned to Mexico whose

24 ¹⁵ *Id.*

25 ¹⁶ *Id.* at 6.

26 ¹⁷*Id.*; see also, *Mexico: Risks at Border for Those with Disabilities*, HUM. RTS.
27 WATCH (Oct. 29, 2019), [https://www.hrw.org/news/2019/10/29/mexico-risks-
border-those-disabilities](https://www.hrw.org/news/2019/10/29/mexico-risks-border-those-disabilities).

28 ¹⁸ Diamond, et al., *supra* note 12, at 7.

¹⁹ *Id.* at 6.

1 physical or mental health issues Defendants refused to accommodate.²⁰

2 In its 2019 Country Reports on Human Rights Practices, the State Department
3 documented significant incidences of persecution and torturous conditions of people
4 with physical or mental health issues in Mexico.²¹ The report found that “[p]ublic
5 buildings and facilities often did not comply with the law requiring access for
6 persons with disabilities.”²²

7 Migrants have reported being turned away from local clinics and hospitals,
8 which can be deadly for those with serious chronic health conditions.²³ For example,
9 Plaintiff D.G.M., who was turned back to Matamoros, Mexico and who has a heart
10 condition that causes dramatic spikes in blood pressure, was turned away from a
11 hospital after the entire left side of his body went numb and he passed out. Decl. of
12 D.G.M. ¶ 22; *see also* Decl. of Helen Rae Perry ¶¶ 32-35.

13 None of the four shelters in Ciudad Juárez, even the newly built ones, are fully
14 accessible to persons with physical or mental health issues returned to Mexico by
15 Defendants. The government-run Leona Vicario National Integration Center, which
16 has a capacity for 3,000 people, originally had no beds, leaving people to sleep on
17 the floor, including persons with physical or mental health issues. The shelter also
18 has no accessible bathrooms for persons with physical health issues and no
19 accessible transportation nearby.²⁴

20 Some asylum seekers with disabilities reported that neither American nor
21 Mexican government officials provide them enough information or facilitate access

22 ²⁰ *Id.* at 7-8.

23 ²¹ U.S. DEP’T OF STATE, 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES:
24 MEXICO 25 (2019), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/mexico/>.

25 ²² *Id.*

26 ²³ Jessica Eller et al., *Migrant Protection Protocols: Implementation and*
27 *Consequences for Asylum Seekers in Mexico*, 218 U. TEX. AUSTIN STRAUSS CTR.
28 INT’L SEC. & L. 29 n.13 (May 2020), <https://repositories.lib.utexas.edu/handle/2152/81991>.

²⁴ *Id.*

1 to health care. Despite an existing public health insurance program for low-income
2 asylum seekers, many were not told of its existence. For example, a woman with
3 high blood pressure and a man with prosthetic eye were deprived of critical health
4 care because they were not informed of the public health insurance.²⁵

5 Limited food options at many shelters results in an inability to provide
6 appropriate dietary accommodations for persons with certain physical health issues,
7 which can lead to a deterioration in their health.²⁶

8 The COVID-19 pandemic has also exacerbated problems with access to
9 shelters for asylum seekers with physical or mental health issues returned from the
10 United States. In Matamoros and Tijuana, migrant shelters have announced that they
11 will be closing or no longer accepting new residents.²⁷

12 *Deafness*

13 Numerous sources point to Mexico as being unsafe and unsupportive to deaf
14 or hard of hearing persons. There is a lack of sign language interpreters for the most
15 basic services, especially in health care. A mother in the MPP with a deaf child stated
16 that there are no sign interpreters in Mexican hospitals and that sometimes hospitals
17 would not allow her to accompany her deaf child to appointments.²⁸

18 Advocates for individuals who are deaf or hard of hearing in Mexico often
19 speak to the constant discrimination, and societal and institutional barriers that deaf
20 persons face in Mexico.²⁹

22 ²⁵ *Id.*

23 ²⁶ *Id.*

24 ²⁷ *Id.* at 30.

25 ²⁸ Amanda Admire & Blanca Ramirez, *Violence and Disability: Experiences and*
26 *Perceptions of Victimization Among Deaf People*, J. INTERPERSONAL VIOLENCE
13-14 (Sept. 14, 2017), <https://journals.sagepub.com/doi/10.1177/0886260517730564>.

27 ²⁹ Paola Cortés Pérez, *Deaf face social and institutional discrimination: DIES*,
28 UNIVERSO (Nov. 3, 2018), <https://www.uv.mx/prensa/general/sordos-enfrentan-discriminacion-social-e-institucional-dies/>.

