

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NORA and her minor son, JOSE, *et al.*)
)
)
 Plaintiffs,)
 v.)
)
 CHAD F. WOLF, *et al.*)
) No. 1:20-cv-00993-ABJ
 Defendants.)
)
)
)

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

This preliminary injunction motion seeks immediate relief for asylum seekers who are unlawfully trapped in life-threatening conditions in one of the most violent regions of the world. Plaintiffs are asylum seekers—12 adults and 14 minor children—who fled violence and other persecution in their home countries in Central or South America, and sought refuge in the United States. Instead of allowing them to pursue their asylum applications from the safety of the United States, the Department of Homeland Security (“DHS”) sent them back across the border to the notoriously dangerous Mexican border state of Tamaulipas, where they have been forced to wait for months, and are continuing to wait, until their immigration proceedings are completed. Asylum seekers in Tamaulipas are routinely targeted for kidnapping, rape and other violent crimes on account of their non-Mexican nationality and other grounds. All Plaintiffs have been subjected to such abuse and live in fear for their lives.

Absent this Court’s intervention, Plaintiffs will suffer irreparable harm by being forced to remain in Tamaulipas. Indeed, each of the Plaintiffs has already suffered irreparable harm. Plaintiff Nora¹ was kidnapped and repeatedly gang raped in front of her three-year old son. Plaintiff Jonathan was kidnapped and subjected to physical torment and psychological abuse, [REDACTED]. Plaintiff Fabiola and her children were kidnapped once and then narrowly escaped kidnapping twice. Fabiola was so fearful for her children’s safety that she sent them alone to enter the United States. Plaintiff Ernesto has been extorted and assaulted on a regular basis because he is both a foreigner and gay. Plaintiff Emilia and her two daughters were

¹ Pursuant to this Court’s Order dated April 16, 2020, Plaintiffs are identified by pseudonyms in order to protect their identities. ECF No. 2. Plaintiffs’ declarations and psychological evaluations have been filed under seal because certain details of their experiences may also reveal their identities and expose them to further danger in Mexico and their countries of origin.

kidnapped, and she and the elder daughter were repeatedly gang raped. Plaintiff Laura, her husband Joseph, and their two young children have been kidnapped, assaulted, and told they would be killed if they tried leaving Nuevo Laredo, a city in Tamaulipas. Plaintiff Diana's daughter, Wanda, was brutally raped and then nearly kidnapped from the migrant tent camp where they are forced to reside. Plaintiff Jessica and her sons were kidnapped and starved for 33 days. Plaintiff Henry and his daughter Carolina were repeatedly extorted and threatened with death, even after seeking help from Mexican authorities. Plaintiff Armando was kidnapped by cartel members who forced him into labor and threatened to traffic his three-year-old son. Plaintiff Carmen was—on two separate occasions—kidnapped and raped in front of her five-year-old daughter and infant son. Plaintiffs have all received credible death threats.

Defendants were fully aware of the extraordinary levels of violence that Plaintiffs, and other asylum seekers, would face when returned to Tamaulipas—a region that has long been recognized as one of the most violent and lawless in the world. For years the U.S. Department of State (“State Department”) has issued a Level 4 travel alert for Tamaulipas, instructing Americans not to travel there. This is the highest-level travel alert, assigned to active conflict zones like Iraq, Syria, and Afghanistan. Moreover, all of the Plaintiffs disclosed or attempted to disclose their fears of remaining in Mexico to U.S. immigration officials. Yet despite being aware of the persecution and torture Plaintiffs had already suffered in Mexico, and the continuing threats they face, Defendants returned each of the Plaintiffs to Mexico—in most cases, multiple times.

Plaintiffs were returned to Mexico pursuant to DHS's so-called “Migrant Protection Protocols” (“MPP”), and DHS's expansion of MPP to the Mexican state of Tamaulipas (“MPP-Tamaulipas”). Under MPP, the agency returns to Mexico certain asylum seekers who arrive at the United States' southern border and requires them to remain there pending adjudication of their

U.S. immigration cases. Under MPP-Tamaulipas, Plaintiffs must report for their immigration hearings at U.S. ports of entry bordering Tamaulipas, forcing them to reside in or repeatedly travel through the dangerous state. Plaintiffs' hearings have recently been postponed in light of the coronavirus pandemic, even as they continue to be subject to life-threatening conditions. Plaintiffs challenge Defendants' actions on three grounds.

First, they challenge Defendants' decision to expand MPP to the Mexican state of Tamaulipas—the basis for each Plaintiff being returned there—as arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). When DHS first announced MPP in December 2018, the agency emphasized that under MPP “vulnerable populations will get the protection they need while they await a determination in Mexico,” and more attention could focus on “assisting legitimate asylum-seekers.”² Yet seven months later, in July 2019, Defendants expanded MPP to return asylum seekers to Tamaulipas—despite knowing that conditions in Tamaulipas rendered both of those assurances utterly implausible and subjected bona fide asylum seekers to grave danger. *See* Argument, Part I, *infra*.

Second, for similar reasons, Defendants' decision to subject Plaintiffs to MPP-Tamaulipas violates Plaintiffs' due process rights to physical safety from state-created danger. Defendants returned Plaintiffs to Tamaulipas with, at a minimum, deliberate indifference to the known and obvious violence they face there. Defendants' actions increased or *created* a situation of danger for returned asylum seekers like Plaintiffs, forcing them into an extraordinarily dangerous region, where they are both captive and readily identifiable targets for criminal groups that Mexican authorities cannot and/or are not willing to control. Defendants have blatantly ignored or refused

² Decl. of Darlene Boggs (“Boggs Decl.”), Ex. 1 (U.S. Dep’t of Homeland Sec., Press Release, Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, Dec. 20, 2018) (“2018 DHS Press Release”).

to hear warnings of the dangers in Tamaulipas—and continue to do so—repeatedly sending Plaintiffs into harm’s way. This conduct shocks the conscience. *See* Argument, Part II, *infra*.

Third, Defendants’ decisions to return each of the Plaintiffs to Tamaulipas were unlawful for the independent reasons that they violated Defendants’ own rules and were arbitrary, capricious, and contrary to law. MPP prohibits the return to Mexico of individuals who are likely to face persecution or torture there, and mandates certain procedures and standards for making those determinations. Under those standards, as set forth in agency regulations, a showing of past persecution establishes a presumption that an individual will face a likelihood of future persecution. And, a showing of a pattern or practice of persecution against a particular group, coupled with a showing of membership in that group, likewise establishes a likelihood of future persecution. Yet, despite evidence of both, Defendants returned Plaintiffs to Tamaulipas, failing to follow their own procedures and standards. For similar reasons, the decisions to return Plaintiffs were arbitrary, capricious, and contrary to law because they were contrary to the evidence of future persecution before the agency. *See* Argument, Part III, *infra*.

Plaintiffs satisfy all requirements for preliminary injunctive relief. This Court should order Defendants to promptly return Plaintiffs to the United States and allow them to continue to pursue their removal proceedings from within the United States during the pendency of this litigation.

FACTUAL BACKGROUND

A. Defendants’ Adoption and Expansion of MPP.

For decades, individuals applying for asylum at the southern border remained in the United States while their claims for asylum and other protection were adjudicated in removal proceedings. However, on December 20, 2018, DHS announced an “unprecedented” change: MPP. Boggs Decl., Ex. 1 (2018 DHS Press Release). Under MPP, DHS would require 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.* at 1. According to DHS, MPP was intended to deter migrants seeking to “game the system” from making “false” asylum claims at the border, while also ensuring that “[v]ulnerable populations receive the protections they need while they await a determination in Mexico.” *Id.* at 1-3. DHS claimed that MPP would “strengthen our humanitarian commitments” by “allow[ing] us to focus more attention on those who are actually fleeing persecution.” *Id.* at 1.

DHS issued documents detailing the terms of MPP through its components U.S. Customs and Border Protection (“CBP”), U.S. Citizenship and Immigration Services (“USCIS”), and U.S. Immigration and Customs Enforcement (“ICE”). Boggs Decl., Ex. 2 (USCIS, Policy Memorandum, PM-602-0169, Jan. 28, 2019) (“USCIS Memo”); *id.*, Ex. 3 (CBP, Memorandum from Kevin K. McAleenan, Commissioner, Implementation of the MPP, Jan. 28, 2019) (“McAleenan Memo”); *id.*, Ex. 4 (ICE Policy 11088.1, Implementation of the MPP, Feb. 12, 2019) (“ICE Memo”); *id.*, Ex. 5 (CBP, Enforcement Programs Division (HQ), Guiding Principles for MPP, Jan. 28, 2019) (“MPP Guiding Principles”) These documents (collectively, MPP’s “terms” or “rules”) lay out requirements for screening migrants to determine whether to apply MPP.

Critically, in recognition of the United States’ obligation under both domestic and international law not to return individuals to places where they are likely to face persecution or torture (“nonrefoulement obligation”)—the MPP terms exempt from MPP “any alien who is more likely than not to face persecution or torture in Mexico.” Boggs Decl., Ex. 5 at 1 (MPP Guiding Principles). If an individual affirmatively states fear of being returned the Mexico, the CBP officer must refer that individual to a USCIS asylum officer for a fear screening, also known as a “nonrefoulement interview” (“NRI”). *Id.* at 1-2. If the asylum officer determines that

a migrant is “more likely than not” to be persecuted or tortured in Mexico, the migrant “may not be processed for MPP.” *Id.* at 2. The “more likely than not standard,” which applies to NRI fear determinations, is “the same standard” set forth in the regulations governing “withholding of removal and CAT protection determinations.” Boggs Decl., Ex. 2 at 2 (USCIS Memo).

Individuals placed into MPP are put in 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. Boggs Decl., Ex. 5 at 2 (MPP Guiding Principles). When the hearing date arrives, they must return to their assigned port of entry, where they are processed by 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. *Id.* This process continues for as many hearings as necessary to conclude the individual’s immigration proceedings, including through the appeals process. *Id.* Thus, aside from on the dates of their hearing, asylum seekers are forced to wait in Mexico at least six months, not including time for any appeal. Decl. of Denise Gilman (“Gilman Decl.”) ¶¶ 29-32.

