IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

J.O.P., *et al.*, Plaintiffs, v. **U.S. DEPARTMENT OF HOMELAND SECURITY**, *et al.*, Defendants.	Civil Action No. 8:19-CV-01944-GJH

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO AMEND THE PRELIMINARY INJUNCTION

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I. INTRODUCTION

Notwithstanding the Court's injunction to maintain the status quo pending a decision on the merits, Defendants continue to reject jurisdiction over the asylum applications of children who had been determined to be UACs and who turned 18 or were reunited with parents or legal guardians before filing their applications. Even if Plaintiffs ultimately prevail on the merits and the Court rules the 2019 Redetermination Memorandum unlawful, such a ruling will not undo the irreparable harm that prospective class members may suffer as a result of Defendants' practices in the meantime. In bringing this Motion, Plaintiffs seek to prevent further irreparable harm by placing a temporary hold on these continuing practices at least until the Court has the opportunity to rule on the merits.

Defendants' Opposition largely sidesteps these considerations. Instead, it mischaracterizes Plaintiffs' Motion: as an amended complaint, as an attempt to add new plaintiffs, or as a motion to reconsider the Court's Order on the Motion to Enforce. Where Defendants do engage with the specific practices at issue, their arguments in opposition are tangential and off-target. Most prominently, Defendants now argue that an administrative decision from the Board of Immigration Appeals, *Matter of M-A-C-O-*, is binding on USCIS, forcing them to defer to an immigration judge's decision as to whether USCIS has jurisdiction. That new litigating position is a complete departure from the challenged 2019 Redetermination Memorandum itself—stating that the *M-A-C-O-* decision "does not divest USCIS of its authority to determine whether an application was filed by a UAC, such that USCIS has jurisdiction over it." The fact that Defendants now insist they are bound to follow *M-A-C-O-* even while the 2019 Redetermination Memorandum is enjoined—thus achieving the same substantive result as intended by that unlawful policy—illustrates why it is necessary to amend the Court's

preliminary injunction to ensure it has meaningful effect. And this new litigating position explains why Defendants insist on implementing the enjoined policy in other ways. These include the advocacy of ICE attorneys for immigration judges to make jurisdictional determinations in a manner that subverts the 2013 Kim Memo, as well as USCIS's litigation-inspired rewriting of the 2013 Kim Memo's narrow "affirmative act" clause in order to replicate the results of the enjoined 2019 Redetermination Memorandum.

Nothing in Defendants' Opposition meaningfully responds to the points presented in Plaintiffs' opening brief. Instead, having been enjoined from pursuing their Plan A, Defendants are now using Plans B, C, and D to achieve the same result all the while insisting that there is no urgency here. Defendants are wrong. Plaintiffs are likely to succeed on the merits for the reasons set forth in their opening brief and largely unaddressed by Defendants. Until there is a final decision, the Court should ensure that the prospective class members who stand to benefit from such a decision do not suffer irreparable harm, both to their asylum applications and their selves.

II. ARGUMENT

A. The Motion to Amend the Preliminary Injunction Is Proper

As an initial matter, Defendants' Opposition significantly confuses the procedural posture of the present Motion. Defendants variously characterize the present Motion as an attempt to surreptitiously amend the complaint, an attempt to add new named plaintiffs, and a relitigation of this Court's past decisions, and state that "it is entirely unclear why the request for relief is being made at this time and in this manner." D.I. 127 at 6. Each of Defendants' characterizations is mistaken. The Motion is a request that the Court specify that Defendants may not charge forward with the challenged practices, which stem from the 2019 Redetermination Memorandum, even as the Court determines whether that memorandum and its accompanying

policies violated the law. The Court's Order granting a preliminary injunction was an interlocutory order, which it retains plenary authority to amend or modify in response to new evidence and to correct manifest injustice. Plaintiffs bring the Motion now in order to protect the prospective members of their class while the Motion for Class Certification is pending and before summary judgment is even briefed, much less decided. Plaintiffs have no doubt that all the governing legal issues in this litigation will be ultimately put to rest in the future. But as the examples of E.D.G., J.S.G.C., and L.M.Z. show, Defendants' practices and their effects on vulnerable asylum applicants will not cease without the Court's intervention to protect the prospective class members from irreparable harm as a result of Defendants' unlawful policies.