1 *Blindness*

2 People who are visually impaired face architectural barriers as a major
3 obstacle to accessing rehabilitation services in Mexico.³⁰

4 Blind people also face discrimination and accessibility challenges in Mexico.
5 For example, many blind people are prevented from entering public places and using
6 public transportation with their guide dogs. Once inside, navigating public places
7 can be particularly difficult due to barriers such as many elevators lacking braille
8 signage.³¹

9 In its 2019 Country Reports on Human Rights Practices, the State Department
10 stated that public buildings and facilities in Mexico were often not accessible to
11 those with physical or mental health issues. Furthermore, the State Department
12 documented systemic problems of abuse and unhygienic conditions within mental
13 health institutions and care facilities meant for people with physical or mental health
14 issues in Mexico.³² The report found that “[p]ublic buildings and facilities often did
15 not comply with the law requiring access for persons with disabilities.”³³

16 **D. Effect of COVID-19 on Persons Within the Informal Refugee**
17 **Camps**

18 In addition to the crime and poor health conditions that Plaintiffs have
19 experienced in Mexico, they are now facing another layer of threat due to COVID-
20 19 exposure. The informal refugee camps force people to live within arms’ reach of
21 other tents, and shelters are also very crowded. These overcrowded conditions are

22 _____
23 ³⁰ Guillermo Rivera, *What it’s like to be blind in Mexico: “We blind have it*
24 *complicated”*, VICE (en español) (July 7, 2016), <https://www.vice.com/es/article/pp5qvm/los-ciegos-la-tenemos-complicada-como-es-ser-invidente-en-mexico>.

25 ³¹ Mario Mora Legaspi, *They regret that there is discrimination against blind*
26 *people*, FUNDACIÓN ONCE AMÉRICA LATINA (Oct. 7, 2014), <https://www.foal.es/es/noticias/lamentan-que-haya-discriminaci%C3%B3n-hacia-personas-invidentes>.

27 ³² U.S. DEP’T OF STATE, *supra* note 21, at 25.

28 ³³ *Id.*

1 ripe for the spread of COVID-19.³⁴ And in fact, in Matamoros and Tijuana, migrant
 2 shelters have announced that they will be closing or no longer accepting new
 3 residents.³⁵

4 In addition to the above-mentioned risks, on July 17, 2020, DHS and DOJ
 5 postponed § 240 proceedings for people in the MPP until the completion of certain
 6 public health criteria,³⁶ which caused additional backlog in court proceedings.³⁷

7 Nonetheless, Defendants are still issuing new hearing dates for people in the
 8 MPP. Plaintiffs who have been given updated court hearing dates have attempted to
 9 prepare for them despite the limitations and lack of access noted above, only to have
 10 them postponed yet again each time.

11 Plaintiffs are forced to remain in these abysmal conditions in order to access
 12 even basic medical care and humanitarian aid. Some risk losing access to even the
 13 minimal protection if they leave and are forced to give up their space in a shelter or
 14 a refugee camp where access is restricted. *See* Decl. of A.A.F.S.O. ¶ 49.

15 **III. LEGAL STANDARD**

16 To obtain a preliminary injunction, a movant must “meet one of two variants
 17 of the same standard.” *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th
 18 Cir. 2017). “Under the original *Winter* standard, a party must show ‘that [they are]

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 20
 21 ³⁴ Ashoka Mukpo, *Asylum Seekers Stranded in Mexico Face a New Danger: COVID-19*, ACLU (Mar. 26, 2020), <https://www.aclu.org/news/immigrants-rights/asylum-seekers-stranded-in-mexico-face-a-new-danger-covid-19/>.

22 ³⁵ *Mexico: Risks at Border for Those with Disabilities*, HUM. RTS. WATCH 30 (Oct.
 23 29, 2019), [https://www.hrw.org/news/2019/10/29/mexico-risks-border-those-](https://www.hrw.org/news/2019/10/29/mexico-risks-border-those-disabilities)
 24 [disabilities](https://www.hrw.org/news/2019/10/29/mexico-risks-border-those-disabilities).

25 ³⁶ U.S. DEP’T OF HOMELAND SEC., DEPARTMENT OF HOMELAND SECURITY AND
 26 DEPARTMENT OF JUSTICE ANNOUNCE PLAN TO RESTART MPP HEARINGS (July 17,
 2020), [https://www.dhs.gov/news/2020/07/17/department-homeland-security-and-](https://www.dhs.gov/news/2020/07/17/department-homeland-security-and-department-justice-announce-plan-restart-mpp)
 27 [department-justice-announce-plan-restart-mpp](https://www.dhs.gov/news/2020/07/17/department-homeland-security-and-department-justice-announce-plan-restart-mpp).

28 ³⁷ U.S. DEP’T OF HOMELAND SEC., JOINT DHS/EOIR STATEMENT ON THE
 RESCHEDULING OF MPP HEARINGS (May 10, 2020), [https://www.dhs.gov/](https://www.dhs.gov/news/2020/05/10/joint-dhseoir-statement-rescheduling-mpp-hearings)
[news/2020/05/10/joint-dhseoir-statement-rescheduling-mpp-hearings](https://www.dhs.gov/news/2020/05/10/joint-dhseoir-statement-rescheduling-mpp-hearings).

