CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondents make the following disclosures:

1) Respondents Innovation Law Lab, Central American Resource Center of Northern California; Centro Legal de la Raza, Immigration and Deportation Defense Clinic at the University of San Francisco School of Law, Al Otro Lado, and Tahirih Justice Center do not have parent corporations.

2) No publicly held company owns ten percent or more of the stock of any Respondent.

INTRODUCTION

On January 28, 2019, the government initiated an unprecedented policy that fundamentally changed the Nation's asylum system, contrary to Congress's design and the United States' treaty obligations. Pursuant to

seekers returned to Mexico under MPP risk substantial harm, even death. App. 62a. Indeed, the U.S. State Department itself has recognized the victimization of migrants in Mexico, including kidnappings, extortion, and sexual violence. *See* Statement, *infra.*

The government argues that any change to MPP now would disrupt the status quo. Stay Appl. 37. But the government should not be able to use its own conduct over the past ten months, during which it aggressively expanded MPP while the injunction was stayed pending appeal, as a reason to obtain a further stay. Preliminary injunctions are meant to "preserve the relative positions of the parties," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), *prior to* the unlawful conduct at issue. And this case demonstrates precisely why: If the government's illegal policy had not been instituted and expanded, the government would not now be faced with the challenge of how to remedy the situation of people who were unlawfully returned to Mexico.

In any event, by its plain language, the injunction does not provide a right of re-entry to individuals who were returned to Mexico, except for the Individual Plaintiffs. *See* App. 130a n.14, 131a. Even were others to request re-entry once the injunction takes effect, such requests would be short-lived once it becomes apparent that individuals are not being granted entry. And if the government views the injunction as ambiguous on this point, nothing prevents it from asking this Court to clarify that the injunction provides no right of re-entry, or to stay the injunction to the extent that it somehow does so.

Finally, there is no basis for narrowing the scope of the injunction to the Individual Plaintiffs and the Plaintiff Organizations' known clients, as the government proposes. *See* Stay Appl. 38-40. The Administrative Procedure Act ("APA") authorizes courts to "set aside" unlawful agency policies. *See* 5 U.S.C. § 706(2). The

Recognizing that many individuals who lack valid entry documents are *bona fide* asylum seekers, Congress created an exception to expedited removal for those who could establish a "credible fear" of persecution or torture. Individuals who express a fear of persecution or torture are referred to an asylum officer for a credible fear interview to assess whether they have potentially meritorious asylum claims. *See* §§ 1225(b)(1)(A)(i), (ii). If they make that showing, they are placed into regular removal proceedings under § 1229a. *See* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

those proceedings. Suppl. App. 1a. The policy applies to nationals of any country except Mexico who arrive in or enter the United States from Mexico "illegally or without prior documentation." *Id.* MPP thus creates a forced return policy for asylum seekers who previously would have been entitled to remain in the United States pending their removal proceedings.

In official memoranda, the government stated that the forced return policy must be implemented "consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees ["Refugee Convention"] . . . and Article 3 of the Convention Against Torture ["CAT"]." Suppl. App. 6a, 3a. Nonetheless, the procedure the government created for meeting this obligation consists of a single interview by an asylum officer—held within days, if not hours of the individual's encounter with Customs and Border Protection ("CBP"). At that interview, the asylum officer determines if the individual is more likely than not to face persecution or torture in Mexico. This is the *ultimate* standard applied in full § 1229a removal proceedings, which—unlike the fear interview—include a panoply of procedural safeguards. These include the right to consult with and be represented by counsel, the right to a decision by an immigration judge, and the right to appellate review. *See, e.g.*, 8 U.S.C. §§ 1229a(b)(4) (right to consult an attorney and review evidence), (c)(1) (right to a decision by an immigration judge), (c)(5) (right to appeal that decision, and to be notified of this right). In contrast, MPP fear interviews contain none of these basic safeguards. Suppl. App. 7a. Moreover, individuals are referred for that interview

only if they affirmatively express a fear of return to Mexico during processing: CBP officers do not advise them of the possibility of a fear interview or even tell them that they will be sent to Mexico if they do not ask for an interview and prove their case. *Id.*; *see also id.* at 567a (*amicus* brief of asylum officers' union, noting fear of persecution in Mexico is something most asylum seekers "would not volunteer when being apprehended at the border"); *id*. at 12a-16a, 22a-

