UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are 26 individuals seeking asylum in the United States who were unlawfully sent into life-threatening conditions in one of the most violent regions in the world—Tamaulipas, Mexico—and forced to wait there during their drawn-out asylum proceedings. Plaintiffs' Complaint and the sealed declarations attached to it explain the danger, persecution, and torture suffered by Plaintiffs and other asylum seekers following Defendants' expansion of the so-called Migrant Protection Protocols ("MPP") to Tamaulipas. *See generally*, Compl.[1]

Defendants have filed a motion to dismiss all claims, recycling some of the jurisdictional arguments from their prior briefing and arguing that Plaintiffs have failed to state claims for relief. ECF No. 52; Mot. 1–3. Defendants' arguments are unavailing for the following reasons.

First, with respect to Plaintiffs' Claim One, which challenges the expansion of MPP to Tamaulipas, all the Plaintiffs have standing to raise this Claim because their injuries from MPP-Tamaulipas—including risking their lives to wait in or travel through Tamaulipas—are caused by the expansion to Tamaulipas and redressable by the relief Plaintiffs seek: a declaration that the expansion is unlawful, an order setting aside that agency action, and an injunction requiring Defendants to remove Plaintiffs from MPP. In addition, Claim One states a cause of action under the Administrative Procedure Act ("APA") because the expansion of MPP to Tamaulipas is final agency action, and judicially manageable standards for reviewing that action can be found in the statute Defendants cite as authorizing MPP, 8 U.S.C. § 1225(b)(2)(C) (the "contiguous-territory-return provision"), as well as the agency's own announcements and rules for implementing MPP, both of which set forth the agency's intentions and goals with respect to MPP. Moreover, Claim

[1] "Compl." refers to Plaintiffs' Complaint (ECF No. 3), "Mot." to Defendants' Memorandum in Support of their Motion to Dismiss (ECF No. 52-1), and "Mem. Op." to the Memorandum Opinion on Plaintiffs' Motion for Preliminary Injunction (ECF No. 43).

One states a claim for arbitrary and capricious action. As alleged in the Complaint, Defendants failed to provide any explanation for adopting MPP-Tamaulipas and failed to consider an important aspect of the problem—namely, the effect that sending asylum seekers to a region with such extreme danger would have on the government's stated intent that vulnerable individuals would be safe in Mexico and able to pursue their asylum claims.

Second, with respect to Plaintiffs' Claim Two, which challenges the government's adoption and implementation of MPP in Tamaulipas as violating the Due Process Clause, this Court has jurisdiction over this claim; the Court already held it had jurisdiction to review the expansion of MPP and, as to application of the program to individual Plaintiffs, it is not within Defendants' discretion to violate the Constitution. Plaintiffs allege that the horrors they have faced in Tamaulipas were obvious to Defendants when they expanded MPP there, knowing it was one of the world's most dangerous states; Plaintiffs further allege that MPP-Tamaulipas returns people to danger in particularly egregious ways, such as dropping people at known kidnapping locations and requiring them to show up for hearings at early morning hours when the government imposes a curfew on its own employees for safety. Plaintiffs' claims are not defeated simply because they arise in the context of immigration: courts have long recognized such substantive due process challenges to how the government treats asylum-seekers while their cases are pending. Because the Complaint reflects that Defendants have affirmatively placed Plaintiffs in danger in a way that shocks the conscience and shows deliberate indifference to Plaintiffs' safety, Plaintiffs allegations are more than sufficient to support this claim.

Finally, in Claim Three, Plaintiffs challenge the individual decisions returning Plaintiffs to Tamaulipas, and the nonrefoulement determinations on which they were based, on two grounds: First, Plaintiffs challenge that, under the APA and the *Accardi* doctrine, the government failed to

follow its own rules for conducting nonrefoulement interviews, and determining whether Plaintiffs satisfied the standard necessary to exempt them from MPP. Second, Plaintiffs challenge that these and other defects render these decisions arbitrary, capricious or otherwise not in accordance with law. Review of this claim is not barred by 8 U.S.C. § 1252(a)(2)(B)(ii) because that provision applies only to discretionary relief decisions pertaining to admission or removal, and the decisions challenged here are neither. Moreover, even if this provision did apply, it would not bar review of nondiscretionary legal issues that are components of these decisions, including the agency's failure to follow its own rules in making nonrefoulement determinations, and predicate legal questions.

The Court should deny Defendants' motion to dismiss in full.

BACKGROUND[2]

I. MPP's Adoption and Guiding Principles

Until recently, asylum seekers at the southern border were placed either into expedited removal proceedings under 8 U.S.C. § 1225(b)(1), or regular removal proceedings under 8 U.S.C. § 1229a; in either scenario, asylum seekers were allowed to remain in the United States while their claims for asylum and other protections were adjudicated in removal proceedings. Compl. ¶ 28.

On December 20, 2018, the Department of Homeland Security ("DHS") announced a historic change to the processing of asylum seekers, which it labeled the "Migrant Protection Protocols" ("MPP"). *Id*. ¶ 29. 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*. DHS claimed that the authority for MPP derives from the contiguous-territory-return provision, 8 U.S.C. § 1225(b)(2)(C), which

[2] The Court is familiar with the factual background of this case and, for purposes of this brief, Plaintiffs will review only the most relevant facts as alleged in the Complaint.

authorizes DHS to return to Mexico or Canada certain applicants for admission who arrive from these countries by land, without documents authorizing their admission, and who are placed in regular removal proceedings under § 1229a, pending the conclusion of those proceedings. *Id.* ¶ 29 n.5 (citing DHS press release on MPP). In its announcement, DHS explained that the goal of MPP was to deter migrants 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.* DHS also claimed that MPP would strengthen our humanitarian commitments" by "allow[ing] us to focus more attention on those who are actually fleeing persecution." *Id.*

Following this announcement, in January 2019, DHS issued documents detailing the terms of MPP through its components, including U.S. Customs and Border Protection ("CBP") and U.S. Citizenship and Immigration Services ("USCIS"). *Id.* ¶ 33, n.6–8. These documents (collectively, MPP's "terms" or "rules") lay out requirements for screening migrants to determine whether to subject them to MPP. *Id.* 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 immigrant who is more likely than not to face persecution or torture in Mexico," *id.* ¶ 33, a point that Defendants themselves acknowledge. *See* Mot. 6 (stating that "MPP is categorically inapplicable to . . . any applicant who is more likely than not to face persecution" and citing as support, ECF 34-3, DHS Policy Guidance for Implementation of the MPP) (quotations omitted). The MPP rules incorporate the "more likely than not" fear standard and regulations governing withholding of removal and protection under the Convention Against Torture ("CAT"), and require DHS to refer individuals who affirmatively express a fear of return to Mexico for a "nonrefoulement interview" ("NRI") with an asylum officer. Compl. ¶ 33.

Under these rules, DHS began putting individuals it deemed not exempt from MPP into removal proceedings under 8 U.S.C. § 1229a, physically returning them to Mexico, and requiring them to repeatedly return to a designated U.S. port of entry for their immigration hearings. *Id.* ¶ 30. Section 1229a provides for a host of procedures and rights in the individual's removal proceedings, including the right to apply for asylum. *See* 8 U.S.C. §§ 1229a(b)(4), 1158(a)(1). Individuals who fail to report at their designated port of entry for the date and time of their hearing may be ordered removed in absentia. Compl. ¶ 31; *see also* 8 U.S.C. § 1229a(b)(5). And this process of appearing for a hearing and being sent back to Mexico repeats until the person's immigration proceedings, including appeals, are concluded. Compl. ¶ 32.

DHS originally implemented MPP just at the San Ysidro port of entry in San Diego, California, but announced that expansion to other ports of entry and border areas was anticipated. *Id*. ¶ 34.[3] With each expansion, DHS would begin sending individuals who crossed at or near certain ports of entry back to neighboring regions in Mexico, and requiring them to report back to designated ports of entry for their hearings. *See id.* ¶¶ 35–36.

II. Defendants' Expansion of MPP to Tamaulipas Despite Extreme Danger to Migrants There, and Subsequent Exposure of Migrants to Danger, Persecution, and Torture

In July 2019, DHS expanded MPP to the Mexican border state of Tamaulipas ("MPP-Tamaulipas") without providing any explanation and despite the well-documented dangers facing migrants in that part of Mexico. Compl. ¶¶ 36, 38. Thereafter, under MPP-Tamaulipas, individuals

[3] Shortly after DHS's announcement, MPP was preliminarily enjoined, *see Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019), *stayed pending appeal*, 924 F.3d 503 (9th Cir. 2019). That injunction was subsequently upheld by the Ninth Circuit and then stayed again by the Supreme Court, pending the government's petition for certiorari. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *stay granted*, *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020) (mem.). Unlike *Innovation Law Lab*, which challenges the MPP in its entirety, this case addresses only the July 2019 decision to expand MPP to Tamaulipas, subsequent harms to Plaintiffs, and errors associated with the NRIs that Plaintiffs received.

entering the United States at or near the Texas ports of Laredo, McAllen, or Brownsville are returned through these ports to Tamaulipas, and required to present at either Brownsville or Laredo for future immigration hearings. *Id.* ¶ 36.

At the time of DHS's expansion of MPP to Tamaulipas, the U.S. State Department had long recognized the extreme levels of violence in Tamaulipas, the targeting of migrants, and the inability of Mexican authorities to provide protection. *Id.* ¶¶ 38–45. For instance, since at least 2018, the State Department has assigned Tamaulipas a "Level 4: Do Not Travel" advisory—the highest level of warning, and one, prior to the coronavirus epidemic, assigned primarily to active-combat zones such as Afghanistan, Iraq and Syria. *Id.* ¶ 39. Tamaulipas is the only Mexican border state with such a high-level travel advisory. *Id.* ¶ 41. The travel advisory issued a few months before MPP's expansion warned against travel to Tamaulipas due to "kidnapping, forced disappearances, extortion, and sexual assault," the presence of criminal groups targeting buses and cars traveling through the region, as well as the impunity of these criminal groups because of local law enforcement's "limited capacity" to respond. *Id.* ¶ 40. These warnings were echoed by the State Department's Overseas Security Advisory Council, describing two cities in Tamaulipas—Nuevo Laredo and Matamoros—and Tamaulipas as a whole as extraordinarily dangerous. *Id.* ¶ 43. Moreover, the State Department's country reports on Mexico documented, for multiple years, the extreme violence in Tamaulipas as well as the targeting of migrants by both state and non-state actors. *Id.* ¶ 44. Even the Mexican government recognized the extreme dangers in Tamaulipas prior to the expansion of MPP there. *Id.* ¶ 46. Thus, given these public reports from another agency within the U.S. government and Mexican officials, Defendants knew or should have known of the extraordinary dangers facing people returned to Tamaulipas. *Id.* ¶¶ 8, 80, 107, 110.

