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| 19 | Plaintiffs, | |
| 20 | v. | |
| 21 | Kirstjen Nielsen, <i>et al.</i> , | |
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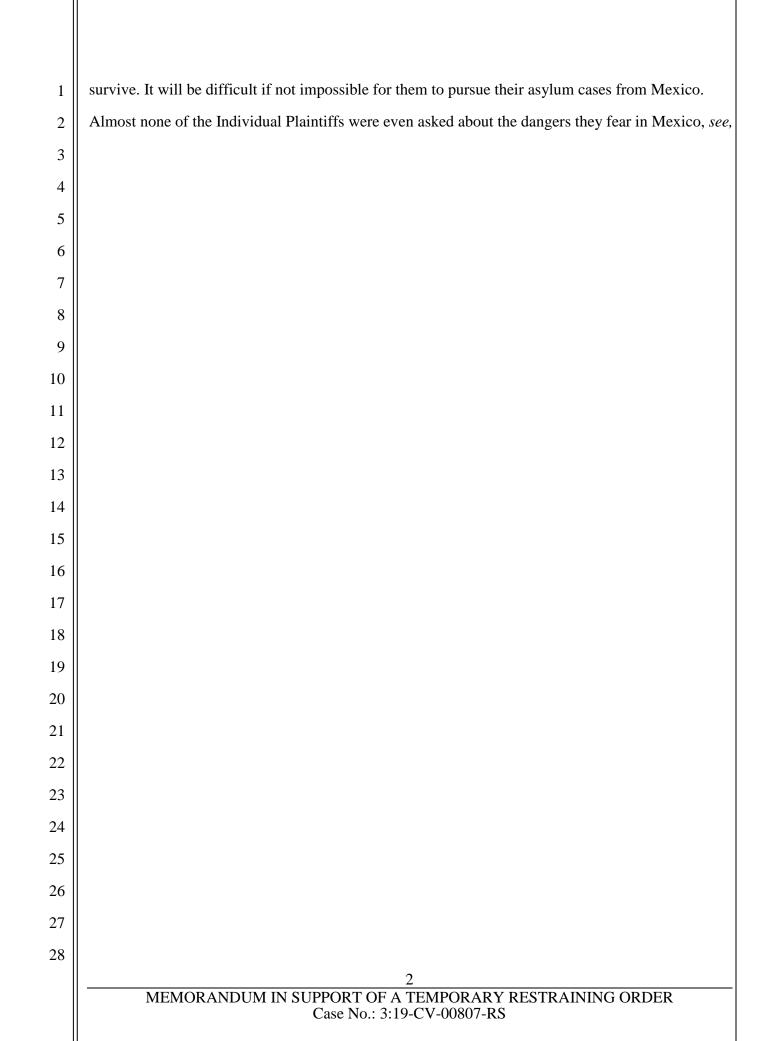
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| | MEMORANDUM IN SUPPORT OF A TEMPORARY RESTRAINING ORDER Case No.: 3:19-CV-00807-RS |
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| 1 | 8 C.F.R. § 208.30(g) |
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INTRODUCTION

On January 29, 2019, Defendants began implementing an unprecedented forced return policy at the southern border. Under the new policy, individuals who have come to the United States to seek asylum are forced to return to Mexico while their removal proceedings are pending, even though they are not from Mexico, have no domicile in that country, and the border regions they are being sent back to are among the most dangerous in the world. The new policy, which Defendants dub the "Migrant Protection Protocols," is the government's latest effort to deter asylum seekers from seeking protection in the United States under the pretext of a manufactured border crisis. Apprehension rates at the southern border in FY 2017 were the lowest since 1972. *See* Isacson Decl. ¶ 4. Meanwhile U.S. Customs and Border Protection's budget is at a record high. *See id.* ¶ 9.

A bedrock principle of U.S. and international law known as *nonrefoulement* prohibits the United States from returning individuals to countries where they are more likely than not to face persecution, torture, or cruel, inhuman, or degrading treatment. Defendants pay lip service to this standard, stating that under their new policy no one who can prove such a claim will be returned. *See, e.g.*, Rodriguez Decl., Ex. A (Memorandum from Kirstjen M. Nielsen,



Third, Defendants violated the APA rulemaking requirements when they established their new, nondiscretionary procedure for determining who has a fear of persecution or torture in Mexico, and failed to comply with their notice-and-comment obligations.