Mexico Travel Advisory (Dec. 17, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (State Department advisory issuing a "Level 4: Do Not Travel" for Mexican border state of Tamaulipas—the same threat level as active war zones as well as China due to the COVID-19 outbreak); Suppl. App. 603a-13a (*amicus* brief of international human rights organizations explaining the dangers for migrants forced to remain in Mexico); *id.* at 661a-64a (*amicus* brief documenting cases of individuals returned to danger). Indeed, the U.S. State Department itself has recognized the "victimization of migrants" in Mexico "by criminal groups and in some cases by police, immigration officers, and customs officials," including kidnappings, extortion, and sexual violence. *See* U.S. State Dep't, Mexico 2018 Human Rights Report at 19-20 (Mar. 2019) *available at* https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf (hereinafter "2018 State Dep't Report") (noting spread of Central American gangs to Mexico and resulting threat to "migrants who had fled the same gangs in their home countries.").

In the months since MPP has been in effect, reports of murder, rape, torture, kidnapping, and other violent assaults against returned asylum seekers have climbed. *See* Human Rights First, Delivered to Danger, *available at* https://www.humanrightsfirst.org/campaign/remain-mexico (last visited March 9, 2020) (reporting, as of February 28, 2020, "at least 1,001 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults" against migrants in MPP). Asylum seekers face extreme harm from Mexican cartels, corrupt

government officials, and the same Central American gangs that many fled their home countries to escape; they also face anti-migrant hostility that has been fueled by the increased numbers of people being returned. *See* 2018 State Dep't Report at 7, 9, 19-20, 27, 33, 35; Suppl. App. 68a-69a, 90a, 103a-106a, 113a-114a, 42a-46a, 127a-28a, 133a-35a, 142a, 148a-53a, 158a, 173a-74a, 199a-200a, 672a-73a.

People forcibly sent to Mexico also face a daily struggle to survive. They must find places to live, and means of support, in border regions where the few shelters and support services are already well beyond capacity, and where migrants lack any support network of their own. *See, e.g.*, Suppl. App. 218a-19a, 228a. Few have permission to work, and even those who do are often too afraid to go out and seek it. *See, e.g.*, *id.* at 238a, 248a, 257a.

5. MPP has resulted in an exceptionally low rate of asylum grants—less than one percent—and an exceptionally high number of *in absentia* removal orders when compared to asylum seekers allowed to seek protection from within the United States. Suppl. App. 681a-83a. This data strongly suggests that MPP has prevented thousands of *bona fide* asylum seekers from obtaining protection. No evidence establishes that "illegal immigration and false asylum claims" have declined as a result of MPP, or that MPP is "assisting legitimate asylum seekers." *Id.* at 44a; *see also id.* at 677a-79a (explaining how decreased migrant flows are attributable more to the Mexican government's stepped up enforcement on its southern border than to MPP).

The forced return policy has overwhelmed Mexican border communities unable to receive tens of thousands of asylum seekers. Suppl. App. 672a-73a (declaration of former Mexican ambassador to the U.S. explaining the Mexican government's inability to cope with the influx of migrants); *id.* at 527a-32a (*amicus* brief of former U.S. officials explaining the same).

6. Plaintiffs are organizations serving migrants, and individuals who fled death threats and violence in their home countries, only to be returned to Mexico when they attempted to seek asylum in the United States. *See* Suppl. App. 211a-89a (plaintiff declarations).

On April 10, 2019, the district court granted a preliminary injunction against MPP. App. 131a. The district court found that the Individual Plaintiffs had made an "uncontested" showing that they "fled their homes" to "escape extreme violence, including rape and death threats," and faced "physical and verbal assaults" in Mexico. *Id*. at 128a. It further found that the Plaintiff Organizations had shown "a likelihood of harm" to "their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers." *Id.* The court thus held Plaintiffs were "likely to suffer irreparable harm" if the policy continued. *Id.*

The district court enjoined the government from "continuing to implement or expand" MPP, and ordered the government to "permit the named individual

"determine[] if any individuals" already returned to Mexico under MPP, "other than those appearing as plaintiffs in this action, should be offered the opportunity to re-enter the United States." *Id*. at 130a n.14.

7. The district court delayed the injunction's effect to allow the government to seek a stay pending appeal, App. 130a, which the court of appeals motions panel granted on May 7, 2019. *Id.* 85a. The motions panel issued three opinions, including a lengthy opinion from Judge Fletcher concurring "only in the result." App. 89a. In their per curiam opinion, Judges O'Scannlain and Watford stated that Plaintiffs were unlikely to prevail on their claim that MPP violates the contiguous-territory-return statute or on their notice-and-comment claim—the only two claims they said could justify the injunction "in its present form." *Id*. at 81a-85a.