Despite the widespread recognition of these safety concerns, especially for migrants and individuals traveling through Tamaulipas, Defendants nevertheless expanded MPP to Tamaulipas in July 2019. *Id.* ¶ 36. Overnight, asylum seekers who crossed along the border of Texas or presented at the Brownsville, McAllen or Laredo port of entry, who would have previously been detained or paroled into the United States during their immigration proceedings, were forcibly sent to a dangerous region where many—including some Plaintiffs—had already experienced harm. *Id.* ¶¶ 28, 48, 60. In so doing, Defendants have created a cycle of events that constantly expose asylum seekers to violence from state actors and non-state actors, like cartels and street gangs, who target non-Mexican migrants with impunity. *Id.* ¶¶ 48, 50–52.

First, individuals processed into MPP-Tamaulipas are dropped off at bridges at the border where they are readily identifiable, and thus easy prey to kidnappings and assault. *Id.* ¶ 53; *see also id.* ¶ 49 n.17 (documenting how migrant kidnapping has become a business model). Second, DHS orders these individuals to appear for their immigration court hearings in Laredo or Brownsville, Texas, usually early in the morning, when they are also easily identifiable and vulnerable to cartel violence. *Id.* ¶ 54. At the same time that individuals are ordered to appear, U.S. government employees are generally forbidden to be out in Tamaulipas because the government imposes a curfew on its employees for safety. *Id.* ¶ 40; *see also id.* ¶ 40 n.10 (citing U.S. Dep't of State, Mexico Travel Advisory (Apr. 9, 2019)). In between hearings, asylum seekers must live in or travel through Tamaulipas, subjecting themselves to potential kidnapping and violence while on the road. *Id.* ¶ 55. And, there is no possibility of escaping this cycle while an individual is in proceedings, which could last multiple months, if not longer, during which they live in constant danger of kidnapping, assault, extortion, sexual violence, and death. *Id.* ¶¶ 48, 56.

Both before and after DHS's expansion of MPP to Tamaulipas, Defendants have been aware of the dangers posed to migrants in the region. *Id.* ¶ 80. Individuals have informed DHS directly, as reflected in Plaintiffs' experiences. *Id.* ¶¶ 78–79. In addition, numerous other sources—including congressional testimony, the media, humanitarian and other nonprofit organizations, academics, and U.S. Senators—have documented and described the violence suffered by individuals subject to MPP-Tamaulipas. *Id.* ¶¶ 80–82. Even the CBP Acting Commissioner, Mark A. Morgan, has acknowledged the extreme danger faced by asylum seekers. *Id.* ¶ 85. Yet, DHS has continued to implement MPP-Tamaulipas, and as of April 2020, had returned an estimated 27,000 migrants to Tamaulipas pursuant to this this inhumane policy. *Id.* ¶¶ 49, 83.

III. Plaintiffs' Experience of Life-Threatening Danger, Persecution and Torture Under MPP-Tamaulipas, and Defendants' Return of Them to Tamaulipas Notwithstanding

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.[4] 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. Jonathan Decl. ¶¶ 24–35; Nora Decl. ¶¶ 20–23; Carmen Decl. ¶¶ 32–36, 42–50. The Plaintiffs at the migrant camp in Matamoros live with the constant fear of kidnapping and sexual assaults,

[4] Plaintiffs' sealed declarations were submitted to the Court as attachments to the Complaint under ECF No. 3-3.

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.

All Plaintiffs have identified their nationality (e.g., as non-Mexican nationals and/or Central Americans specifically), and/or their status as non-Mexican migrants, as a significant reason for the harms perpetrated against them in Tamaulipas, and describe how other migrants, many of them Central American and all non-Mexican, have been similarly targeted by locals for persecution and torture in Tamaulipas. Nora Decl. ¶¶ 27, 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. Ernesto Decl. ¶¶ 20, 33 (describing persecution on account of sexual orientation); Emilia Decl. ¶ 11 (same for gender); Carmen Decl. ¶¶ 33–35, 49 (same); C.M.O.R. Decl. ¶¶ 45–52 (same for reporting against persecutors).

All Plaintiffs have expressed their fear of return to Mexico to a U.S. immigration officer—most, multiple times, including prior to being placed into MPP without an NRI. 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. Although all of the Plaintiffs but Diana eventually received NRIs when they returned to the port of entry for a hearing after being sent to Tamaulipas, many of them were prevented from fully sharing their experiences or submitting evidence. Jonathan Decl. ¶¶ 41, 44–45, 59–68; Emilia Decl. ¶¶ 23–24; Nora Decl. ¶¶ 36–37; Fabiola Decl. ¶¶ 41–44; Armando Decl. ¶¶ 22–23; Henry

Decl. ¶ 30.[5] All Plaintiffs who received NRIs after their hearings received negative assessments without any or adequate explanation and were sent back to Tamaulipas. Laura Decl. ¶ 48; Jonathan Decl. ¶¶ 44–45, 69–70; Jessica Decl. ¶ 51; Henry Decl. ¶ 30; Nora Decl. ¶¶ 38–40; Fabiola Decl. ¶¶ 46–47, 69–72; Emilia Decl. ¶ 25; Armando Decl. ¶¶ 22–24; Carmen Decl. ¶ 41; Ernesto Decl. ¶ 28. Following these negative NRI assessments, Plaintiffs continued to be subject to abuse, danger and threats when returned to Tamaulipas. Nora Decl. ¶¶ 44–55; Jonathan Decl. ¶¶ 50–54; Emilia Decl. ¶¶ 17–18; Fabiola Decl. ¶¶ 48–51; Ernesto Decl. ¶¶ 20–24, 32; Jessica Decl. ¶¶ 53–54; Henry Decl. ¶¶ 32–38; Laura Decl. ¶¶ 35–39; Armando Decl. ¶¶ 28–29; Carmen Decl. ¶¶ 45–49.

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 indefinitely postponed so Plaintiffs will likewise be subject to MPP-Tamaulipas for many more months.[6]

IV. Procedural History

Plaintiffs filed the Complaint in mid-April, raising three claims against Defendants, and shortly thereafter moved for a preliminary injunction. ECF No. 18.

The Court granted in part and denied in part the motion. Mem. Op. 30. On Claim One, the Court held it had jurisdiction to review Plaintiffs' first claim under the APA against MPP-

[5] In an effort to rebut Plaintiffs' factual allegations, Defendants rely on cherry-picked statements from the NRI assessments attached to their opposition to the motion for preliminary injunction. Mot. 7–21. As elaborated below, the Court may consider the NRI assessments only to the extent that they pertain to standing and mootness. *See infra*, Argument, Part I.A n.8; Part II.D.

[6] *See* U.S. Dep't of Justice, Executive Officer for Immigration Review, *Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings* (July 17, 2020), https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic.

Tamaulipas, *id.* 13–15, but, because it lacked an administrative record for the decision to expand MPP to Tamaulipas, the Court consolidated the preliminary injunction motion with expedited consideration on the merits of Claim One. *Id.* 21–23. On Claim Two, the Court held it had jurisdiction over the due process challenge to the extent it pertained to MPP-Tamaulipas as a whole, but not to the extent it pertained to the individual return decisions, *id.* 15–16, and that Plaintiffs had not shown a likelihood of success on the former. *Id.* 23–28. Lastly, the Court held it had jurisdiction over Claim Three's challenge to the failure to provide Plaintiff Diana with an NRI, but not as to other aspects of Claim Three that Plaintiffs briefed in their motion, *id.* 16–21, and ordered Defendants to provide Plaintiff Diana with an NRI. *Id.* 28–30.

Defendants have now moved to dismiss the Complaint.

LEGAL STANDARD

"In resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations—including mixed questions of law and fact—as true and draw all reasonable inferences therefrom in the plaintiff's favor." *Swedish Am. Hosp. v. Sebelius*, 691 F. Supp. 2d 80, 84 (D.D.C. 2010). The court will not dismiss a complaint if "the pleaded factual content 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 436 F. Supp. 3d 354, 357 (D.D.C. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In deciding a Rule 12(b)(1) motion, the court "is not limited to the allegations in the complaint but may consider material outside of the complaint in an effort to determine whether the court has jurisdiction in the case." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 195 (D.D.C. 2002). In deciding a Rule 12(b)(6) motion, the court may only consider "the facts alleged in the

complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Id.* at 196.

ARGUMENT

I. Plaintiffs' Challenge to MPP-Tamaulipas as Arbitrary and Capricious States a Claim Under the APA.

Plaintiffs' first claim challenges the July 2019 expansion of MPP to Tamaulipas as arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A). Compl. ¶¶ 105–108. Defendants raise three arguments for dismissing this claim, all of which fail for the reasons elaborated below.[7]

A. All Plaintiffs Have Standing to Challenge MPP-Tamaulipas.

Plaintiffs ask the Court to declare MPP-Tamaulipas unlawful, set it aside, and issue an injunction requiring Defendants to remove each of the Plaintiffs from MPP to allow each of them return to the United States to pursue their removal proceedings from within the United States. Compl. ¶¶ 105–108, Prayer for Relief (c)–(f). All Plaintiffs have standing to pursue this claim.