Finally, Defendants' forced return policy is arbitrary and capricious because their asserted justifications—such as deterring illegal migration and fraudulent asylum claims—are not rationally connected to the policy's design. And indeed, some of the purported justifications for Defendants' policy—such as circumventing court decisions and laws that Defendants simply do not like, and responding to *in absentia* rates in immigration court—are either patently illegitimate or belied by the facts.

Plaintiffs are likely to succeed on the merits of their claims, are suffering irreparable harm as a result of the policy, and satisfy the remaining TRO factors. Thus, this Court should grant an immediate TRO.

BACKGROUND

I. Legal Framework For Asylum Seekers At The Border

Until recently, individuals applying for asylum at a port of entry along the southern border were either placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1), or placed in regular removal proceedings before an immigration judge ("IJ") under 8 U.S.C. § 1229a. Expedited removal allows for the summary removal of certain noncitizens who lack valid entry documents or attempt to enter the country through fraud—unless they express a fear of removal and pass a "credible fear" interview to assess whether they have a potentially meritorious asylum claim. *See* 8 U.S.C. § 1225(b)(1)(A)(i). Most asylum seekers at the southern border lack valid entry documents and are therefore subject to expedited removal proceedings. However, the government has prosecutorial discretion to place them in regular removal proceedings instead. *See, e.g., Matter of E-R-M-* & *L-R-M-*, 25 I. & N. Dec. 520, 521-24 (BIA 2011); 8 C.F.R. § 235.3(b)(3).

Prior to Defendants' new policy, asylum seekers went through these proceedings *inside* the
United States. Those in expedited removal proceedings first underwent a credible fear interview with
an asylum officer, a low-threshold screening, which if they passed resulted in their being placed in
regular removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). Those not placed in

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issued by U.S. Citizenship and Immigration Services ("USCIS") on January 28, 2019, set out the procedures for satisfying this obligation. Rodriguez Decl., Ex. D (USCIS, Policy Memorandum, PM-602-0169, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, Jan. 28, 2019). It provides that individuals will be referred (in person, by videoconference, or by phone) to an asylum officer only if they affirmatively express a fear of return to Mexico during processing. *Id.* at 3.

MEMORANDUM IN SUPPORT OF A TEMPORARY RESTRAINING ORDER Case No.: 3:19-CV-00807-RS 2003)).

I.

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ARGUMENT

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The Forced Return Policy Violates 8 U.S.C. § 1225(b)(2)(C). A.

Defendants claim that their new forced return policy is authorized by 8 U.S.C. § 1225(b)(2)(C), which allows certain individuals to be returned to Mexico or Canada while their removal proceedings are pending. That is wrong: Defendants are misapplying the return provision to a class of individuals who are not subject to it. The provision specifically exempts from its scope individuals to whom the expedited removal statute, 8 U.S.C. § 1225(b)(1), "applies." See 8 U.S.C. § 1225(b)(2)(B)(ii). That includes all the Individual Plaintiffs and the general population affected by 10 the forced return policy. Thus, the policy violates § 1225(b)(2)(C). In addition, § 1225(b)(2)(C) only authorizes return of individuals "pending a [regular removal] proceeding under section 1229a[.]" Id. Although the Individual Plaintiffs were issued notices to appear ("NTAs") for such removal proceedings, to the best of counsel's knowledge, those NTAs have not been filed with the immigration court, and thus no proceedings are officially pending. See 8 C.F.R. § 1239.1(a); see also Tavarez Decl. ¶¶ 1-4 (summarizing Individual Plaintiffs' case information available on the Executive Office for Immigration Review's ("EOIR") automated immigration court case information system).

Section 1225(b)(2) provides:

(2) Inspection of other aliens

(A) In general

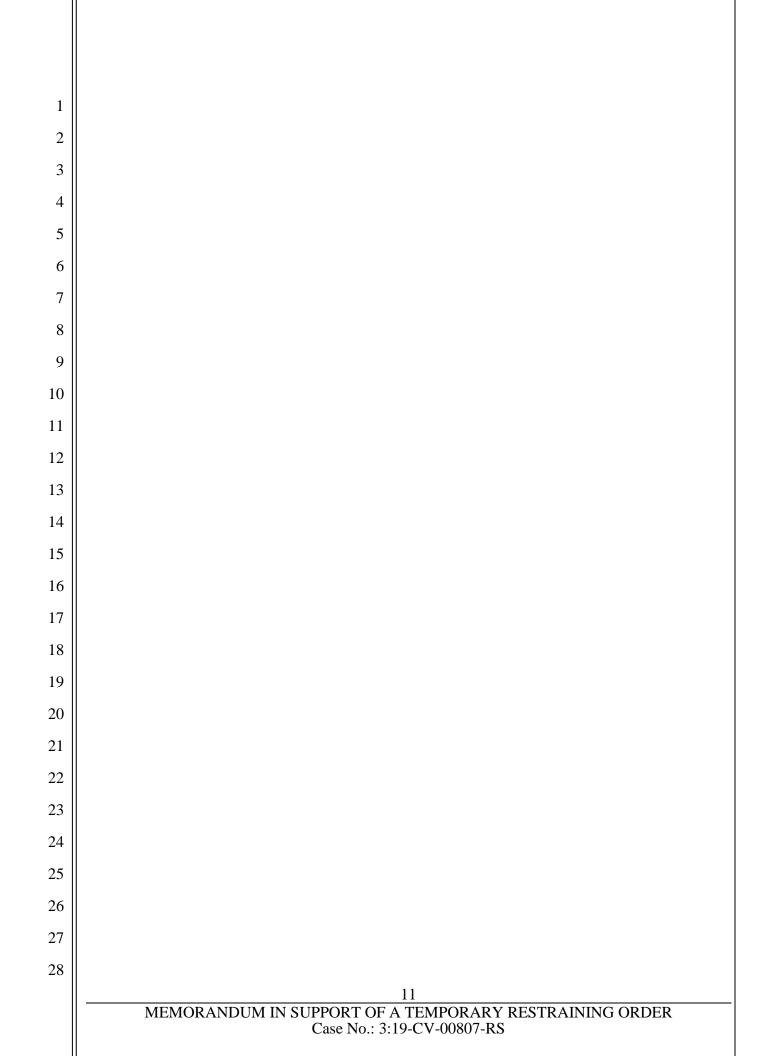
Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a 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

| 1 | ultimate determination of whether persecution is "more likely than not" must be made by an |
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| 2 | immigration judge in full removal proceedings where noncitizens have the right to counsel, 8 U.S.C. |
| 3 | § 1362, 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. § 1240.3, and the right to a "full and fair hearing," |
| 4 | Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000), with a "reasonable opportunity" to present, |
| 5 | examine, and confront evidence, 8 U.S.C. § 1229a(b)(4)(B). ² Defendants' procedure is thus unlawful |
| 6 | because it authorizes an asylum officer to make withholding determinations and without an adequate |
| 7 | process. |
| 8 | Second, the forced return policy does not even provide any of the minimal procedural |
| 9 | safeguards afforded as part of the credible fear and reasonable fear screenings |
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2. The Significant Public Interest in the Forced Return Policy also Makes Notice and Comment Rulemaking Appropriate.

In evaluating the need for notice and comment rulemaking, many courts have considered the level of public interest in the issue at stake. *See, e.g., Hoctor v. USDA*, 82 F.3d 165, 171 (7th Cir. 1996) ("The greater the public interest in a rule, the greater reason to allow the public to participate in its formation."); *Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) (where "thousands of employers" would be affected by a rule, "[t]he value of ensuring that [the agency] is well informed and responsive to public comments" is "considerable").

