No. 19-15716

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, *et al.*,
Plaintiffs-Appellees,
v.
KIRSTJEN NIELSEN, Secretary of Homeland Security, *et al.*
Defendants-Appellants.

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

APPELLEES' OPPOSITION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The district court issued a preliminary injunction to temporarily halt Defendants' new policy of forcing asylum seekers arriving in the United States to return to Mexico to await their removal proceedings, without the most basic safeguards to ensure they are not returned to persecution or torture. The forced return policy constitutes an unprecedented change in U.S. asylum policy, one that puts the lives of returned asylum seekers in grave danger. Defendants' motion for a stay of the injunction should be denied.

First, Defendants are unlikely to prevail on their merits arguments on appeal. The district court held that Plaintiffs are likely to succeed on three separate claims: 1) that Defendants are unlawfully applying the forced return policy to a population Congress expressly exempted from contiguous territory return—individuals who arrive at the border without proper documents, who are often seeking asylum, and who are subject to "expedited removal" proceedings; 2) that the forced return policy is arbitrary and capricious in violation of the Administrative Procedure Act ("APA") because its fear determination process for determining if individuals can be safely returned to Mexico dramatically departs, without explanation, from prior practice and virtually ensures that noncitizens who face persecution or torture in Mexico will be returned there in violation of our *nonrefoulement* obligation; and 3) that Defendants violated the APA by

adopting the new fear determination process without undergoing notice and comment.

Because Defendants have not shown they are likely to prevail on each of these claims, they are not entitled to a stay.

Second, Defendants have failed to demonstrate that the balance of harms favors a stay. They offer conclusory assertions that the injunction will hinder their diplomatic negotiations and efforts to deter unauthorized migration at the border, but provide no concrete evidence of any irreparable harm. In contrast, as the district court correctly found, "there is no real question" that the Individual and Organizational Plaintiffs face "the possibility of irreparable injury." Op. at 24. Moreover, the injury to Plaintiffs and the harm to the public interest will increase exponentially as Defendants expand the policy.

Finally, the nationwide reach of the injunction does not warrant a stay. There is no other way to provide a remedy to the Plaintiff Organizations.

LEGAL BACKGROUND

Prior to Defendants' new forced return policy, asylum seekers apprehended at or near the border pursued their asylum claims in removal proceedings from *inside* the United States. Those who arrived without proper documents, or with fraudulent documents, were typically placed in "expedited removal" ("ER") proceedings. They were subject to a low threshold "credible fear" screening by an

asylum officer and, if they passed, were placed in regular removal proceedings to pursue their asylum applications. Individuals not placed in ER proceedings were allowed to apply for asylum in regular removal proceedings without going through a credible fear screening. In neither case could an asylum seeker be physically removed from the United States without an order of removal issued either by an immigration judge ("IJ") in regular removal proceedings or, for those asylum seekers in ER proceedings who failed to pass a credible fear screening, by an immigration officer, subject to IJ review. Under Defendants' new policy, however, asylum seekers can be forced to return to Mexico while their removal proceedings work their way to completion—a process that can easily take a year or more. Moreover, the decision to return them to Mexico is made without the most basic procedural safeguards, including an opportunity for review by an IJ.

ARGUMENT

I. DEFENDANTS ARE UNLIKELY TO SUCCEED ON APPEAL

A. The Policy Violates 8 U.S.C. § 1225(b)(2).[1]

The district court correctly held that Defendants' forced return policy likely violates § 1225(b)(2) because the statute's plain language precludes application of the contiguous territory return provision, § 1225(b)(2)(C), to individuals who fall within the criteria of the ER statute, §1225(b)(1)—the very population to whom

[1] All further statutory references are to Title 8 of U.S.C, unless otherwise specified.

the policy is being applied. Op. at 12-18. This reading of the statute is confirmed by its structure.