To show standing, a "plaintiff must establish (1) that it has suffered an injury in fact . . . ; (2) that a causal connection exists between that injury and the conduct complained of; and (3) that it is likely . . . that the injury will be redressed by a favorable decision." *Dignity Health v. Price*, 243 F. Supp. 3d 43, 51 (D.D.C. 2017) (internal quotation marks and alterations omitted). Defendants do not contest that all Plaintiffs satisfy the first two requirements: they have suffered injury, in the form of kidnappings, assault, death threats, and similar harm, all as a result of DHS's expansion of MPP to Tamaulipas, under which they were returned to—and must transit back through—a region that is so dangerous that the State Department has placed it under a "Level 4"

[7] As Defendants acknowledge, this Court has already held that the Immigration and Nationality Act ("INA") does not foreclose review of Plaintiffs' challenge to MPP-Tamaulipas. Mot. 2 n.1; Mem. Op. 14–15. Defendants do not ask the Court to revisit that holding.

travel advisory. Compl. ¶¶ 60–76 (describing attempted and successful kidnappings, rapes, assaults, and death threats against Plaintiffs in Tamaulipas, where they are living either in hiding or self-imposed lockdown out of fear). And these injuries are very likely to recur as dangerous conditions and migrant targeting persist in Tamaulipas, according to U.S. government and non-governmental sources. *Id*. ¶¶ 44, 80–82, 85. Therefore Plaintiffs, who are all still in immigration proceedings and must remain in or travel through Tamaulipas for their hearings, continue to fear for their survival so long as they are subject to MPP-Tamaulipas. Nora Decl. ¶¶ 58–59; Jonathan Decl. ¶¶ 71–75; Emilia Decl. ¶ 28; Laura Decl. ¶¶ 56–61; Fabiola Decl. ¶¶ 74–77; Ernesto Decl. ¶¶ 32–34; Jessica Decl. ¶¶ 52–54; Henry Decl. ¶¶ 35–40; Armando Decl. ¶¶ 28, 30–31; Carmen Decl. ¶¶ 51–53.

Defendants challenge only redressability. This argument fails because, if the Court declares that Defendants' adoption of MPP is unlawful and sets the expansion aside, Plaintiffs' injuries would be redressed. In particular, setting aside the expansion of MPP to Tamaulipas would redress Plaintiffs' harm by restoring Plaintiffs—all of whom have hearings remaining in their asylum proceedings, *see supra*—to their position prior to the expansion of MPP to Tamaulipas. *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.C. Cir. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect[.]"). Before the adoption of MPP-Tamaulipas, DHS did not place individuals crossing the border in the regions surrounding Laredo, McAllen, and Brownsville, Texas into MPP at all. Compl. ¶¶ 28, 35–36. Moreover, Plaintiffs also seek an injunction against Defendants to remove Plaintiffs from MPP. Thus, if the Court grants relief on Claim One, Plaintiffs would be able to pursue their applications for asylum and other protections from within the United States.

Defendants argue that setting aside MPP-Tamaulipas would not redress the injuries of certain Plaintiffs—Jonathan, Henry, Armando, and their families—because, during their NRIs, those Plaintiffs allegedly expressed a fear of return to parts of Mexico other than Tamaulipas. Mot. 23–24. But whatever fears Plaintiffs may have expressed with respect to other parts of Mexico have no bearing on the injuries they suffer from the extreme dangers in Tamaulipas, Compl. ¶¶ 59–76, 107–108, dangers which the State Department itself has recognized to be on a higher order than the dangers elsewhere in Mexico. *Id.* ¶¶ 38–47, 106.

"[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *accord Massachusetts v. EPA*, 549 U.S. 497, 525 (2007); *see also Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 10 (D.C. Cir. 2015) (concluding plaintiff had demonstrated redressability where a favorable outcome would "likely at least partially . . . redress his injury"). Thus, to establish standing for Claim One, it is not necessary for Plaintiffs to show that *all* of the potential harms they may suffer will be redressed by a favorable decision. They need only show that the specific harms they are challenging—in this case, the harms they face as a result of being subjected to MPP-Tamaulipas—are redressable by the relief they are seeking under Claim One: a declaration that the expansion of MPP to Tamaulipas is unlawful, the setting aside of that agency action, and an injunction removing Plaintiffs from MPP. Compl. ¶¶ 59–76, 105–108, Prayer for Relief (c)–(f).[8] That is clearly the case

[8] Plaintiffs do not agree that the NRI assessments are incorporated into the Complaint through Plaintiffs' declarations, as Plaintiffs' declarations make no reference to these documents, they have not been authenticated, and Plaintiffs have not had an opportunity to challenge their veracity. *See Vargus v. McHugh*, 87 F. Supp. 3d 298, 302 (D.D.C. 2015). And, while the Court may consider extrinsic evidence in considering a jurisdictional challenge under Rule 12(b)(1), the statements cited by Defendants here are irrelevant for the purpose of establishing Plaintiffs' standing because they do not address redressability of Plaintiffs' injuries under Claim One.

here. As alleged in the Complaint, if not for Defendants' expansion of MPP to Tamaulipas, Plaintiffs would not have been returned to Tamaulipas pending their asylum proceedings. Compl. ¶¶ 1–7. Thus, Plaintiffs Jonathan, Henry, Armando, and their families' injuries from MPP-Tamaulipas would be directly redressed by the remedies they seek under Claim One and, like the other Plaintiffs, they have standing to raise that claim.

B. Plaintiffs' Challenge to MPP-Tamaulipas is Reviewable Under the APA.

Defendants argue that Plaintiffs' challenge to MPP-Tamaulipas is unreviewable because MPP-Tamaulipas is an action "committed to agency discretion by law" under the APA, 5 U.S.C § 701(a)(2). Mot. 25–30. But, as the Supreme Court recently affirmed, "[t]he APA establishes a basic presumption of judicial review for one suffering legal wrong because of agency action," and "the exception in § 701(a)(2) [is therefore read] quite narrowly." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (citation omitted). The § 701(a)(2) exception to judicial review applies only in the "rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019) (citation omitted).[9]

Plaintiffs' APA challenge to MPP-Tamaulipas is "the sort of routine dispute that federal courts regularly review." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). An agency (DHS) made a policy decision (MPP-Tamaulipas) "affecting the rights of . . .

[9] The Supreme Court has "generally limited the exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion . . . such as a decision not to institute enforcement proceedings." *Dep't of Commerce*, 139 S. Ct. at 2568 (citations and internal quotation marks omitted). Defendants have not and could not claim that the decision to expand MPP to Tamaulipas falls within the types of actions "traditionally . . . regarded as committed to agency discretion." *Id.* (citation and internal quotation marks omitted).

private part[ies], and the private part[ies] object[] that the agency did not properly justify its determination," *id.*, including because "the agency did not appropriately consider all of the relevant factors," *id.* at 371, or because the expansion of MPP is "[in]consistent with its own declared intentions and goals." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985); *see* Compl. ¶¶ 105–108; *see also*, *e.g.*, *Regents*, 140 S. Ct. at 1906 ("The creation of" a detailed government program, with attendant benefits "—and its rescission—is an 'action [that] provides a focus for judicial review.'"); *Judulang v. Holder*, 565 U.S. 42, 52–53 (2011) (applying arbitrary and capricious review to the Board of Immigration Appeals' policy regarding certain discretionary relief in deportation cases); *Grace v. Barr*, No. 19-5013, --- F.3d ---, 2020 WL 4032652, at *11 (D.C. Cir. 2020) (same to agency's adoption of a new standard in asylum proceedings).

Moreover, here, judicially manageable standards are present in the MPP rules and related statutes and regulations. Defendants thus cannot meet their "heavy" burden to rebut the presumption of reviewability. *Ramirez v. U.S. Immigration & Customs Enf't*, 338 F. Supp. 3d 1, 37 (D.D.C. 2018) (citation omitted).

First, "judicially manageable standards" to apply to Plaintiffs' claim "may be found in [the] formal and informal policy statements and regulations" that DHS has used to describe MPP's goals. *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d. 634, 643 (D.C. Cir. 2020) (internal quotation marks and citation omitted). For example, DHS repeatedly asserted that through MPP, the agency would protect vulnerable populations and maintain a commitment to bona fide asylum seekers. *See* Compl. ¶ 7 (citing announcement that MPP would "strengthen our humanitarian commitments" to "legitimate asylum-seekers," comply "with all domestic and international legal obligations," and assure that "[v]ulnerable populations will get the protection they need" while they await a determination in Mexico), ¶ 33 (citing CBP and USCIS guidance for implementing

MPP, which discuss individuals who "are not amenable to MPP"). Such statements establish factors that can guide the Court's review of the agency's action regarding MPP. *See, e.g.*, *Weyerhaeuser*, 139 S. Ct. at 371 (law to apply found where agency was required by the statutory provision's language to consider "economic and other impacts"); *Clifford v. Pena*, 77 F.3d 1414, 1417 (D.C. Cir. 1996) (discretionary waivers are subject to review when "[t]he agency's policies" "supplied a list of factors to guide" the agency's judgment); *Seeger v. U.S. Dep't of Def.*, 306 F. Supp. 3d 265, 283–84 (D.D.C. 2018) (law to apply in reviewing safety of Department of Defense housing at Guantanamo Bay based exclusively on internal Department policies and directives); *see also Robbins*, 780 F.2d at 45 ("[T]he agency itself can often provide a basis for judicial review through the promulgation of regulations or announcement of policies.").

Additional "law to apply" to Plaintiffs' claim can be found in the INA and its implementing regulations, which confirm the government's intent that individuals returned to Mexico pursuant to MPP should be able to pursue their claims for asylum. *See id.* ("Even when there are no clear statutory guidelines, courts often are still able to discern from the statutory scheme a congressional intention to pursue a general goal."). For example, the contiguous-territory-return provision, which Defendants cite as their authority to implement MPP, specifies that individuals who are returned to Mexico remain in removal proceedings under 8 U.S.C. § 1229a. *See* 8 U.S.C. §§ 1225(b)(2)(A), (C). Section 1229a, in turn, entitles individuals to seek asylum in such proceedings. *See, e.g.*, 8 C.F.R. § 208.14(c)(1); *see also* 8 U.S.C. § 1229a(b)(5) (providing that individuals who do not appear for their hearings "shall be ordered removed in absentia").

Thus, the purported intention of MPP, and by extension MPP-Tamaulipas, is to allow individuals to pursue their asylum applications through regular removal proceedings in accordance with U.S. domestic and international obligations. Moreover, the contiguous-territory-return

provision presupposes that individuals who are returned will be able to travel to and from their hearings, and to participate fully in those proceedings, despite being forced to wait in another country. *See* 8 U.S.C. § 1225(b)(2)(C). As the D.C. Circuit noted in *Robbins*, "courts have a clear role to play in ensuring that an agency's practical implementation of its program is consistent with its own declared intentions and goals." 780 F.2d at 46; *see also Empire Health Found. v. Burwell*, 209 F. Supp. 3d 261, 273–74 (D.D.C. 2016) (instructing that "courts could consider the [agency] rule's context along with the 'general goal' being pursued" when reviewing under "an arbitrary-and-capricious standard") (citation omitted). Combined, the relevant authorities—both DHS statements and the statute itself—identify applicant safety and the right to seek asylum as relevant considerations, and thus provide judicially manageable standards to guide the Court's assessment of whether, in expanding MPP to Tamaulipas, Defendants acted arbitrarily and capriciously in light of the well-known risk of grave harm to migrants in region. In fact, this Court implicitly recognized that there are manageable standards by which to review MPP-Tamaulipas when it concluded, based on the allegations in the Complaint, that "what was known to – and announced by – some agencies within U.S. government about Tamaulipas . . . gives rise to serious questions about whether it would be reasonable for DHS to require asylum seekers to stay there for an indefinite period of time." Mem. Op. 22. The Court deferred adjudication of Claim One not for a lack of standards but for lack of a full administrative record. *Id.* at 22–23.