In January 2019, DHS, through then-CBP Commissioner Kevin McAleenan, announced that DHS would begin implementing MPP at the San Ysidro port of entry in San Diego, California, and that expansion to other ports of entry and border areas was anticipated “in the near future.” Boggs Decl., Ex. 3 (McAleenan Memo).³ DHS later expanded MPP to additional ports of entry in

³ Soon thereafter, a group of individuals and organizations affected by MPP filed a lawsuit challenging the policy on multiple grounds. *See Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019). In February 2020, the Ninth Circuit upheld a preliminary injunction against MPP as a whole, but in March, the Supreme Court stayed that decision, pending the government’s petition for certiorari. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *stay granted*, - - S. Ct. ---, 2020 WL 1161432 (U.S. Mar. 11, 2020). Plaintiffs’ claims for a preliminary injunction are distinct from those in the other case because, unlike in *Innovation Law Lab*, Plaintiffs challenge the July 2019 decision to extend MPP to Tamaulipas, not the 2018 decision to create MPP generally.

March 2019. Boggs Decl., Ex. 6 (*Innovation Law Lab v. Nielsen*, Case No. 3:19-cv-00807, Dkt. No. 58 (N.D. Cal. Mar. 18, 2019); *id.*, Dkt. No. 69 (N.D. Cal. Apr. 2, 2019)).

On June 7, 2019, a joint declaration issued by the State Department and the Mexican government announced that the United States would “immediately expand the implementation of the existing Migrant Protection Protocols across its entire Southern Border.” Boggs Decl., Ex. 7 at 1 (Office of the Spokesperson, Washington, DC, Media Note, U.S.-Mexico Joint Declaration, U.S. Dep’t of State, Jun. 7, 2019). And in July 2019, DHS began applying MPP to Tamaulipas.⁴ Decl. of Stephanie Leutert (“Leutert Decl.”) ¶ 28.

Under MPP-Tamaulipas, DHS returns to Tamaulipas, Mexico, certain individuals who present themselves at ports of entry in Texas, including in Laredo, McAllen, and Brownsville—as well as individuals who enter without inspection near these ports. Gilman Decl. ¶¶ 22-23. DHS requires these individuals to remain in Mexico pending their removal hearings, which are scheduled in U.S. immigration courts at the ports of entry in Laredo or Brownsville. *Id.* ¶¶ 29-32. In order to gain entry to the United States for their hearings, they must appear and line up at the bridges that connect the Mexican cities of Nuevo Laredo and Matamoros, in Tamaulipas, with Laredo and Brownsville, respectively. *Id.* ¶¶ 26-27. If they fail to show up for their hearings, they are ordered removed. *Id.* ¶¶ 33, 46, 48.

B. Dangers Facing Migrants in Tamaulipas Are Extreme and Widely Recognized.

DHS expanded MPP to Tamaulipas even though Tamaulipas is one of the most dangerous places in the world. At the time of this expansion to Tamaulipas, the State Department had long

⁴ Boggs Decl., Ex. 8 (Camilo Montoya-Galvez, *U.S. Will Now Return Asylum Seekers to One of Mexico’s Most Dangerous Areas*, CBS News, Jul. 19, 2019).

recognized the extreme levels of violence in Tamaulipas, the targeting of migrants, and the inability of Mexican authorities to provide protection.

Indeed, since early 2018, Tamaulipas has been under a “Level 4: Do Not Travel” advisory from the U.S. State Department. Leutert Decl. ¶ 26. This is the Department’s highest level of warning, assigned to active-combat zones like Afghanistan, Iraq, and Syria. *Id.* Until recent travel restrictions due to the coronavirus pandemic, Tamaulipas was the only Mexican border state with such a high travel advisory. *Id.* The advisory warns:

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.

Boggs Decl., Ex. 9 at 13 (U.S. Dep’t of State, Mexico Travel Advisory, Apr. 9, 2019) (“April 2019 Mexico Travel Advisory”).⁵ Because of the extraordinary danger in Tamaulipas, the travel advisory has 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 have been 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.*

The gravity of the danger associated with a Level 4 travel advisory is further highlighted by the State Department’s instructions that anyone who nevertheless travels to high-risk areas like

⁵ The most recent State Department travel advisory repeats this classification level and warning, issued December 17, 2019, has continued to assign Tamaulipas a “Level 4” warning and similarly warns of dangers discussed in the April 2019 travel advisory. *See* Boggs Decl., Ex. 10 (U.S. Dep’t of State, Mexico Travel Advisory, Dec. 17, 2019).

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.⁶

Similarly, in April 2019, the State Department's Overseas Security Advisory Council, which traces the overseas security environment through the help of the U.S. private sector, described Nuevo Laredo and Matamoros, and Tamaulipas as a whole, as extraordinarily dangerous. The Council's Crime and Safety Report 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. 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). The Report also highlighted dangerous trends of 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. *Id.* 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. 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).

These travel advisories and reports are consistent with years of State Department country reports documenting extreme violence in Tamaulipas, as well as and the targeting of migrants by state and non-state actors in Mexico as a whole. *See, e.g.*, Boggs Decl., Ex. 14 at 4-5 (U.S. Dep't of State, Mexico 2018 Human Rights Report, Mar. 13, 2019) (reporting on the 2018 disappearance of 23 individuals by Mexican security forces in Nuevo Laredo and complaints of cruel, inhuman,

⁶ Boggs Decl., Ex. 11 (U.S. Dep't of State, High-Risk Area Travelers, last updated Nov. 6, 2019).

or degrading treatment and torture by law enforcement and other actors in Tamaulipas); *id.*, Ex. 15 at 1, 4 (U.S. Dep’t of State, Mexico 2017 Human Rights Report, Apr. 20, 2018) (describing “violence against migrants by government officers and organized criminal groups” as among the “most significant human rights issues” in Mexico and identifying Tamaulipas as the state with the highest numbers of missing or disappeared persons in all of Mexico); *id.*, Ex. 16 at 17 (U.S. Dep’t of State, Mexico 2016 Human Rights Report, updated Apr. 7, 2017) (describing victimization of migrants by criminal groups, police, immigration officers, and customs officials). For the last three years, the State Department has noted the spread of Central American gangs in Mexico and the resulting threat to “migrants who had fled the same gangs in their home countries.” *Id.*, Ex. 14 at 19-20; *id.* Ex. 15 at 21-22 (same); *id.*, Ex. 16 at 17 (same).

The State Department’s findings are echoed by experts on Mexico, who overwhelmingly describe Tamaulipas as a lawless state with the worst security situation of all border regions, especially for migrants. *See, e.g.*, Leutert Decl. ¶¶ 16-28 (discussing migrant victimization in Tamaulipas as a growing trend over the past decade, documented by higher rates of disappearances, kidnappings and mass graves of migrants in the state). In Tamaulipas, migrants from countries other than Mexico are targeted systematically because of their nationality and perceived vulnerability due to lack of social networks and protection. *See id.* ¶ 29; Decl. of Kennji Kizuka of Human Rights First (“HRF Decl.”) ¶¶ 12-13, 18; Decl. of Sergio Martin of Doctors Without Borders (“MSF Decl.”) ¶¶ 9-11, 24-36, 31. Mexican authorities in Tamaulipas are, at best, unable to protect migrants, and sometimes are involved in these abuses. *See* Leutert Decl. ¶¶ 50-53; HRF Decl. ¶¶ 14, 26-27, 34-35; MSF Decl. ¶¶ 20, 62-63, 65-67.

DHS was well aware of the Tamaulipas travel advisory and other country conditions reports before expanding MPP to that region. Indeed, DHS routinely disseminates information

from the State Department, including by directly linking to the State Department’s travel advisories on its website. *See* Boggs Decl., Ex. 17 (DHS, Travel Alerts, last published Sept. 24, 2015).⁷ DHS was also aware of the extreme violence in Tamaulipas from other sources. For example, advocates had apprised DHS of the dangers in Tamaulipas as well. *See id.*, Ex. 18 at 2-3 (Letter from the American Immigration Council et al. to Secretary Nielsen, Feb. 6, 2019) (noting that Tamaulipas is one of the most dangerous places in the world with a Level 4 travel advisory); *see also id.*, Ex. 19 at 1, 6 and 8 (Int’l Rescue Comm., *Needs Assessment Report, Mexico: Northern Border*, Mar. 25, 2019) (identifying Nuevo Laredo and Matamoros as among the most dangerous border crossings and reporting migrants’ heightened need for safety and protection from violence in Nuevo Laredo), *id.*, Ex. 20 at 14 (Human Rights First, *A Sordid Scheme, The Trump Admin’s Illegal Return of Asylum Seekers to Mexico*, updated Mar. 2019) (describing violent crimes committed by criminal organizations in Tamaulipas against migrants, including murder, armed robbery, kidnapping and sexual assault).

After DHS’s adoption of MPP and prior to its expansion of MPP to Tamaulipas, the Mexican government had also warned the United States that it would be too dangerous to return migrants to certain areas of Mexico, like Tamaulipas, because of the inability of the Mexican government to guarantee their safety and security. In July 2019, Mexico’s ambassador to the United States, Martha Bárcena Coqui, explained that the Mexican government was not prepared

⁷ Furthermore, DHS asylum regulations require that country conditions information be disseminated “in cooperation with the Department of State” to train DHS asylum officers, 8 C.F.R. § 208.1(b); authorize the State Department to provide “[d]etailed country conditions” to USCIS, *id.* § 208.11(b); and permit asylum officers to rely on country information from the State Department when adjudicating asylum applications, *id.* § 208.12(a). *See also* 8 U.S.C. § 1232(a)(5)(B) (“The Secretary of Homeland Security shall consult the Department of State’s Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.”).

for the expansion of MPP to Tamaulipas, because it is a region that is simply too dangerous: “[W]e recognize there are certain areas of Mexico in which the challenges of security are higher. So, that is why we have been very careful of not opening up, for example, the return in Tamaulipas” Boggs Decl., Ex. 21 at 25 (CQ Newsmaker Transcripts, CQ Roll and the Meridian International Center Holds Discussion on Trade, Immigration and Foreign Affairs, CQ Newsmaker, Jul. 18, 2019).

Notwithstanding the clear dangers that migrants would face in Tamaulipas, Defendants decided to expand MPP to create MPP-Tamaulipas.

C. MPP-Tamaulipas Exposes Returned Migrants to a Danger of Persecution and Torture in Tamaulipas, Among Other Harms.

1. Violence Against Migrants Caused by MPP-Tamaulipas.

MPP-Tamaulipas exposes returned migrants to violence in Tamaulipas by returning them to and forcing them to transit through this extraordinarily dangerous region. Specifically, it puts asylum seekers at particular risk of being targeted for kidnapping or other forms of violence in three ways. *First*, DHS officials quite literally drive such individuals into harm’s way. When individuals subject to MPP-Tamaulipas enter the United States at or near Laredo or Brownsville, Texas, DHS agents put them in vehicles and drop them off at bridges that connect these Mexican cities to the Texas ports of entry. At these locations, asylum seekers are easy, identifiable prey for cartels, and many are kidnapped within moments of their return. *See* Leutert Decl. ¶¶ 30, 33-35; HRF Decl. ¶¶ 12-13, 28; MSF Decl. ¶ 31.

