UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION

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INTRODUCTION

This motion for partial summary judgment seeks judgment and a permanent injunction on Claim One of Plaintiffs' Complaint, which challenges Defendants' expansion of the Migrant Protection Protocols ("MPP") to Tamaulipas, Mexico ("MPP-Tamaulipas")—a border region the U.S. State Department has recognized as one of the most violent and lawless places in the world. Plaintiffs, 21 asylum seekers who fled violence and other persecution in their home countries in search of refuge in the United States, seek to set aside MPP-Tamaulipas, a policy that has left them and thousands of others trapped in life-threatening conditions. Pursuant to the policy, the Department of Homeland Security ("DHS") sent Plaintiffs back across the border to Tamaulipas, where they have been subjected to kidnapping, rape and other violent crimes.[1]

Defendants' decision to expand MPP to Tamaulipas in July of 2019 was arbitrary and capricious because Defendants adopted the policy without the most basic elements of reasoned decisionmaking. In announcing MPP in December 2018, Defendants stated that individuals returned to Mexico would be safe while waiting for their immigration hearings. Yet the agency's administrative record shows that seven months later, when Defendants expanded MPP to Tamaulipas, the agency blatantly ignored the safety concerns of returning asylum seekers to a region the State Department has compared to an active war zone.

[1] This case was originally brought by 26 asylum seekers. ECF 3, Compl. ¶ 1. Pursuant to the Court's preliminary injunction order, Defendants were ordered to grant Plaintiff Diana a nonrefoulement interview and, because she showed a likelihood of torture in Mexico, she and her two children were removed from MPP and paroled into the United States. ECF 51, Joint Status Report. Additionally, given their escalating desperate situation in Tamaulipas, Plaintiff Jessica sent her children, Edgar and Damian, across the border in late October 2020. ECF 69-1, Potter Decl. ¶¶ 5–7. For that reason, the two child plaintiffs have been processed by the Office of Refugee Resettlement as unaccompanied minors, placed into the custody of Jessica's family in the United States, and thus should no longer be subject to MPP. *Id.* ¶¶ 6–9.

The agency's administrative record for MPP-Tamaulipas is most notable for what it lacks: it has none of the State Department reports or travel advisories pertaining to Tamaulipas—or any other evidence of the well-documented dangers facing asylum seekers there. Because the agency failed to consider this critical aspect of its policy, its decision to expand MPP to Tamaulipas was arbitrary and capricious in violation of the Administrative Procedure Act ("APA"), and should be set aside. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). In light of the irreparable harm that Plaintiffs will continue to face, Plaintiffs also seek a permanent injunction ordering Defendants to return them to the United States for the duration of their immigration proceedings.

This Court has already noted "serious questions about whether it [was] reasonable for DHS" to expand MPP to Tamaulipas. ECF 43, Mem. Op. at 22. It further noted that the outcome of Plaintiffs' arbitrary and capricious claim would be determined, once the administrative record was produced, by "what facts were known to or considered by the decision makers, and what risks were evaluated or ignored." *Id*. at 22–23. The Court ordered Defendants to produce the administrative record, while allowing Defendants to file a motion to dismiss all three claims in Plaintiffs' complaint. Min. Order (July 6, 2020). The administrative record has now been produced, ECF 56, and the motion to dismiss has been fully briefed for over five months. ECF 52, 54, 55. Given Plaintiffs' perilous situation in Tamaulipas, Plaintiffs urge the Court to consider this motion for partial summary judgment simultaneously with the motion to dismiss—or at least simultaneously with the motion to dismiss Claim One, the same claim at issue in this Motion.

BACKGROUND[2]

A. Asylum Processing at the Border Prior to 2019 and Adoption of MPP.

Prior to January 2019, individuals applying for asylum at the southern border were placed into either expedited removal proceedings under 8 U.S.C. § 1225(b)(1), or regular removal proceedings under 8 U.S.C. § 1229a. AR 17, 57–58, 518–19. In regular removal proceedings under § 1229a, noncitizens are entitled to a full evidentiary hearing before an immigration judge, as well as notice of their rights, access to counsel, time to prepare, and administrative and judicial review. *See* 8 U.S.C. § 1362; *id*. §§ 1229a(b)(4)(A), (B), (b)(5); *id*. § 1252(a); 8 C.F.R. §§ 1240.3, 1240.15. In either regular or expedited removal proceedings, asylum seekers were allowed to remain in the United States while their claims for asylum and other protections were adjudicated in removal proceedings. AR 17, 57–58, 518–19.

On December 20, 2018, DHS announced a "historic" change to the processing of asylum seekers, which it labeled the "Migrant Protection Protocols." AR 16. Under MPP, DHS requires noncitizens who arrive in or enter the United States from Mexico, "illegally or without proper documentation," to be "returned to Mexico for the duration of their immigration proceedings." *Id*. According to DHS, MPP allows the agency to "focus more attention on those who are actually fleeing persecution." *Id*. DHS claimed that MPP would "strengthen our humanitarian commitments" and be "consistent with all domestic and international legal obligations." AR 16–

[2] The administrative record that Defendants produced for their adoption of MPP-Tamaulipas consists of two parts. The first consists of the administrative record produced by DHS in the district court proceedings of *Innovation Law Lab v. Nielsen*, No. 3:19-cv-00807-RS (N.D. Cal), a case challenging the agency's adoption of MPP, located at ECF 56-2–56-10 (Bates-stamped and hereafter referred to as "AR"). The second consists of a handful of additional documents added to the record on June 10, 2020, which are not Bates-stamped and are thus referred to by the docket number, ECF 56-1.

17. DHS also promised that "[v]ulnerable populations will get the protection they need while they await a determination in Mexico." AR 18.

Individuals placed into MPP are put in regular removal proceedings under 8 U.S.C. § 1229a, served with a Notice to Appear for their first immigration court hearing at a specific U.S. port of entry at a future date, and physically returned to Mexico until that date. AR 1. When the hearing date arrives, they must return to their assigned port of entry, where they are processed by Customs and Border Protection ("CBP"), transported to the hearing site in the United States, and then sent back to Mexico through the same port of entry after the hearing. AR 2. This process repeats for as many hearings as necessary to conclude the individual's immigration proceedings, including through the appeals process. AR 2, 2276–77. Individuals who fail to report at their designated port of entry for the date and time of their hearing may be ordered removed in absentia. 8 U.S.C. § 1229a(b)(5).

DHS has represented that "MPP will provide a safer and more orderly process," AR 13, and "effectively assist legitimate asylum-seekers and individuals fleeing persecution." AR 15. In addition, in recognition of the United States' nonrefoulement obligation, DHS purports to exempt from MPP "any alien who is more likely than not to face persecution or torture in Mexico." AR 1, 9. In making this determination, the agency specifically requires that U.S. Citizenship and Immigration Services ("USCIS") asylum officers take into account "reliable assessments of current country conditions in Mexico (especially those provided by DHS and the U.S. Department of State)." AR 2273–74. DHS assured that individuals placed into MPP would receive humanitarian visas to stay in Mexico, the ability to apply for work, and other protections while they await a determination on their U.S. immigration cases. AR 17. The Mexican government also

stated it would work with DHS to "put mechanisms in place that allow migrants [in MPP to] have access . . . to information and legal services." AR 320.