As set forth in the Motion and in more detail below, Plaintiffs are not seeking to amend the complaint, but rather to protect prospective class members from irreparable harm while merits briefing proceeds. Each of the practices Plaintiffs seek to have added to the preliminary injunction stems from the 2019 Redetermination Memorandum and Defendants' multifaceted attempts to further its policy of rejecting jurisdiction over asylum applications filed by children who had been determined to be UACs because they had turned 18 or been reunited with a parent or legal guardian before filing their applications.

Moreover, the present Motion is not an attempt to seek reconsideration of this Court's decision on the previous Motion to Enforce. This Court denied that motion, stating that it would determine whether these practices were unlawful in the course of merits briefing. However, the Court also stated that its denial was "without prejudice . . . to Plaintiffs' right to move for emergency equitable relief to enjoin enforcement of the IJ deferral policy if Plaintiffs believe such enforcement threatens impending irreparable harm." D.I. 115 at 24-25. The relief sought in the Motion to Enforce could have required the Court to resolve issues that may turn on factual

disputes more appropriately resolved based on the record. The present Motion, which seeks further preliminary relief while the Court considers the ultimate merits on a future date, only requires the Court to find that Plaintiffs are *likely* to succeed on the merits and that prospective class members are likely to suffer irreparable harm in the interim.

Regarding the elements for a motion to amend an interlocutory order, Defendants' contention that "no new evidence has become available since the preliminary injunction was entered, let alone since the motion to enforce was denied in May 2020" is mistaken. Setting aside any factual dispute about when Defendants began deferring to immigration judge jurisdictional determinations, it is undisputed that the issue was not raised to the Court nor briefed by the parties before the preliminary injunction issued. Since the preliminary injunction order was entered, Plaintiffs became aware of prospective class members who had had USCIS reject jurisdiction over their asylum applications. Even if Defendants were engaging in this practice prior to the preliminary injunction order, this was unbeknownst to Plaintiffs and is not a reason to decline to amend the interlocutory order which is needed to protect the prospective class during the pendency of this litigation. Further, the practice of deference to immigration judge jurisdictional determinations is directly related to the claims in the original complaint (and now included in the Amended Complaint), and it causes the *same* harm as the enjoined policy. In light of new evidence of this practice, the Court may appropriately amend the preliminary injunction to account for this previously unaddressed practice. And whether the evidence came to light since the Court resolved a different motion is entirely irrelevant.[1]

[1] Defendants do not contest Plaintiffs' argument that it would constitute "manifest injustice" to preliminarily protect only some, but not all, of the prospective class members while this litigation proceeds to the merits.

Amendment of the preliminary injunction is necessary now because Defendants have continued to press forward in rejecting jurisdiction over the asylum applications of individuals who were determined to be UACs and who filed their asylum applications after turning 18 or being reunited with a parent or legal guardian. Each of the examples cited in Plaintiffs' Motion had USCIS jurisdiction over their asylum applications denied on this very basis. As a matter of equity, Plaintiffs respectfully submit that the Court should require Defendants to cease these practices while they are evaluated by the Court rather than allow prospective class members to suffer irreparable harm before a final judgment. *See Bethesda Softworks, L.L.C. v. Interplay Entm't Corp.*, 452 F. App'x 351, 354 (4th Cir. 2011) ("The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits.").

B. The Court Should Amend the Preliminary Injunction Order to Protect the Status Quo

As noted in Plaintiffs' Motion, they satisfy all of the requirements to receive further injunctive relief: Plaintiffs are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Citizens for a Responsible Curriculum v. Montgomery Cty. Pub. Sch.*, 2005 WL 1075634, at *7 (D. Md. May 5, 2005).

a. Defendants Should Be Enjoined from Abdicating Their Responsibility to Exercise Jurisdiction over Asylum Claims by Deferring to Immigration Judges' Jurisdictional Determinations

Defendants raise two main arguments in opposition to Plaintiffs' claim that they are likely to succeed on the merits: that the practice of deferring to immigration judge jurisdictional

determinations preceded the 2019 Redetermination Memorandum and that "[a]s soon as *Matter of M-A-C-O-* was handed down, USCIS had no choice but to defer to an IJ assessment that a person was not a UAC on her filing date when an IJ made such an assessment." D.I. 12 at 17-18.