Second, asylum seekers must again travel to public, easily targeted locations to obtain the humanitarian visas they need to remain in Mexico until their next hearing. Those documents are available only at Mexican immigration (“INM”) offices on or near the international bridge. Gilman Decl. ¶ 83. Asylum seekers are frequently picked off as they leave the INM offices—at times, with

the aid of corrupt INM officers. *Id.* ¶ 77; Leutert Decl. ¶¶ 33-35; HRF Decl. ¶¶ 14, 32. Indeed, one study found that 26 percent of publicly reported cases of kidnappings and attempted kidnappings took place outside the INM office on the international bridge or near the port of entry. Leutert Decl. ¶ 36.

Third, asylum seekers must expose themselves to the dangers in Nuevo Laredo or Matamoros in order to return to the United States to participate in their asylum proceedings. DHS orders individuals to report for their immigration hearings in Laredo or Brownsville. Gilman Decl. ¶ 23. Individuals must report—sometimes as early as 4:30 a.m.—by crossing the bridges that connect Nuevo Laredo and Matamoros to the ports of entry in Texas. *Id.* ¶ 50. This journey once again makes them easy targets. *Id.* ¶ 48; Decl. of Jodi Goodwin (“Goodwin Decl.”) ¶ 21; Leutert Decl. ¶ 43. Migrants are particularly vulnerable to violence and kidnapping while they are in transit and when they present themselves for their immigration hearings. Gilman Decl. ¶¶ 50-54; Goodwin Decl. ¶¶ 21, 23; HRF Decl. ¶¶ 15, 28. The State Department imposes a curfew on U.S. government employees in Nuevo Laredo and Matamoros between midnight and 6:00 a.m. because of the dangers there. Boggs Decl., Ex. 9 at 13 (April 2019 Mexico Travel Advisory). Yet asylum seekers are forced to travel through these dangerous cities at night, when they are exposed to organized groups like the cartels. Gilman Decl. ¶¶ 48, 51; Goodwin Decl. ¶ 21.

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. Leutert Decl. ¶ 44; HRF Decl. ¶¶ 15, 33; Gilman Decl. ¶ 50. Further, because asylum seekers are often targeted at bus stations, they risk kidnapping and assault in attempting to leave the cities and when returning for their hearings. Leutert Decl. ¶¶ 44-49; HRF Decl. ¶ 30. One study found that 37 percent of publicly reported kidnappings and attempted

kidnappings in Nuevo Laredo took place at a bus station. Leutert Decl. ¶ 37. Asylum seekers may also be targeted on buses between cities, as they are easily identifiable through the use of their Mexican humanitarian visas. *Id.* ¶¶ 38-39. Thus, asylum seekers are unable to safely relocate to another region, even temporarily. *Id.* ¶¶ 44-49 (highlighting cases); Gilman Decl. ¶¶ 48-52 (same); HRF Decl. ¶¶ 30, 32 (same).

Finally, once individuals report to their immigration hearings in Laredo or Brownsville, DHS repeats its cycle of putting them in danger. After their hearings, DHS sends all individuals subject to MPP-Tamaulipas back to Tamaulipas—either to Nuevo Laredo or to Matamoros. Because immigration proceedings require multiple hearings that typically occur over a period of many months, individuals are repeatedly returned to danger in Nuevo Laredo and Matamoros, and required to appear at these same locations for their subsequent hearings. HRF Decl. ¶ 10; Goodwin Decl. ¶ 10; Gilman Decl. ¶¶ 31-32, 49. Asylum seekers are kidnapped on the way to their hearings or receive *in absentia* removal orders because they are too afraid to attend their hearings. Gilman Decl. ¶¶ 48-50; Leutert Decl. ¶ 49; HRF Decl. ¶ 33.

Given the dangerous conditions in Tamaulipas, as well as the ways in which MPP-Tamaulipas makes migrants easy targets, it should come as little surprise that experts, journalists and legal practitioners have found that asylum seekers have suffered significant harms since the expansion of MPP to Tamaulipas. As of the end of March 2020, DHS had returned around 28,500 migrants to Mexico pursuant to MPP-Tamaulipas, including hundreds of children. *See* Boggs Decl., Ex. 22 (TRAC Immigration, Details on MPP (Remain in Mexico) Deportation Proceedings, Transactional Records Access Clearinghouse, through Mar. 2020); *see also* Gilman Decl. ¶¶ 62, 88; HRF Decl. ¶ 17. Large numbers of these asylum seekers have been subject to physical violence, kidnapping, sexual violence and other crimes. *See* Gilman Decl. ¶¶ 43-45 (citing study that found

80 percent of surveyed migrants in Nuevo Laredo to have suffered at least one violent incident during the first nine months of 2019); Leutert Decl. ¶¶ 29-43 (summarizing reports of violence in Matamoros, Reynosa and Nuevo Laredo); Goodwin Decl. ¶¶ 11-23 (describing targeting of migrants in Matamoros for kidnappings, extortion, rape, robbery and assault); HRF Decl. ¶¶ 11-15 (describing trends in Tamaulipas), 20-24 (same for Matamoros), 26-32 (same for Nuevo Laredo); MSF Decl. ¶¶ 27-36.

In addition to facing the extraordinarily levels of violence in Tamaulipas, asylum seekers returned to Tamaulipas are targeted because of their status as non-Mexicans and other protected grounds. HRF Decl. ¶ 10; MSF Decl. ¶¶ 9-10, 30. As described in one recent report, asylum seekers sent to Tamaulipas are like “fish in a barrel.”⁸ Kidnappings, extortion, beatings, assaults, and sexual violence against asylum seekers in Nuevo Laredo and Matamoros are so common that they have become a modus operandi for criminal groups like cartels.⁹

Mexican authorities in Tamaulipas are unable to offer migrants protection, are unwilling to do so, are willfully blind to the violence perpetrated against migrants, or are themselves perpetrators of such violence. *See* Leutert Decl. ¶¶ 50-55 (describing inability to stop cartels and gangs); HRF Decl. ¶ 11 (same); Leutert Decl. ¶ 55 (describing corruption allegations against INM officers in Nuevo Laredo); Gilman Decl. ¶ 77 (citing reports of local law authorities and immigration officials working with cartels to target migrants); HRF Decl. ¶¶ 23-24, 32 (same).

Even Mexican officials have expressed their concerns with the security situation in Tamaulipas. *See* Boggs Decl., Ex. 26 (Kevin Sieff, *When They Filed Their Asylum Claim, They*

⁸ *See* Boggs Decl., Ex. 23 (Human Rights Watch, *US Move Puts More Asylum Seekers at Risk*, Sept. 25, 2019).

⁹ *See, e.g.*, Boggs Decl., Ex. 24 (This American Life, Episode 688, *The Out Crowd*, Nov. 15, 2019); *id.*, Ex. 25 (Emily Green, *Trump’s Asylum Policies Sent Him Back to Mexico. He was Kidnapped Five Hours Later By A Cartel*, Vice News, Sept. 16, 2019).

Were Told To Wait in Mexico They Say, They Were Kidnapped, The Washington Post, Aug. 10, 2019) (reporting statement of a Mexican congressman from Tamaulipas that the lives of migrants are in danger and that the State does not have the capacity to protect them). Tamaulipas’ own communications director has recognized that “neither the municipal nor state governments have the resources” to address the rampant crime and violence. *See* Jonathan Decl., Addendum.

2. Other Harms to Migrants Caused by MPP-Tamaulipas.

The dangers in Tamaulipas have made it difficult for asylum seekers to pursue their cases. Lawyers are afraid to travel to Tamaulipas to meet with asylum seekers there, or must take extreme precautions to meet their clients. Goodwin Decl. ¶¶ 36-46; Gilman Decl. ¶¶ 34-42. As a result, less than 4.5% of those in MPP-Tamaulipas obtain representation. Gilman Decl. ¶¶ 62-68. Moreover, asylum seekers are afraid to travel to their hearings, resulting in their being ordered removed *in absentia*. Goodwin Decl. ¶¶ 21, 23; Gilman Decl. ¶¶ 62-68. Based on the most recently available statistics, of all the removal orders issued out of Brownsville and Laredo, 83 and 87 percent were *in absentia* orders, respectively out of 28,604 migrants returned to Tamaulipas between July 2019 and March 2020, over 15,900—more than half—have been ordered removed without hearings.¹⁰

MPP-Tamaulipas has also forced many migrants to survive in unsafe and unsanitary living conditions: Doctors have found the Matamoros camp to be even worse than the refugee camps

¹⁰ *See* TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, Transactional Records Access Clearinghouse (Mar. 2020), <https://trac.syr.edu/phptools/immigration/mpp/> (follow these steps: check “Measure” as “Current Status”; check “Graph Time Scale” as “by Month and Year”; select “Hearing Location” on leftmost dropdown menu; select “Hearing Attendance” on center dropdown menu; check “Hearing Attendance” on rightmost dropdown menu; click on “MPP Brownsville” in the leftmost “Hearing Location” column; in the center “Hearing Attendance” column note the values under “All” and “Not Present” for “MPP Brownsville”; click on “MPP Laredo” in the leftmost “Hearing Location” column; in the center “Hearing Attendance” column note the values under “All” and “Not Present” for “MPP Laredo” and add these to the same values for “MPP Brownsville”) (last visited May 1, 2020).

they have examined around the world, in terms of security and access to medical care. Decl. of Dr. Niyogi (“Niyogi Decl.”) ¶¶ 35-38. Conditions at the camp and the security situation are so dire that many parents have made the excruciating choice of sending their children to present at the port of entry alone, as unaccompanied minors. During the first three weeks of November 2019, more than 50 migrant children, some as young as three years old, were sent unaccompanied from Matamoros to the Brownsville port of entry,¹¹ and those numbers appear to be climbing.¹²

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

The horrors of MPP-Tamaulipas have directly affected Plaintiffs. After fleeing persecution and torture in their home countries, *all* Plaintiffs have been kidnapped or assaulted in Tamaulipas, have been threatened with death, and live in daily fear for their lives. 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; Diana Decl. ¶¶ 42-52; 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. [REDACTED] Nora Decl. ¶¶ 20-23; Carmen Decl. ¶¶ 32-36, 42-50. The Plaintiffs at the migrant camp in Matamoros live with the 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; Diana Decl. ¶¶ 42-52; Jessica Decl. ¶¶ 29, 39-40.