The per curiam opinion did not address Plaintiffs'

under the [APA]." *Id*. at 87a (Watford, J., concurring). In particular, Judge Watford found the fact that "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country" to be a "glaring deficiency" that was "virtually guaranteed to result in . . . applicants being returned to Mexico in violation of the United States' *non-refoulement* obligations." App. 87a-88a. Thus, he "expect[ed] that appropriate relief . . . [would] involve (at the very least) an injunction directing DHS to ask applicants for admission whether they fear being returned to Mexico." *Id.* at 88a–89a.

Judge Fletcher wrote separately to express his strong disagreement with the majority's analysis of the contiguous-territory-return provision. *Id*. at 89a-104a (Fletcher, J., concurring only in the result).

8. The court of appeals affirmed the district court's injunction on February 28, 2020. *Id*. at 14a. As a threshold matter, the merits panel held it was not bound by the motions panel's legal analysis, because "[s]uch a decision by a motions panel is 'a probabilistic endeavor,' 'doctrinally distinct' from the question considered by the later merits panel, and 'issued without oral argument, on limited timelines, and in reliance on limited briefing.'" *Id.* at 32a. (citations omitted).

The panel concluded that Plaintiffs had "shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with 8 U.S.C. § 1225(b)." *Id*. at 33a. Relying on this Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the panel distinguished between applicants for admission described in § 1225(b)(1)—that is, noncitizens traveling with fraudulent

or no documents—and "other aliens" deemed inadmissible

1225(b)(2) and applies only to applicants under § (b)(2), not to applicants under § (b)(1). App. 41a.

by fraud, misrepresentation, or without valid documents—and not only those whom the agency has chosen to process under expedited removal.

Indeed, as the court of appeals further explains, the word "apply" is used twice in the provision, each time to refer to the application of the statute and not the exercise of an officer's discretion:

> The first time the word is used, in the lead-in to the section, it refers to the application of a statutory section ("Subparagraph (A) shall not apply"). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section ("to whom paragraph [(b)](1) applies"). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: it does not apply to applicants to whom § (b)(1) applies. The word is used in the same manner both times to refer to the application of subparagraph (A). The word is not used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS.

App. 44a-45a.

Third, the court of appeals correctly rejected the government's contention that when DHS exercises its discretion to put an individual in regular removal proceedings rather than expedited removal, that individual is suddenly recategorized from § 1225(b)(1) to (b)(2). "[T]he fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant or vice versa, by virtue of being placed in a removal proceeding under § 1229a." App. 40a. This follows from the plain language of the statute, which distinguishes § (b)(1) and § (b)(2) by reference to the *grounds of inadmissibility*, not the exercise of DHS officers' discretion. And contrary to the government's brief, *see* Stay Appl. 10, Plaintiffs have never "conceded"

otherwise. Plaintiffs recognize that DHS officers have discretion to place § (b)(1) applicants in removal proceedings. But they have consistently argued that the authority to do so does *not* come from § (b)(2), and that such individuals remain within the class of applicants to whom subject to § (b)(1) "applies." Suppl. App. 420a-21a.

Section 1229a(a)(2) authorizes commencement of regular removal proceedings against *any* noncitizen who is potentially removable for any ground—including noncitizens inadmissible based on the two grounds specified in § 1225(b)(1). Moreover, the government's position that individuals who are put into regular removal proceedings necessarily fall under § 1225(b)(2), not § 1225(b)(1), ignores that § 1225(b)(1) itself encompasses individuals who are placed in regular removal proceedings after passing a credible fear interview. *See* § 1225(b)(1)(B)(ii) (individuals who pass credible fear "shall be detained for further consideration of the application for asylum"); 8 C.F.R. § 208.30(f) ("further consideration" shall be in the form of full removal proceedings under § 1229a). *See also Matter of M-S-*, 27 I.&N. Dec. 509, 515 (A.G. 2019) (noncitizens "who are originally placed in expedited proceedings and then transferred to full proceedings after establishing a credible fear," remain part of the class of noncitizens to whom § 1225(b)(1) applies).