B. Defendants' Expansion of MPP to Tamaulipas.

In January 2019, DHS, through CBP Commissioner Kevin McAleenan, announced that DHS would begin implementing MPP at the San Ysidro port of entry in San Diego, California, that expansion to other ports of entry and border areas was anticipated "in the near future," and that "each stage of MPP expansion [would be] closely coordinated with [McAleenan's] office." AR 3. With each expansion, DHS began sending individuals who crossed at or near certain ports of entry back to neighboring regions in Mexico, and began requiring them to report back to designated ports of entry for their hearings. AR 11, 14, 2277. The first three locations for MPP implementation—San Ysidro, Calexico, and El Paso—were chosen based on their close proximity to existing immigration courts. ECF 23-2 at 7 n.3 (citing MPP Assessment Notice); ECF 52-1 at 7 n.5 (same).

On April 1, 2019, DHS Secretary Kirstjen M. Nielsen issued a memorandum to CBP Commissioner McAleenan, directing CBP to "immediately expand" MPP "in coordination with ICE [Immigration and Customs Enforcement], USCIS, and DOJ." ECF No. 56-1 at 10–11. The memorandum directed CBP to expand the daily volume of noncitizens processed and returned to Mexico under MPP, as well "the locations in which it [then] operate[d] in California and Texas," in order to purportedly "secure our territory while also maintaining our humanitarian values." ECF 56-1 at 11.

On June 7, 2019, the United States and Mexico issued a Joint Declaration, announcing that "the United States will immediately expand the implementation of the existing MPP across its entire southern border. This means that those crossing the U.S. Southern Border to seek asylum

will be rapidly returned to Mexico where they may await the adjudication of their asylum claims." ECF 56-1 at 2.[3] The Joint Declaration did not mention where in Mexico asylum seekers would be returned to. *Id*.

In July 2019, DHS began to implement MPP at the Laredo and Brownsville ports of entry bordering Nuevo Laredo and Matamoros, respectively, in the Mexican state of Tamaulipas. ECF 18-35 (Boggs Decl., Ex. 22 TRAC Immigration, Details on MPP (Remain in Mexico) Deportation Proceedings, through Mar. 2020). Under MPP-Tamaulipas, migrants are not only physically returned across the border to Tamaulipas, but they are also scheduled for immigration hearings at U.S. ports of entry bordering Tamaulipas. AR 2277. This means that, to participate in their hearings, migrants must remain in or travel through Tamaulipas to appear at their assigned port of entry, either way exposing themselves to the region's known dangers. AR 2.

C. Defendants' Expansion of MPP to Tamaulipas Without Consideration of Extreme Dangers Facing Migrants There.

DHS did not consider the extreme dangers asylum seekers would face if returned to the state of Tamaulipas and required to report to hearings at the U.S. ports of entry bordering that state. Noticeably absent from the administrative record are the numerous State Department advisories and reports attesting to the extreme dangers facing asylum seekers in Tamaulipas, including State Department "Travel Advisories," which since early 2018 assigned to Tamaulipas a Level 4 "Do Not Travel" advisory—the State Department's highest-level travel alert, assigned to active conflict zones like Iraq, Syria, and Afghanistan. *See* Decl. of Darlene Boggs ("Boggs Decl."), Ex. 1 (U.S. Dep't of State, Mexico Travel Advisory, Jan. 10, 2018) ("2018 Mexico Travel Advisory"). While

[3] The administrative record includes a link to the Joint Declaration, but not a copy of the full text. ECF 56-1 at 2. The link provided in the record does not currently function, but there is also a copy of the Joint Declaration filed at ECF 23-3 (Ex. 1).

the State Department did note the dangers in other border regions of Mexico, it assigned the Level 4 advisory *only* to Tamaulipas, reflecting the extraordinary dangers of the area. *Id*. The State Department's April 9, 2019 travel advisory, in place before the expansion of MPP to Tamaulipas, warned:

> Do not travel due to crime and kidnapping.
>
> Violent crime, such as murder, armed robbery, carjacking, kidnapping, extortion, and sexual assault, is common. Armed criminal groups target public and private passenger buses as well as private automobiles traveling through Tamaulipas, often taking passengers hostage and demanding ransom payments. Federal and state security forces have limited capability to respond to violence in many parts of the state.

ECF 18-22 at 13 (Boggs Decl., Ex. 9, U.S. Dep't of State, Mexico Travel Advisory, Apr. 9, 2019) ("April 2019 Mexico Travel Advisory"). The travel advisory instructed U.S. government employees, including DHS officials, to travel only within a limited radius around the U.S. consulates in Nuevo Laredo and Matamoros and the U.S. ports of entry in those cities. *Id.* Government employees were prohibited from using the highways between cities in Tamaulipas and have been subject to a curfew in Nuevo Laredo and Matamoros between midnight and 6:00 a.m. *Id*.[4] The State Department has instructed that anyone who nevertheless travels to high-risk areas like Tamaulipas should make a will, designate a family member to negotiate with kidnappers, and establish secret questions and answers to verify that the traveler is still alive when kidnappers reach out to family. ECF 18-24 (Boggs Decl., Ex. 11, U.S. Dep't of State, High-Risk Area Travelers, last updated Nov. 6, 2019).

[4] Although Defendants did not include this advisory in the administrative record, DHS's website for April 2019 included a link to all of the State Department travel advisories, indicating that DHS was aware of these travel advisories and that the State Department had singled out Tamaulipas, alone among the Mexican border states, as warranting the highest "no travel" advisory. *See* ECF 18-30 (Boggs Decl., Ex 17, DHS, Travel Alerts, last published Sept. 24, 2015); ECF 18-22 (April 2019 Mexico Travel Advisory).

In addition, in April 2019, the State Department's Overseas Security Advisory Council, which tracks the security environment abroad, described Nuevo Laredo and Matamoros, and Tamaulipas as a whole, as extraordinarily dangerous. Its Crime and Safety Report for Nuevo Laredo noted: "[t]he absence of municipal police forces; the inability to form a reliable, vetted state police force capable of maintaining law and order; and an inconsistent presence of federal forces" in Nuevo Laredo and Tamaulipas in general; gun battles in broad daylight and on public streets; beatings and torture of kidnap victims; and violence on major highways connecting Nuevo Laredo to other cities. *See* ECF 18-25 (Boggs Decl., Ex. 12, Bureau of Diplomatic Sec., Overseas Sec. Advisory Council, Mexico 2019 Crime and Safety Report: Nuevo Laredo, U.S. Dep't of State, April 3, 2019) ("2019 Nuevo Laredo Crime and Safety Report"). Likewise, the Council's Crime and Safety Report for Matamoros emphasizes high rates of kidnapping and gun battles near public roadways and U.S. ports of entry. ECF 18-26 (Boggs Decl., Ex. 13, Bureau of Diplomatic Sec., Overseas Sec. Advisory Council, Mexico 2019 Crime and Safety Report: Matamoros, U.S. Dep't of State, April 2, 2019) ("2019 Matamoros Crime and Safety Report").