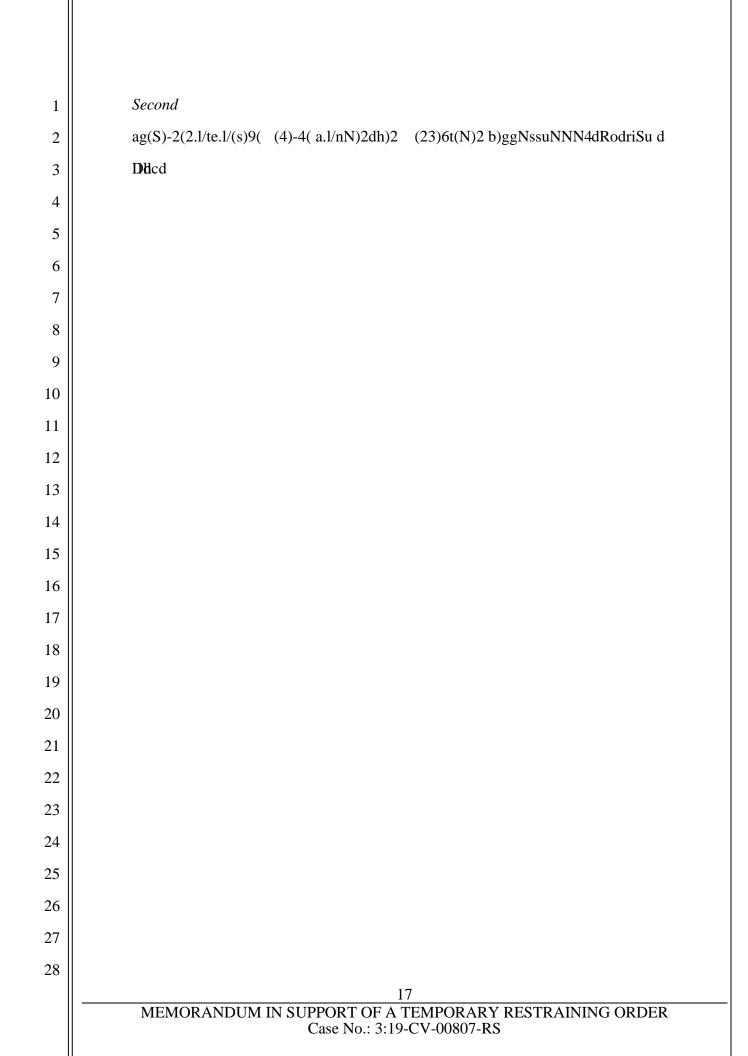
Defendant Nielsen characterized the forced return policy as a "historic measure[] to bring the illegal immigration crisis under control," Rodriguez Decl., Ex. B at 1, and has emphasized its significance.⁶ Had Defendants engaged in notice and comment rulemaking, the Organizational Plaintiffs would have submitted comments explaining why the forced return policy is unlawful and unnecessary. *See* Brown Scott Decl. ¶ 27; Cutlip-Mason Decl. ¶ 19; First Manning Decl. ¶ 26; Sanchez Decl. ¶¶ 38-40; Wolfe-Roubatis Decl. ¶¶ 33-34. Given the potentially far-reaching impact of the policy, its stark departure from longstanding agency practice, and the potentially thousands of migrants to whom the policy applies, many other stakeholders likely would have done the same.

D. The Forced Return Policy Is Arbitrary And Capricious In Violation Of The APA Because It Is Not Rationally Connected To Its Justifications.

Finally, Defendants' forced return policy is arbitrary and capricious because the policy's design is not rationally connected to its purported justifications, many of which are impermissible and belied by the facts. A policy is arbitrary and capricious in violation of the APA where the agency cannot articulate "a rational connection between the facts found and the choice made," "has relied on factors which Congress has not intended it to consider," has "entirely failed to consider an important aspect of the problem," or has "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). All three flaws apply to Defendants'

⁶ See also Hrg. on Homeland Security Oversight, Immigration & Border Security, Before the House Judiciary Cmte., Wildlife, 115th Cong. (Dec. 20, 2018) (testimony of Kirstjen Nielsen, Sec'y, Dep't Homeland Security) at minute 26:34, https://www.c-span.org/video/?456086-1/homeland-security-department-oversight#.

| 1 | policy. 1. There is No Rational Connection Between the Policy and Its Purported |
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| 2 | Justifications. |
| 3 | The asserted justifications for the forced return policy are not rationally connected with the |
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| | 16 MEMORANDUM IN SUPPORT OF A TEMPORARY RESTRAINING ORDER Case No.: 3:19-CV-00807-RS |



but Defendants' application of the forced return policy in the current context arbitrarily deprives asylum seekers of any way to meaningfully exercise that right.

2. The Agency Relied on Factors Congress Did Not Intend for It to Consider.

DHS has justified the forced return policy in part by pointing to "[m]isguided court decisions and outdated laws [that] have made it easier for illegal aliens to enter and remain in the U.S.," especially "adults who arrive with children, unaccompanied alien children, or individuals who fraudulently claim asylum." Rodriguez Decl., Ex. C at 2. Defendants may not like these court decisions and laws, but that does not change the fact that they are bound to follow them. Circumvention of court decisions and duly enacted statutes surely was not a factor that Congress intended the agency to consider when deciding to implement § 1225(b)(2)(C). Agency action intended to serve as an end run around courts and Congress is arbitrary and capricious. *Cf. Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 935 (D.C. Cir. 2008) ("To maintain two irreconcilable policies, one of which . . . apparently enables the agency . . . to circumvent the other . . . is arbitrary and capricious agency action.").