1 likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the
 2 absence of preliminary relief, that the balance of equities tips in his favor, and that
 3 an injunction is in the public interest.” *Id.* (quoting *Winter v. Nat. Res. Def. Council,*
 4 *Inc.*, 555 U.S. 7, 20 (2008)).

5 Under the Ninth Circuit’s “‘sliding scale’ variant of the *Winter* standard,”
 6 however, “‘if a plaintiff can only show that there are “serious questions going to the
 7 merits”—a lesser showing than likelihood of success on the merits—then a
 8 preliminary injunction may still issue if the “balance of hardships tips sharply in the
 9 plaintiff’s favor,” and the other two *Winter* factors are satisfied.” *Id.* (quoting *Shell*
 10 *Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *All.*
 11 *for the Wild Rockies*, 632 F.3d at 1135)).

12 In line with this “sliding scale” approach, the Ninth Circuit has emphasized
 13 that “[t]he critical element in determining the test to be applied is the relative
 14 hardship to the parties. If the balance of harm tips decidedly toward the plaintiff,
 15 then the plaintiff need not show as robust a likelihood of success on the merits as
 16 when the balance tips less decidedly.” *Republic of the Phil. v. Marcos*, 862 F.2d
 17 1355, 1362 (9th Cir. 1988). Moreover, “[t]he balance of equities and public interest
 18 factors merge ‘[w]hen the government is a party.’” *Habibi v. Barr*, 445 F. Supp. 3d
 19 990, 995 (S.D. Cal. 2020) (quoting *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073,
 20 1092 (9th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009))).

21 **IV. ARGUMENT**

22 **A. Plaintiffs Are Likely to Succeed on Their *Accardi* Claim that** 23 **Defendants Arbitrarily and Capriciously Departed from Their** 24 **Own Policies in Violation of the APA**

25 “For the court to grant a preliminary injunction, plaintiff[s] must show
 26 likelihood of success on the merits of *at least one*”—though not necessarily all—“of
 27 the[ir] claims.” *Bravado Int’l Grp. Merch. Servs., Inc. v. Does 1-100*, No. 19-cv-
 28 01274, 2019 WL 3425990, at *3 (E.D. Cal. July 30, 2019) (emphasis added). This
 Court should grant Plaintiffs’ Motion because they are likely to succeed on the

1 merits of their claims under the APA.

2 Under the APA, a court must “hold unlawful and set aside agency action,
3 findings, and conclusions found to be . . . arbitrary, capricious, an abuse of
4 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A);
5 *Judulang v. Holder*, 565 U.S. 42, 52 (2011). The Supreme Court has emphasized
6 that there is a “strong presumption that Congress intends judicial review of
7 administrative action.” *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667,
8 670 (1986). An agency’s failure to follow its own procedures is sufficient grounds
9 to set aside its action. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S.
10 260, 268 (1954) (holding habeas relief proper where the agency did not follow its
11 own procedural rules possessing “the force and effect of law” that governed the
12 processing of an application for suspension of deportation); *Alcaraz v. INS*, 384 F.3d
13 1150, 1162 (9th Cir. 2004) (noting that “th[is] doctrine has its clearest origin in
14 [*Accardi*]”).

15 Courts distinguish between rules or policies that are ““intended primarily to
16 confer important procedural benefits upon indiv[i]duals”” or implicate “fundamental
17 statutory or constitutional rights,”³⁸ on the one hand, and purely procedural rules or
18 policies “benefitting the agency,”³⁹ on the other. Agency violations of the first
19 category of rules or policies warrant judicial review regardless of a showing of
20 prejudice, whereas agency violations of purely procedural rules or policies require a
21 showing of prejudice. *Montes-Lopez v. Holder*, 694 F.3d 1085, 1091 (9th Cir. 2012).
22 Both standards are met here.

23 First, the Physical/Mental Health Exclusion clearly was intended to confer
24 important benefits on immigrants with these health issues, rather than as a
25 procedural policy benefiting the agency. Defendants expressly recognized that

26 _____
27 ³⁸ *Montes-Lopez v. Holder*, 694 F.3d 1085, 1091 (9th Cir. 2012); *see also Morton*
28 *v. Ruiz*, 415 U.S. 199, 235 (1974) (“[w]here the rights of individuals are affected, it
is incumbent upon agencies to follow their own procedures.”).

³⁹ *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003).