The administrative record for MPP-Tamaulipas includes none of the above-referenced State Department reports. Instead, the 2300-plus-page administrative record (most of which consists of the record for MPP itself, with only around 10 pages added to justify its expansion to Tamaulipas), includes only a handful of documents referencing the dangers that asylum seekers face in Mexico as a whole, without specifically addressing the dangers in Tamaulipas. *See, e.g.*, AR 775–805 (2017 report from Médecins Sans Frontières (Doctors Without Borders), noting that asylum seekers face serious dangers in Mexico and that the Mexican government routinely violates its domestic and international legal obligations to protect migrants); AR 739 (October 2018 Washington Post article reporting that Central American migrants in Mexico "are prime targets

for kidnapping" and "cartel lookouts ply the Mexican side of the bridge, watching for Central Americans"); AR 834–35 (November 2018 letter from members of Congress noting "dangerous conditions" for asylum seekers in Mexico); AR 713–14 (2018 law review article noting dangers facing asylum seekers in Mexico, including danger of being sent back to their home countries by Mexican government); AR 807 (2014 Congressional Research Service report describing dangers facing Central American migrants in Mexico, including from Mexican government and corrupt government officials). However, there is no indication that DHS considered any of this evidence in expanding MPP to Tamaulipas, not to mention the readily available State Department reports about Tamaulipas that are wholly absent from the record.

D. MPP-Tamaulipas Has Subjected Plaintiffs to Life-Threatening Danger.

As foreshadowed by the State Department's travel advisories and other country condition reports, the expansion of MPP to Tamaulipas has subjected Plaintiffs to extraordinary harm. After fleeing persecution and torture in their home countries, *all* Plaintiffs have been kidnapped or assaulted, have been threatened with death, and live in daily fear of their lives.[5] Nora Decl. ¶¶ 20–23; Jonathan Decl. ¶¶ 13, 24–35; Emilia Decl. ¶¶ 10–13, 16–18; Laura Decl. ¶¶ 12–24; Fabiola Decl. ¶¶ 20–25, 33–36, 48–51; Ernesto Decl. ¶¶ 14, 18–24, 32–33; Jessica Decl. ¶¶ 16–22, 29, 39–40; Henry Decl. ¶¶ 14–17, 22; Armando Decl. ¶¶ 14–20; Carmen Decl. ¶¶ 32–36, 42–50. Five of the Plaintiffs were raped, most of them multiple times. Emilia Decl. ¶¶ 12–13, 16; Nora Decl. ¶¶ 21–22; Diana Decl. ¶¶ 21–23; Carmen Decl. ¶¶ 34, 48–49. Three of the Plaintiffs were kidnapped and tortured in the presence of their young children. Jonathan Decl. ¶¶ 24–35; Nora Decl. ¶¶ 20–23; Carmen Decl. ¶¶ 32–36, 42–50. The Plaintiffs at the migrant camp in Matamoros live with the

[5] All cited Plaintiff declarations have been filed under seal at ECF 3, and psychological evaluations under seal at ECF 17-1 through ECF 17-15.

constant fear of kidnapping and sexual assaults, repeated taunts for being "invaders" and other threats such as the burning down of their tents. Fabiola Decl. ¶¶ 33–36, 48–51; Jessica Decl. ¶¶ 29, 39–40.

Plaintiffs are unable to seek protection from Mexican police. Despite being assaulted and extorted on a weekly basis in Matamoros, Ernesto has been refused help by the local police. Ernesto Decl. ¶ 23. Nora—who was kidnapped and brutally gang-raped in Matamoros in front of her three-year-old son—filed a report with Mexican authorities to no avail; her perpetrators remain at large. Nora Decl. ¶¶ 23, 27. Similarly, although Emilia reported a neighbor's attack on her daughter to the Mexican police, they did not arrest or take any meaningful action against the perpetrator. Emilia Decl. ¶ 18. The police also told her there was nothing they could do about the men who gang-raped her. *Id.*

All Plaintiffs live in constant fear, most either in hiding or in self-imposed lockdown in their tents or shelters. Laura Decl. ¶ 37; Jonathan Decl. ¶¶ 71–75; Jessica Decl. ¶¶ 52–53; Henry Decl. ¶¶ 32–33; Nora Decl. ¶¶ 44, 58, 60; Emilia Decl. ¶ 19; Armando Decl. ¶ 29; Carmen Decl. ¶ 51; Fabiola ¶¶ 74–75; Ernesto Decl. ¶¶ 32–33. Many, like Emilia, Nora, and Carmen, are terrified of appearing for their next court hearings because of the necessary travel from their hide-outs through Tamaulipas to the ports of entry. *See* Emilia Decl. ¶¶ 21, 26, 28; Nora Decl. ¶ 43; Carmen Decl. ¶ 53. One Plaintiff, Fabiola, grew so desperate that, in December 2019, she sent her eight-year-old son and six-year-old daughter alone across the bridge in Matamoros to spare them from further harm. Fabiola Decl. ¶¶ 55–58. Other parents have contemplated doing the same. Nora Decl. ¶ 60; Jessica Decl. ¶ 54; *see also* ECF 62-2, ¶¶ 10–11; ECF 62-4, ¶¶ 39–40. And, in late October 2020, after months of escalating harassment and death threats, Jessica made the painful decision

to send her two sons across the border to protect them from the dangers in Matamoros. ECF 69-1, Potter Decl. ¶¶ 5–7.