¹¹ Boggs Decl., Ex. 27 (Kevin Sieff, *In Squalid Mexico Tent City, Asylum Seekers Are Growing So Desperate They’re Sending Their Children Over the Border Alone*, The Washington Post, Nov. 22, 2019).

¹² Boggs Decl., Ex. 28 (Priscilla Alvarez, *At Least 350 Children of Migrant Families Forced To Remain in Mexico Have Crossed Over Alone to US*, CNN, Jan. 24, 2020).

All Plaintiffs have identified their status as migrants as the central reason for the harms perpetrated against them in Tamaulipas, and describe how other migrants, many of them Central American, have been similarly targeted for violence and torture in Tamaulipas. Nora Decl. ¶¶ 11, 45; Jonathan Decl. ¶ 13; Laura Decl. ¶¶ 15, 38-39; Fabiola Decl. ¶¶ 20-22, 37, 52; Emilia Decl. ¶¶ 10-12, 16-17; Diana Decl. ¶¶ 48-49; Ernesto Decl. ¶¶ 14, 18-19; Jessica Decl. ¶¶ 18, 29, 39; Armando Decl. ¶¶ 12, 20; Carmen Decl. ¶¶ 22, 49, 53. Additionally, a number of plaintiffs have also been targeted on account of their sexual orientation, gender, or other protected status. Declaration of C.M.O.R. ¶¶ 45-52 ([REDACTED]); Ernesto Decl. ¶¶ 20, 33 (describing persecution on account of sexual orientation); Emilia Decl. ¶ 11 (same for gender); Fabiola Decl. ¶ 76 (same); Carmen Decl. ¶¶ 33-35, 49 (same); *see also* HRF Decl. ¶¶ 10, 23-25 (describing targeting of migrants based on race, gender identity, and sexual orientation).

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. The same happened to Diana after her daughter Wanda was nearly kidnapped and they sought help from Mexican authorities. Diana Decl. ¶¶ 45, 59. 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; Diana Decl. ¶¶ 57-58; 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 has grown so desperate that she has sent her children unaccompanied to the border. Fabiola made that difficult decision in December 2019, sending 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 like Nora and Jessica have contemplated doing the same. Nora Decl. ¶ 60; Jessica Decl. ¶ 54.

All Plaintiffs have expressed their fear of return to Mexico to a U.S. immigration officer, as explained more fully in their declarations. Ernesto Decl. ¶¶ 12, 27-28; Laura Decl. ¶¶ 28, 45-48; Jonathan Decl. ¶¶ 38-41, 58-68; Jessica Decl. ¶¶ 48-50; Henry Decl. ¶¶ 28-29; Nora Decl. ¶¶ 15, 35-37; Diana Decl. ¶¶ 34, 52; Fabiola Decl. ¶¶ 30, 40-41, 59-60, 69-71; Emilia Decl. ¶¶ 22-24, 26-27; Armando Decl. ¶ 21; Carmen Decl. ¶¶ 39-40. The majority did so upon their initial contact with CBP, yet they were not referred for an NRI, as required, to determine if they could establish a likelihood or persecution or torture in Mexico and thus be exempted from MPP. Laura Decl. ¶ 28; Nora Decl. ¶ 15; Fabiola Decl. ¶ 30; Diana Decl. ¶¶ 34, 36; Ernesto Decl. ¶ 12.¹³

¹³ When Plaintiff Laura presented at the Laredo port of entry and informed CBP officer about her family's kidnapping in Nuevo Laredo, she was told that because she had not been raped, the family would be sent back to Mexico; she was not given an interview. Laura Decl. ¶ 28. Plaintiff Jessica, who had just escaped with her family from a horrific 33 days of being kidnapped and starved, was not allowed to speak at all when she was processed by CBP. Jessica Decl. ¶ 26. In the three months since Plaintiff Fabiola's desperate decision to send her children across the border without her, and as her own situation in the migrant encampment became more precarious, Plaintiff Fabiola twice went to the bridge in Matamoros and pleaded with an officer to provide safety in the United States. Fabiola Decl. ¶¶ 59-60. Both times she was turned away without an interview. *Id.* Plaintiff Diana similarly walked up to the American side of the bridge and tried to tell an officer about her fear of remaining in Matamoros; she also was simply turned away. Diana Decl. ¶ 52.

Although all of the Plaintiffs but Diana eventually received NRIs when they returned to the port of entry for a hearing, many of them were prevented from fully sharing their experiences or submitting evidence. Jonathan Decl. ¶¶ 41, 44-45, 59-68; Nora Decl. ¶¶ 36-37; Ernesto Decl. ¶ 28; Fabiola Decl. ¶¶ 41-44; Henry Decl. ¶ 30. Moreover, even after Plaintiffs described to DHS adjudicators the persecution and torture they had suffered in Tamaulipas, and the reasons for their continued fear, the adjudicators incredibly found that none of them had established the requisite fear and sent them all back to Tamaulipas again. Ernesto Decl. ¶ 20; Laura Decl. ¶ 48; Jonathan Decl. ¶¶ 44-45, 69-70; Jessica Decl. ¶ 51; Henry Decl. ¶ 30; Nora Decl. ¶¶ 38-40; Fabiola Decl. ¶¶ 40-41, 69-71; Emilia Decl. ¶ 25; Armando Decl. ¶¶ 22-24; Carmen Decl. ¶ 41.

Thus, despite their fears and the harms they have suffered, Plaintiffs remain in Tamaulipas—or must return there for their hearings. 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. And due to the current pandemic, all MPP hearings have been postponed until after June 1st, possibly longer. *See* Boggs Decl., Ex. 29 (Exec. Office for Immigration Review, EOIR Operation Status During Corona Virus Pandemic, updated April 30, 2020) (DHS “will make further determinations as necessary”), and it appears the DHS has ceased conducting NRIs at Brownsville, *see* Decl. of Thelma Garcia ¶¶ 5-7.

LEGAL STANDARD

“A party seeking a preliminary injunction must make a ‘clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest.’” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (quoting *Pursuing Am. ’s*

Greatness v. FEC, 831 F.3d 500, 505 (D.C. Cir. 2016)).

ARGUMENT

Plaintiffs are likely to succeed on the merits of their challenges to the expansion of MPP to Tamaulipas in July 2019 and the decisions to return them to Mexico. Defendants' actions are unlawful in three ways. First, Defendants' expansion of MPP to Tamaulipas was arbitrary and capricious because it lacked a reasoned explanation and is contrary to the evidence before it. *See generally* 5 U.S.C. § 706(2). Indeed, the adoption of MPP-Tamaulipas cannot be squared with Defendants' stated commitment to protecting the safety of migrants returned to Mexico under MPP and to furthering the rights of bona fide asylum seekers. Second, Defendants' actions violate Plaintiffs' due process right to be free from state-created danger. Third, Defendants' decisions to send Plaintiffs back to Mexico were unlawful because Defendants failed to follow their own rules for determining whether Plaintiffs faced a likelihood of persecution or torture in Mexico and should be exempted from MPP, and because those decisions were arbitrary, capricious, and contrary to law, in finding that Plaintiffs had failed to establish the requisite fear despite clear evidence to the contrary, in violation of the APA. Finally, Plaintiffs will continue to suffer irreparable injury without an injunction, and the balance of hardships and public interest overwhelmingly favor granting relief.

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

A. The Adoption of MPP-Tamaulipas Is Final Agency Action.

An agency action is final if it (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is an "action ... by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78

(1997) (internal quotation marks and citations omitted). The decision to expand MPP Tamaulipas satisfies both.

First, there is nothing “tentative or interlocutory” about MPP-Tamaulipas. *Bennett*, 520 U.S. at 178. Defendants’ decision to expand MPP to Tamaulipas is complete. Pursuant to that decision, DHS has been returning migrants to cities in Tamaulipas and requiring that they return through those cities for their court hearings. *See, e.g.*, Boggs Decl., Ex. 5 at 1 (MPP Guiding Principles).

Second, the decision to expand MPP to Tamaulipas determines rights and obligations or is one from which legal consequences flow. Prior to MPP-Tamaulipas, migrants who were apprehended in areas bordering Tamaulipas were allowed to remain in the United States for their removal proceedings. Boggs Decl., Ex. 1 (2018 DHS Press Release). Because of MPP-Tamaulipas, Plaintiffs were returned to Tamaulipas and are now required to report through Tamaulipas to pursue their immigration cases. *See CSI Aviation Servs., Inc. v. U.S. Dep’t of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (finding that agency action was final where it imposed “immediate and significant burden” on regulated party). Thus, the expansion of MPP to Tamaulipas is a final agency action.

B. Defendants’ Decision to Adopt MPP-Tamaulipas Is Arbitrary and Capricious.

A “reasoned explanation” is a fundamental requirement for agency action. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). Thus, “textbook example(s) of arbitrary and capricious action” include when an agency offers no plausible explanation, *Mori v. Dep’t of the Navy*, 917 F. Supp. 2d 60, 64 (D.D.C. 2013), or ignores pertinent evidence, *Aragon v. Tillerson*, 240 F. Supp. 3d 99, 110 (D.D.C. 2017). *See generally Motor Vehicle Mfrs. Ass’n of U.S., Inc. v.*

State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). For these reasons, Defendants’ decision to expand MPP to Tamaulipas is arbitrary and capricious. *See* 5 U.S.C. § 706(2).

In implementing MPP, DHS repeatedly asserted that “[v]ulnerable populations [would] receive the protections they need while they await a determination in Mexico,” Boggs Decl., Ex. 1 at 1-3 (2018 DHS Press Release); *accord id.*, Ex. 5 at 2 (MPP Guiding Principles) (same), and that MPP would “strengthen our humanitarian commitments” to *bona fide* asylum seekers, *id.*, Ex. 1 at 1; *accord* Ex. 2 at 2 (same). But with respect to Tamaulipas, as the Defendants well knew, these assurances were wholly implausible and belied by the facts. *See Burt Lake Band of Ottawa & Chippewa Indians v. Bernhardt*, --- F. Supp. 3d ----, 2020 WL 1451566, at *12 (D.D.C. Mar. 25, 2020) (concluding that agency’s action was arbitrary and capricious because it was “neither well-reasoned nor rationally connected to the facts in the record”).