Section 1225(b)(2) provides, with emphasis added:

> (2) Inspection of other aliens
> (A) In general
> *Subject to subparagraphs (B) and (C)*, in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.
> (B) Exception *Subparagraph (A) shall not apply to an alien—*
> (i) who is a crewman,
> (ii) *to whom paragraph (1) applies*, or
> (iii) who is a stowaway.
> (C) Treatment of aliens arriving from contiguous territory
> *In the case of an alien described in subparagraph (A)* who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

Section 1225(b)(2)(C) authorizes return to a contiguous territory only "[i]n the case of an alien described in subparagraph (A)." Subparagraph (B) sets out categories of individuals to whom "Subparagraph (A) shall not apply." § 1225(b)(2)(B). *See also id.* § 1225(b)(2)(A) (providing that Subparagraph (A) is "[s]ubject to subparagraphs (B) and (C)"). One of these categories is noncitizens "to whom paragraph (1) applies." *Id.* § 1225(b)(2)(B)(ii). "[P]aragraph (1)" refers to § 1225(b)(1), the ER statute. Accordingly, § 1225(b)(2)(C) does not authorize

the return pending removal proceedings of noncitizens to whom the ER statute "applies." *See id.* §§ 1225(b)(2)(B)(ii); 1225(b)(2)(A), (C).

Paragraph (1) of § 1225(b)—the ER statute—applies to arriving aliens or recent entrants who are inadmissible for only two inadmissibility grounds: (1) fraud or misrepresentation, or (2) lack of a document that would permit entry into the United States. *See* § 1225(b)(1)(A)(i). Accordingly, individuals who fall within this category are exempt from contiguous territory return.

In district court, Defendants conceded that § 1225(b)(2)(B)(ii) sets forth exemptions to the contiguous territory return authority. ECF 42 at 13. However, they took the position that § 1225(b)(2)(B)(ii)'s exemption for noncitizens to whom the ER statute "applies" refers only to noncitizens who have actually been placed in ER, not to individuals whom Defendants place into regular removal proceedings instead of ER in the exercise of their discretion. *Id.* As the district court correctly concluded, that reading is incompatible with the text of the statute. Op. at 16-17. Conspicuously absent from § 1225(b)(2)(B)(ii) is any reference to *an action by the agency* to apply the ER statute to the individual in question.[2] Instead, the text makes clear that the exempted individuals are those to whom the ER *statute* ("paragraph (1)") applies.

[2] Notably, in other immigration provisions Congress used language such as "has applied" or "was applied" to refer to situations in which the agency actually applied a particular provision to an individual or group. *See, e.g.*, § 1182(d)(3)(B)(ii); § 1182(m)(2)(C)(i)(II).

The district court also properly rejected Defendants' argument—repeated here—that when the government exercises prosecutorial discretion to place an individual subject to § 1225(b)(1) into regular removal proceedings, in lieu of ER proceedings, that individual becomes subject to § 1225(b)(2), and is thus no longer "an alien to whom paragraph (1) [the ER statute] applies." Op. at 16-17; Stay Motion at 13. This argument is incompatible not only with the statutory text, but also its structure.

As the district court held, paragraphs (1) and (2) of § 1225(b) set forth two, mutually exclusive categories of applicants for admission. Op. at 14. The district court relied on the Supreme Court's recent decision in *Jennings v. Rodriguez*, which emphasized that the two paragraphs apply to different categories of applicants for admission:

> [A]pplicants for admission fall into *one of two categories*, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. . . . Section 1225(b)(2) . . . . serves as a catchall provision that applies to all applicants for admission *not covered by § 1225(b)(1)*. . .

138 S. Ct. at 837 (emphasis added) (cited in Op. at 14). Defendants completely ignore this language from *Jennings*, as well as the titles of paragraphs (1) and (2), which further support that the paragraphs refer to two mutually exclusive categories. *Compare* § 1225(b)(1) ("Inspection of aliens . . .") *with* § 1225(b)(2) ("Inspection of *other* aliens") (emphasis added).

As the district court correctly held, Defendants' decision to exercise prosecutorial discretion does not change the applicability of the ER statute. Op. at 16-17. Just as the government's decision not to prosecute someone for shoplifting does not mean that the shoplifting statute no longer applies to that person, likewise the decision to place someone who is subject to ER into regular removal proceedings does not change the fact that they are an alien to whom the ER statute "applies." *See, e.g.*, *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011) (holding that the agency has discretion to place noncitizens subject to the ER statute into regular removal proceedings, while recognizing that those individuals continue to be noncitizens "to whom paragraph (1) applies" and therefore exempt from § 1225(b)(2)(A)).