Plaintiffs' experiences reflect those among asylum seekers subject to MPP-Tamaulipas, who have been targeted when returned to Mexico from Laredo or Brownsville, Texas, ECF 18-7, Leutert Decl. ¶¶ 30, 33–35; ECF 18-6, HRF Decl. ¶¶ 12–13, 29; ECF 18-8, MSF Decl. ¶ 31, and when around Mexican immigration offices, where they had to go to obtain humanitarian visas in order to remain in Mexico until their next hearing, ECF 18-4, Gilman Decl. ¶¶ 77, 83; ECF 18-7, Leutert Decl. ¶¶ 33–35; ECF 18-6, HRF Decl. ¶¶ 14, 32. Individuals subject to MPP-Tamaulipas also exposed themselves to danger when they return to those ports of entry for their hearings, especially when they were instructed to appear as early as 4:30am at the bridges connecting Nuevo Laredo and Matamoros to the ports of entry in Texas. ECF 18-4, Gilman Decl. ¶¶ 23, 48, 50; ECF 18-5, Goodwin Decl. ¶ 21; ECF 18-7, Leutert Decl. ¶ 43. Even individuals who try to escape the dangers in Nuevo Laredo and Matamoros by relocating to safer parts of Mexico must inevitably travel through Tamaulipas and return to those two cities for their hearings. ECF 18-7, Leutert Decl. ¶¶ 37–39, 44; ECF 18-6, HRF Decl. ¶¶ 15, 33; ECF 18-4, Gilman Decl. ¶ 50. Once individuals reported to their immigration hearings in Laredo or Brownsville, DHS repeated its cycle of putting them in danger by sending individuals back into Tamaulipas and requiring them to appear at the same dangerous locations for their next hearing. ECF 18-6, HRF Decl. ¶ 10; ECF 18-5, Goodwin Decl. ¶ 10; ECF 18-4, Gilman Decl. ¶¶ 31-32, 49. Thus, like Plaintiffs, large numbers of individuals subject to MPP-Tamaulipas have been subject to physical violence, kidnapping, sexual violence and other crimes. ECF 18-4, Gilman Decl. ¶¶ 43–45; ECF 18-7, Leutert Decl. ¶¶ 29–43; ECF 18-5, Goodwin Decl. ¶¶ 11–23; ECF 18-6, HRF Decl. ¶¶ 11–15, 20–24, 26–32; ECF 18-8,

MSF Decl. ¶¶ 27–36; Supplemental Declaration of Kennji Kizuka ("HRF Suppl. Decl.") ¶¶ 4–5, 11–15; Supplemental Declaration of Sergio Martin ("MSF Suppl. Decl.") ¶¶ 1, 6, 8.

Despite their fears and the harms they have suffered, Plaintiffs remain subject to MPP-Tamaulipas. *See* Ernesto Decl. ¶¶ 32–34; Laura Decl. ¶¶ 56, 61; Jonathan Decl. ¶ 75; Jessica Decl. ¶ 43; Henry Decl. ¶ 39; Nora Decl. ¶¶ 44, 58; Diana Decl. ¶¶ 56–59; Fabiola Decl. ¶ 77; Emilia Decl. ¶ 28; Armando Decl. ¶ 30; Carmen Decl. ¶¶ 51–53; *see also* ECF 69, Joint Status Report at 1. Conditions for individuals subject to MPP-Tamaulipas have worsened since the filing of the preliminary injunction in May 2020. *See* HRF Suppl. Decl. ¶ 11 ("[T]he security situation in Mexico, including in the state of Tamaulipas has worsened . . . [as] [o]ne of Mexico's most powerful and violent cartels, the Jalisco New Generation Cartel, has reportedly increased its activities in Tamaulipas in 2020"); *id*. ¶ 21 ("Indeed, escalating dangers and unconscionable conditions have led to mounting desperation among asylum seekers forced to wait in Mexico under MPP."); MSF Suppl. Decl. ¶ 1 ("[W]e see that the suspension of MPP hearings and the COVID-19 pandemic have contributed to an even worse situation for these individuals trying to seek shelter in the United States, but trapped in Tamaulipas."); *id*. ¶ 6 (discussing how limitations on movement have "increas[ed] exposure to violence, threats and extortions to those people present at the border"). MPP hearings have been suspended indefinitely since March 2020, with no foreseeable end in sight based on government treatment of the border region during the pandemic. *See* Boggs Decl., Ex. 2 (U.S. Dep't of Justice, Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings, July 17, 2020); HRF Suppl. Decl. ¶ 6; *see also* ECF 63 at 8 (DHS acknowledgement that public health criteria governing resumption of MPP hearings will result in "indefinite suspension of MPP hearings"). While DHS, under the new Biden administration, has recently announced that it is suspending new enrollments in MPP starting

January 20, 2021, the agency has also advised that "[a]ll current MPP participants should remain where they are." Boggs Decl., Ex. 3 (U.S. Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program, Jan. 20, 2021). Thus, Plaintiffs are helplessly stranded in Tamaulipas, in life threatening circumstances, with no end in sight.[6]

LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Superior Fibre Prod., Inc. v. U.S. Dep't of the Treasury*, 156 F. Supp. 3d 54, 60 (D.D.C. 2016) (citing Fed. R. Civ. P. 56(a)). In APA cases, the Court "review[s] the administrative record directly," in order to "determine whether the agency has complied with the APA." *Troy Corp. v. Browner*, 120 F.3d 277, 281 (D.C. Cir. 1997) (citations omitted). The APA authorizes the Court to set aside agency action that is arbitrary and capricious. 5 U.S.C. § 706.

In addition, to obtain a permanent injunction, a plaintiff must establish actual success on the merits and show (1) likelihood of success; (2) irreparable injury; (3) that the balance of hardships favor the plaintiff; and (4) "that the public interest would not be disserved by a permanent injunction." *Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 356 (D.D.C. 2012) (citation omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008)

[6] On February 2, 2021, President Biden signed an Executive Order directing DHS to "promptly review and determine whether to terminate or modify the program known as the Migrant Protection Protocols (MPP)," and providing for consideration of a "phased strategy" for processing individuals already subject to MPP. *See* Boggs Decl., Ex. 4 (The White House, Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, Feb. 2, 2021). The government has not specified how the program will be modified or whether it will be terminated. *See* ECF 69 at 1 (parties agreeing in joint status report that MPP is still in effect for Plaintiffs).

("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987))).

JURISDICTION

The Court has federal question jurisdiction under 28 U.S.C. § 1331, as this Court already held in its decision on the motion for preliminary injunction. In finding that it had jurisdiction, the Court held that the Immigration and Nationality Act ("INA") does not bar review of Plaintiffs' APA claim challenging MPP-Tamaulipas. ECF 43, Mem. Op. at 13–15. *See also* ECF 54, Plaintiffs Mem. in Opp. to Defendants' Motion to Dismiss at 12–20.

ARGUMENT

Defendants' decision to expand MPP to Tamaulipas was arbitrary and capricious for two reasons. First, the agency "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43—the extreme dangers in Tamaulipas and the effect of those dangers on asylum seekers returned there and on the agency's stated goals for MPP. *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (failure to consider important aspects of problem, including "costs" of action on immigrants, rendered agency action arbitrary and capricious). Second, the agency failed to adequately explain its decision to expand MPP to Tamaulipas. Indeed, far from providing a "reasoned explanation," *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) the administrative record "is devoid of any explanation or reasoning" at all, *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 116 (D.C. Cir. 2020).

For these reasons, Plaintiffs are entitled to have MPP-Tamaulipas vacated and set aside. In addition, they are entitled to a permanent injunction ordering their removal from MPP and

their return to the United States to pursue their applications for asylum from within the country, in light of the irreparable harm they have suffered and will continue to suffer if they are forced to remain in Tamaulipas, the balance of hardships and the public interest.