For example, as Defendants knew, at the time they expanded MPP to Tamaulipas, the area was under a Level 4 State Department travel advisory, prohibiting travel to Tamaulipas because of widespread crime, including rampant kidnapping, that the Mexican government was unable to control. Other sources similarly warned DHS of the extraordinary levels of danger in Tamaulipas. *See* Background Parts A and B, *supra*. Given the extreme dangers facing migrants in Tamaulipas, Defendants could not have reasonably concluded that expanding MPP to Tamaulipas would lead to any of their promised outcomes. Rather, it was obvious that the consequences of expanding MPP to Tamaulipas would be the opposite of their stated goals, would place migrants in significant danger, and would make it practically impossible for migrants to meaningfully pursue their asylum claims. *See* Background Parts C and D, *supra*. And Defendants provided no explanation for their decision.

In expanding MPP to Tamaulipas, Defendants thus either ignored or failed to consider the *harms* that would result from returning migrants there. But agencies must “adequately analyze the . . . consequences” of their actions—including the negative ones. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017). Here, “the potential devastation” resulting from MPP’s expansion “is *so* obvious that DHS can be fairly faulted for its unexplained failure to predict, and attempt to mitigate, the fully foreseeable [consequences].” *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 56 (D.D.C. 2019). Defendants’ decision was contrary to the evidence before the agency or “entirely failed to consider an important aspect of the problem,” *State Farm*, 463 U.S. at 43, namely, the inevitable effect that MPP-Tamaulipas would have on the safety of returned asylum seekers. *See, e.g., Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1113 (D.C. Cir. 2019) (holding agency action was arbitrary and capricious for failing to consider that eliminating a subsidy would cause “many low-income consumers on Tribal lands [to] lose access to affordable telecommunications service”); *United Keetoowah Band of Cherokee Indians in Oklahoma v. FCC*, 933 F.3d 728, 740 (D.C. Cir. 2019) (same where agency failed to consider the harms of eliminating historic preservation review of small cell radio towers); *Am. Wild Horse*, 873 F.3d at 931 (same where agency failed to address the “relevant environmental concern,” “denied its very existence,” and “averted its eyes altogether” to the consequences of its action). As this Court recently explained in enjoining another DHS action under the APA, “an agency cannot possibly conduct reasoned, non-arbitrary decision making concerning policies that might impact *real* people and not take such *real life circumstances* into account.” *Make the Rd. N.Y.*, 405 F. Supp. 3d at 55.

II. DEFENDANTS DEPRIVED PLAINTIFFS OF DUE PROCESS BY AFFIRMATIVELY PLACING THEM IN DANGER.

Defendants violated Plaintiffs' substantive due process rights because, by applying MPP-Tamaulipas to them, "the [s]tate knowingly created or increased the risk that [they] would be exposed to danger," *Butera v. District of Columbia*, 235 F.3d 637, 654 (D.C. Cir. 2001), in a manner "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," *id.* at 651 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). To establish that DHS's actions shock the conscience so as to rise to a due process violation, Plaintiffs must show "more than negligence" but may show "less than intentional conduct." *Id.* (internal quotation marks omitted). Thus, deliberate indifference shocks the conscience in the context where officials "had the opportunity to plan" and still chose to put people in the path of known or obvious harm through their affirmative acts. *Id.* at 652 (citing cases). "When . . . opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853.

Defendants deprived Plaintiffs of due process by conduct that, for two reasons, shocks the conscience. First, Defendants chose to apply MPP-Tamaulipas to Plaintiffs when it was obvious at the outset, even from the government's own warnings, that Defendants would be forcing migrants into one of the most dangerous regions of the world. Second, despite further warnings—including each adult Plaintiff told or attempted to inform Defendants about their physical dangers, psychological harms, and ongoing threats that they faced and would likely continue to face—Defendants nonetheless sent Plaintiffs back into Tamaulipas. *See* Background Part D, *supra*.

1. That the dangers to migrants in Tamaulipas are dire is well known to the Defendants from the State Department's warnings that "[v]iolent crime, such as murder, armed robbery,

carjacking, kidnapping, extortion, and sexual assault, is common” there. Boggs Decl., Ex. 9 at 13 (April 2019 Mexico Travel Advisory). Gun battles and blockades are “widespread.” *Id.* Both “public and private passenger buses” are targeted by “[a]rmed criminal groups,” as are private carpools. *Id.* Hostage-takings and ransom demands happen “often” and there is little prospect of help: “Federal and state security forces have limited capability to respond.” *Id.*; *see also* Background Part B, *supra*. Indeed, local security forces are known to be perpetrators of the danger Plaintiffs face. *See* Gilman Decl. ¶ 77; HRF Decl. ¶¶ 23-24, 32.

Despite these many warnings, Defendants have been cruelly indifferent to the violence that migrants suffer as a result of MPP-Tamaulipas. As Defendant Mark A. Morgan, CBP Acting Commissioner, told reporters in December 2019: “I have heard reports the same as you of violence,” noting that it is well known that dangerous drug cartels target migrants south of the border, and advising, “We encourage these people first of all not to even put themselves in the hands of the cartels to begin with.” *See* Jonathan Decl., Addendum. During an immigration court hearing, in arguing against an attorney’s request to waive the presence of his recently kidnapped client, a DHS attorney argued that waiving appearance would open the proverbial floodgates to such claims because kidnappings were common in Tamaulipas: “the circumstances that they’re concerned with,” the attorney said, “is potentially a reality for every respondent.” Decl. of Jerusalem Hadush, Ex. 1 at 2 (Transcript of Immigration Court Proceedings in the Matter of G.M. and W.P., Oct. 30, 2019).

2. Each time Defendants have returned Plaintiffs to Tamaulipas, they have done so despite ample warning of ongoing dangers migrants in MPP-Tamaulipas face,¹⁴ and of the particular

¹⁴ These warnings include congressional oversight hearings, which DHS officials attended, and dozens of government, nongovernmental, and media reports, all documenting that MPP-Tamaulipas affirmatively endangers migrants. *See* Boggs Decl., Ex. 30 (U.S. Senate Comm. on

dangers each Plaintiff has faced and continues to face. For example, after Defendants returned Plaintiff Nora to Tamaulipas, she was kidnapped and repeatedly gang raped. Nora Decl. ¶¶ 20-23. So was Plaintiff Emilia and her eldest daughter. Emilia Decl. ¶¶ 10-13, 16-18. Plaintiff Jonathan was physically tormented at length, [REDACTED] after Defendants returned him to danger. Jonathan Decl. ¶¶ 24-35. Every Plaintiff has been kidnapped or assaulted in Tamaulipas, threatened with death, and lives in daily fear. 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; Diana Decl. ¶¶ 42-52; 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.

Defendants knew such harms were likely and that they continue to be likely for each Plaintiff. Every Plaintiff communicated their fear in some manner. Every Plaintiff but Diana and her children were given nonrefoulement interviews—and each Plaintiff interviewed was returned to Mexico despite describing the abundant dangers and harms they had endured and described. Ernesto Decl. ¶¶ 27-28; Laura Decl. ¶¶ 45-48; Jonathan Decl. ¶¶ 38-41, 58-68; Jessica Decl. ¶¶ 48-50; Henry Decl. ¶¶ 28-29; Nora Decl. ¶¶ 35-37; Fabiola Decl. ¶¶ 40-41, 59-60, 69-71; Emilia Decl. ¶¶ 22-24, 26-27; Armando Decl. ¶ 21; Carmen Decl. ¶¶ 39-40. Indeed, Plaintiff Laura was told by a CBP officer that because she was not raped during her family’s kidnapping, she would be sent back to Mexico. Laura Decl. ¶ 28.

Homeland Sec. & Governmental Affairs, Unprecedented Migration at the U.S. Southern Border, Nov. 13, 2019); *id.*, Ex. 31 (U.S. House Subcomm. on Border Sec., Facilitation & Operations (116th Congress), Examining the Human Rights and Legal Implications of DHS’ ‘Remain in Mexico’ Policy, Nov. 19, 2019); *id.*, Ex 32 (Letter from the American Civil Liberties Union and Center for Gender & Refugee Studies to Chad F. Wolf, Acting Secretary of Homeland Security, et al., Dec. 9, 2019) (reviewing nearly 70 reports of dangers in Tamaulipas); HRF Decl. ¶¶ 6-8; MSF Decl. ¶ 32; *see also* Background Part C, *supra*.

Courts have repeatedly recognized that state acts increasing a person's exposure to known dangers violates the Due Process Clause. *See, e.g., Wood v. Ostrander*, 879 F.2d 583, 589 (9th Cir. 1989) (government violated due process by acting "in callous disregard for [plaintiff]'s physical security"); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (due process violation where government "act[s] with 'deliberate indifference'" by directing plaintiffs into the path of "a 'known or obvious danger'" (quoting *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 74 (9th Cir. 2011)); *Briscoe v. Potter*, 355 F. Supp. 2d 30, 33 (D.D.C. 2004) ("where state officials create a dangerous situation or render individuals more vulnerable to a dangerous situation, constitutional liability may be imposed" (citing *Butera*, 235 F.3d at 649)); *see also Pena v. DePrisco*, 432 F.3d 98, 108 (2d Cir. 2005) ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.") (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)). Because of Defendants' awareness of the dangers in Tamaulipas, and of the dangers specific to each Plaintiff, Defendants acted "with protracted failure even to care." *Lewis*, 523 U.S. at 853. Their actions are "truly shocking," and violate due process. *Id.*

III. DEFENDANTS VIOLATED THEIR OWN NONREFOULEMENT RULES IN RETURNING EACH OF THE PLAINTIFFS TO MEXICO, AND THEIR DECISIONS WERE ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

The agency's rules governing MPP prohibit the return of individuals to persecution or torture. Boggs Decl., Ex. 5 at 2 (MPP Guiding Principles). Defendants' decisions to return each of

the Plaintiffs to Mexico--notwithstanding the harms they had already suffered and the certain dangers they would face upon return—violated these rules and were therefore unlawful.¹⁵

These decisions were additionally arbitrary, capricious, and in violation of the law, in failing to consider the evidence that was before the agency.

A. DHS is Obligated to Follow the Nonrefoulement Rules it Adopted for MPP.

Government agencies must follow their own rules, including agency procedures “[w]here the rights of individuals are affected,” *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954); *accord Damus v. Nielsen*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018). This obligation extends even to unpublished measures intended to be binding. *See Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 150 (D.D.C. 2018).