Notably, Defendants' reading of the statute has shifted since the injunction issued, as Defendants now advance an interpretation they did not raise before the district court. Contrary to their concession below, they now appear to contend that the exemption in § 1225(b)(2)(B)(ii) is *not* an exception to § 1225(b)(2)(C)'s contiguous territory return authority. Stay Mot. at 11, 13. While Defendants acknowledge that the contiguous territory return authority may be exercised only with respect to "an alien described in subparagraph (A)," § 1225(b)(2)(C), they now assert that "an alien described in subparagraph (A)" means only an alien who is an "'applicant for admission' who the 'examining officer determines … is not

clearly and beyond doubt entitled to be admitted,'" and has nothing to do with the subparagraph (B) exemptions. Stay Mot. at 13 (quoting § 1225(b)(2)(A)).

This new interpretation is untenable, as it ignores the plain text. Subparagraph (A) is "[s]ubject to subparagraph" (B), which in turn states that "Subparagraph (A) shall not apply" to three categories of noncitizens: stowaways, crewmen, and individuals to whom the ER statute "applies." For this same reason, Defendants' reliance on *Nielsen v. Preap*, 139 S.Ct. 954 (2019), is unavailing. Defendants cite *Preap* for the proposition that the phrase "'described in'" communicates "'the salient identifying features' of individuals," rather than actions an agency must take toward "the 'described' alien." Stay Mot. at 13 (quoting 139 S.Ct. at 964-65). But that proposition is entirely consistent with Plaintiffs' interpretation of the statute, as subparagraph (B) says nothing about what an agency must do to a noncitizen. Rather, it lists "salient identifying features" of the noncitizens who are subject to subparagraph (A), namely that they cannot be "a crewman," a noncitizen "to whom [the ER statute] applies," or "a stowaway." § 1225(b)(2)(B). Thus, "an alien described in subparagraph (A)" is a noncitizen with the "salient identifying features" set out in subparagraph (A) *subject to the additional "salient identifying features" set out in subparagraph (B)*.

Defendants' newly proposed interpretation also cannot be reconciled with *Jennings*. As noted, *Jennings* explained that §§ 1225(b)(1) and (b)(2) set forth two

distinct categories of applicants for admission: "aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation" (who are subject to ER), and "applicants for admission not covered by § 1225(b)(1)." 138 S.Ct. at 837. In contrast, under Defendants' reading, § 1225(b)(2)(A) sets forth one category of applicants for admission that includes both noncitizens subject to ER as well as those subject to regular removal proceedings. The only interpretation consistent with *Jennings'* conclusion that §§ 1225(b)(1) and (b)(2) provide for two distinct categories of applicants is Plaintiffs' reading, under which the description in subparagraph (A) is "[s]ubject to" the exemptions in subparagraph (B).

Similarly implausible is Defendants' new position that the function of the § 1225(b)(2)(B)(ii) exemption is merely to make clear that noncitizens subject to ER are not entitled to regular removal proceedings. Stay Mot. at 13. This makes no sense, since the ER statute itself makes clear that such individuals are not *required* to be placed in regular removal proceedings unless they pass a credible fear interview. In addition, § 1225(b)(2) applies only to "other aliens"—those "not covered by § 1225(b)(1)," *Jennings*, 138 S. Ct. at 837. Section 1225(b)(2)(A) makes clear that it is these *other* applicants for admission who must be placed in regular removal proceedings. At bottom, Defendants' shifting, see-what-sticks interpretations of the statute are at odds with the statute's plain text and structure,

and make clear that Defendants implemented the forced return policy without regard for the constraints Congress imposed.

Defendants also wrongly claim that the district court's conclusion—that noncitizens to whom the ER statute "applies" are exempt from contiguous territory return—ascribes to Congress an "implausible intent" to limit such return "to only a small subset of land-arriving aliens." Stay Mot. at 13-14. First, the ER statute applies only to noncitizens inadmissible for two grounds: fraud or lack of proper documents. *See* § 1225(b)(1)(A)(i). In contrast, § 1225(b)(2) applies to applicants for admission who are inadmissible for *any other ground* of inadmissibility, such as a criminal conviction, a contagious disease, likelihood of becoming a public charge, or any other of a long list of inadmissibility grounds Congress painstakingly enumerated. *See* § 1182(a).