I. DEFENDANTS' DECISION TO ADOPT MPP-TAMAULIPAS WAS ARBITRARY AND CAPRICIOUS.

To survive arbitrary and capricious review, the APA demands "reasoned decisionmaking." *State Farm*, 463 U.S. at 52. The arbitrary and capricious standard requires an agency to examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Id*. at 43 (citation omitted). Defendants' decision to expand MPP to Tamaulipas is arbitrary and capricious in two ways.

A. The Agency Failed to Consider Important Aspects of the Problem.

In expanding MPP to Tamaulipas, the agency entirely ignored the dangers in Tamaulipas and the likelihood that returning migrants to the region would place them at significant risk of harm, while also making it unsafe for them to pursue their asylum claims. As the Court has already noted, there are "serious questions about whether it would be reasonable for DHS to require asylum seekers to stay there for an indefinite period of time." ECF 43, Mem. Op. at 22. The administrative record shows DHS did not consider danger or harm at all in reaching its decision, let alone the U.S. government's own acknowledgment of the extraordinary peril facing migrants stranded in Tamaulipas. And DHS made no effort to address whether or how expansion of MPP to Tamaulipas would affect the agency's stated goals of (1) ensuring that vulnerable populations would be safe waiting for their hearings in Mexico and (2) furthering their ability to pursue asylum, AR 13, 15, 16–17, 18. *See Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) (agencies must not only consider how taking action will help achieve their desired goals and outcomes, they must also "adequately analyze the . . . consequences" of their actions, including

the negative ones, on regulated individuals and on the agency's goals). The agency's failure to grapple with, or even consider, these "important aspect[s] of the problem" demonstrates the lack of "reasoned decisionmaking" required by the APA. *Regents*, 140 S. Ct. at 1905, 1903 (quoting *State Farm*). For this reason alone, the Court should set aside MPP-Tamaulipas.

In adopting MPP, Defendants stated their commitment to protecting the safety of migrants returned to Mexico under MPP and to furthering the rights of bona fide asylum seekers to pursue their claims. AR 13, 15, 16–17, 18. Indeed, the program's name itself reflects this proclaimed purpose: "Migrant *Protection* Protocols." These goals are reinforced in the contiguous territory return statute itself, which provides the asserted authority for MPP. That statute and the regulations implementing it presume that those who are returned to a contiguous territory will be able to participate in their removal proceedings in the United States, which includes pursuing their applications for relief. *See, e.g.*, 8 U.S.C. §§ 1225(b)(2)(A), (C) (providing that individuals who are returned to a contiguous territory remain in removal proceedings under 8 U.S.C. § 1229a); 8 C.F.R. § 208.14(c)(1) (individuals in § 1229a removal proceedings are entitled to seek asylum). Additional rules implementing MPP also recognize these goals. *See, e.g.*, AR 14 ("Aliens who need to return to the U.S. to attend their immigration court hearings will be allowed to enter and attend those hearings."); AR 2277 ("On the day of the hearing, an alien returned to Mexico under the MPP will arrive at the [port of entry] at the time designated—generally, a time sufficient to allow for . . . timely appearance at hearings.").

Before expanding MPP to Tamaulipas, Defendants were thus obligated, at a minimum, to consider whether migrants returned to Tamaulipas would be safe, whether they would be able to pursue their asylum claims while needing to wait in or travel through Tamaulipas, whether counsel

could communicate with them in Tamaulipas, and whether they would be able to access the border ports of entry to report for their asylum hearings inside the United States. *See, e.g.*, 8 U.S.C. § 1229a(b)(5) (providing that individuals who do not appear for their hearings "shall be ordered removed in absentia"); 8 C.F.R. § 235.3(d) (asylum seeker returned to Mexico "while awaiting a removal hearing" may be ordered removed in absentia, "if the alien fails to appear for the hearing."); *see also* AR 14–15 (assuring that individuals in MPP would have same right to counsel of their choosing as provided by statute and regulations). Yet the administrative record reflects no consideration of these issues. ECF 56-1–56-10. As already noted, the record contains nothing about the dangers that asylum seekers face in Tamaulipas. Although there is some evidence of the dangers facing asylum seekers in Mexico in general, there is no indication that DHS actually considered these dangers, let alone the special dangers that asylum seekers face in Tamaulipas. *See Gerber v. Norton*, 294 F.3d 173, 183 (D.C. Cir. 2002) ("'[K]nowing' is not, in any event, the same as actually considering the problems raised by [plaintiffs]. The [Fish and Wildlife] Service cannot point to any discussion in the agency's own decisional documents that addresses any of the three problems plaintiffs highlighted."); *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055–56 (D.C. Cir. 1986) (holding that "two fleeting references" in the administrative record and "[s]tating that a factor was considered . . . is not a substitute for considering it").

The Supreme Court's recent decision in *Regents* is instructive. In *Regents*, the Court held that DHS's rescission of the Deferred Action for Childhood Arrivals (DACA) program violated the APA's requirement of reasoned decision making because DHS decided upon a course of action—rescinding DACA in full—without considering "important aspect[s] of the problem." *See Regents*, 140 S. Ct. at 1910–14 (quoting *State Farm*, 463 U.S. at 43). Specifically, the DHS Secretary's decision to rescind DACA was based solely on a determination that DACA's provision

of work authorization to certain noncitizens was illegal, without considering other "important aspect[s]" of the DACA program that would be affected by its rescission—*i.e.*, the protection it provided against removal (forbearance) for certain noncitizens who entered the United States as children, *id*. at 1910–13, as well as the reliance interests of both DACA recipients and others, as evident in (for example) college enrollment and employment. *Id*. at 1913–14. Because the agency failed to consider these two relevant factors, the Court held the agency's rescission of the program arbitrary and capricious. *Id*. at 1913–14.

The agency made similar fatal missteps here. The administrative record shows that Defendants made no attempt to consider adverse "consequences" of returning asylum seekers to Tamaulipas, such as the risks they would face of kidnapping, rape, and severe physical injury, nor how such risks would affect their ability to pursue their asylum claims—*e.g.*, their ability to safely travel to the port of entry to participate in their asylum hearings, and their ability to obtain counsel to assist them in preparing their claims. By failing to consider the hazards asylum seekers face in Tamaulipas, the agency necessarily failed to assess whether expanding MPP to that region would actually serve, or instead undermine, the agency's stated goals of facilitating the adjudication of bona fide asylum claims.