The MPP nonrefoulement rules easily meet this standard. They state the agency’s requirements for assessing whether individuals are eligible for MPP and plainly affect the rights of individuals.

The rules were adopted by the agency for the express purpose of insuring MPP’s compliance with the mandatory prohibition against refoulement, *i.e.*, to prevent the return of individuals to a likelihood of persecution or torture. This prohibition is reflected in statute,¹⁶ as

¹⁵ The Ninth Circuit held that the MPP’s nonrefoulement rules were inadequate on their face, violating 8 U.S.C. § 1231(b)(3)(A), because they impermissibly imposed an affirmative burden on individuals to express a fear of return to Mexico, erroneously adopted a “more likely than not” standard, and suffered from other procedural inadequacies. *Innovation Law Lab*, 951 F.3d at 1087-89. Of the six judges to have considered the legality of MPP to date, all but one expressed the view that the procedure was almost certainly legally inadequate. *Id.* at 1097 (Fernandez, J, dissenting); *Innovation Law Lab*, 924 F.3d 503, 511-12 (9th Cir. 2019) (Watford, J., concurring). This question, need not be answered here, because regardless whether the rules are adequate, Defendants failed to follow them in Plaintiffs’ cases.

¹⁶ *See* 8 U.S.C. § 1231(b)(3)(A) (withholding of removal) and Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 (codified at 8 U.S.C. § 1231 note) (Convention Against Torture).

well as in Article 33 of the Refugee Convention¹⁷ and the CAT,¹⁸ which prevent the return of migrants to persecution or torture Boggs Decl., Ex. 33 at 2-3 (DHS, Memorandum from Secretary Kirstjen M. Nielsen, Policy Guidance for Implementation of the MPP, Jan. 25, 2019) (“Nielsen Memo”) (“[I]mplementation will be done consistent with applicable domestic and international legal obligations. . . .[specifically] the *nonrefoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and Article III of the Convention Against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment (CAT).”).

Consistent with this purpose, the MPP rules state that any migrant who is “more likely than not to face persecution or torture in Mexico” is “not amenable to MPP.” Boggs Decl., Ex. 5 at 1 (MPP Guiding Principles) (emphasis added); *see also id.* at 2 (“If USCIS assesses that an alien . . . is more likely than not to face persecution or torture in Mexico, the alien may not be processed for MPP”); *id.*, Ex. 33 at 3-4 (Nielsen Memo) (same).

To insure compliance with this obligation, the MPP rules require that whenever a migrant expresses a fear of return to Mexico, DHS must refer the migrant to an asylum officer for a nonrefoulement interview. Boggs Decl., Ex. 5 at 1 (MPP Guiding Principles) (if there is an affirmative statement of fear, that individual “will be referred to a USCIS asylum officer for [nonrefoulement] screening”). The purpose of these interviews is to determine if the individual

¹⁷ “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. I, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276 (binding United States to comply with Article 33).

¹⁸ “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

would face a likelihood of persecution or torture in Mexico, and if so, to exempt the person from MPP. *Id.* at 1-2. The rules also establish the standard that should be used for adjudicating fear claims at nonrefoulement interviews. They specify that it is the “same standard” that is used in adjudicating claims for withholding of removal under 8 U.S.C. § 1231(b)(3) and for relief under CAT, and reference the specific withholding and CAT regulations that define when a person is “more likely than not” to face persecution or torture. Boggs Decl., Ex. 2 at 3-4 (USCIS Memo).

B. Defendants Violated Their Nonrefoulement Rules When Returning Plaintiffs to Tamaulipas.

Defendants violated their nonrefoulement rules in two ways when returning Plaintiffs to Tamaulipas. First, they failed to provide nonrefoulement interviews to Plaintiffs, such as Diana, who expressed their fear of being sent back to Mexico. Second, when the rest of the Plaintiffs were later provided with nonrefoulement interviews, Defendants failed to give them an opportunity to fully present their claims and failed to adjudicate these claims under the proper standard.

1. Defendants failed to provide Plaintiff Diana with an NRI.

The protocols the agency adopted to comply with its nonrefoulement obligation require that whenever migrants express a fear of return to Mexico, CBP officers must refer them for an interview by an asylum officer to determine if they face a likelihood of persecution or torture in Mexico, and should thereby be exempted from MPP. Boggs Decl., Ex. 5 at 1 (MPP Guiding Principles) (“If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico . . . that alien *will be referred* to a USCIS asylum officer for screening” (emphasis added)). Many of the Plaintiffs, including Diana, explained, or attempted to explain, their fears to CBP officers. But CBP officers did not refer them for interviews with asylum officers. *See* n.13, *supra*. Although the rest of the Plaintiffs later received interviews, Plaintiff Diana and her two children never did. Diana Decl.

¶¶ 52, 55. Thus, Diana and her children remain in Tamaulipas, despite never having received an opportunity to demonstrate why they face a likelihood of persecution or torture there.

2. Defendants Improperly Denied the Nonrefoulement Claims of the Other Plaintiffs.

Although Defendants ultimately provided the rest of the Plaintiffs with nonrefoulement interviews, they violated their own nonrefoulement rules for MPP by failing to apply the proper standard for assessing whether a likelihood of persecution or torture had been established. Thus, despite the Plaintiffs' credible accounts of being raped, assaulted, and subjected to repeated death threats in Tamaulipas, Defendants did not find that *any* of them had established the requisite fear to remove them from MPP.¹⁹

Agency regulations set forth the standard for assessing whether an individual has established a "likelihood of persecution or torture." *See* 8 C.F.R. §§ 208.16(b)(2), (c)(3). Although these regulations govern "likelihood" determinations in the context of withholding and CAT claims, "the same [likelihood] standard" applies to MPP. Boggs Decl., Ex. 5 at 2 (MPP Guiding Principles). Plaintiffs met this standard in three ways, each of which provided an independent basis for exempting them from MPP.

First, Plaintiffs showed they had experienced past persecution in Tamaulipas on account of a protected ground, and, therefore, they should have been *presumed* to face a future threat of

¹⁹ In addition, Defendants prevented some Plaintiffs from fully developing their claims—cutting them off, forcing them to give only yes or no answers, and stopping them from elaborating on testimony. *See, e.g.*, Jonathan Decl. ¶¶ 59, 66; Emilia Decl. ¶ 24; Fabiola Decl. ¶ 42; Armando Decl. ¶ 22. In other cases Defendants refused to consider evidence presented by Plaintiffs, or kept Plaintiffs from presenting evidence. *See, e.g.*, Armando Decl. ¶ 23 (interviewer did not allow Plaintiff to show pictures from his phone and refused to consider evidence); Jonathan Decl. ¶ 60 (officer refused to look at photographs and other evidence presented by Plaintiff). Despite these shortcomings, however, the evidence Plaintiffs submitted at their interviews was sufficient to establish a likelihood of persecution or torture. *See infra*.

persecution. *See* 8 C.F.R. § 208.16(b)(1)(i); *see also id.* § 208.16(c)(3) (agency must consider evidence of past torture inflicted upon the applicant). All of the Plaintiffs have been subjected to heinous acts in Mexico that constitute past persecution. For example, cartel members [REDACTED] [REDACTED] [REDACTED] Jonathan Decl. at ¶ 32; *see also* Laura Decl. ¶¶ 19-21 (family kidnapped, threatened with death, and husband, Joseph, beaten with a wooden plank). Five of the Plaintiffs who were kidnapped, two of them minors, were also repeatedly gang raped. *See* Diana Decl. ¶¶ 21-25; Emilia Decl. ¶¶ 11-13, 16; Nora Decl. ¶¶ 21-22; Carmen Decl. ¶¶ 34, 48. Further, many of the Plaintiffs were forced to witness these abuses of their family members. *See, e.g.,* Jonathan Decl. ¶ 32 [REDACTED]; Emilia Decl. ¶ 16 (mother and daughter witnessed each other raped); Carmen Decl. ¶¶ 34, 48-49 (mother raped in front of minor children); Nora Decl. ¶ 21 (three-year old son forced to witness mother's gang rape); Fabiola Decl. ¶¶ 48-51 (two children watched their mother assaulted and nearly kidnapped). All of the Plaintiffs were threatened with death. *See* Background Part D, *supra*.

The kidnappings, rapes, beatings, death threats, and psychological torments suffered by Plaintiffs constitute past persecution. *See Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998) (harms must be considered cumulatively); *see also, e.g., Ming Dai v. Sessions*, 884 F.3d 858, 870 (9th Cir. 2018) (physical violence, as well as deprivation of food and sleep during detention); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (death threats); *Sumolang v. Holder*, 723 F.3d 1080, 1083–84 (9th Cir. 2013) (harm to a child as persecution of the parent); *Sheriff v. Attorney Gen. of U.S.*, 587 F.3d 584, 589 (3d Cir. 2009) (witnessing rape of daughter); *Gomez-Zuluaga v. Attorney Gen. of U.S.*, 527 F.3d 330, 343 (3d Cir. 2008) (confinement); *Delgado v. Mukasey*, 508 F.3d 702, 707 (2d Cir. 2007) (kidnapping); *Tamara-Gomez v. Gonzales*,

447 F.3d 343, 346-49 (5th Cir. 2006) (physical harm not required in context of violent threats); *Matter of D-V-*, 21 I. & N. Dec. 77, 79 (BIA 1995) (rape).²⁰ That each Plaintiff suffers from psychological conditions as a result of the traumatic experiences endured in Tamaulipas, including Post Traumatic Stress Disorder (PTSD), only underscores the severity of the harm they have suffered. *See, e.g.*, Psychological Evaluation of Wanda by Dr. Barbara Eisold (“Wanda Eval.”) ¶ 26 (describing flashbacks, nightmares, and panic attacks); Psychological Evaluation of Jonathan and Steven by Dr. Amy J. Cohen (“Jonathan Eval.”) ¶ 27 [REDACTED]; *see also, e.g.*, *Matter of L-S-*, 25 I. & N. Dec. 705, 711-13 (BIA 2012) (finding psychological effects of harm relevant to severity of past persecution).