Moreover, Defendants themselves acknowledge that contiguous territory return was not intended to be a sweeping policy applicable by default to most arriving aliens when they contend that "*detention* pending removal proceedings is the process Congress expected for most aliens arriving at our Nation's borders …." Stay Mot. at 14. While Defendants offer no support for their assertion that Congress expected mass *detention* pending removal proceedings, they are right in acknowledging that contiguous territory return was seen as an exception. Returning vulnerable migrants to another country while awaiting their removal

proceedings is an extreme option, intended for limited circumstances, with explicit exceptions mandated by Congress. Yet, under Defendants' statutory reading, Congress authorized the return to Mexico of Mexican asylum seekers who are subject to ER, before their asylum claims are adjudicated.[3] This makes no sense, and further supports the district court's interpretation of the statute as not applying contiguous territory return to individuals—overwhelmingly asylum seekers—who are subject to ER.

Finally, Defendants are wrong to suggest that the district court's decision exempting noncitizens "to whom" the ER statute "applies" would privilege lawbreakers rather than "aliens who follow our laws." Stay Mot. at 14. Many asylum seekers arriving at our borders lack documents, or—desperate to escape persecution in their home countries—rely on fake documents. *See, e.g.*, *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1249 (9th Cir. 2018). Moreover, like many individuals subject to ER, each of the eleven Individual Plaintiffs proceeded in exactly the way Defendants claim to prefer: they sought admission at a port of entry and requested asylum.

Defendants' statutory arguments should be rejected.

[3] That is because the contiguous territory return provision applies on its face to Mexicans even though Defendants are not presently applying it to them.

B. The Procedures for Assessing Fear of Return to Mexico Violate the APA.

The district court correctly held that Defendants' procedures for ensuring compliance with *nonrefoulement*—i.e., the prohibition on returning individuals to countries where they face persecution or torture—likely violate the APA.[4] Op. at 21-23. Defendants adopted *nonrefoulement* as an objective of the program, AR00009, but established procedures that do not satisfy that obligation, and that fall far short of existing procedures for compliance with this critical obligation, without explanation or acknowledgement and without any opportunity for public comment on these important questions.

1. The new procedures are arbitrary and capricious.

The new procedures drastically depart from Defendants' established practices for assessing protection claims—practices that Defendants previously deemed necessary to satisfy their *nonrefoulement* obligations. *See Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (policy violates APA where agency does not acknowledge, or cannot show "good reasons" for, departing from prior policy). Moreover, they do not remotely achieve their stated

[4] The United States is bound by the *nonrefoulement* obligations set out in the Refugee Convention and Protocol, and the Convention Against Torture ("CAT"). *See* AR01636, 01679. These critical prohibitions are codified in the withholding of removal statute, § 1231(b)(3), and the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, div. G., Title XXII, § 2242, 112 Stat. 2681 (1998), with regulations setting forth specific procedural safeguards for adjudications of such claims.

goals. Instead, they effectively guarantee that asylum seekers with *bona fide* fears of return will be sent to conditions where they face persecution or torture. *See Bangor Hydro-Elec. Co. v. F.E.R.C.*, 78 F.3d 659, 663 (D.C. Cir. 1996) (agency action is arbitrary and capricious where not "reasonably related" to its goal).

"[T]here is no dispute that the procedural protections [applying to returns] are less robust than those available in expedited removal proceedings, or those that apply … at … regular removal proceedings." Op. at 5. Immigration officers need not notify asylum seekers that they face return to Mexico, or ask about fear of return there. Instead, a refugee must "affirmatively state[]" a fear of return to Mexico to obtain an asylum officer interview. AR02273. Without access to counsel, an opportunity to gather evidence, or guaranteed interpreter, *see* AR02273-02274, noncitizens must prove there is a "more likely than not" chance they will be persecuted or tortured in Mexico. *Id*. Denials are not reviewed by a neutral adjudicator. *See* AR02274.