The agency's omission is all the more egregious given that the State Department singled out Tamaulipas alone among the Mexican border states for its highest "no travel" advisory because of the extreme dangers there.[7] It was thus entirely foreseeable that attorneys in the United States

[7] Plaintiffs request that the Court take judicial notice of these State Department advisories, *see* Boggs Decl., Ex. 1 (2018 Mexico Travel Advisory), ECF 18-22 (April 2019 Mexico Travel Advisory), as well as related State Department publications documenting the dangers of Tamaulipas, *see* ECF 18-25 (2019 Nuevo Laredo Crime and Safety Report); ECF 18-26 (2019 Matamoros Crime and Safety Report). Plaintiffs do not request judicial notice of the underlying facts asserted in these documents—although elsewhere in the administrative record the agency identifies State Department reports as a reliable basis for assessing country conditions in the

would be reluctant to travel to Tamaulipas to provide representation to asylum seekers returned there.[8] Likewise, the State Department's travel advisory for Tamaulipas specifically warns about the hazards of travel there, barring travel by government employees at night and before 6 a.m. These warnings would also be relevant to migrants, who are expected to travel and present for their hearings at the very time the State Department imposes a safety curfew on its own employees.[9]

DHS was undoubtedly aware of the advisory's existence, as DHS's own website includes a link to State Department travel advisories. *See supra* n.4. And the ability of migrants to reside safely or travel in Tamaulipas during the pendency of their removal proceedings are at a minimum "relevant factors" and "important aspect[s] of the problem" that the agency had an obligation to

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context of nonrefoulement claims by migrants subjected to MPP, *see* AR 2273–74. Instead, Plaintiffs request judicial notice merely of the fact—not "subject to reasonable dispute," Fed. R. Evid. 201(b)(2) —that at the time that the agency expanded MPP to Tamaulipas, the State Department had issued a Level 4 travel alert for Tamaulipas alone among Mexican border states, and that other State Department publications had also identified Tamaulipas as particularly dangerous. Numerous courts in this district have taken judicial notice of similar documents for such purposes, including in APA cases. *See, e.g.*, *Farrell v. Tillerson*, 315 F. Supp. 3d 47, 54 n.3 (D.D.C. 2018); *Pharm. Rsch. & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs.*, 43 F. Supp. 3d 28, 33 (D.D.C. 2014); *Seifert v. Winter*, 555 F. Supp. 2d 3, 11 n.5 (D.D.C. 2008)); *see also Mitchell v. Pompeo*, No. 1:15-CV-1849 (KBJ), 2019 WL 1440126, at *1 n.3 (D.D.C. Mar. 31, 2019) (non-APA case in which court took judicial notice of document located on State Department's website because it was "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned[.]").

[8] Data on representation rates of migrants returned to Tamaulipas bear this out, showing only 6.18 and 6.9 percent of such migrants had representation in their hearings in Brownsville and Laredo, respectively, as compared to a 32 percent representation rate for individuals who participate in their removal proceedings from inside the U.S. *See* Boggs Decl., Ex. 5 (TRAC Immigration, Details on MPP (Remain in Mexico) Deportation Proceedings, through Dec. 2020) ("TRAC MPP Data"); *id*., Ex. 6 (TRAC Immigration, Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases, Dec. 19, 2019).

[9] Data on high in absentia rates for migrants in MPP-Tamaulipas confirm this issue, with 48.5 percent and 60 percent in absentia rates for individuals with cases calendared at Brownsville and Laredo, respectively, compared to 25 percent in Calexico and 27 percent in San Ysidro, two other MPP courts. *See* Boggs Decl., Ex. 5 (TRAC MPP Data).

consider. *D&F Afonso Realty Tr. v. Garvey*, 216 F.3d 1191, 1195 (D.C. Cir. 2000) ("we must strike down agency action if the agency failed to consider relevant factors"); *Nat'l Lifeline Ass'n v. F.C.C.*, 921 F.3d 1102, 1105–06 (D.C. Cir. 2019) (for agency decision making to pass muster under the APA, the agency must "analyze the impact" of policy changes on affected individuals).

Because the agency left "serious concerns unaddressed," its decision to expand MPP to Tamaulipas was arbitrary and capricious. *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 710 (D.C. Cir. 2014). Indeed, had the agency considered the conditions in Tamaulipas, as required, there is no plausible way that it could have reconciled those conditions with the decision to expand MPP to Tamaulipas, a place that the U.S. government itself deems so dangerous that it warns against travel there. *See, e.g.*, ECF 18-22.

B. The Agency Failed to Explain Its Decision.

An agency also acts arbitrarily and capriciously when it fails to "articulate[] a satisfactory explanation for [its] decision." *Dep't of Commerce*, 139 S. Ct. at 2570. Providing a "reasoned explanation" may not be "a high bar, but it is an unwavering one." *Judalang v. Holder*, 565 U.S. 42, 45 (2011). DHS failed in this regard as well.

The administrative record contains no mention of the decision to expand MPP to Tamaulipas, let alone an explanation of the basis or rationale for the decision to expand MPP to Tamaulipas.[10] The closest the administrative record comes to an "explanation" are statements from April 1, and June 7, 2019, announcing plans to expand MPP to additional locations in response to the "emergency" at the border, ECF 56-1 at 11, and ultimately to expand it "across the entire border." ECF 23-3 at 4. But these are *announcements* of decisions, *not explanations* of the reasons

[10] The record only includes one policy document stating that the agency would expand MPP "across the entire border," ECF 23-3 at 4, but it makes no mention of—let alone provides any explanation for—expansion to Tamaulipas.

for those decisions. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126–27 (2016) (holding that there was no explanation provided when the agency simply stated its change in position and that it "believes that this interpretation is reasonable").

The administrative record shows that the agency intended MPP to be rolled out in stages, with the first three sites chosen based on their proximity to immigration courts. ECF 23-2 at 7 n.3; ECF 52-1 at 7 n.5. Then, sometime between April 1, 2019, and June 7, 2019, the agency decided to expand MPP across the "entire southern border." *See* ECF 56-1 at 10 (April 1, 2019, statement from then DHS Secretary Nielsen, directing expansion of MPP beyond the locations where it was currently being used), ECF 23-3 at 3 (June 7, 2019, U.S.-Mexico Joint Declaration, announcing immediate expansion of MPP "across the entire southern border."). These statements purport to link the expansion of MPP to a border "emergency" caused by an increase in migrants. But they are wholly conclusory statements that not only fail to address conditions in Tamaulipas, but are fundamentally "devoid of any explanation or reasoning," *Bhd. of Locomotive Eng'rs*, 972 F.3d at 116, for why such expansion generally, or sending people back to Tamaulipas, in particular, was the appropriate response to "resolving the humanitarian emergency and security situation." ECF 23-3 at 2; *see also Encino Motorcars*, 136 S. Ct. at 2127 ("Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all."); *id*. at 2126–27 (holding that it was insufficient for the agency to simply state that, in reaching its decision, it had 'carefully considered all of the comments, analyses, and arguments made for and against the proposed changes'").

II. THIS COURT SHOULD SET ASIDE MPP-TAMAULIPAS AND ISSUE A PERMANENT INJUNCTION.

Because the expansion of MPP to Tamaulipas is arbitrary and capricious and thus unlawful, this Court should declare MPP-Tamaulipas unlawful and set it aside. 5 U.S.C. § 706(2); *see Nat'l*

Min. Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (recognizing that set-aside is the standard remedy under the APA).