3. The Agency's Justifications for the Policy are Based on False Premises.

Finally, DHS's key justifications offered to explain the challenged policy are based on false premises and are inconsistent with the evidence before the agency.

First, the agency explained that it is instituting the forced return policy because "many" asylum seekers "disappear[] into the country before a judge denies their claim and simply become fugitives." Rodriguez Decl., Ex. C at 2. That explanation is at odds with the facts before the agency. Data from EOIR shows that between FY 2008 and FY 2018, asylum seekers who passed a credible fear interview showed up for their immigration court hearings approximately 87.5 percent of the time. *See* Reichlin-Melnick Decl. ¶ 9 (discussing EOIR data).

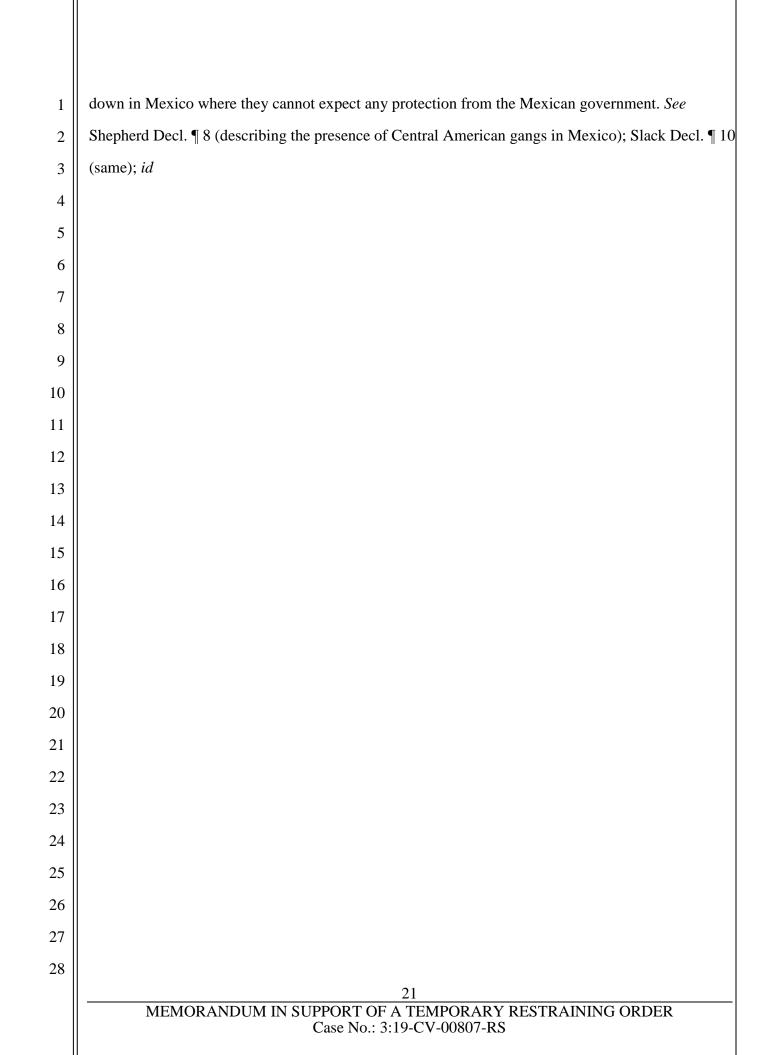
Second, the agency explained that it is instituting the policy because of an "unprecedented number of . . . fraudulent asylum claims." Rodriguez Decl., Ex. C at 1 (internal quotation marks omitted). But the assertions marshaled in support of this justification are incorrect. Asylum seekers from