The government's position also directly conflicts with the BIA's decision in *Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520 (BIA 2011), which upheld the government's prosecutorial discretion to initiate regular removal proceedings against individuals subject to § 1225(b)(1). *Id.* at 523. Notably, the BIA stated that

appeals explained, the term "remove" as used in § 1231(b)(3) encompasses both deportations and returns. *See* App. 51a-52a.

The history of the withholding provision undermines the government's purported distinction. The United States' *non-refoulement* obligation arises under the 1951 and 1967 United Nations Protocols Relating to the Status of Refugees. Paragraph one of Article 33 of the 1951 Convention, entitled "Prohibition of expulsion or return ('refoulement')," provides:

> No Contracting State shall *expel or return* ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Protocol Relating to the Status of Refugees art. 33, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276 (binding Unit

shall not *deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country" on account of a protected ground. 8 U.S.C. § 1253(h)(1) (1980). In 1996, Congress amended this provision to adopt

First, the court of appeals

a protected ground in Mexico" and argue that Plaintiffs merely complain of "ordinary criminal conduct" Stay Appl. 29-30. But the unrefuted evidence established that Plaintiffs were targeted on account of their nationality and other protected grounds, by both private parties and government officials. *See, e.g.,* App. 54a. (Gregory Doe describing tear gas thrown into shelters holding asylum seekers and threats directed to Hondurans); *id*. at 55a (Christopher Doe repeatedly questioned and threatened with arrest by Mexican police and assaulted and robbed by Mexican citizens because of his Honduran nationality); App. 55a-56a (Howard Doe robbed at gun point by men who identified him as Honduran); App. 54a-55a. (describing groups in Mexico throwing stones at asylum seekers). *Accord* Suppl. App. 660a (*amicus* explaining that "criminal actors often work in collaboration with Mexican law enforcement and migration officials to target asylum seekers"); *id.* at 606a-08a (*amicus* reporting accounts of kidnap and rape by federal police in Mexico and attempted kidnapping of tender-age children); *id*. at 605a

In short, as the court of appeals found, the "evidence in the record is enough—indeed, far more than enough" to show that the government's "speculations" regarding the likelihood of non-Mexican asylum seekers experiencing harm in Mexico "have no factual basis." App. 60a; *see also id*. (citing amicus briefs and news accounts as supporting Plaintiffs). Indeed, the U.S. State Department itself has recognized the "victimization of migrants by criminal groups and in some cases by police, immigration officers, and customs officials"

In any event, this concern is unfounded because the preliminary injunction does *not* require the immediate re-entry of individuals currently in Mexico pursuant to MPP.

The district court's plain language provides that:

> Within 2 days of the effective date of this order, defendants shall permit *the named individual plaintiffs* to enter the United States. At defendants' option, any named plaintiff appearing at the border for admission pursuant to this order may be detained or paroled, pending adjudication of his or her admission application.

App. 131a (emphasis added).

The district court further explained that:

> [w]hile the injunction precludes the "return" under the MPP of any additional aliens . . . nothing in the order determines if any individuals, other than those appearing as plaintiffs in this action, should be offered the opportunity to re-enter the United States . . . .

App. 130a n.14 (emphasis added).

Thus, the injunction prohibits the government only from returning asylum seekers to Mexico—for example, when they first arrive in the United States, or, for those individuals already in MPP, when they have been allowed into the United States for their hearings in immigration court. Apart from the named plaintiffs, the injunction does not provide any right to "re-enter." As such, the injunction contemplates an orderly unwinding of MPP—and not the rush on the border that the government fears. To the extent there is any confusion on this point, this Court can of course reiterate and underline the limited scope of the injunction in denying the stay.

For the same reason, the government is wrong when it asserts that the preliminary injunction will overwhelm the immigration detention system. *See* Stay Appl. at 34-35. The government provides no support for its assertion that current detention space, unburdened by previous levels of migration at the southern border,

event, CBP is equipped to handle any such temporary increases in the number of migrants who present at ports of entry. *See* Suppl. App. 686a (former CBP Commissioner explaining that the agency is "better-resourced" than in the past when it handled larger influxes). Citing anecdotal evidence, the government claims that the injunction, even as limited to the Ninth Circuit, will encourage migrants to travel to Arizona and California to avoid being placed in MPP. Stay Appl. 33 (citing App. 139a-140a). The government's assertions are speculative and lack specific data to support them, and moreover ignore the dangers that migrants would face in traveling west thousands of miles to attempt entry within the Ninth Circuit. Suppl. App. 687a.