In addition, Plaintiffs seek an injunction ordering Defendants to allow them to return to the United States and to remove them from MPP so they may pursue their immigration proceedings from within the United States rather than waiting in limbo and in fear of persecution or torture in Mexico. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57, 165–66 (2010) (courts may issue injunction where vacatur is not sufficient to redress the plaintiffs' injuries).

A. Plaintiffs Are Suffering Irreparable Harm.

Plaintiffs are asylum seekers who fear persecution in their home countries and have suffered persecution and torture in Mexico caused by MPP-Tamaulipas. As detailed in their declarations, Plaintiffs have already experienced rape, sexual assault, beatings, kidnapping, and death threats in Tamaulipas. Nora Decl. ¶¶ 20–23; Jonathan Decl. ¶¶ 13, 24–35; Emilia Decl. ¶¶ 10–13, 16–18; Laura Decl. ¶¶ 12–24; Fabiola Decl. ¶¶ 20–25, 33–36, 48–51; Ernesto Decl. ¶¶ 14, 18–24, 32–33; Jessica Decl. ¶¶ 16–22, 29, 39–40; Henry Decl. ¶¶ 14–17, 22; Armando Decl. ¶¶ 14–20; Carmen Decl. ¶¶ 32–36, 42–50.

Further, similar harm—or even death—is likely if Plaintiffs remain in Tamaulipas, without an injunction allowing them to return to the United States to pursue their asylum cases from within the United States. For instance, Plaintiffs Jessica and Fabiola have expressed fear of being victimized (yet again) by members of a local criminal group, La Maña, that has been targeting women like them around the Matamoros migrant camp. Jessica Decl. ¶ 38; Fabiola Decl. ¶ 76. Similarly, Plaintiffs Ernesto, Henry and Armando feel trapped with nowhere to hide from their persecutors in Matamoros. Ernesto Decl. ¶ 32; Henry Decl. ¶¶ 36–39; Armando Decl. ¶¶ 28–30. Plaintiffs Jonathan and Emilia have been continually threatened. Jonathan Decl. ¶¶ 51–54; Emilia

Decl. ¶ 16. Plaintiff Laura and her family have been explicitly warned that they would be killed if they tried to travel outside of Nuevo Laredo, Laura Decl. ¶ 56, while Plaintiffs Nora and Carmen are terrified of being kidnapped and raped again when they travel to their assigned port of entry for their next hearing, if and when it is scheduled. Nora Decl. ¶¶ 43, 55; Carmen Decl. ¶ 53. Without an injunction, Plaintiffs are living in terror and some, like Nora and Jessica, have contemplated sending their young children—ranging in ages from one to 16—alone across the border to save them from the dangers in Tamaulipas. Nora Decl. ¶ 60; Jessica Decl. ¶ 54. In fact, this sad possibility became reality for Jessica who, after months of escalating harassment and death threats, made the painful decision to send her two sons alone across the border in order to protect them from the dangers in Matamoros. ECF 69-1, Potter Decl. ¶¶ 5–7.

Moreover, Plaintiffs are particularly vulnerable to the harm that will be inflicted by their continued exposure to violence in Tamaulipas because they already experienced trauma before fleeing their home countries. As previously explained, all Plaintiffs have been evaluated by psychological experts who agree that: (1) Plaintiffs are traumatized from their experiences in Mexico, which have added to the trauma they had previously experienced in their home countries; (2) Plaintiffs cannot recover so long as they remain in a setting where they do not feel safe; and, (3) lack of treatment and safety will jeopardize Plaintiffs' long term mental and physical health. Nora Eval. ¶¶ 92–99; Jonathan Eval. pp. 24–26, 28–30; Emilia Eval. ¶¶ 64, 73–87; Fabiola Eval. ¶¶ 66–96; Ernesto Eval. ¶¶ 71–86, 100–106, 110; Laura Eval. ¶¶ 9–10; Anna Eval. ¶¶ 9–11; Joseph Eval. ¶¶ 52–63; Wanda Eval. ¶¶ 23–38; Jessica Eval. ¶¶ 63–72; Henry Eval. ¶¶ 31–48; Armando Eval. ¶¶ 64–94, 99–126; Carmen Eval. pp.7–9. Evaluators have highlighted symptoms of Post-Traumatic Stress Disorder ("PTSD"), complex PTSD, depression, and anxiety, among Plaintiffs who feel hopeless and in a perpetual state of limbo, danger and loss. Nora Eval. ¶¶ 92–99; Jonathan

Eval. pp. 24–26, 28–30; Emilia Eval. ¶¶ 64, 73–87; Fabiola Eval. ¶¶ 66–96; Ernesto Eval. ¶¶ 71–86, 100–106, 110; Laura Eval. ¶¶ 9–10; Anna Eval. ¶¶ 9–11; Joseph Eval. ¶¶ 52–63; Wanda Eval. ¶¶ 23–38; Jessica Eval. ¶¶ 63–72; Henry Eval. ¶¶ 31-48; Armando Eval. ¶¶ 64–94, 99–126; Carmen Eval. pp.7–9.

The harm is particularly acute for Plaintiffs who are children and who have experienced and witnessed violence inflicted against their family members. Anna Eval. ¶¶ 7–11; Carolina Eval. ¶¶ 33–55; Nora Eval. ¶¶ 70-81 (describing clinical observations of Jose who witnessed his mother being gang raped and threatened); Jonathan Eval. pp. 20–22, 26–28 (same for Steven, whose trauma from witnessing his father's abuse has led to such trauma that his symptoms mimic those of a child with severe autism); Emilia Eval. ¶¶ 65–72 (same for Gabriela, who described crying nonstop, not eating or sleeping, and, when she does sleep, having continual nightmares of what the men did to her and her mother); Armando Eval. ¶¶ 80–94, 99 (same for Salvador, whose profound psychological distress and poor social functioning was described as impediments to normal childhood development). Experts agree that this childhood trauma can cause long-lasting neurological and psychological consequences—irreparable damage for the child Plaintiffs unless they are allowed to recover in a safe and stable living environment. Decl. of Drs. Berkowitz and Gutman ("Berkowitz/Gutman Decl.") ¶¶ 17–26, 47. Moreover, these evaluations were conducted before MPP hearings were postponed indefinitely. Plaintiffs are thus now further isolated and trapped in Mexico. *See supra* at 12–13.

Plaintiffs' experiences and feared harms are consistent with findings of countless reports documenting the widespread violence and brutality faced by non-Mexican nationals forced to travel through and remain in Tamaulipas. *See* ECF 18-4, Gilman Decl. ¶¶ 43–45; ECF 18-7, Leutert Decl. ¶¶ 29–43; ECF 18-5, Goodwin Decl. ¶¶ 11–23; ECF 18-6, HRF Decl. ¶¶ 11–15, 20–

24, 26–32; ECF 18-8, MSF Decl. ¶¶ 27–36. And experts from Human Rights First and Médecins Sans Frontières confirm that the security and humanitarian situation for asylum seekers in Tamaulipas have only worsened since MPP hearings were indefinitely cancelled, with no foreseeable change in sight. HRF Suppl. Decl. ¶¶ 5, 21–22; MSF Suppl. Decl. ¶¶ 1, 13–14.