These procedures hold returnees to the same merits standard—more likely than not—that applies in regular removal proceedings, but deny them even the minimal procedural protections the agency provides in summary removal proceedings, much less the full protections that accompany regular proceedings. A noncitizen who applies for withholding of removal pursuant to § 1231(b)(3) in regular removal proceedings has notice; access to counsel and an interpreter; a

"reasonable opportunity" to present, examine, and confront evidence, *id.* § 1229a(b)(4)(B); and the right to a "full and fair hearing," *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000).[5] None of these protections are provided here.

In summary removal contexts, applicants are held to a much lower standard of proof designed to screen protection claims. Individuals in ER need only show a "significant possibility" of persecution or torture,[6] and noncitizens subject to administrative removal or reinstated removal orders need only show a "reasonable possibility," 8 C.F.R. § 208.31(c). In either context, individuals who meet this lower standard are placed in full removal proceedings inside the United States, where they may apply for relief with all attendant procedural protections.

These summary contexts also afford much greater procedural safeguards. Contrary to Defendants' assertion, *see* Stay Mot. at 17, ER proceedings require an immigration officer to ask whether the individual fears return. Supp. Excerpts of Record ("SER") 218 (Form I-867AB); 8 C.F.R. § 235.3(b)(2)(i) (requiring officers to use Form I-867AB). Individuals may consult with and bring an attorney to interviews. *See* 8 C.F.R. §§ 208.30(d)(4), 208.31(c). The asylum officer must

[5] Although the district court held—incorrectly—that the withholding statute does not apply to forced returns to Mexico, *see* Op. at 21, the withholding procedures remain relevant to determining whether Defendants have departed arbitrarily from their procedures for assessing protection claims. *See infra*.

[6] *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(v); 8 C.F.R. §§ 208.30(e)(3), 235.3(b)(4).

provide an interpreter where needed; create a summary of the material facts; review that summary with the applicant for accuracy; and create a written record of the decision. *Id.* §§ 208.30(d)(5), (d)(6) & (e)(1), 208.31(c). Denials are subject to IJ review. *Id.* §§ 208.30(g), 1208.30(g), 208.31(g). These minimal procedures reinforce that the lesser process here is woefully inadequate to satisfy *nonrefoulement*.

In addition, Defendants have neither acknowledged nor explained their extraordinary deviation from longstanding procedures for meeting their *nonrefoulement* obligations. This failure also renders the policy arbitrary and capricious. *See Fox Television*, 556 U.S. at 515; Op. at 22.

Defendants' arguments to the contrary are unavailing. Defendants assert that Plaintiffs' claims arise under international law, so they lack a cause of action. Stay Mot. at 15. But Plaintiffs challenge arbitrary and capricious agency action in violation of the APA, which clearly permits their claims. *See* ECF 1 ¶¶ 161-162; 5 U.S.C. § 706(2)(A). Similarly flawed is Defendants' reliance on *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc), to assert their procedures adequately implement their *nonrefoulement* obligations. *See* Stay Mot. at 16. That case does not even address the APA's prohibition on arbitrary departures from agency policy.

Defendants next assert that their procedures are appropriate because MPP involves *returns*, as opposed to formal *removal*. *See* Stay Mot. at 16-17. But *nonrefoulement* applies equally to "returns" and "removals." As the district court recognized, Article 33 of the Refugee Convention expressly bars the United States from "expel[ling] *or return[ing]*" an individual to conditions of persecution. AR01679 (emphasis added); Op. at 20.[7] And the difference to the noncitizen between a "return" to conditions of danger and a formal removal to those same conditions is immaterial.

Finally, Defendants complain the district court did not specify what screening procedures would satisfy the APA. *See* Stay Mot. at 17. But it is well-established that courts may remand an arbitrary and capricious policy to the agency to justify its policy or adopt a different, reasoned rule. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*, 463 U.S. 29, 34, 50-57 (1983) (where agency fails to provide reasoned explanation, reviewing court may remand to agency for further proceedings); *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. N.L.R.B.*, 309 F.3d 578, 585-86 (9th Cir. 2002) (remanding "to afford the Board the opportunity either to articulate a

[7] The United States is a party to the 1967 Protocol, which incorporates Articles 2-34 of the Convention. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

reasoned explanation for its rule, or to adopt a different rule with a reasoned explanation that supports it").