1 people with physical or mental health issues “are not amenable” to being forced to
2 return to Mexico, and on those grounds, created a policy to exclude such persons.
3 Thus, the Physical/Mental Health Exclusion confers “important procedural benefits”
4 on asylum seekers with physical or mental health issues, and the Defendants’ failure
5 to comply with their own policy warrants judicial review.⁴⁰

6 Second, the Physical/Mental Health Exclusion implicates other important
7 statutory rights outside of the agency’s guidance. The Plaintiffs and members of the
8 class all have the right under Section 240 of the INA to present evidence and to
9 establish that they should be admitted into the United States. As demonstrated above,
10 forcing people with medical or mental health conditions to return to Mexico makes
11 it difficult, and in many cases impossible, for such persons to effectively participate
12 in these proceedings.

13 Finally, even if the Physical/Mental Health Exclusion is construed to be a
14 purely procedural policy benefiting the agencies, judicial review is warranted
15 because Defendants’ violations of that policy by returning Plaintiffs and class
16 members to Mexico—where they are at substantial risk of abuse or crime, and where
17 necessary medical supports often do not exist—results in great prejudice to them.
18 *See Montes-Lopez*, 694 F.3d at 1093 (holding that judicial review is appropriate even
19 for violations of “a relatively minor procedural rule” where the violation resulted in
20 prejudice).

21
22 ⁴⁰ Defendants’ recent “supplemental” guidance does not extinguish the rights to
23 which Plaintiffs and class members are entitled under the Physical/Mental Health
24 Exclusion, which unequivocally grants Plaintiffs the right to be excluded from the
25 MPP. *See, e.g., Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 465 (S.D. Fla.
26 1980) (“The new regulations are not on their face retroactive and this court should
27 not interpret them to deprive the plaintiffs of their vested rights.”). Indeed, the
28 principle against retroactivity is especially important in *Accardi* claims such as this
as, otherwise, the agency could avoid liability through expedient “changes to the
rules of the game.” *Hymas v. United States*, 117 Fed. Cl. 466, 505 (Fed. Cl. July
25, 2014), *vacated on other grounds*, (quoting *Bowen v. Georgetown Univ. Hosp.*,
488 U.S. 204, 220 (1988) (Scalia, J. concurring)).

1 Other courts have held that agency violations of similar immigration-related
2 rules were properly vindicated through *Accardi* claims. For instance, in *Torres v.*
3 *U.S. Dep’t of Homeland Sec.*, No. 17CV1840, 2017 WL 4340385 (S.D. Cal. Sept.
4 29, 2017), the court confronted undisputed allegations that the agency defendants
5 failed to comply with various Standard Operating Procedures in terminating the
6 plaintiff’s Deferred Action for Childhood Arrivals (“DACA”) status. The court
7 noted that “[w]hile Defendants are granted broad discretion to commence,
8 adjudicate, and execute removal orders, a fundamental principle of federal law is
9 that a federal agency must follow its own procedures,” *id.* at *6, and thus the court
10 held that the plaintiff had demonstrated a likelihood of success on the merits.
11 Similarly, the court in *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018),
12 addressed class action claims that “five [DHS] Field Offices no longer follow the
13 policies and procedures outlined in [a] 2009 Parole Directive.” *Id.* at 334. The court
14 concluded that the plaintiffs’ “allegation that ICE’s systematic departure from the
15 Parole Directive is unlawful is . . . actionable under [the APA],” *id.* at 336-37, and
16 went on to find the plaintiffs’ cited evidence and arguments sufficiently
17 demonstrated a likelihood of success on the merits. *Id.* at 341. Finally, in *Nora v.*
18 *Wolf*, the district court found an *Accardi* violation where CBP failed to follow its
19 procedures regarding fear determinations for people in the MPP. No. 20-0993, 2020
20 WL 3469670, at *14 (D.D.C. June 25, 2020).

21 Thus, courts have determined that the plaintiffs demonstrated a likelihood of
22 success on the merits in cases in which agencies failed to comply with their own
23 immigration-related policies. Here, too, the Court should determine that Plaintiffs
24 have demonstrated a clear likelihood of success on their APA claim under the
25 *Accardi* doctrine.

26 **B. Subjecting People with Physical or Mental Health Issues to the**
27 **MPP Has Caused and Will Continue to Cause Irreparable Harm**

28 Due to Defendants forcibly returning Plaintiffs to Mexico under the MPP,

1 Plaintiffs face irreparable harm, which is “[p]erhaps the single most important
 2 prerequisite for the issuance of a preliminary injunction.” *Singleton v. Kernan*, No.
 3 16-cv-02462, 2017 WL 4922849, at *3 (S.D. Cal. Oct. 31, 2017) (quoting 11A
 4 Wright & Miller, Fed. Prac. & Proc. § 2948.1 (3d ed.)). A party must, as Plaintiffs
 5 do, demonstrate “a significant threat of irreparable injury, irrespective of the
 6 magnitude of the injury” that cannot be remedied if the court waits until a final trial
 7 on the merits. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999). Absent
 8 judicial relief, Plaintiffs face at least three types of irreparable harms: (i) serious and
 9 daily risks of persecution, discrimination, violence, and death; (ii) exacerbated
 10 health issues due to the unsanitary living conditions and denial of adequate medical
 11 care, including risk of death; and (iii) barriers to participate in Section 240
 12 proceedings—all of which increase the likelihood of erroneous removal to countries
 13 where Plaintiffs will be persecuted, tortured, or killed. Plaintiffs’ experiences in the
 14 MPP are emblematic of the types of harm suffered by the putative class members.⁴¹