Defendants' contention about when the practice of deferring to immigration judge jurisdictional determinations began does not affect Plaintiffs' likelihood of success on the merits. First, despite repeatedly averring that USCIS engaged in this practice before issuance of the 2019 Redetermination Memorandum, the administrative record produced by Defendants does not include any factual support for this contention. Second, even if asylum officers did defer to immigration judge jurisdictional determinations on an ad hoc basis before the 2019 Redetermination Memorandum, it was that policy document that enshrined such deference as binding on asylum officers. In other words, the fact that asylum officers periodically did not comply with the requirements of the 2013 Kim Memo before 2019, if true, does not entitle Defendants to upend their established policy without challenge.

Defendants' argument based on *M-A-C-O-* is also puzzling, as it is an entirely new position that is contradicted by the 2019 Redetermination Memorandum itself and Defendants' earlier positions in this litigation. Before Plaintiffs filed this motion, Defendants' position was that *M-A-C-O-* only affected the jurisdiction of immigration judges and not that of USCIS. Indeed, the 2019 Redetermination Memorandum itself explains, "The BIA's decision, however, does not divest USCIS of its authority to determine whether an application before it was filed by a UAC, such that USCIS has jurisdiction over it. Rather, both the Immigration Judge and USCIS have authority to make this jurisdictional determination." D.I. 128-32 at US-000291; *see also* D.I. 128-31 at US-000282 (agenda for May 2019 USCIS Asylum Division Quarterly Meeting, stating *M-A-C-O-* "addresses immigration judge determinations as to whether an asylum

application was filed by a UAC" but "does not address USCIS determinations about its own jurisdiction. USCIS continues to make its jurisdictional determinations under its own procedures."). But now Defendants claim that "*M-A-C-O-* is binding on USCIS and requires that, when an IJ has determined that the TVPRA's jurisdictional provision . . . does not apply, USCIS must defer to that jurisdiction." D.I. 127 at 15. Defendants even suggest that the 2019 Redetermination Memorandum was "eventually issued" simply "as an attempt to minimize the potential for conflicts between the agencies' jurisdictional determinations," suggesting that it merely formalized what *M-A-C-O-* already required. *Id.*

This post-hoc explanation does not account for Defendants' conduct in issuing the 2019 Redetermination Memorandum. In particular, as the newly produced administrative record shows, the policy that went on to be enshrined in the 2019 Redetermination Memorandum was preliminarily approved in January 2018, more than nine months prior to *M-A-C-O-*. *Compare* D.I. 128-21 at US-000238 (January 8, 2018 date on approval of recommendation "to rescind the 2013 memo . . . and replace it with one that . . . allow[s] USCIS Asylum Officers to make independent UAC re-designations based on the facts at the time of filing the asylum application"), *with M-A-C-O-*, 27 I&N Dec. 477 (decided October 16, 2018). There is an utter mismatch between the origins of the 2019 Redetermination Memorandum—which also establishes a policy of deference to immigration judge jurisdictional determinations—and Defendants' current explanation. Defendants' new position is nothing more than a "*post hoc* rationalization[]," which the Supreme Court has made clear courts cannot rely upon in assessing agency action. *See Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) ("Considering only contemporaneous explanations for agency action . . . instills confidence that the reasons given are not simply 'convenient litigating position[s].'" (citation

omitted)); *id.* at 1934 (Kavanaugh, J., dissenting) (similarly rejecting "after-the-fact explanations advanced *by agency lawyers during litigation*" (emphasis in original)). Accordingly, Defendants' arguments on the likelihood of success of Plaintiffs' claim have no merit.

b. ICE Should Be Enjoined from Advocating Against USCIS Jurisdiction in Removal Proceedings