Seeking to avoid judicial review, Defendants point to § 1225(b)(2)(C)'s use of the word "may" as support for DHS's discretion over return provisions. *See* Mot. 27–29. But the statute uses that term only with respect to *individual* return decisions, not decisions to create or expand a complex program such as MPP. *See* 8 U.S.C. § 1225(b)(2)(C) ("In the case of *an alien* . . . the [Secretary] may return *the alien*") (emphasis added). Moreover, mere use of the word "may" does

not render an action "committed to agency discretion" under § 701(a)(2), as it would contradict "the command in § 706(2)(A)." *Weyerhaeuser*, 139 S. Ct. at 370–71 (concluding that decision taken under statute using the term "may" is reviewable); *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (reasoning that may "does not mean the matter is committed exclusively to agency discretion"); *Stewart v. Azar*, 313 F. Supp. 3d 237, 256 (D.D.C. 2018) (same). Here, because of the sources of standards to apply to review of MPP-Tamaulipas, Defendants are wrong that there is "'absolutely no guidance' as to how agency 'discretion is to be exercised.'" Mot. 25.

Defendants' reliance on *Make the Road New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020), is equally misplaced, Mot. 26, because the D.C. Circuit found a claim unreviewable based on statutory language that is not present here. In *Make the Road*, the relevant statute, 8 U.S.C. § 1225(b)(1)(A)(iii), provided that the Secretary of Homeland Security could designate which individuals could be subject to expedited removal, and stated further that "[s]uch designation shall be *in the sole and unreviewable discretion* of the [Secretary] and may be modified at any time." 962 F.3d at 633 (emphasis added) (citing 8 U.S.C. § 1225(b)(1)(A)(iii)(I)). The court emphasized three aspects of the statutory language that signaled "Congress's judgment to commit the decision exclusively to agency discretion": (1) the "forceful phrase" of "unreviewable discretion"; (2) "sole" meaning one decisionmaker alone; and, (3) "at any time," which reflects the "[t]ripling down" by Congress to "confine[] the judgment to the Secretary's hands." *Id.* at 632. The Court relied on what it deemed a "deliberate" choice by Congress to specify that the authority to designate shall be in "the sole and unreviewable discretion" of the Secretary to find no judicially manageable standards in the statute. *Id.* at 633. Moreover, *Make the Road* concluded that there were no "other legal standards constraining the Secretary's discretionary judgment." *Id.*

By contrast, as explained above, such standards exist here. And the relevant statutory provision (the contiguous-territory-return provision), 8 U.S.C. § 1225(b)(2)(C), contains no similarly absolute language.[10] *Make the Road* does not reverse the long line of circuit authority that manageable standards are to be found through a consideration of the "statutory scheme, taken together with other relevant materials," *id.* at 632 (quotation omitted), like those that demonstrate manageable standards here. *See, e.g.*, *Robbins*, 780 F.2d at 45; *Kirwa v. U.S. Dep't of Defense*, 285 F. Supp. 3d 21, 36–37 (D.D.C. 2017) (looking to the agency's past practice, in addition to the statutory and regulatory regime, to draw meaningful standard).

Lastly, Defendants assert that Plaintiffs "identify no objective way this Court can measure 'dangerousness,'" or any other "statutory provision that constrains DHS's return authority" based on danger. Mot. 28–29. Plaintiffs do not claim MPP-Tamaulipas failed to comply with a standard for measuring danger. Plaintiffs' claim "is the familiar one in administrative law," *Weyerhaeuser*, 139 S. Ct. at 371: that Defendants' decisionmaking was arbitrary and capricious. This review includes looking at whether "the agency … appropriately consider[ed] all of the relevant factors," *id.*, or "aspect[s] of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And, as described above, DHS's own materials, as well as the statutory scheme, make safety and the ability to pursue asylum important considerations. Because there is law to apply to review whether MPP-Tamaulipas is arbitrary and capricious, § 701(a)(2) does not exempt Claim One from judicial review.

[10] Similarly, Defendants' case, *Joorabi v. Pompeo*, is easily distinguishable as that APA claim concerned a challenge to a delay in adjudicating a discretionary waiver, which the court held could not be reviewed because the relevant Proclamation committed the waiver process to the agency's discretion and did not require adjudication within any time requirements. --- F. Supp. 3d ----, 2020 WL 2527209, at *5–*6 (D.D.C. May 17, 2020); *but see Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 121 (D.D.C. 2020) (holding that challenge to the delay of the same discretionary waiver was not committed by law to the agency's discretion).

C. Plaintiffs State a Claim that MPP-Tamaulipas is Arbitrary and Capricious.

The APA provides that courts "shall … hold unlawful and set aside agency action" that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2). Under this standard, an agency must provide a "reasoned explanation" for its actions. *Dep't of Commerce*, 139 S. Ct. at 2575. Agency action is arbitrary and capricious, and must be set aside "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Plaintiffs' Complaint clearly pleads that Defendants have violated these standards and therefore states a claim on which relief can be granted. *See, e.g.*, *Swedish Am. Hosp.*, 691 F. Supp. 2d at 89.[11]

Defendants, in adopting MPP, committed to protecting vulnerable populations and strengthening humanitarian commitments to bona fide asylum seekers. Compl. ¶ 7. Yet, in July 2019, Defendants expanded MPP to Tamaulipas, without explanation and despite the extreme dangers in Tamaulipas that have long been documented in State Department travel advisories, crime and safety reports, and country reports. *Id.* ¶¶ 36, 38–47. Defendants failed to provide a reasoned explanation for their action, failed to consider the severe harm asylum-seekers would face in Tamaulipas, and took action that contradicts the stated goals of MPP. *Id.* ¶¶ 36, 106–08. *See also Farrell v. Tillerson*, 315 F. Supp. 3d 47, 69 (D.D.C. 2018) (denying motion to dismiss arbitrary and capricious claim where "plaintiff has alleged that the Secretary has not engaged in reasoned decisionmaking in this case").

[11] *Baystate Franklin Med. Ctr. v. Azar*, cited by Defendants, Mot. 31, is irrelevant to the Court's analysis as that case was resolved on summary judgment. 950 F.3d 84, 89 (D.C. Cir. 2020).

Defendants do not contest that the allegations in Plaintiffs' Complaint have stated a claim for relief under the APA. Indeed, this Court has already recognized that Plaintiffs' Complaint "gives rise to serious questions about whether it would be reasonable for DHS to require asylum seekers to stay there for an indefinite period of time, even if their route to the United States took them through that territory." Mem. Op. 22. Instead, Defendants argue against Plaintiffs' claim on the merits. But on a motion to dismiss, the Court's focus must be on the allegations in Plaintiffs' Complaint, which are construed liberally in their favor. *Citizens*, 436 F. Supp. 3d at 358. At this stage, a claim that agency action is arbitrary and capricious cannot be resolved, as a matter of law, in Defendants' favor because it "depends . . . on the agency's ability to demonstrate that it engaged in reasoned decisionmaking," *Farrell*, 315 F. Supp. 3d at 69 (citation omitted). That requires an "administrative record that delineates the path by which it reached its decision." *Id.* (citation omitted); *see also Regents*, 140 S. Ct. at 1909 (recognizing that arbitrary and capricious review is based on an agency's contemporaneous explanation, not post-hoc rationalizations such as those only offered by lawyers in litigation). Accordingly, this Court has already recognized the need for an administrative record, which "could reveal what facts were known to or considered by the decision makers, and what risks were evaluated or ignored." Mem. Op. 22–23; *cf. Swedish*, 691 F. Supp. 2d at 89 (denying motion to dismiss because "[t]he court is unable to assess the merits of these arguments [challenging the administrative decision and process that led to that decision] without considering the administrative record").

In any event, Defendants' arguments do not establish that DHS's expansion of MPP-Tamaulipas was reasoned. First, Defendants misconstrue the agency action that Plaintiffs challenge, focusing on "individualized decisions" to return that are purportedly justified because it is presumptively reasonable to return individuals "back to the very place in Mexico from which

they chose to attempt to enter the United States." Mot. 30–31. But as this Court recognized, "Claim One does not take on the individual decisions made to return each plaintiff to Mexico"; rather, it "is directed at an agency decision [] to 'expand' MPP implementation to Tamaulipas." Mem. Op. 14, 22. *Accord Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1287 (D.C. Cir. 2016) (differentiating between a discrete agency action and the broader ongoing policy underlying that action).

Defendants' next attempt to rationalize the expansion of MPP to Tamaulipas by pointing to the availability of NRIs as a safety valve for those individuals who would face persecution or torture in Tamaulipas. Mot. 30–32. But this does not address the extent to which Defendants considered the harm migrants would face in Tamaulipas, reconcile that harm with the stated goals of MPP, or explain why Defendants expanded MPP to Tamaulipas, rather than continuing their prior practice of allowing asylum seekers who enter through the southern border to stay in the United States during the duration of their proceedings. Moreover, Plaintiffs' challenge to the expansion of MPP to Tamaulipas is not based on the likelihood that some returnees will face persecution or torture there, but more broadly on the extreme danger and violence that face all migrants who are returned to Tamaulipas. Compl. ¶¶ 38–58. The relevant question for Claim One is whether Tamaulipas-MPP is arbitrary and capricious because the dangers in Tamaulipas render it nearly impossible for individuals with bona fide claims to asylum to participate in, or even survive through, their asylum proceedings. Because the NRI process does not address these concerns, it does not save the expansion of MPP-Tamaulipas from being arbitrary and capricious.

II. Plaintiffs' Challenge to MPP-Tamaulipas as a State-Created Danger States a Claim on Which Relief Can be Granted and Which is Reviewable by this Court.