15 1. Plaintiffs’ Heightened Risk of Discrimination, Persecution, and
 16 Death Constitutes Irreparable Harm

17 _____
 18 ⁴¹ The Supplemental Guidance does not remedy the harms or safeguard the rights of
 19 Plaintiffs and class members. The Supplemental Guidance fails to ensure the right
 20 to be assessed and excluded for physical and mental health issues as the guidance (i)
 21 does not make clear that it is binding; (ii) does not formally renounce the categorical
 22 exclusion; (iii) fails to identify and remedy the repeated failures to properly identify,
 23 evaluate, and exclude people with disabilities in the past or future; (iv) was issued
 24 shortly after the complaint was filed; and (v) has been in place for less than a month.
 25 See, e.g., *A.O. v. Cuccinelli*, 457 F. Supp. 3d 777, 787-88 (N.D. Cal. 2020)
 26 (discussing that policy changes that fail to meet the factors set forth in *Rosebrock v.*
 27 *Mathis*, 745 F.3d 963, 972 (9th Cir. 2014), do not “deprive a federal court of its
 28 power to determine the legality of the practice,” especially “where the new policy
 could be easily abandoned or altered in the future”) (internal quotation marks
 omitted). Indeed, the Supplemental Guidance provides no procedural safeguards to
 prevent the agency from returning to “its old ways” of either erroneously sending
 people with known physical and health issues to Mexico or refusing to remove
 qualifying people from the MPP. *Moreno Galvez v. Cuccinelli*, No. C19-0321, 2020
 WL 5892011, at *6 (W.D. Wa. Oct. 5, 2020) (quotation marks omitted).

1 Under the MPP, Plaintiffs are at risk of serious violence and murder.⁴² Indeed,
 2 “there is no greater irreparable harm than death.” *Ahlman v. Barnes*, 445 F. Supp.
 3 3d 671, 692 (C.D. Cal. 2020) (citing *Helling v. McKinney*, 509 U.S. 24, 33 (1993)).
 4 The Department of State issued travel warnings to various areas in Mexico due to
 5 pervasive crime and violence,⁴³ in part due to the “notable” number of homicides in
 6 non-tourist areas.⁴⁴ Plaintiffs with physical or mental health issues have faced, or are
 7 at high risk of facing, violence in Mexico in the form of sexual assault, extortion,
 8 kidnapping, robbery, or murder. *See, e.g.*, Decl. of V.A.G. ¶¶ 14-15; Decl. of E.H.M.
 9 ¶ 16; Decl. of A.A.F.S.O. ¶ 40. For example, D.Y.S., a nine-year-old boy with
 10 epilepsy and autism, has already been sexually assaulted while in the MPP. Decl. of
 11 M.S.S. ¶¶ 36-37 & 56-59. Although he now lives in a different shelter, other people
 12 in the MPP at the new shelter have also been sexually assaulted. *Id.*⁴⁵

13 Furthermore, Plaintiffs face irreparable harm from the daily discrimination
 14 and persecution suffered in Mexico. *See, e.g., Nora v. Wolf*, No. 20-0993, 2020 WL
 15 3469670, at *14 (D.D.C. June 25, 2020) (“[Plaintiff] has also demonstrated that she
 16 would be likely to suffer irreparable injury if she and her children were to remain in
 17 Mexico without being properly evaluated for a fear of persecution.”). Despite
 18 Plaintiffs’ physical or mental health issues and fear of bodily harm in Mexico,
 19 Defendants forced Plaintiffs to return to Mexico under the MPP with no regard to
 20 the risks that they face in the MPP. *See, e.g.*, Decl. of H.A.H.G. ¶¶ 10-11; Decl. of
 21 V.A.G. ¶¶ 8-9. The State Department itself reported that people with physical or
 22

23 ⁴² *Delivered to Danger: Trump Administration sending asylum seekers and*
 24 *migrants to danger*, HUM. RTS. FIRST (May 13, 2020),
 25 <https://www.humanrightsfirst.org/campaign/remain-mexico> (last visited Nov. 4,
 2020).

26 ⁴³ U.S. DEP’T OF STATE, MEXICO TRAVEL ADVISORY (Sept. 8, 2020), [https://travel.](https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html)
 27 [state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-](https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html)
 28 [advisory.html](https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html).

⁴⁴ *Id.*

⁴⁵ *See also* HUM. RTS. FIRST, *supra* note 42.