Defendants oppose amending the preliminary injunction to enjoin ICE from advocating against USCIS jurisdiction over asylum applications in immigration court, but do so solely by contesting the exemplar case put forward by Plaintiffs, J.S.G.C. D.I. 127 at 13-14. Defendants note that "a complaint must be amended to add an additional plaintiff," *id.* at 13, and they put forward various arguments contesting J.S.G.C.'s suitability to serve as a plaintiff, including challenging whether he has standing in light of his Special Immigrant Juvenile petition and his related placement on the immigration court's status docket. But Plaintiffs have not sought to add J.S.G.C. as an additional named plaintiff. The issue of ICE advocacy is already part of the case, as it is explicitly pled in the Amended Complaint, and the Court has already denied Defendants' motion to dismiss on this issue. D.I. 115 at 38-40. Plaintiffs do not need to add a new named plaintiff to pursue this claim on behalf of absent prospective class members, and J.S.G.C.'s case was described in order to illustrate the practices that Defendants are presently engaged in. Because Plaintiffs neither need nor seek to add J.S.G.C. as a new plaintiff, the objections Defendants raise to him serving in that capacity are irrelevant to Plaintiffs' effort to protect both the named plaintiffs and absent members of the prospective class from efforts by ICE to subvert the 2013 Kim Memo. Each challenged practice potentially affects the members of the proposed class, including the named plaintiffs. Defendants point to no authority that would preclude the Court from considering factual allegations by members of a proposed class, and indeed courts routinely consider facts from prospective class members beyond named class representatives.

See, e.g., *Mondragon v. Scott Farms, Inc.*, 329 F.R.D. 533, 544 (E.D.N.C. 2019), *objections overruled*, 2019 WL 489117 (E.D.N.D. Feb. 7, 2019); *Alfaro Zelaya v. A+ Tires, Brakes, Lubes & Mufflers, Inc.*, 2015 WL 5703569, at *1-2 (E.D.N.C. Sept. 28, 2015); *Whitt v. Wells Fargo Fin., Inc.* 664 F. Supp. 2d 537, 539-40 (D.S.C. 2009).

Notably, aside from their irrelevant procedural objections about J.S.G.C.'s specific case, Defendants do not really contest the merits of Plaintiffs' claim regarding ICE advocacy. They do not contest any statements in Derek Elder's declaration, D.I. 124-5, including that ICE advocates in immigration court against its sister agency USCIS's jurisdiction over asylum claims despite USCIS's statutory responsibility to exercise such jurisdiction. Nor do they provide any argument as to why such conduct is consistent with the TVPRA or controlling USCIS policies designed to protect children previously determined to be UACs.

Although J.S.G.C. himself no longer faces a likelihood of imminent irreparable harm from ICE's advocacy, many other prospective class members in removal proceedings do. *See, e.g.*, D.I. 124-9 ¶ 20 (L.M.Z.'s attorney Casey Frank stating that "[w]hile attending immigration court, I have periodically observed ICE attorneys advocate for immigration judges to assert jurisdiction over an asylum claim where jurisdiction at USCIS is proper, including for young child applicants."). That is why classwide preliminary relief is the appropriate response to the problem. In every instance where an immigration judge exercises jurisdiction over an asylum application based on ICE's advocacy, that applicant will be forced to defend their asylum application in immigration court and thus face adversarial cross-examination and the resulting re-traumatization, rather than under USCIS's child-appropriate procedures. This denial of the forum to which UACs are legally entitled and this experience of trauma cannot be undone by a later merits judgment.

c. USCIS Should Be Enjoined from Denying Jurisdiction over a Child's Asylum Application Based on an Alleged "Affirmative Act" Involving a Mere Determination or Notation that the Child Has Been Reunited with a Parent or Legal Guardian or Has Turned 18 Years Old