Plaintiffs have faced a gauntlet of horrors in Tamaulipas. They have been kidnapped, raped, and savagely attacked; some have suffered these atrocities in front of their children; some Plaintiff

children have been raped multiple times.[12] The danger of these types of harms should have been obvious to Defendants when they expanded MPP to one of the world's most dangerous states and required people to navigate that region to attend hearings spread over months. MPP-Tamaulipas returns people to danger; and it does so in particularly egregious ways. The government drops people at known kidnapping locations and requires them to show up for hearings at hours when the government imposes a safety curfew on its own employees, Compl. ¶¶ 38–46; *see also id.* ¶ 40 (citing U.S. Dep't of State, Mexico Travel Advisory (Apr. 9, 2019)). The supposed mechanisms to evaluate someone's safety are a sham, returning people despite their having told or attempted to tell Defendants of the harms in Tamaulipas.[13] Indeed, Plaintiffs' own accounts are stark examples of Defendants' shocking conduct in implementing the program. In NRIs—the very process that Defendants rely on to defend MPP-Tamaulipas against claims of deliberate indifference, Mot. 37—Plaintiffs have even been prevented from fully reporting their harms or submitting evidence. Jonathan Decl. ¶¶ 41, 44–45, 58–68; Nora Decl. ¶¶ 36–37; Fabiola Decl. ¶¶ 41–42; Henry Decl. ¶ 30.

Plaintiffs' Claim Two challenges the expansion of MPP to Tamaulipas, as well as Defendants' return of Plaintiffs to Tamaulipas as actions that expose them to a state-created danger that threatens their very lives and violates the Due Process Clause. This constitutional claim cannot be brushed aside simply because Plaintiffs are not citizens or because these claims arise in the

[12] *See, e.g.*, Jonathan Decl. ¶¶ 24–35 (kidnap and savage attack), Nora Decl. ¶¶ 20–23 (kidnap and rape); Emilia Decl. ¶¶ 12–13 (same); Carmen Decl. ¶¶ 34, 48–49 (same); Jonathan Decl. ¶¶ 24–35 (atrocities suffered in front of child); Nora Decl. ¶¶ 20–23 (same); Carmen Decl. ¶¶ 32–36, 42–50 (same); Emilia Decl. ¶¶ 12–13 (child raped multiple times); Diana Decl. ¶¶ 21–23 (same).
[13] Ernesto Decl. ¶¶ 12, 27¬–28; Laura Decl. ¶¶ 28, 45–48; Jonathan Decl. ¶¶ 38–41, 58–68; Jessica Decl. ¶¶ 48–51; Henry Decl. ¶¶ 28–31; 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. ¶ 21–24; Carmen Decl. ¶¶ 39–41

immigration context. And the Court has already rejected Defendants' attempts to defeat the claim by mischaracterizing it as a claimed right to entry, or right to certain procedural safeguards. Mem. Op. 3 (citing Compl. ¶¶ 109–14).

A. Plaintiffs' Constitutional Claim Is Reviewable in Its Entirety.

The Court rightly noted that Plaintiffs claim that Defendants violated their due process rights via both systemic and individual-level decisions, i.e., "both by adopting and applying MPP-Tamaulipas, and additionally by subjecting and continuing to subject [p]laintiffs to MPP-Tamaulipas." Mem. Op. 15. The Court held that challenging the decision to "implement the MPP in Tamaulipas at all" is reviewable, *id.* at 15–16, and Defendants do not argue otherwise.

As to individual returns, even if those acts were discretionary decisions that § 1252(a)(2)(B)(ii) purports to jurisdictionally bar—which they are not, *see infra* Part III.B.a—it would not follow that the *constitutional* claims here are thus barred from review. That is so because whatever discretion an agency may have, that discretion cannot ignore constitutional safeguards and cannot escape review for compliance with the constitution: "decisions that violate the Constitution cannot be 'discretionary,' so claims of constitutional violations are not barred by § 1252(a)(2)(B)." *Kwai Fun Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004); *Poursina v. USCIS*, 936 F.3d 868, 876 (9th Cir. 2019) (same); *E.O.H.C. v. DHS*, 950 F.3d 177, 191 (3d Cir. 2020) ("[N]o executive official has discretion to commit ultra vires acts."). Plaintiffs' constitutional due process claim does "not seek review of the Attorney General's exercise of discretion" but, rather, review of "the extent of the Attorney General's authority . . . [a]nd the extent of that authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

Make the Road further supports this understanding: as the Court of Appeals explained, "Even where it applies, [8 U.S.C. 1252(a)(2)] Subsection B's jurisdictional bar does not apply to

challenges based on "constitutional claims or questions of law." 962 F.3d at 630 (citing 8 U.S.C. § 1252(a)(2)(D)). The court's decision in *Cruz v. Department of Homeland Security*, 2019 WL 8139805 (D.D.C. Nov. 21, 2019)— which the Court cited in its ruling on Plaintiffs' preliminary injunction motion, Mem. Op. 15 n.3—is also consistent with *Make the Road*'s explanation of the statute. *Cruz* specifically rejected the view that a due process claim challenging the application of MPP to an individual was barred by § 1252(a)(2)(B)(ii). *Id.* at *3–*4; *see also id.* at *3 (noting that inferring such a bar on constitutional claims would be an "extraordinary step"). Accordingly, Plaintiffs' due process challenge to their individual return decisions is reviewable.

B. Plaintiffs Have a Substantive Due Process Right to Bodily Integrity and Freedom from State-Created Danger.

Plaintiffs' substantive due process claim is that the state cannot, in a conscience-shocking way, increase their risk of deadly harm, and that it has done so by expanding and implementing MPP to Tamaulipas and sending Plaintiffs to that state repeatedly. Compl. ¶¶ 111–14; *see* Mem. Op. 24 (recognizing claim as a liberty interest in bodily integrity).

Defendants repeat arguments this Court has already considered and rejected—that there is no liberty interest here, and that Defendants did not increase dangers because those dangers already existed. Those recycled claims are no more persuasive in the motion to dismiss context. Plaintiffs' liberty interest in bodily integrity is squarely within interests recognized in *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001), and the Court should again decline to adopt Defendants' mischaracterizations. Mem. Op. 24–27.

Defendants rely on cases addressing *procedural* rather than *substantive* due process rights to claim that Plaintiffs have no due process right here. *See* Mot. 33 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976) and other procedural due process cases). In *Zadvydas*, however, seven Justices agreed that even noncitizens who have been ordered removed have substantive due process rights.

533 U.S. at 690; *id.* at 718 (Kennedy, J., joined by Rehnquist, C.J., dissenting); *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) ("[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the fifth and fourteenth amendments . . . "); *accord Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003) (en banc); *Ngo v. INS*, 192 F.3d 390, 396 (3d Cir. 1999).

Thuraissigiam, the only new case Defendants raise, concerned "rights *regarding admission* that Congress has provided by statute." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982–83 (2020) (emphasis added) (citing *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application* . . ." (emphasis added)). Thus, it does not disturb Plaintiffs' substantive due process right to be free from state-created harm.

Defendants also claim that they "did not create the dangers Plaintiffs claim to face" because the dangers already existed. Mot. 34–35. Defendants misapprehend the state-created danger doctrine and "would render [it] meaningless": "by its very nature, the doctrine only applies in situations where the plaintiff was directly harmed *by a third party*—a danger that, in every case, could be said to have 'already existed.'" *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012). For example, in *Butera*, the court ruled that a drug-buying operation gave rise to a state-created danger claim where police conducted it with deliberate indifference to the plaintiff's safety. *Butera* 235 F.3d at 643. Yet the house in which Butera was killed was one he had visited on "numerous occasions" before, and had bought drugs there before, *id.* at 641, 643; it was no answer for the District of Columbia to claim, as Defendants do here, that they "did not create the dangers" because Butera was doing an activity he had done previously. *See id.* at 652 (affirming that "the State also owes a duty of protection when its agents create or increase the danger to an individual").

Defendants' argument that they simply put "Plaintiffs in the same position they were in," Mot. 35, fails. Expanding MPP to Tamaulipas despite the obvious dangers meant that people such as Plaintiffs would now be vulnerable to harms they did not previously face before being expelled to one of the most violent regions in the world: being required to appear at "known kidnapping sites as early as 4:30 AM," an hour so dangerous that it falls within the U.S. State Department's curfew for its employees; being "return[ed] . . . to the dangerous locations at the end of the [hearing] day"; being "forc[ed] . . . to repeat this process again and again for months while their cases are adjudicated"; and being forced to either live in Tamaulipas for months and/or have to travel through the region for every hearing. Mem. Op. 10–11 (citing Compl. ¶¶ 53–56, U.S. Dep't of State, Mexico Travel Advisory (Apr. 9, 2019)).

For similar reasons, Defendants cannot defeat Plaintiffs' substantive due process claim by contending that Plaintiffs chose to travel through Tamaulipas. Plaintiffs are not voluntarily choosing to remain for months in Tamaulipas: they are fleeing persecution in their home countries. Passing through a dangerous area on one's journey to intended safety in the United States is not the same as remaining there for an extended period; it does not mean that one acquiesces to being forced to live amidst the dangers there. *See, e.g.*, *Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989) (travel through high crime area did not defeat state-created danger claim when police forced plaintiff to walk home).

C. Plaintiffs' State-Created Danger Claims Are Not Barred Because They Are Not Brought to Support Claims for Admission or to Challenge Removal Orders.

Defendants argue that in "the immigration context" one cannot raise a due process claim to be free from state-created danger because of "separation of powers principles." Mot. 35. At root, the cases Defendants cite invoke plenary power—deference to "the legislative power of Congress . . . over the admission" and removal "of aliens," *Enwonwu v. Gonzales*, 438 F.3d 22, 31 (1st Cir.

2006) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977))—and contend it "would unduly expand the contours of our immigration statutes" if state-created danger were a defense to "final orders of removal," *Kamara v. Attorney Gen. of U.S.*, 420 F.3d 202, 217–18 (3d Cir. 2005).

The Ninth Circuit has held to the contrary. *See Morgan v. Gonzales*, 495 F.3d 1084, 1093 (9th Cir. 2007) ("The state-created danger doctrine may also be invoked to enjoin deportation.") (citing *Wang v. Reno*, 81 F.3d 808, 818–19 (9th Cir. 1996)). And it has affirmed an injunction against "removing" an individual from the United States or "returning" him to officials from a country where he faced likely serious harm, citing the state-created danger doctrine as the basis for its holding. *Wang*, 81 F.3d at 818.