2. Defendants violated notice and comment.

The district court was also correct to hold that Defendants likely violated the APA's notice and comment requirements when adopting their "protection procedures." 5 U.S.C. § 553(b), (c); Op. at 23. Defendants contend the forced return policy, as a whole, is a "general statement of policy" or an agency "procedure" given the "significant flexibility and discretion" it affords DHS officials. Stay Mot. at 19. But Plaintiffs' claim addresses Defendants' protection procedures, and not the forced return policy as a whole.

Defendants ignore this Court's key distinction between legislative rules, to which notice and comment requirements apply, and statements of policy and procedure: "the extent to which the challenged [directive] leaves the agency, or its implementing official[,] free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009) (alterations in original) (internal quotation marks omitted). Here, Defendants have adopted a mandatory prohibition on return accompanied by mandatory procedures. For individuals who express a fear of return, an asylum officer *must* assess that fear and *must* consider certain factors at the interview. AR00001, 02278. Individuals who demonstrate that they

are more likely than not to be persecuted in Mexico *"may not"* be returned. AR00002, 02279. The policy does not leave officers "discretion to follow, or not to follow, the [announced] policy in an individual case." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987).

Defendants also argue the district court wrongly concluded that their departure from prior policy required notice and comment. *See* Stay Mot. at 18-19. Defendants simply repeat their assertion that "returns" and "removals" are "incomparable," *id.* at 18, while failing to dispute that the *nonrefoulement* obligations apply equally to both.

II. THE EQUITIES AND PUBLIC INTEREST SHARPLY FAVOR PLAINTIFFS

Defendants offer no concrete evidence of irreparable injury. Instead, they invoke the Executive's "authority to secure the Nation's borders" and "conduct of foreign policy." Stay Mot. at 19 (internal quotation marks omitted). But such "institutional injury" claims "do not alone amount to an injury that is 'irreparable,' because the Government may 'pursue and vindicate its interests in the full course of this litigation.'" *E. Bay Sanctuary Covenant*, 909 F.3d at 1254 (quoting *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017)). Moreover, Defendants' vague assertions are insufficient to demonstrate the irreparable injury necessary to justify a stay. The injunction restored the status quo that has prevailed for decades and should not be disturbed.

First, the Executive's authority to secure the border does not give license to violate the INA. A decision to change the framework for processing asylum seekers at the border must be made by Congress. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014). "[T]he public … has an interest in ensuring that 'statutes enacted by [their] representatives' are not imperiled by executive fiat." *E. Bay Sanctuary Covenant*, 909 F.3d at 1255 (quoting *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)).

In addition, Defendants claim the policy is necessary to deter individuals from coming to the United States and to "discourage" illegal entries. Stay Mot. at 20. But they present no evidence that it will actually have this effect.[8] *See E. Bay Sanctuary Covenant*, 909 F.3d at 1254 ("vague assertions that the [policy] may 'deter' [illegal entry] are insufficient" to show irreparable harm). Studies of migration patterns show that the decision to seek asylum is overwhelmingly motivated by push factors—the need to escape imminent danger—rather than a response to U.S. immigration laws. *See* SER 479-83; *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 189-90 (D.D.C. 2015). And, as Defendants note, since the forced return policy was initiated, apprehensions of individuals entering between ports of entry have *increased* rather than decreased. *See* Stay Mot. at 25. *See also, e.g.*, *E.*

[8] Defendants also vastly overstate the problem of fraudulent asylum claims, as is clear from a closer examination of their own data. *See* SER 450, 454-59; *see also* AR 00408.

Bay Sanctuary Covenant, 909 F.3d at 1254 ("there is evidence … suggesting that the Government itself is undermining its own goal of channeling asylum-seekers to lawful entry by turning them away upon their arrival at our ports").