1 mental health issues face discrimination in Mexico. Decl. of Elizabeth Jordan, Ex.
 2 D. Service providers confirm that migrants with physical or mental health issues
 3 repeatedly experience discrimination, even from medical staff, in Mexico. *See* Decl.
 4 of Helen Rae Perry ¶¶ 12, 36.

5 As Plaintiffs face these threats of discrimination, persecution, and violence
 6 every day in Mexico, the delays in asylum proceedings in the MPP greatly increase
 7 the likelihood that Plaintiffs and class members will suffer from violence and
 8 discrimination. *See E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 864
 9 (N.D. Cal. 2018) (“[T]hese asylum seekers experience lengthy or even indefinite
 10 delays waiting at designated ports of entry along the southern border. . . . Further,
 11 the record reveals that asylum seekers experience high rates of violence and
 12 harassment while waiting to enter, as well as the threat of deportation to the countries
 13 from which they have escaped. . . . These harms are both irreparable and likely to
 14 occur.”), *aff’d*, 950 F.3d 1242 (9th Cir. 2020). For example, E.H.M. worries that her
 15 brother, Plaintiff H.H.M., is at a heightened risk of being attacked because he cannot
 16 hear or communicate verbally with others. Decl. of E.H.M. ¶ 17. Similarly, Plaintiff
 17 M.M.G. is at risk of being targeted for persecution and other harm due to his
 18 disability following a brain injury. Decl. of V.A.G. ¶ 11. Plaintiff S.F.L.’s vision
 19 problems caused her to almost be run over. Decl. of S.F.L. ¶ 14.

20 Thus, Plaintiffs and putative class members face irreparable harm from the
 21 commonplace discrimination, persecution, and violence in Mexico.

22 2. Plaintiffs’ Health Conditions are Exacerbated in the MPP,
 23 Resulting in Irreparable Harm and Risk of Death

24 In Mexico under the MPP, Plaintiffs are denied medical care and live in
 25 unsanitary conditions,⁴⁶ which exacerbates their physical or mental health issues.

26 _____
 27 ⁴⁶ “*Unsafe, Unsanitary, Inhumane*”: PHR Medical Expert’s Observations at
 28 *Matamoros Migrant Encampment*, PHYSICIANS FOR HUM. RTS. (Sept. 26, 2019),
<https://phr.org/news/phr-statement-on-migrant-protection-protocols/>; *see also*
 Decl. of Helen Rae Perry ¶¶ 13-27.

1 Denial of medical care and exacerbation of suffering each satisfy the irreparable
2 harm prong. *See, e.g., Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766
3 (9th Cir. 2004) (“Plaintiffs introduced compelling evidence that they (and others)
4 very likely will suffer irreparable. . . . This harm includes pain, infection,
5 amputation, medical complications, and death due to delayed treatment.”); *Leiva-*
6 *Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011) (“[A]s we have previously
7 held, ‘[o]ther important [irreparable harm] factors include . . . medical needs.’”)
8 (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc)).

9 Service organizations and medical care providers report that it is common for
10 migrants with health conditions in the MPP to be denied adequate medical care, even
11 as their health worsens. *See* Decl. of Nicolas Palazzo ¶ 14; Decl. of Charlene D’Cruz
12 ¶ 16; Decl. of Helen Rae Perry ¶ 12. For example, La.V.S.O., a child with congenital
13 hydrocephalus, cannot access the specialized care that she needs; instead, she lives
14 at a shelter where she was forced to sleep on the floor and was given food that she
15 could not eat, which made her ill. Decl. of A.A.F.S.O. ¶¶ 15-18. C.J.V.C., a child
16 whose leg was amputated, must navigate streets and buildings that are not safe for
17 him, placing him at constant risk of injury; yet he cannot even get a replacement for
18 his broken crutches. Decl. of M.C. ¶ 23. D.G.M. has a heart condition that, since
19 being forcibly returned to Mexico, he has been unable to control, requiring his
20 family to check that he is breathing throughout the night; he relies on non-profits to
21 pay for his necessary medication. Decl. of D.G.M. ¶¶ 23-26. S.M.A. and D.Y.S.
22 both have epilepsy and live in conditions that can trigger their seizures. Decl. of
23 M.S.S. ¶ 62; Decl. of K.A.M. ¶¶ 12-15. Similarly, S.F.L. and M.Y.J.L., despite
24 getting some medical care, still face deteriorating health. S.F.L.’s diabetes and
25 mental health are worsening, and M.Y.J.L. faces pain and bleeding that is getting
26 worse and needs further treatment that she is not getting. Decl. of S.F.L. ¶¶ 13-14,
27 19-20; Decl. of M.Y.J.L. ¶¶ 5-6, 15-21. The lack of ongoing, coordinated care is
28 causing both Y.M.M. and her daughter J.C.M.M. to struggle to get accurate

1 diagnoses or continuous planned care for their mental and physical issues, especially
 2 for Y.M.M.’s mental condition, and this affects both of their cases. Decl. of Y.M.M.
 3 ¶¶ 2, 21, 23, 28-29.