But this court need not decide which court of appeals is correct on this point, for a simple reason: the claim Plaintiffs raise does not seek to use state-created danger as an additional basis for challenging removal or gaining admission. Rather, its focus is on how Plaintiffs are treated by the government—more specifically, unconstitutionally endangered by the government—while they are waiting for their removal proceedings to take place. Plaintiffs' claim, particularly in its challenge to the expansion of MPP to Tamaulipas, is thus distinguishable from the cases Defendants cite, Mot 35, all of which involved claims of state-created danger made by individuals as a means to challenge their final orders of removal (or decisions construed as final orders of removal). *See, e.g.*, *Kamara*, 420 F. 3d, at 210, 217–18); *Vicente-Elias v. Mukasey*, 532 F.3d 1086, 1095 (10th Cir. 2008); *Enwonwu* 438 F.3d at 30.

Freedom from state-created danger is thus akin to rights courts have found cognizable in the immigration context. The government does not have carte blanche to torture or impose a term of hard labor on an individual, simply because they are a noncitizen seeking admission or pending removal, *Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting), *Wong Wing v. United States*, 163 U.S.

228, 238 (1896); nor to subject a noncitizen detained for immigration purpose to gross physical abuse, *see, e.g.*, *Lynch*, 810 F.2d at 1374; nor to subject a noncitizen who has already been ordered removed to an indefinite deprivation of their liberty when they cannot be removed, *Zadvydas*, 533 U.S. at 694–95 (interpreting statute to avoid that due process violation). "[N]owhere" do such protections "deny the right of Congress to remove aliens." *Id.* at 695; *see also id.* ("Congress must choose 'a constitutionally permissible means of implementing' [its immigration laws]") (quoting *INS v. Chadha*, 462 U.S. 919, 941–42 (1983)).

Thus in *J.P. v. Sessions*, the court relied on a state-created danger theory to grant injunctive relief to parents who had been separated from their children under the government's "zero-tolerance policy." No. LA CV18-06081 JAK (SKX), 2019 WL 6723686, at *36 (C.D. Cal. Nov. 5, 2019). The due process clause protected such families from the "severe mental trauma" of separation, *id.*, regardless of the fact that their claims arose "in the immigration context," Mot. 35 (quotation marks omitted). So too are Plaintiffs protected from state-created danger here, where they are not seeking to invoke that doctrine as a defense against a final order of removal.

This distinction—that Plaintiffs' claim does not challenge a final removal order—is also important because the Supreme Court has set out limited circumstances under which Congress can channel the enforcement of a constitutional right into certain statutory procedures, and require someone to raise such claims through those procedures. For that to occur, the Supreme Court has explained, the statutory scheme must be "unusually elaborate," "carefully tailored," and "restrictive," among other detailed requirements. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009); *see also Smith v. Robinson*, 468 U.S. 992, 1011 (1984) ("comprehensive" statutory scheme displacing other means to assert a constitutional claim).

The Court need not resolve whether Congress has satisfied the *Fitzgerald* test in the cases that the Defendants cite, all of which concern the statutory procedures for evaluating claims for relief from a final removal order, and then consider whether a petitioner may invoke state-created danger as a new ground for relief. *See, e.g.*, *Vicente-Elias*, 532 F.3d at 1095 (noting concern with adding "a new form of relief from removal onto the statutory scheme established by Congress"). But there is no "unusually elaborate" or "carefully tailored" scheme applicable to the *determination of whether asylum-seekers may be sent to a third-country while awaiting their adjudications*. Unlike the "comprehensive" scheme in *Smith*, here for MPP, there is a spare statutory reference with no process delineated to safeguard the constitutional right at issue. *See* 8 U.S.C. § 1225(b)(2)(C) (entirety of contiguous-territory-return statutory provision). Thus, at least as to the third-country returns while a removal case is pending, there is no comprehensive process that could possibly, under *Fitzgerald*, displace this Court's authority to enforce the Due Process Clause here. *See generally Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (reaffirming courts' inherent power to enjoin the violation of federal law by federal officials). Instead, the application of substantive due process to this circumstance is the stuff of ordinary constitutional litigation: Plaintiffs claim that Defendants have applied a congressional statute in a manner that transgresses a constitutional command.

D. The Allegations in the Complaint Shock the Conscience.

The government "owes a duty of protection when its agents create or increase the danger to an individual." *Butera*, 235 F.3d at 652. The appropriate standard to apply to Defendants' conduct, as alleged in the Complaint, is deliberate indifference to a known or obvious danger, in a manner that shocks the conscience. *Id. Butera* explained that deliberate indifference applies when "the State has a heightened obligation toward the individual," and identified ways to meet that

obligation. *Id.* at 651. For example, a special duty "to assume some responsibility for [a person's] safety and general well-being" attaches where a state "so restrains [a person's] liberty that it renders him unable to care for himself." *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998) (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)). A heightened obligation to protect someone's safety also attaches in circumstances when "actual deliberation is practical" before the state acts and exposes that person to danger from third parties. *Butera*, 235 F.3d at 651–52. The Court of Appeals thus discussed both the manner in which police controlled Butera's liberty, including driving him to the location of the drug-buy, *id.* at 642, and the extent to which the state's actions were planned, *id.* at 652.

Here, the Court has already noted how Plaintiffs' allegations support "a heightened obligation to ensure [P]laintiffs' safety," because "the government has required plaintiffs to remain in Tamaulipas or travel to Tamaulipas to attend their asylum hearings and assumed the role of transporting them from the border to their hearings." Mem. Op. 28 n.8. The government has also required Plaintiffs to report for hearings to known kidnapping locations by the border, at especially dangerous hours when the State Department imposes a curfew on its employees for safety reasons. Mem. Op. 10 (citing Compl. ¶¶ 53–54). These constraints on movement are greater than those in *Butera*, where the court found a heightened obligation. 235 F.3d at 656.

Plaintiffs' allegations also support a heightened obligation toward Plaintiffs' safety because actual deliberation by Defendants before expanding MPP to Tamaulipas was practical. Defendants ignored ample warnings in expanding MPP to Tamaulipas, including warnings from other government departments going back several years. Compl. ¶¶ 38–46. And for years Defendants have not returned individuals to Tamaulipas while their immigration cases are heard; even after they adopted MPP, they had months before they decided to expand to Tamaulipas. *Id.*

¶¶ 36, 38; *see also J.P.*, 2019 WL 6723686, at *36 (applying deliberate indifference to government implementation of family-separation policy). Plaintiffs also alleged how they told immigration officers about their fears of return to Mexico, including often making multiple attempts to inform officers.[14] Those allegations show far more opportunity to deliberate than in *Butera*, where police met with Eric Butera and carried out an undercover operation that same day; even then, the court concluded "actual deliberation [was] practical." 235 F.3d at 652.

In arguing that only "an intent to harm" standard would apply, Mot. 36, Defendants rely on inapposite "instant judgment" cases, *Lewis*, 523 U.S. at 853, such as decisions made in a 75-second police chase, *id.* at 837, or during a prison riot, *id.* at 853.[15] Defendants also claim that circumstances at the border are an "escalating crisis" and do not permit "unhurried judgment," Mot. 37, but those fact-based contentions are not cognizable in a motion to dismiss (and moreover implausible in light of the months Defendants took to decide to expand MPP).

Plaintiffs' Complaint makes clear the extensive harms they have faced, including rapes and attacks subsequent to being forced back to Tamaulipas by Defendants,[16] and Defendants do not contest the shocking nature of those dangers. The likelihood of such harms was clearly known to Defendants when they deliberately chose to expand MPP to Tamaulipas: "Violent crime, such as

[14] 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. Plaintiffs further told officials about their fears in the screening interviews that most but not all received.

[15] *Fraternal Order of Police Dep't of Corr. Labor Comm. v. Williams* found no heightened obligation toward the police officers because of their decision to work in the conditions they claimed were dangerous. 375 F.3d 1141, 1146 (D.C. Cir. 2004).

[16] Nora Decl. ¶¶ 44–55; Jonathan Decl. ¶¶ 50–54; Emilia Decl. ¶¶ 17–18; Fabiola Decl. ¶¶ 48–51; Ernesto Decl. ¶¶ 20–24, 32; Laura Decl. ¶¶ 35–39; Jessica Decl. ¶¶ 53–54; Henry Decl. ¶¶ 32–38; Armando Decl. ¶¶ 28–29; Carmen Decl. ¶¶ 45–49.

murder, armed robbery, carjacking, kidnapping, extortion, and sexual assault, is common." Mem. Op. 10 (citing U.S. Dep't of State, Mexico Travel Advisory (Apr. 9, 2019)).

Defendants appear to rely on the NRIs to show they were not deliberately indifferent, Mot. 37 (citing Mem. Op. 28 n.8), but that argument must fail on a motion to dismiss, where the Court must accept the factual allegations that the nonrefoulement process is a sham as true.[17] Defendants' contrary and unfounded claims at the 12(b)(6) stage cannot support dismissal.

Indeed, as a one federal appellate judge has observed, Defendants' practice of sham NRIs "is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' non-refoulement obligations." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J., concurring); *cf. Huber v. Anderson*, 909 F.3d 201, 208–09 (7th Cir. 2018) (noting that an "ineffectual investigation" can "constitute[] deliberate indifference" where the investigation fails to take basic steps to assess and prevent harms); *Butera*, 235 F.3d at 642–44 (meeting and safety measures that were taken did not defeat claim of deliberate indifference where defendants failed to sufficiently warn informant of dangers); *Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000) ("paper policy" cannot overcome showing of deliberate indifference).

More fundamentally, even if the Court could presume on a 12(b)(6) motion to dismiss that the process was not a sham (which it cannot do because that presumption conflicts with the Complaint), all that Defendants' NRIs can ostensibly do is consider whether a specific individual who affirmatively declares a fear of persecution or torture meets a standard of "more likely than

[17] The Complaint alleges that Plaintiffs expressed fear but were never given interviews, *see e.g.*, Compl. ¶¶ 88, 90; that Plaintiffs were prevented from presenting their fears, *see, e.g.*, *id.* ¶¶ 89, 95, 97, 100, 103, and that even clear showings of past harms and extremely likely future harms were ignored, *id*. ¶¶ 88–104.

not" that they will face persecution or torture on protected grounds. Compl. ¶ 33. But this type of screening by design may ignore dangers that would nonetheless shock the conscience; for example, apart from whether it meets the definitions of persecution or torture to drop an individual in the middle of a gang shoot-out or war zone, it certainly shocks the conscience to do so. Similarly, a 49% chance that someone would be raped and murdered if returned to Mexico would still shock the conscience even if it did not satisfy the "more likely than not" (over 50%) standard. It is no defense to take action against one type of harm while ignoring another obvious potential harm. *See Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 166–67, 177 (4th Cir. 2010) (finding duty not to place child in foster care with deliberate indifference to child's safety, where social service agency removed girl from sexually abusive home but did not separate girl from her sibling who had also sexually abused her); *see also Butera*, 235 F.3d at 643 (defendants positioned themselves to be able to see dangers to informant exiting house but not entering house).