Defendants' conclusory assertion of interference with foreign policy similarly lacks support. Defendants make no effort to explain what effect, if any, the injunction would have on U.S.-Mexico "negotiations."[9]

By contrast, the forced return policy inflicts grave harms on Plaintiffs and the public that dramatically outweigh any potential harm to Defendants. Defendants do not seriously contest the risk of severe injury the Individual Plaintiffs face in Mexico. Stay Mot. at 20-21. Nor could they, given Plaintiffs' undisputed experiences to date involving physical attacks and threats, and extensive documentation that such mistreatment of migrants in Mexico is the norm. *See, e.g.*, SER 98 (describing how members of the brutal Zetas cartel kidnapped and threatened to kill Plaintiff and "burn" his body); SER 526-31 (describing conditions in Mexico for migrants); SER 438-39 (same).

Defendants erroneously assert that any potential risk to Individual Plaintiffs is cured by Mexico's "assurances" that it will abide by domestic and international

[9] The Mexican government has already publicly stated that it does not agree with the forced return policy. *See, e.g.*, Foreign Relations Secretary, "Position of the Mexican Government on the US Federal Judge Ruling on the Return of Non-Mexican Migrants to Mexico," April 9, 2019, *available at* https://www.gob.mx/sre/prensa/position-of-the-mexican-government-on-the-order-issued-by-a-us-federal-judge-on-the-return-of-non-mexican-migrants-to-mexico.

law. Stay Mot. at 21. But even if taken at face value, these assurances speak only to Mexico's *willingness* to try to protect asylum seekers, not its *ability* to do so. *See, e.g.*, *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013). If anything, Defendants' administrative record confirms Mexico is incapable of offering asylum seekers adequate protection and, worse, has itself mistreated migrants. *See* SER 552, 559, 573-74; AR 00778-79, 00785-91, 00794-95. *See also* SER 84, 109 (harm to Plaintiffs by Mexican authorities).[10]

Moreover, the injuries to Plaintiff Organizations resulting from the policy are more than sufficient to justify injunctive relief. They have had to restructure critical aspects of their programming, expend significant resources, and face extraordinary funding losses that could threaten their very existence. *See* SER 112-177. A stay of the injunction will compound these injuries by permitting further expansion of the policy.

Defendants assert that "injuries based on money, time and energy … are not enough." Stay Mot. at 21 (internal quotation marks omitted). But this Court has recognized that diversion of resources away from advancing plaintiffs' organizational missions may constitute irreparable harm and tip the balance of

[10] Notably, the United States has not entered into a "safe third country" agreement with Mexico pursuant to § 1158(a)(2)(A), in part due to Mexico's poor human rights conditions. *See* SER 423.

hardships. *See E. Bay Sanctuary Covenant*, 909 F.3d at 1255; *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018-19, 1029 (9th Cir. 2013).

III. A NATIONWIDE INJUNCTION IS WARRANTED

There is no valid reason to stay the injunction because of its scope. Defendants claim the injunction involves "sweeping harm" because it is not limited to the Individual Plaintiffs and the Organizations' clients "processed under MPP." Stay Mot. at 21-22. But this Court recently rejected a nearly identical argument in *E. Bay Sanctuary Covenant*, 909 F.3d at 1255-56. There, as here, "the Government fail[ed] to explain how the district court could have crafted a narrower [remedy] that would have provided complete relief to the Organizations." *Id*. at 1256 (alterations in original) (quotations omitted); *see also* Op. at 26. Here, relief limited to the Organizations' clients would be incomplete. The Organizations would have to continue diverting resources for outreach, identification, and screening of asylum seekers in Mexico. Their "harms are not limited to their ability to provide services to their *current* clients, but extend to their ability to pursue their programs writ large, including the loss of funding for future clients." *E. Bay Sanctuary Covenant*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018).

Moreover, the district court tailored the injunction by declining to address whether non-plaintiffs "should be offered the opportunity to re-enter the United

States" for their "[§] 1229a proceedings" and declining to "require that any person be *paroled* into the country." Op. at 26 n.14.

Finally, Defendants ignore the bedrock administrative law principle that when an agency-wide program is unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks omitted). The district court hardly abused its discretion by reaching the "ordinary result" here.

CONCLUSION

Defendants' stay motion should be denied.

Dated: April 16, 2019

Respectfully submitted,

By: */s/ Judy Rabinovitz*

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Judy Rabinovitz
Judy Rabinovitz
Dated: April 16, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,186 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Judy Rabinovitz
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