This persecution was inflicted on all Plaintiffs on account of the protected ground of their non-Mexican nationality, and for various Plaintiffs, on account of the protected grounds of gender, sexual orientation, or political opinion, among others. In some instances, the persecutors directly told Plaintiffs why they were targeting them. *See, e.g.*, Emilia Decl. ¶¶ 11, 17 (rapist taunted [REDACTED] [REDACTED] [REDACTED]). Ernesto Decl. ¶¶ 18, 20 ([REDACTED] [REDACTED] [REDACTED]); Carmen Decl. ¶ 49 ([REDACTED] [REDACTED] [REDACTED] [REDACTED]). Rarely do persecutors “specifically articulate their reason for attacking a victim,” but where they have, as here, the motive “should not be questioned.” *Li v. Holder*, 559 F.3d 1096, 1111–12 (9th Cir. 2009).

²⁰ The persecutory nature of the harm is amplified for all of the minor Plaintiffs. *See, e.g.*, *Jorge–Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006) (persecutory effect of harms must be evaluated “from the perspective of a small child”).

The circumstances of the assaults—for example, the targeting of Plaintiffs in places where migrants congregate—provide additional evidence that non-Mexican nationality is at least one, if not *the*, central reason for the persecution.²¹ *See, e.g.*, Laura Decl. ¶¶ 14-15 ([REDACTED]); Nora Decl. ¶¶ 18-21 ([REDACTED]); Fabiola Decl. ¶¶ 33-36 ([REDACTED]); *see Espinosa-Cortez v. Attorney Gen. of U.S.*, 607 F.3d 101, 109 (3d Cir. 2010) (timing and location provide evidence of a persecutor's motives). Documented country conditions in Mexico highlighting discrimination against migrants and gender bias further corroborate the nexus between the persecution and recognized protected grounds. *See, e.g.*, HRF Decl. ¶¶ 10, 13, 23-25, 51; MSF Decl. ¶¶ 9-10, 30-31; Leutert Decl. ¶ 29; *see also, e.g., Inestroza-Antonelli v. Barr*, 954 F.3d 813, 818 (5th Cir. 2020) (holding Board erred by ignoring uncontroverted country conditions evidence in declining to reopen asylum claim); *Sharma v. Holder*, 729 F.3d 407, 412 (5th Cir. 2012) (recognizing circumstantial evidence of motive) (citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)); *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996) (same).

Further, the Mexican government is unable to protect Plaintiffs from these dangers and is oftentimes complicit in it. *See* Ernesto Decl. ¶ 23 ([REDACTED]); Nora Decl. ¶¶ 23, 27 (same); Emilia Decl. ¶ 18 (same); Diana Decl. ¶¶ 45, 59 ([REDACTED]); Laura Decl. ¶ 33 ([REDACTED]); Armando Decl. ¶ 19 ([REDACTED]);

²¹ Courts have repeatedly recognized that the plain language of 8 U.S.C. § 1158(b)(1)(B)(i) permits mixed motives; therefore, even if persecutors targeted them for a non-protected reason, like extortion for financial gain, a protected reason may also be central. *See, e.g., Ayala v. Sessions*, 855 F.3d 1012, 1015 (9th Cir. 2017) (holding that “extortion, plus the threat of violence, on the basis of a protected characteristic can constitute persecution”); *Sealed Petitioner v. Sealed Respondent*, 829 F.3d 379, 383 (5th Cir. 2016) (Board had to consider evidence of mixed motives for the persecution); *Matter of S-P-*, 21 I. & N. Dec. at 492 (recognizing mixed-motives for persecution).

██████████); *see also* HRF Decl. ¶¶ 11, 24 Gilman Decl. ¶¶ 36, 49, 77; Leutert Decl. ¶¶ 31, 53-55; Goodwin Decl. ¶ 20. Accordingly, Plaintiffs demonstrated the harms they experienced constitute past persecution and should have been presumed to have established a likelihood of future persecution.

Second, even if Plaintiffs had not shown past persecution, they met the nonrefoulement standard because of (i) the “pattern or practice of persecution” of migrants in Tamaulipas, and (ii) their being members of the specific group—migrants—which is persecuted. 8 C.F.R. § 208.16(b)(2). Had Defendants applied the proper nonrefoulement standards, they would have concluded that Plaintiffs had also shown a likelihood of future persecution due to a “pattern or practice” of persecution of similarly situated persons in Tamaulipas. A pattern or practice is established where persecution is “systemic, pervasive, or organized.” *Mufied v. Mukasey*, 508 F.3d 88, 92 (2d Cir. 2007) (remanding to consider withholding claim in light of pattern or practice) (citing *Matter of A-M-*, 23 I. & N. Dec. 737, 741 (BIA 2005)); *see also* *Eduard v. Ashcroft*, 379 F.3d 182, 192 n.10 (5th Cir. 2004) (finding repeated attacks aimed at religious group over the course of a year established a pattern or practice); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004) (finding news articles and international organization report documenting ongoing physical violence against ethnic minority established a pattern or practice). As illustrated in their individual declarations, and as documented both before and after MPP-Tamaulipas was implemented, non-Mexican nationals are subject to “systemic, pervasive, or organized” attacks in Tamaulipas. *See* Background Parts C and D, *supra*. There is no question that Plaintiffs are similarly situated to these victims—and in fact, all Plaintiffs have been victims of attacks themselves. *Id.*

Finally, many, if not all, Plaintiffs met the nonrefoulement standard because it was more likely than not that they would be tortured if returned to Mexico. 8 C.F.R. § 208.16(c)(1); *see also*

id. § 208.18(a) (defining torture). Thus, had Defendants properly applied the nonrefoulement standard, Plaintiffs would not have been returned to Tamaulipas pursuant to MPP-Tamaulipas. For instance, it is widely recognized that rape can constitute torture. *See, e.g., Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (“[C]ourts have equated rape with conduct recognized under the law of nations as torture.”); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015) (assaults and rape of transgender woman constituted torture). Similarly, severe mental pain or suffering may rise to the level of torture. 8 C.F.R. § 208.18(a)(4); *see also Perez v. Sessions*, 889 F.3d 331, 336 (7th Cir. 2018) (“The threat of imminent death is one way in which torture by means of mental pain or suffering can be inflicted.”) (citing 8 C.F.R. § 1208.18(a)(4)(iii)); *Pierre v. Gonzales*, 502 F.3d 109, 117–18 (2d Cir. 2007) (same); *Kamar v. Sessions*, 875 F.3d 811, 821 (6th Cir. 2017) (finding that involuntary imprisonment by authorities would result in mental pain and suffering, thus constituting torture). Here, the past harms Plaintiffs have suffered, combined with the Mexican government’s willful blindness to Plaintiffs’ suffering, satisfies the nonrefoulement standard based on torture. Defendants thus erred in returning them to Tamaulipas.

C. Defendants’ Decisions Returning Each of the Plaintiffs to Tamaulipas Were Arbitrary, Capricious, and Contrary to Law.

A court will not uphold an agency decision that “is not supported by substantial evidence, or [where] the agency has made a clear error in judgment.” *Doe v. U.S. Citizenship & Immigration Servs.*, 239 F. Supp. 3d 297, 306 (D.D.C. 2017) (quoting *Hagelin v. Fed. Election Comm’n*, 411 F.3d 237, 242 (D.C. Cir. 2005)); *see also Fogo De Chao (Holdings) Inc. v. U.S. Dep’t of Homeland Sec.*, 769 F.3d 1127, 1147 (D.C. Cir. 2014) (agency action was arbitrary, capricious, and contrary to law based in part on agency’s closing “its eyes to on-point and uncontradicted record evidence without any explanation at all”).

As cataloged above, Plaintiffs presented clear evidence of their past persecution. The agency also had evidence of the pattern and practice of persecution in Tamaulipas against migrants like the Plaintiffs. *See* Background Parts B and C.i, *supra*. Here, Defendants’ decisions finding that Plaintiffs had failed to demonstrate a likelihood of persecution or torture in Tamaulipas, and refusing to exempt them from MPP, were also arbitrary, capricious, and contrary to law, because they were contrary to the evidence that was before the agency. *See* Background Part D; Argument, Parts III.A-B, *supra*.

IV. PLAINTIFFS ARE SUFFERING IRREPARABLE INJURY, AND THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR INJUNCTIVE RELIEF.

A. Plaintiffs Have Suffered, and Continue to Suffer, Irreparable Injury.

A “preliminary injunction requires only a likelihood of irreparable injury.” *League of Women Voters*, 838 F.3d at 8-9. To be irreparable, the injury must be “beyond remediation.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Plaintiffs have suffered great and irreparable harm due to Defendants’ unlawful actions, and will continue to suffer such harm unless they receive the requested relief: return to the United States.

Plaintiffs have already experienced rape, sexual assault, beatings, kidnapping, and death threats in Tamaulipas. *See* Background Part D, *supra*. Further, similar harm—or even death—is likely if Plaintiffs remain in Tamaulipas, without an injunction returning them to the United States. For instance, Plaintiffs Diana, Jessica and Fabiola have learned of members of a local criminal group, La Maña, targeting women like them and Diana’s daughter, Wanda, around the Matamoros migrant camp, and fear they will become victims again too. Diana Decl. ¶ 48; 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 inevitably travel to their assigned port of entry. Nora Decl. ¶¶ 43, 55; Carmen Decl. ¶ 53. Without an injunction, Plaintiffs like Nora and Jessica are living in terror and contemplating sending their young children—ranging in ages from three to 16—alone across the border to save them from the dangers in Tamaulipas. Nora Decl. ¶ 60; Jessica Decl. ¶ 54. Indeed, Plaintiffs’ experiences and feared harms are consistent with the findings of countless reports documenting the widespread violence in Tamaulipas and the particular levels of brutality faced by asylum seekers in the region. *See* Background Parts B and C.i, *supra*.