In sum, Defendants will have the opportunity at summary judgment to produce evidence showing that its procedures are real safeguards and not a fig leaf to cover the systematic forcing of migrants, with no regard for their safety, into a hornet's nest where they are in grave danger of being kidnapped, sexually assaulted, or killed. But Plaintiffs' allegations—which draw on Defendants' own assessment of the conditions in Tamaulipas and their blatant disregard for Plaintiffs' safety in the face of their own findings—are certainly plausible enough to survive a motion of dismiss.

III. This Court Has Jurisdiction to Review Claim Three.

Claim Three challenges defects in Plaintiffs' return decisions and the nonrefoulement determinations on which those decisions were based. The fact that all Plaintiffs received NRIs

does not cure these defects. As such, except as to Plaintiff Diana,[18] Claim Three is not moot. Additionally, notwithstanding the jurisdictional provision at 8 U.S.C. § 1252(a)(2)(B)(ii), this Court can review the return decisions and the associated nonrefoulement determinations. For one, these decisions are not discretionary, rendering them outside the scope of § 1252(a)(2)(B)(ii). The decisions are also beyond the scope of that provision because they do not provide relief related to admission or removal, as is required for the provision to apply. Finally, even if § 1252(a)(2)(B)(ii) applied, this Court has jurisdiction to review the nonrefoulement determinations because they are a nondiscretionary component of the return decision.

A. Claim Three Is Not Moot.

Claim Three challenges the return decisions and the nonrefoulement determinations on which they are based, on two grounds: *First*, based on the APA and *Accardi* doctrine, Plaintiffs challenge the government's failure to adhere to rules for MPP NRIs. Compl. ¶¶ 115, 119–20 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). As this Court has already held, this includes, at a minimum, failing to referr noncitizens to an NRI when they express a fear of return to Mexico. Mem. Op. 29. But MPP rules also mandate other key requirements, including the opportunity to be meaningfully heard and present evidence in a non-adversarial setting, as well as an obligation to adjudicate nonrefoulement determinations under the proper legal standards. Compl. ¶¶ 117–118; ECF No. 18-15 ("USCIS Memo") at 3–4. Plaintiffs have alleged that Defendants violated these obligations in Plaintiffs' cases. Compl. ¶ 117; *see also* ECF No. 19 at 32–37. *Second*, Claim Three challenges both the return decisions and the nonrefoulement determinations as arbitrary, capricious, or contrary to law for these and other reasons. In addition

[18] Because Plaintiff Diana and her children were removed from MPP and paroled into the United States, Mot. 16, Plaintiffs agree Claim Three is moot as to her.

to violating its own rules for conducting NRIs and making nonrefoulement determinations, these determinations were contrary to, or failed to consider, evidence that Plaintiffs properly presented to the agency by means of sworn testimony or documentary evidence. Compl. ¶¶ 117, 119, 120; *see also id.* ¶¶ 91, 93; ECF Nos. 19, 37–38.

Defendants argue for dismissal of "a portion" of Claim Three, relying solely on the fact that all the Plaintiffs have received NRIs. Mot. 38. But the mere fact that Plaintiffs received such interviews does not render even a portion of Claim Three moot, because Plaintiffs remain in Mexico pursuant to return decisions based on defective nonrefoulement determinations. Indeed, in arguing for dismissal of the portion of Claim Three that pertains to the government's failure to provide NRIs, *id.*, Defendants ignore that this was only *one aspect* of a broader challenge to their failure to follow the MPP rules with respect to these interviews. Thus, there is no basis for dismissing Claim Three as moot, even in part.

B. Section 1252(a)(2)(B)(ii) Does Not Bar Review of Claim Three.

"The Supreme Court has consistently applied the presumption of reviewability to immigration statutes, including the very statute at issue here, 8 U.S.C. § 1252(a)[.]" *Make the Road*, 962 F.3d at 624 (quotations omitted) (citing *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069–70 (2020); *Kucana v. Holder*, 558 U.S. 233, 251–52 (2010)). "That 'well-settled' presumption can be overcome only by 'clear and convincing evidence' of congressional intent to preclude judicial review." *Id.* (citations omitted). Defendants have not met their burden to show that § 1252(a)(2)(B)(ii) precludes review of the decisions at issue in Claim Three—the decisions returning Plaintiffs to Mexico, and the nonrefoulement determinations on which they were based.

a. The Return Decisions at Issue Here Fall Outside the Scope of § 1252(a)(2)(B)(ii) Because the Government Has No Discretion to Return Someone Who Meets the Nonrefoulement Standard.

Section 1252(a)(2)(B)(ii) bars review of certain "[d]enials of discretionary relief," 8 U.S.C. § 1252(a)(2)(B), including "decision[s] or action[s] . . . specified under this subchapter to be *in the discretion* of the Attorney General or the Secretary of Homeland Security," *id.* § 1252(a)(2)(B)(ii) (emphasis added). But the government's nonrefoulement determination—a key component of the return decision—is *not discretionary*. And DHS does not have discretion to return an individual under MPP who has received a positive nonrefoulement determination. Mot. 6. These nonrefoulement determinations implement a mandatory requirement—the nonrefoulement obligation—that constrains the government's discretion to return individuals under MPP.[19]

Indeed, Defendants concede that the nonrefoulement obligation—and specifically the determination made at an NRI that an individual has met the nonrefoulement standard—constrains DHS's discretionary return authority under MPP, stating that "MPP is categorically inapplicable . . . to any applicant who is more likely than not to face persecution or torture in Mexico." Mot. 6. This is made clear by MPP's rules, which mandate that the contiguous-territory-return provision, 8 U.S.C. § 1225(b)(2)(C), "be [implemented] consistent with applicable domestic and international legal obligations," ECF No. 18-46 at 2, and that "DHS officials should act consistent with . . . *non-refoulement* principles." *Id.* at 3; *see also* USCIS Memo at 2. "Specifically, a third-country national

[19] In its previous order, Mem Op. 16–21, this Court did not address Plaintiffs' arguments that the government's nonrefoulement obligation, which applies to and constrains MPP return decisions, is mandatory and not discretionary, *see* ECF No. 36 at 19. Instead, the Court's decision assumes that the determinations made at Plaintiffs' NRIs were "*discretionary* decisions" and thus barred from review under § 1252(a)(2)(B)(ii), Mem. Op. 17 (emphasis added), which they are not.

should not be involuntarily returned to Mexico . . . if the alien would more likely than not be persecuted . . . or would more likely than not be tortured." ECF No. 18-46 at 3–4 (emphasis added).

The language of the MPP rules make clear that even if the contiguous-territory-return provision purports to make decisions about the return of eligible individuals discretionary, that discretion is limited by the mandatory nonrefoulement obligation, which is required by treaty and codified in the INA. *See* ECF No. 18-18 ("MPP Guiding Principles" this Court has already found bind the agency, Mem. Op. 20) at 1 (stating that certain noncitizens "*are not amenable* to MPP," including those "who [are] more likely than not to face persecution or torture in Mexico") (emphasis added); *id*. at 2 ("If USCIS assesses that an alien who affirmatively states a fear of return to Mexico is more likely than not to face persecution or torture in Mexico, *the alien may not be processed for MPP*.) (emphasis added); *see also* USCIS Memo at 2 (specifying individuals who meet "the same standard used for withholding of removal and CAT protection determinations" are exempted from MPP and citing the treaties, statutes and regulations outlining these standards).[20]

Subsection (B)(ii) does not bar review of nondiscretionary constraints on the agency's discretion, *see supra* Part II.A (citing *Zadvydas*, 533 U.S. at 688). Even where constraints on agency discretion are imposed by binding sub-statutory requirements, courts, including this one, have found § 1252(a)(2)(B)(ii)'s bar on "discretionary" agency actions does not apply. *See, e.g.*,

[20] As the MPP rules make clear, nonrefoulement determinations are a mandatory implementation of the government's obligations under Article 33 of the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention"), *see* Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276, and its obligations under Article III of the Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988). These obligations are also made mandatory by the statutes implementing them: 8 U.S.C. § 1231(b)(3)(A) (implementing Article 33 of the Refugee Convention) and the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G Title XXII, § 2242, 112 Stat. 2681-761, 2681-822 (implementing Article III of CAT) (codified at 8 U.S.C. § 1231 note). These statutory nonrefoulement obligations apply to the return decisions at issue in MPP. *See* Mot. 6 (citing *Innovation Law Lab*, 924 F.3d at 506).

Sharkey v. Quarantillo, 541 F.3d 75, 86 (2d Cir. 2008) (finding reviewable a claim that the agency failed to follow mandatory procedures applying to rescission of legal status, where the statute did not mandate those procedures); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 327–28 (D.D.C. 2018) (same for claim that agency was "as a matter of general course, not complying with the policies and procedures" set forth in a directive); *see also Aracely v. Nielsen*, 319 F. Supp. 3d 110, 150 (D.D.C. 2018) (explaining that when agency rules affect the rights of individuals, as they do here, those rules are binding on the agency) (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)).

In arguing for dismissal of Claim Three under § 1252(a)(2)(B)(ii), Defendants ignore this mandatory aspect of the return decision. Mot. 40–41. Instead, they concede that the nonrefoulement obligation limits DHS's discretion to return noncitizens. *Id*. 6. This concession is fatal because it admits that, even if DHS retains some discretion over the return decision, the agency's authority is constrained by the nonrefoulement requirement. While the government is *not* required to return to Mexico an individual who fails to meet the nonrefoulement standard,[21] the government has no discretion to return someone who satisfies it. *See, e.g.*, ECF No. 18-18 at 1, 2.

Moreover, the nonrefoulement determination itself contains no element of discretion. Rather, it is a determination of whether an individual meets the required legal standard. *See* 8 U.S.C. §§ 1231(b)(3), 1231 note; 8 C.F.R. § 1208.16 (provisions codifying the nonrefoulement obligation). And unlike asylum, which is a process first requiring determination of whether an applicant meets a legal standard, and then requiring an exercise of discretion, *see, e.g. Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004), once an applicant meets the standard for nonrefoulement, the agency is prohibit from returning them to the country feared. *See, e.g.*,

[21] *See, e.g.*, ECF No. 18-18 at 1 (authorizing the exemption of any individual from MPP at discretion of the Port Director).