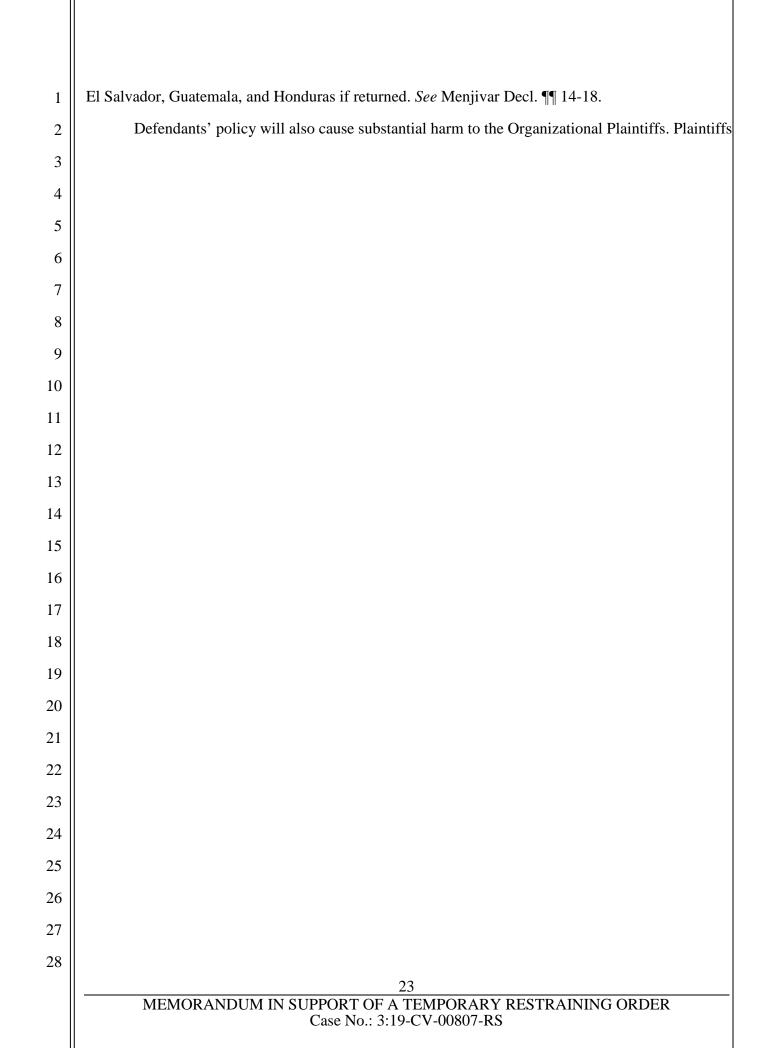
II.

THE REMAINING FACTORS TIP DECIDEDLY IN FAVOR OF GRANTING A TRO AND PRESERVING THE STATUS QUO

A. Plaintiffs Are Suffering Irreparable Harm.

Plaintiffs have experienced irreparable harm and are at significant risk of suffering additional harms as a result of Defendants' forced return policy. In Mexico, the Individual Plaintiffs have already endured physical attacks and threats at the hands of members of the Mexican government and organized criminal groups due in large part to their status as migrants. For example, members of the brutal Mexican Zetas cartel kidnapped Plaintiff Howard Doe in Chiapas and threatened to kill him and "burn" his body. ECF No. 5-10 (Howard Doe Decl.) ¶ 20. Mexican police have detained Plaintiff Ian Doe on multiple occasions, threatening a month ago to "take [him] to jail unless [he] paid a bribe." ECF No. 5-11 (Ian Doe Decl.) ¶ 24. Other Individual Plaintiffs have also been assaulted and h8pTc -0.0020.0020.0020.(nd h8pTc)4(r)-7(D)-A-uc o. - yr3re(a0020.0020.(nd h8pTc)4(r),o MEMORANDUM IN SUPPORT OF A TEMPORARY RESTRAINING ORDER Case No.: 3:19-CV-00807-RS





| 1 | notice-and-comment requirements before putting the policy into effect, the Organizational Plaintiffs |
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| 2 | would have had the opportunity to inform Defendants of their serious concerns regarding the |
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| | 24 MEMORANDUM IN SUPPORT OF A TEMPORARY RESTRAINING ORDER Case No.: 3:19-CV-00807-RS |

| 1 | CON | ICLUSION |
|----|---|---|
| 2 | For the foregoing reasons, Plaintiffs' m | otion for a TRO should be granted. |
| 3 | Dated: February 20, 2019 | Respectfully submitted, |
| 4 | Judy Rabinovitz** | /s/Jennifer Chang Newell |
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MEMORANDUM IN SUPPORT OF A TEMPORARY RESTRAINING ORDER Case No.: 3:19-CV-00807-RS

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