4 Furthermore, these imminent health risks are further compounded by the
 5 dangers posed by the COVID-19 pandemic—given that Plaintiffs are at a
 6 particularly high risk of serious complications if infected. *Cf., e.g., Alcantara v.*
 7 *Archambeault*, No. 20CV0756, 2020 WL 2315777, at *9 (S.D. Cal. May 1, 2020)
 8 (issuing a temporary restraining order where medically vulnerable individuals in an
 9 ICE detention center with high rates of COVID-19 infection “are more susceptible
 10 to severe and dire consequences ” and likely face irreparable harm absent a TRO).⁴⁷
 11 The informal refugee camps most Plaintiffs live in are ripe for the spread of COVID-
 12 19 because everyone lives close to one another and shares hygiene stations, toilets,
 13 and bathing areas, including in the Rio Grande River. *See* Decl. of Helen Rae Perry
 14 ¶¶ 13-19. Medical professionals who work with those returned to Mexico under the
 15 MPP report that individuals with physical or mental health issues are at particularly
 16 high risk of severe and life-threatening medical complications. *Id.* ¶ 12.

17 Thus, Plaintiffs and class members face irreparable harm as their health issues
 18 worsen due to the lack of adequate medical care and the unsanitary conditions where
 19 Defendants have forcibly returned them.

20 3. Plaintiff’s Face Insurmountable Barriers to Prepare for Their
 21 Section 240 Proceedings, Which Could Result in Erroneous
 22 Deportations

23
 24 ⁴⁷ *See also See Gayle v. Meade*, No. 20-21553-Civ, 2020 WL 3041326, at *21-23
 25 (S.D. Fla. June 6, 2020) (entering a temporary restraining order and preliminary
 26 injunction ordering ICE to immediately comply with its own ICE and CDC
 27 guidelines on the COVID-19 pandemic response in the detention centers); *Basank*
 28 *v. Decker*, 449 F. Supp. 3d 205, 213 (S.D.N.Y. 2020) (issuing a temporary
 restraining order because “[t]he risk that Petitioners will face a severe, and quite
 possibly fatal, infection if they remain in immigration detention constitutes
 irreparable harm warranting a TRO.”).

1 The barriers described above create significant obstacles for Plaintiffs and
2 class members to meaningfully prepare for and participate in Section 240
3 proceedings, greatly increasing the chance the Plaintiffs will be erroneously
4 removed to countries where they face persecution and death. “[T]he threat of
5 deportation to the countries from which they have escaped” constitutes irreparable
6 harm. *E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 864; *see also Torres v. Dep’t*
7 *of Homeland Sec.*, No. EDCV 18-2604, 2020 WL 3124216, at *8 (C.D. Cal. April
8 11, 2020) (finding that, “given the high stakes of immigration proceedings,” barriers
9 that result in the erroneous denial of asylum constitute irreparable harm). As
10 reflected in their declarations, some putative Class representatives find themselves
11 in the MPP fearing persecution, if removed. *See, e.g.*, Decl. of V.A.G. ¶ 2; Decl. of
12 H.A.H.G. ¶ 3. Removal to places where individuals fear persecution and death
13 greatly increases the chance, as has been the case, that individuals will be seriously
14 harmed or die.⁴⁸

15 With every day that passes, Plaintiffs fall further behind in their ability to
16 prepare for their Section 240 proceedings. Plaintiffs’ declarations detail how the
17 return to Mexico has hindered their participation in Section 240 proceedings in light
18 of their physical or mental health issues. *See, e.g.*, Decl. of S.F.L. ¶¶ 19-22; Decl. of
19 V.A.G. ¶¶ 9-19; Decl. of H.A.H.G. ¶¶ 14-21. For example, Y.M.M. and her daughter
20 struggle to cope with their living situation due to their Y.M.M.’s mental illness and
21 her daughter’s mental disability. Decl. of Y.M.M. ¶¶ 20-23. As another example,
22 N.R.R. and her teenage son take turns making sure that their husband and father,
23 D.G.M., is still breathing because his heart condition causes him to stop breathing
24 at night, leaving them exhausted and unable to focus on their Section 240
25 proceedings. Decl. of N.R.R. ¶¶ 20-21, 24.