Salgado-Sosa v. Sessions, 882 F.3d 451, 456 (4th Cir. 2018) (in contrast to asylum, the withholding nonrefoulement obligation is "mandatory"); *Nuru v. Gonzalez*, 404 F.3d 1207, 1216 (9th Cir. 2005) (both the nonrefoulement withholding obligation, and obligation not to remove an individual meeting the torture standard are mandatory where a noncitizen meets their burden).[22]

b. Return Decisions Also Fall Outside the Scope of § 1252(a)(2)(B)(ii) Because They Are Not Relief Decisions Concerning Admission or Removal.

Section 1252(a)(2)(B)(ii) also does not apply to decisions to return individuals to Mexico (or the nonrefoulement determinations on which they are based) because § (B)(ii) restricts review of only a narrow set of decisions not at issue here: "individualized forms of discretionary relief from removal or exclusion," that are specified in statute to be discretionary. *Make the Road*, 962 F.3d at 630; *see also id.* at n.11 (quoting *Kucana*, 558 U.S. at 237).

The narrow reach of the provision stems from the statutory structure. As the Supreme Court has made clear, and the D.C. Circuit recently reiterated, § (B)(ii) is a "catchall" or residual clause that should be interpreted as limited by "the enumerated categories . . . which are recited just before it" in § (B)(i). *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001); *accord Kucana*, 558 U.S. at 247; *Make the Road*, 962 F.3d at 629. All of the relief decisions enumerated in § (B)(i) go to inadmissibility (grounds for exclusion) or removability: they "include waivers of inadmissibility based on certain criminal offenses, § 1182(h), or based on fraud or misrepresentation, § 1182(i); cancellation of removal, § 1229b; permission for voluntary departure, § 1229c; and adjustment of status, § 1255." *Kucana*, 558 U.S. at 248. Subsection (B)(ii) only covers decisions that "are of a like kind as those identified in [§ (B)](i)." *Make the Road*, 962 F.3d at 629 (recognizing that the

[22] Though, like asylum decisions under 8 U.S.C. § 1158(b)(2)(A), withholding decisions are subject to statutory bars, 8 U.S.C. § 1231(b)(3)(B), withholding and torture obligations are *not* "discretionary."

"Supreme Court repeated that understanding of Subsection B's scope recently in *Nasrallah v. Barr*, 140 S. Ct. 1683, 1694 n.5 (2020)") (quoting *Kucana*, 558 U.S. at 248).

A decision whether to "return" an individual to Mexico during the course of immigration proceedings is not an "individualized form[] of discretionary relief *from removal or exclusion*," *Make the Road*, 962 F.3d at 630 (emphasis added). The return decision has nothing to do with whether an individual will ultimately be found inadmissible or removable at the *end* of proceedings. Rather, it involves only the location of a person who has preliminarily been determined to be inadmissible, *pending* the final determination of that issue in removal proceedings. 8 U.S.C. §§ 1225(b)(2)(A), (C). By the same token, a decision not to put someone in MPP does not grant admission, waive inadmissibility, or otherwise grant relief from removability. *See Make the Road*, 962 F.3d at 629 (specifying types of decisions covered). And as explained, *see supra* Part III.B.a., the particularly determinations at issue here, nonrefoulement determinations, are legal determinations—not discretionary ones made "as a matter of grace," Mem. Op. 19 (quoting *Kucana*, 558 U.S. at 247).

The government argues that *Make the Road*'s recognition of § 1252(a)(2)(B)(ii)'s narrow reach is inapposite because (1) the plaintiff organizations there challenged general rulemaking, not individual decisions; and (2) the INA includes a provision regarding the jurisdiction to review the rule at issue there, which is not relevant here. Mot. 40–41. While true, neither of these observations negates that, as the D.C. Circuit reiterated, decisions covered by § 1252(a)(2)(B)(ii) are only those concerning relief from removability or inadmissibility (i.e., exclusion)—neither of which apply to return decisions covered by the contiguous-territory-return provision.

And although this Court considered and rejected Plaintiffs' similar arguments, Mem Op. 19–20, it did not address the language in *Make the Road*, decided shortly before this Court's ruling.

The Court read the "main focus" of the Supreme Court's analysis of § 1252(a)(2)(B)(ii) in *Kucana* to be whether discretion is specified in statute rather than in a regulation. Mem. Op. 19. But *Make the Road* makes clear that *Kucana* "teaches two things—not just one." 962 F.3d at 630 n.11. In applying § (B)(ii), even if a statute specifies a decision as discretionary, the Court must inquire whether the decision is of a like kind to those enumerated in § (B)(i). *See id.* In discussing the character of return decisions, the Court focused on distinguishing an "adjunct," procedural decision from a "substantive" one, Mem. Op. 19. But *Make the Road* makes clear § (B)(ii) only reaches substantive decisions that pertain to relief from exclusion or removal, *i.e.*, whether noncitizens can stay in or enter the United States at the *end* of their proceedings, not a decision like this one, regarding what happens *during* proceedings. *See* 962 F.3d at 630.

For these reasons, return decisions fall outside the scope of § 1252(a)(2)(B)(ii).

c. Even if 1252(a)(2)(B)(ii) Applies to Return Decisions, This Court has Jurisdiction to Review Challenges to Nondiscretionary Aspects of Return Decisions, Including the Government's Failure to Follow Its Own Rules, and Predicate Legal Questions.

Even where a decision is subject to § 1252(a)(2)(B)(ii), the government is bound to follow its own rules, and failure to do so "is not immune from judicial review because it is not a discretionary decision." Mem. Op. 20 (citing *Damus*, 313 F. Supp. 3d at 327). The hallmark of these claims is that they challenge the "method" by which a decision is reached and not the "outcome."[23] *Damus*, 313 F. Supp. 3d at 327; *see also Aracely*, 319 F. Supp. 3d at 134 (notwithstanding § 1252(a)(2)(B)(ii), court found jurisdiction to review government's "failure to follow procedures set out in [agency documents]"); *Ravulapalli v. Napolitano*, 773 F. Supp. 2d 41,

[23] The government argues there is no "way for this Court to assess Count 3 without reviewing individual decisions to return particular aliens to Mexico[.]" Mot. 40. As explained in this section, to the extent the argument argues that Claim Three cannot be assessed without a review of the merits of the individual decisions, this is wrong.

50–51 (D.D.C. 2011) (whether an agency follows its guidelines is a reviewable legal question notwithstanding § 1252(a)(2)(B)(ii)). This Court has already found jurisdiction to review the government's failure to comply with certain aspects of MPP rules, including the requirement that DHS refer individuals expressing a fear to a NRI. Mem. Op. 20. However, this is not the *only* aspect of MPP rules that Plaintiffs allege Defendants failed to apply.

Plaintiffs also challenge the government's failure to provide them with "a meaningful opportunity to explain their fears . . . at their nonrefoulement interviews." Compl. ¶ 117. This requirement is captured in MPP rules stating, among other things, that: (1) the MPP assessment should be conducted "in a non-adversarial manner," USCIS Memo at 3; (2) the officer should "elicit all relevant and useful information bearing on [the nonrefoulement determination]," *id.*; (3) officers "should take into account . . . *other such relevant factors* [beyond credibility of statements made by the noncitizen, country conditions, and the noncitizens engagement in criminal activity]," *id.* at 3–4 (emphasis added). In at least two cases, however, Plaintiffs have alleged that they presented DHS with documentary evidence that officers ignored or otherwise failed to consider in making their decisions. *See, e.g.*, Jonathan Decl. ¶ 60; Nora Decl. ¶ 36. Other Plaintiffs have alleged that officers cut them off during their interviews, failed to allow them to elaborate on answers, or otherwise carried out interviews in a hostile manner that prevented them from fully presenting their respective cases. Jonathan Decl. ¶¶ 41, 44–45, 59–68; Emilia Decl. ¶¶ 23–24; Nora Decl. ¶ 37; Fabiola Decl. ¶ 42; Henry Decl. ¶ 30; Armando Decl. ¶¶ 22–23. As such, Plaintiffs have presented challenges regarding Defendants' failure to follow MPP rules that are not barred by § 1252(a)(2)(B), and stated a claim that officers violated the requirements of MPP rules.

Additionally, Plaintiffs challenge Defendants' failure to "adjudicate the nonrefoulement interviews" under the proper legal standards adopted in MPP rules. Compl. ¶ 118. MPP rules state

that individuals who meet "the same standard used for withholding of removal and CAT protection determinations" are exempted from MPP. USCIS Memo at 2 (citing the withholding and CAT regulations); *see also supra* Part III.B.a.[24]

Finally, even where § 1252(a)(2)(B)(ii) may apply, "[f]ederal courts have jurisdiction to review a 'predicate legal question that amounts to a nondiscretionary determination underlying the denial of relief.'" *IQ Sys., Inc. v. Mayorkas*, 667 F. Supp. 2d 105, 109 (D.D.C. 2009) (citation omitted). Thus, this Court has found that it may review questions going to the eligibility for discretionary relief, where the agency has made a nondiscretionary eligibility determination based on its interpretation of either sub-statutory or statutory requirements. *See id.* (sub-statutory requirements); *Mawalla v. Chertoff*, 468 F. Supp. 2d 177, 181 (D.D.C. 2007) (statutory requirement); *see also Ibrahimi v. Holder*, 566 F.3d 758, 763 (8th Cir. 2009) (where "eligibility for discretionary relief is a question of law or the application of law to facts, this court retains jurisdiction to review"). Accordingly, because the nonrefoulement determinations are legal not discretionary determinations, *see supra* Part III.B.a., even if this Court finds that the return decisions are subject to § 1252(a)(2)(B), it may review the nonrefoulement determinations as a nondiscretionary component of those decisions.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss in full.

[24] Absent a complete administrative record regarding the nonrefoulement decisions, Plaintiffs cannot know exactly what legal standard the government applied to them. Yet based on allegations made in the Complaint, Compl. ¶¶ 118–20, and over the course of the preliminary injunction briefing, Plaintiffs have identified at least two possible violations of the withholding and CAT standard. *See* ECF No. 36 at 21–23 (explaining violation of the "nexus" requirement and the "government acquiescence" requirement). At a minimum, Plaintiffs have stated a claim that Defendants violated its rules by applying the wrong legal standard.

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