2. The government claims that MPP has deterred asylum seekers from coming to the United States to make "baseless" asylum claims and abscond into the interior. *See* Stay Appl. 32-33. But the government has *never* established that most asylum seekers at the southern border raise "baseless" claims or pose flight risks. *See* Suppl. App. 451a, 452a. Nor is MPP tailored to address this problem; it targets individuals without regard to the merits of their asylum claims or their flight risk. *See id.*; *see also* Suppl. App. 686a (former CBP Commissioner noting that MPP appears to deter "all asylum applicants—even those with legitimate claims for protection"). The government surely has no interest in deterring *bona fide* asylum seekers. Indeed, "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of

themselves. Stay Appl. 36. But the government has never established that asylum seekers placed in MPP pose a threat to communities in the United States. And it is *MPP* that has created a humanitarian crisis on Mexico's northern border, putting asylum seekers in harm's way, increasing the burden on local Mexican cities, and triggering an increase in nativism and xenophobia. *See* Suppl. App. 672a, 673a (former Mexican Ambassador, noting that cities and states that faced security concerns prior to MPP "are now strained to provide even basic care and safety to migrants"). If anything, enjoining MPP may lessen the burden on these border cities, by preventing additional migrants from being returned there.

4. Because the government fails to show either a likelihood of success or irreparable injury, the Court need not "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. In any event, whatever harms the government may suffer are dramatically outweighed by the harms that MPP will inflict on Plaintiffs and the public if it is allowed continue.

As the court of appeals found, "[u]ncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum." App. 62a. The Plaintiff Organizations will also suffer serious harm if a stay is entered. They have already had to divert significant resources to restructuring their programs, which impairs their ability to carry out their core objectives of providing life-saving representation to asylum seekers. *See* Supp App. 449a; *see also id*. at

33a, 34a, 276a, 284a, 312a, 313a); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (recognizing injury based on diversion of resources); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (same).

Finally, the government wrongly claims that the "status quo" is one where MPP is operative. Stay Appl. 37. The fact that, because of a prior stay, the government was able to operate a policy that has been enjoined as likely unlawful, that radically departs from the government's historical practice, and that endangers the lives of asylum seekers does not somehow render MPP the status quo. The government should not be able to use the existence of a prior stay as a reason for a further stay. Preliminary injunctions are meant to "preserve the relative positions of the parties," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), *prior to* the unlawful conduct at issue, and "prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). The preliminary injunction in this case falls squarely within those traditional limits.

III. THE COURT SHOULD NOT NARROW THE SCOPE OF THE INJUNCTION.

A stay is also not warranted by the scope of the preliminary injunction, which the district court carefully tailored and the Ninth Circuit further limited geographically. A long line of cases from this Court and lower courts recognize that relief under the Administrative Procedure Act ("APA") may include setting aside a challenged policy. The district court's injunction is consistent with ordinary

principles of equity because it is necessary to address the organizational Plaintiffs' injuries.

1. The district court crafted its order to avoid broadly interfering with immigration enforcement by providing no right to re-enter the United States to asylum seekers already sent to Mexico under MPP. *See* App. 130a n.14. The Ninth Circuit then limited that carefully-tailored injunction to its own boundaries. In sum,

result is that the rules are vacated . . . .'") (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495, n.21 (D.C.Cir.1989)).

> [Where] the 'agency action' [] consists of a rule of broad applicability . . . the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff . . . may obtain 'programmatic' relief that affects the rights of parties not before the court.

Lujan v. Natl Wildlife Fedn, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting but apparently expressing the view of all nine Justices on this question); *see also Natl Mining Assn*, 145 F.3d at 1409.[4] The government does not explain why MPP should not be "set aside" as a matter of ordinary APA relief.[5]

2. Ordinary principles of equity also support the injunction's scope is necessary to redress the Plaintiff Organizations' injuries. The Plaintiff Organizations challenge *their own*

identification, and screening of potential asylum seeker clients in Mexico. Relief

program to continue, but rather to prevent enforcement of MPP anywhere on the U.S.-Mexico border.

The government's argument proves too much. By its logic, a stay would be warranted whenever a federal appellate court enjoins a national immigration enforcement policy within its jurisdiction. Under the government's view, any such decision would incentivize noncitizens to attempt to migrate to parts of the country covered by the injunction. But appellate courts are surely empowered to determine the lawfulness of federal enforcement programs within their own jurisdictions. The fact that such decisions may affect migration patterns cannot be a basis for a stay.

CONCLUSION

The application should be denied.

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