27 ⁴⁸ *See, e.g.*, Sarah Stillman, *When Deportation is a Death Sentence*, NEW YORKER
28 (Jan. 15, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

1 or mental health issues in the MPP in violation of Defendants’ own Physical/Mental
2 Health Exclusion policy will not harm the government since a government agency
3 “cannot suffer harm from an injunction that merely ends an unlawful practice.”
4 *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citation omitted); *see*
5 *also City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 408 F.
6 Supp. 3d 1057, 1126-27 (N.D. Cal. 2019) (holding that government agencies would
7 barely suffer any hardship when a court enjoins them from replacing an old rule with
8 a more expansive one). Here, Defendants cannot establish that they will suffer
9 meaningful injury if required to comply with a policy that Defendants themselves
10 published, to protect an identified group of people who should have been able to rely
11 on it.

12 Second, ensuring compliance with the APA also meets the public interest
13 prong. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (“The public
14 interest is served by compliance with the APA.”). Upon implementing the MPP,
15 DHS expressly provided that refugees with known physical or mental health issues
16 were to be excluded from the MPP.⁴⁹ Granting this preliminary injunction will
17 require the Defendants to comply with the Physical/Mental Health Exclusion. Thus,
18 as would have been the case had Defendants followed their own policies, injunctive
19 relief would ensure Plaintiffs and class members have the opportunity to pursue
20 Section 240 proceedings with the necessary support available in the United States

21
22 ⁴⁹ *See* U.S. DEP’T OF HOMELAND SEC., MIGRANT PROTECTION PROTOCOLS (Jan. 24,
23 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; Decl.
24 of Elizabeth Jordan, Ex. B (OFF. OF FIELD OPERATIONS, SAN DIEGO FIELD OFF.,
25 GUIDING PRINCIPLES FOR MIGRANT PROTECTION PROTOCOLS (Jan. 28, 2019),
26 [https://www.cbp.gov/sites/default/files/assets/documents/2019-](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf)
27 [Jan/MPP%20Guiding%20Principles%201-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf)); Decl. of Elizabeth Jordan,
28 Ex. A (U.S. DEP’T OF HOMELAND SEC., MIGRANT PROTECTION PROTOCOLS,
<https://www.dhs.gov/migrant-protection-protocols> (last updated Aug. 10,
2020)); U.S. DEP’T OF HOMELAND SEC., GUIDANCE ON MIGRANT PROTECTION
PROTOCOLS (Jan. 28, 2019), [https://www.cbp.gov/sites/default/files/assets/](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20OFO%20Memo%201-28-19.pdf)
[documents/2019-Jan/MPP%20OFO%20Memo%201-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20OFO%20Memo%201-28-19.pdf).

1 by being exempted from the MPP. *See Torres v. U.S. Dep’t of Homeland Sec.*, 2017
2 WL 4340385, at *5-6 (S.D. Cal. Sept. 29, 2017) (“[t]his court is simply requiring
3 Defendants to follow their own procedural dictates for termination of DACA
4 status”); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 343 (D.D.C. 2018) (“[I]n finding
5 that injunctive relief is warranted in this case, this Court is simply ordering that
6 Defendants do what they already admit is required—follow the ICE Directive.”)
7 Accessible public programs run better for both the government and program
8 participants, so this is in both sides’ interests.

9 Third, the public interest is substantial in preventing unnecessary bodily harm
10 or deaths of asylum seekers who seek to enter the United States. *See E. Bay*
11 *Sanctuary Covenant*, 354 F. Supp. 3d 1094, 1118 (N.D. Cal. 2018) (finding
12 substantial public interest in preventing deaths at the southern border and enjoining
13 the government from denying asylum to all non-citizens who failed to enter at a
14 designated port of entry). The effect on Plaintiffs of denying the requested relief
15 would be severe and immediate as set forth above. The Ninth Circuit has made it
16 clear that it “ha[s] little difficulty concluding that the balance of hardships tips
17 decidedly in plaintiff’s favor” when faced with preventing human suffering.
18 *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). Absent the requested
19 injunction, Plaintiffs face severe suffering: threats of violence and kidnapping in
20 Mexico, deprivation of medical care, aggravation of existing physical and mental
21 health issues, impediments to their right to participate in Section 240 proceedings,
22 and even erroneous deportation to countries where they fear grave harm. Therefore,
23 injunctive relief will prevent unnecessary harm or death to asylum seekers with
24 physical or mental health issues and their families.

25 Thus, the balance of the equities and the public interest strongly favor granting
26 preliminary injunctive relief to Plaintiffs.

27 **V. CONCLUSION AND PRAYER**

28 For all of these reasons, Plaintiffs request that the Court (1) provisionally

1 certify the class under Federal Rule of Civil Procedure 23(a) and 23(b)(2) for the
2 purposes of providing class members with preliminary relief necessary to end the
3 imminent threats to their lives and (2) issue a preliminary injunction requiring
4 Defendants to parole into the United States Plaintiffs and class members who were
5 placed in MPP despite their known physical or mental health conditions, and are
6 currently being forced to wait in Mexico.

7
8 Date: December 23, 2020

Respectfully submitted,

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**Pro hac vice application forthcoming*

***Pro hac vice application pending*