Defendants argue that Plaintiffs' challenge to their practice of treating notations that a child has turned 18 or been reunited with a parent or legal guardian as affirmative acts, as exemplified by L.M.Z., "was not pleaded in the amended complaint and is wholly separate from the issues contemplated in that complaint." D.I. 127 at 9. But this practice effectively replicates the policy set forth in the 2019 Redetermination Memorandum under a slightly different guise: rejecting jurisdiction over asylum applications filed by children who had been determined to be UACs solely on the basis that they had turned 18 or had been reunited with a parent or legal guardian when they filed their application. *See* D.I. 124-1 at 23-27. Defendants claim that this issue relates only to Defendants' interpretation of the 2013 Kim Memo, which was not included in the complaint, but that is not the case. Instead, this practice *is* an application of the 2019 Redetermination Memorandum *through* a litigation-inspired reinterpretation of the 2013 Kim Memo's narrow affirmative-act exception. The 2013 Kim Memo instructed asylum officers to exercise jurisdiction over asylum applications filed by children previously determined to be UACs "even if there appears to be evidence that the applicant may have turned 18 years of age or may have been reunited with a parent or legal guardian since the CBP or ICE determination." D.I. 91-4 at 2. Although the 2013 Kim Memo provided a narrow exception where HHS, ICE, or CBP terminates the UAC finding through an "affirmative act," this exception was clearly not intended to swallow the rule. Defendants' prior practices and the context of the 2013 Kim Memo, which devotes a single mention to affirmative acts, demonstrate this. In 2013 just as much as now, these agencies routinely made note of facts that would demonstrate that an applicant had turned 18 or been reunited with a parent or legal guardian. Yet the bulk of the

2013 Kim Memo was dedicated to USCIS's responsibility to assert jurisdiction notwithstanding any such evidence, rather than an invitation to decline jurisdiction in reliance upon it. Plaintiffs challenge the application of the 2019 Redetermination Memorandum in any manner in the Amended Complaint, and this is just such an application.[2]

Defendants also cite *Salmeron-Salmeron v. Spivey*, 926 F.3d 1283, 1289 (11th Cir. 2019), as supposedly standing for the proposition that "looking for such affirmative acts without providing notice" is acceptable. D.I. 127 at 4 n.1. *Salmeron-Salmeron* provides no such support. The plaintiff in that case was transferred to an adult detention facility by ICE, and it was that transfer, the legitimacy of which was documented in ICE's attendant recordkeeping, that constituted an affirmative act. As the *Salmeron-Salmeron* court observed, "The AAPM [Affirmative Asylum Procedures Manual] also notes that transferring an individual to an adult detention facility is an affirmative act that terminates UAC status." *Salmeron-Salmeron*, 926 F.3d at 1288-89. This is a far cry from merely noting in an internal computer system that an individual has turned 18 or been reunited with a parent, without any additional purpose.

The challenge exemplified by L.M.Z.'s case falls under the claims in the Amended Complaint, and thus Defendants' Opposition has missed its mark. The newly produced administrative record further confirms that the 2019 Redetermination Memorandum is related to Defendants' practice of interpreting undisclosed notations that an applicant has turned 18 or been

[2] The connection between the 2019 Redetermination Memorandum and the practice of manufacturing "affirmative acts" that are merely acknowledgments that a UAC has turned 18 or been reunited with a parent or legal guardian can be seen from the administrative record. In particular, the decision memorandum in which the policy that became the 2019 Redetermination Memorandum was approved also included one additional recommendation: "Authorize ICE, as a matter of policy, to re-designate UACs as accompanied juvenile aliens, when appropriate, upon release of the child by HHS to a parent or legal guardian." D.I. 128-21 at US-000238. The memorandum notes that "USCIS supports ICE's plan to make UAC re-designations." *Id.* at US-000237.

reunited with a legal guardian. *See* D.I. 128-21 at US-000238. They stemmed from the same policy discussions, in the same documents, and aimed at a singular goal of authorizing USCIS to reject jurisdiction over these asylum applications.

To the extent the Court disagrees that the claim exemplified by L.M.Z.'s case is encompassed by the Amended Complaint, then Plaintiffs would respectfully request leave to amend to remove any doubt that USCIS's dramatic expansion of the "affirmative act" exception from the 2013 Kim Memo is at issue here, as it effectively seeks to implement the same policy as the 2019 Redetermination Memorandum in an equally unlawful manner. As part of Defendants' continuing course of action of exploring new ways to reject jurisdiction over asylum applications filed by children previously determined to be UACs, Plaintiffs believe that many more prospective class members may be affected by this practice, as is only now coming to light via decisions from asylum offices nationwide.[3] *Cf.* D.I. 124-9 ¶ 16 (L.M.Z.'s attorney Casey Frank stating that during her years of representing children reunited with parents before filing their asylum applications, "[i]n no other case did USCIS reject jurisdiction based upon a purported affirmative act by ICE, much less a secret affirmative act without notice to me or my child client.").