Finally, although setting aside MPP-Tamaulipas would prevent Defendants from forcing Plaintiffs to return to Tamaulipas after their next hearings, Plaintiffs in the meantime will experience irreparable harm in the form of continued exposure to danger, persecution, or torture. *Cf. R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (granting preliminary injunction because harm from detention pursuant to an unlawful policy is beyond remediation). An injunction ordering Plaintiffs' immediate return to the United States is the only means of preventing such irreparable harm. And the Court has the authority to order this relief. *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 145 (D.D.C. 2018), *aff'd in part, rev'd in part on other grounds*, *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020) (ordering plaintiffs' return as "necessary for the Court to fashion an effective remedy"); *Walters v. Reno*, 145 F.3d 1032, 1050–51 (9th Cir. 1998) (affirming order requiring parole into the United States "to permit the alien 'to pursue any administrative and judicial remedies to which he is lawfully entitled.'") (quoting *Mendez v. Immigration & Naturalization Serv.*, 563 F.2d 956, 959 (9th Cir. 1977)); *Bollat Vasquez v. Wolf*, 460 F. Supp. 3d 99, 116 (D. Mass. 2020) (ordering immediate return of plaintiffs to the United States based in part on danger in Tamaulipas, Mexico); *Turcios v. Wolf*, No. 1:20-cv-00093, ECF 39, Order, at 7 (S.D. Tex. Oct. 16, 2020) (same).[11]

[11] *See also J.L. v. Cuccinelli*, No. 18-CV-04914-NC, 2020 WL 2562895, at *3 (N.D. Cal. Feb. 20, 2020), *modified on reconsideration*, 2020 WL 2562896 (N.D. Cal. Mar. 27, 2020) (ordering that the government "must facilitate [plaintiffs'] return to the United States."); *Gordon v. Barr*, 965 F.3d 252, 254-55 (4th Cir. 2020) (vacating removal order and directing government to facilitate noncitizen's return to the United States); *Ramirez v. Sessions*, 887 F.3d 693, 706–07 (4th Cir.

B. The Balance of Equities and Public Interest Favor Permanent Injunctive Relief for the Plaintiffs.

The remaining factors also favor injunctive relief. "The Government 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" *R.I.L.-R.*, 80 F. Supp. 3d at 191. Allowing Defendants to keep asylum seekers like Plaintiffs in a dangerous region like Tamaulipas would "permit[] and prolong[] a continuing violation of United States law." *Nken v. Holder*, 556 U.S. 418, 436 (2009) (quotation marks omitted).

Indeed, it is in the government's interest to ensure that asylum seekers like Plaintiffs are not forced to remain in a place where they fear grave persecution or death. *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018) (the public also "has an interest in ensuring that its government respects the rights of immigrants"). Ensuring Plaintiffs and other asylum seekers a meaningful opportunity to pursue their asylum claims in a safe environment is also in the public interest. *See Grace*, 344 F. Supp. 3d at 146 (holding public interest served by ensuring that asylum seekers are not forced to remain in place where they fear for their bodily safety and face multiple, systemic

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2018), *as amended* (June 7, 2018) (same); *Orabi v. Att'y Gen. of the U.S.*, 738 F.3d 535, 543 (3d Cir. 2014) (same); *Singh v. Waters*, 87 F.3d 346, 350 (9th Cir. 1996) (ordering that a noncitizen erroneously deported be permitted to "return to the United States" for further immigration proceedings); *Estrada-Rosales v. I.N.S.*, 645 F.2d 819, 822 (9th Cir. 1981) (concluding that the Board of Immigration Appeals erred by not "order[ing] petitioner readmitted to the United States" for a new hearing); *Mendez*, 563 F.2d at 959 (ordering government to return noncitizen to United States and restore him to "the same status he held prior to the [unlawful] deportation"); *Ms. L. v. U.S. Immigration & Customs Enf't*, 403 F. Supp. 3d 853, 856, 868 (S.D. Cal. 2019) (ordering the government "to allow a small group of migrant parents . . . to travel to the United States"); *Kashannejad v. USCIS*, No. C-11-2228, 2011 WL 4948575, at *11 (N.D. Cal. Oct. 18, 2011), *aff'd*, 584 F. App'x 375 (9th Cir. 2014) (ordering government to "effectuate [plaintiff's] return"); *Rantesalu v. Cangemi*, No. Civ. 04-1375 (JRT/SRN), 2004 WL 898584, at *8 (D. Minn. Apr. 23, 2004) (ordering government to "permit petitioner to re-enter the United States" after unlawful removal); *Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 408 (S.D.N.Y. 2004) (ordering noncitizen "be returned to the United States" after unlawful removal); *Dennis v. I.N.S.*, No. 3:01-CV-279 (SRU), 2002 WL 295100, at *3 (D. Conn. Feb. 19, 2002) (ordering noncitizen's return to "redress" his wrongful deportation).

obstacles to presenting their asylum claims). Far from undermining the public interest, treating asylum seekers with basic fairness and dignity is among our nation's best traditions. *See, e.g.*, Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102 ("[I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States."); *Bollat*, 460 F. Supp. 3d at 116 (holding that "[m]oving the [plaintiffs] out of the constant danger they face outweighs the government's or the public's interest in the continued application of the MPP" and that on balance, an injunction "is in the public interest").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial summary judgment and permanent injunctive relief should be granted.

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/s/ Judy Rabinovitz

Scott Michelman (D.C. Bar No. 1006945)
Arthur B. Spitzer (D.C. Bar No. 235960)
Michael Perloff (D.C. Bar No. 160104)
American Civil Liberties Union Foundation of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
(202) 457-0800

Andre Segura*
Edgar Saldivar*
Kathryn Huddleston*
ACLU Foundation of Texas
P.O. Box 8306
Houston, TX 77288
(713) 942-8146

Rochelle M. Garza*
ACLU Foundation of Texas
P.O. Box 6087
Brownsville, Texas 78523
(956) 338-1603

Anne Peterson*
Blaine Bookey*
Karen Musalo*
Jamie L. Crook (D.C. Bar No. 1002504)
Center for Gender & Refugee Studies
200 McAllister St.
San Francisco, CA 94102
(415) 565-4877

Judy Rabinovitz*
Michael Tan*
Anand Balakrishnan*
Daniel A. Galindo*
Celso J. Perez (D.C. Bar No. 1034959)
American Civil Liberties Union Foundation, Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600

My Khanh Ngo*
American Civil Liberties Union Foundation, Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770

Rebecca Smullin (D.C. Bar No. 1017451)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-7714

**Admitted pro hac vice*

Attorneys for Plaintiffs