Moreover, Plaintiffs already experienced trauma before fleeing their home countries, and are thus particularly vulnerable to the harm inflicted by their continued exposure to violence in Tamaulipas.²² All psychological experts who evaluated Plaintiffs agree that: (1) Plaintiffs are traumatized, particularly from their experiences in Mexico; (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

²² Plaintiffs have filed reports from their psychological evaluations under seal in order to protect their identities and sensitive details about their experiences. *See* Psychological Evaluation of Nora and Jose by Dr. Debora S. Munczek (“Nora Eval.”); Jonathan Eval.; Psychological Evaluation of Emilia and Gabriella by Dr. Debora S. Munczek (“Emilia Eval.”); Psychological Evaluation of Fabiola by Brenda Punskey (“Fabiola Eval.”); Declaration of Dr. Allen S. Keller regarding Ernesto (“Ernesto Eval.”); Affidavit of Dr. Vidya Kumar Ramanathan regarding Laura (“Laura Eval.”); Affidavit of Dr. Vidya Kumar Ramanathan regarding Anna (“Anna Eval.”); Affidavit of Dr. Anjali Niyogi in support of Joseph (“Joseph Eval.”); Psychological Evaluation of Diana by Dr. Barbara Eisold (“Diana Eval.”); Wanda Eval.; Declaration of Dr. Barbara Eisold in support of Jessica, Edgar and Damian (“Jessica Eval.”); Psychological Evaluation of Henry by Brenda Punskey (“Henry Eval.”); Psychological Evaluation of Carolina by Brenda Punskey (“Carolina Eval.”); Declaration of Dr. Allen S. Keller regarding Armando and Salvador (“Armando Eval.”); Psychological Report of Carmen by Dr. Amy J. Cohen (“Carmen Eval.”).

jeopardize Plaintiffs’ 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; Diana Eval. ¶¶ 46, 48-51; 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 PTSD, complex PTSD, depression, and anxiety, among Plaintiffs who feel hopeless and in a perpetual state of limbo, danger and loss. *See, e.g.*, Fabiola Eval. ¶ 86 (describing her as “at the brink of falling apart”); Joseph Eval. ¶ 62 (describing how the family feels entrapped in their current situation); Nora Eval. ¶ 48 (describing panic, desperation and feeling that the family “ha[s] been living in a nightmare”); Jonathan Eval. p. 30 (describing family as severely disabled due to their trauma); Carmen Eval. p.6 (admitting to “episodic thoughts of suicide with moments of extreme hopelessness”). Some have even considered or attempted suicide. [REDACTED]

[REDACTED]

[REDACTED]

These evaluations, explained more fully in the attached declarations, are consistent with the findings of other medical and psychiatric experts, who have documented symptoms of anxiety, depression, and PTSD in the asylum seekers they have evaluated in this region who were also returned to Tamaulipas pursuant to MPP. Niyogi Decl. ¶¶ 31-74; MSF Decl. ¶¶ 47-51; *see also* Decl. of Drs. Berkowitz and Gutman (“Berkowitz/Gutman Decl.”) ¶¶ 41-42, 50. Without treatment, physical manifestations of trauma—including chronic pain, poor appetite, difficulty sleeping and other physical ailments—may exacerbate underlying psychological symptoms, and vice versa. Niyogi Decl, ¶¶ 13, 31-33, 38, 46-47.

There is very limited access to medical and psychiatric care for asylum seekers in Tamaulipas, where hospitals and clinics have been reported to undertreat or even turn away migrant patients. Niyogi Decl. ¶¶ 24-30; MSF Decl. ¶¶ 70-75. Thus, Plaintiffs are not only being re-traumatized by the violent and unstable conditions in Tamaulipas, but they also face chronic psychological and medical issues if they remain in the region.

The harm is especially acute for Plaintiffs who are children. They have all personally experienced violence, witnessed violence inflicted against their family members, and live in terror in Tamaulipas, with the exception of Gabriela and Jane, who are in hiding with their mother Emilia [REDACTED]. Anna Eval. ¶¶ 7-11; Wanda Eval. ¶¶ 23, 33-38; Carolina Eval. ¶¶ 33-55; Jessica Eval. ¶¶ 53-60, 66-70 (describing evaluation of Edgar and Damian); Nora Eval. ¶¶ 70-81 (describing clinical observations of Jose); Jonathan Eval. pp.20-22, 26-28 (same for Steven); Emilia Eval. ¶¶ 65-72 (same for Gabriela); Armando Eval. ¶¶ 80-94, 99 (same for Salvador). Some also suffer from separation from family in the United States. Jonathan Eval. pp.25-28 ([REDACTED] [REDACTED]); Fabiola Eval. ¶¶ 86-88 (describing impact of separation from children). Decades of research have confirmed that, because childhood is a critical time of development for the brain, emotional and behavioral regulation, and learning, childhood trauma can have long-lasting neurological and psychological consequences. Berkowitz/Gutman Decl. ¶¶ 17-26. For instance, trauma and PTSD can disrupt a child's brain development, cause brain damage, and contribute to learning disabilities and dysfunctions, including anxiety, depression, withdrawal, impulsive and aggressive behavior, substance abuse problems, increased thoughts of suicide and many other psychiatric disorders. Berkowitz/Gutman Decl. ¶¶ 25, 47; Wanda Eval. ¶¶ 17, 28 [REDACTED] [REDACTED]; Carolina Eval. ¶ 40 [REDACTED]

[REDACTED]; Jessica Eval. ¶
60 [REDACTED]; Nora
Eval. ¶¶ 76, 78 [REDACTED]

[REDACTED]

[REDACTED]; Jonathan Eval. pp. 27-28 [REDACTED]

[REDACTED]; Emilia Eval. ¶¶ 62, 65-73

[REDACTED]

[REDACTED] Armando Eval. ¶¶ 80-94 [REDACTED]

[REDACTED]

[REDACTED]; Anna Eval. ¶ 8(ii) [REDACTED]

[REDACTED]

[REDACTED] The traumatized children Plaintiffs will therefore suffer irreparably unless they are allowed to recover in a safe and stable living environment. *See Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enf't*, 319 F. Supp. 3d 491, 503 (D.D.C. 2018) (granting preliminary injunction in part based on irreparable harm to immigrant children because “highly stressful experiences . . . can disrupt a child’s brain architecture and affect his or her short- and long-term health” (internal alterations omitted)).

The injuries that Plaintiffs will suffer in the absence of an injunction are also indisputably “beyond remediation.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. The harm from continued exposure to danger as well as persecution or torture pursuant to an unlawful policy—in this case, MPP-Tamaulipas—cannot be remediated after the fact. *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).

B. The Balance of Harms and Public Interest Weigh in Plaintiffs' Favor.

Because of the severity of injury that Plaintiffs face, the balance of harms weighs strongly in favor of a preliminary injunction. A preliminary injunction would also further the public interest, which is served when the government complies with its obligations under the APA and the Constitution. *See O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992); *Damus*, 313 F. Supp. 3d at 342; *R.I.L.-R*, 80 F. Supp. 3d at 191. The public also “has an interest in ensuring that its government respects the rights of immigrants[.]” *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 124 (D.D.C. 2018) (issuing a preliminary injunction and enjoining immigration authorities from removing Plaintiffs pursuant to expedited removal orders).

Ensuring Plaintiffs a meaningful opportunity to pursue their asylum claims also furthers the public interest. *Cf. Nken v. Holder*, 556 U.S. 418, 436 (2009) (“Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm.”). It is in the public’s interest to ensure that asylum seekers are not forced to remain in a place where they fear for their bodily safety and face multiple, systemic obstacles to presenting their asylum claims. Gilman Decl. ¶¶ 62-76 (describing barriers to pursuing and obtaining asylum under MPP-Tamaulipas); Laura Decl. ¶¶ 40-43, 55; Diana Decl. ¶ 54; Henry Decl. ¶ 40; Jessica Decl. ¶ 46; *see Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018). 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.”). To turn a blind eye to Plaintiffs’ plight in Tamaulipas would contravene these basic principles.

C. Plaintiffs’ Return is Necessary to Preserve Meaningful Relief.

“[A] preliminary injunction is an injunction to protect [the movant] from irreparable injury and to preserve the court’s power to render a meaningful decision [. . .] on the merits.” *Aracely, R.*, 319 F. Supp. 3d at 125 (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedures* § 2947 (2d ed. 1992)); *Ramirez v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 7, 16 (D.D.C. 2018) (same); *see also Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”). “[T]he decision to grant injunctive relief is a discretionary exercise of the district court’s equitable powers.” *Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1209 (D.C. Cir. 1989).

Absent return to the United States, Plaintiffs face violence, trauma, and even potential death in Tamaulipas. If Plaintiffs are *not* returned to the United States, the violence they experience will effectively prevent the Court from ever awarding them relief on the merits.²³ Numerous cases confirm courts’ authority to order equitable relief in the form of allowing noncitizens back into the United States. *See, e.g., Walters v. Reno*, 145 F.3d 1032, 1050-51 (9th Cir. 1998) (requiring parole

²³ “The usual role of a preliminary injunction is to preserve the status quo,” which is defined as “the last uncontested status which preceded the pending controversy.” *Dist. 50, United Mine Workers of Am. v. Int’l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969) (citation omitted). Here, the last uncontested status was CBP’s processing of Plaintiffs within the United States *prior to* unlawfully sending each of them back to Mexico pursuant to MPP-Tamaulipas. *See Jacinto-Castanon de Nolasco*, 319 F. Supp. 3d at 498 (where mother challenged separation from children, last uncontested status was “when she and her sons were approached by border agents”); *see also S.A. v. Trump*, No. 18-CV-03539-LB, 2019 WL 990680, at *14 (N.D. Cal. Mar. 1, 2019) (last uncontested status, for noncitizens whose applications were in processing when parole program was terminated, was at the time of program’s termination).

into country or other arrangement for hearing attendance for class of noncitizens); *Singh v. Waters*, 87 F.3d 346, 350 (9th Cir. 1996) (ordering government to permit return for immigration hearing regarding whether favorable exercise of discretion in his case was warranted, following unlawful removal); *Grace*, 344 F. Supp. 3d at 105 (ordering government to return to United States noncitizens wrongfully removed); *Ms. L v. U.S. Immigration & Customs Enf't*, 403 F. Supp. 3d 853, 860 (S.D. Cal. 2019) (finding the court has remedial authority to bring back parents who were wrongfully deported and therefore unlawfully separated from their children); *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. INS*, No. CIV.A. 301CV279SRU, 2002 WL 295100, at *4 (D. Conn. Feb. 19, 2002) (same).

In light of the grave and irreparable harm Plaintiffs face, ordering their return to the United States during the pendency of the litigation is not only appropriate but imperative.²⁴

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for a preliminary injunction should be granted.

²⁴ In the alternative, the Court should order that such Plaintiffs be promptly provided with nonrefoulement interviews, to be adjudicated under the proper standard as set forth by this Court. In addition, it should order that Defendants provide written explanations for any determinations, following those interviews, that Plaintiffs failed to demonstrate at a likelihood of persecution or torture in Mexico.

Dated: May 1, 2020

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*
Center for Gender & Refugee Studies
200 McAllister St.
San Francisco, CA 94102
(415) 565-4877

**Pro hac vice application forthcoming*

/s/ Celso J. Perez
Celso J. Perez (D.C. Bar No. 1034959)
Judy Rabinovitz
Michael Tan
Anand Balakrishnan
Daniel A. Galindo
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

Attorneys for Plaintiffs