[3] Indeed, since filing their Motion to Amend, Plaintiffs' counsel have become aware of another such instance where USCIS has declined jurisdiction over an asylum application based on an undisclosed affirmative act consisting solely of ICE noting that the applicant had been reunited with a parent or legal guardian. *See* DeJong Decl., Ex. A (describing decision issued by USCIS's New Orleans Asylum Sub-Office). Unlike L.M.Z., this asylum applicant will now be subject to the one-year bar for filing an application and may not be able to pursue an asylum claim absent eventual relief from this Court. And as a result, if this asylum applicant is required to proceed in immigration court and receives a denial, even an eventual judgment in this case could be too late for them.

d. Prospective Class Members Are Likely to Suffer Irreparable Harm

Defendants raise only one challenge to Plaintiffs' argument that prospective class members to whom the challenged practices would apply would suffer irreparable harm if the Court were not to amend the preliminary injunction. Defendants observe that "the period in which ICE may remove an alien does not begin until the order of removal becomes administratively final," which happens "at the conclusion of removal proceedings." D.I. 127 at 7. Because all three of the asylum applicants discussed in the Memorandum "are in removal proceedings," Defendants insist "there is no immediate risk of removal." *Id.*

This argument is without merit for two reasons. First, it fundamentally mistakes how imminent the threatened irreparable harm must be, especially in light of an ultimate threat of deportation. *See, e.g.*, *Tefel v. Reno*, 972 F. Supp. 608, 619–20 (S.D. Fla. 1997) (finding irreparable harm to plaintiffs and class members "if they are deported to their native countries after having been denied an opportunity to have a hearing on their claims for suspension of deportation"); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) ("Plaintiff class members will suffer irreparable harm if they are summarily removed from the United States without being afforded the opportunity to exercise their rights to apply for asylum and relief from deportation."). Defendants do not contest the declaration of Miguel Mariscal, which states, "I anticipate that within weeks of the BIA decision ICE would issue a 'bag and baggage' letter requiring E.D.G. to report to ICE with his belongings for removal to Honduras." D.I. 124-4 ¶ 21; *see also* D.I. 124-1 at 16. When the BIA could issue a decision any day and E.D.G.'s deportation would be effected within *weeks*, the fact that E.D.G. is not at this moment being escorted to the airport does nothing to lessen the imminence of the irreparable harm he will likely

suffer without protection. And in the meantime, E.D.G. (and others like him) suffer emotional harm with the possibility of a deportation order hanging over his head. The mere fact that there remains a single administrative step between prospective class members and this harm does not show that there is not an emergency, especially where Defendants do not even venture to offer a likely timeframe for how far the three prospective class members discussed in the Motion might be from "the conclusion of removal proceedings."

Second, in claiming that one as-yet-incomplete administrative step entirely vitiates irreparable harm here, Defendants ignore multiple irreparable harms that Plaintiffs argue would be likely without an amended preliminary injunction. For instance, some prospective class members, who delayed filing their asylum applications in reliance on Defendants' prior policy, may lose their opportunity to pursue asylum entirely. *See* D.I. 54 at 15. As discussed in greater detail in Plaintiffs' Motion, UACs are exempted from the one-year bar for filing an asylum application, and if USCIS declines jurisdiction there may be no other forum in which to pursue such a claim. *See, e.g.*, D.I. 124-1 at 28. Further, even if an asylum applicant is able to present their application in immigration court, they will be "subject to an adversarial process rather than the child-appropriate procedures they are entitled to by the TVPRA," an experience that could further traumatize a vulnerable child and cannot be undone after the fact. *Id.*; *see also* D.I. 54 at 15 (finding irreparable harm where asylum applicants relying on the 2013 Kim Memo "will be forced to proceed before an adversarial system where they will be subject to cross-examination by trained government lawyers even though they believed that they would be able to proceed before an asylum officer trained in trauma-informed interviewing"). Defendants do not mention these likely harms to prospective class members and do not even attempt to show that these

likely harms are not "actual and imminent." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (citation omitted).

Because the Motion to Amend the Preliminary Injunction is a procedurally proper vehicle to protect prospective class members until the Court rules on the merits, because Plaintiffs are likely to succeed on those merits, and because prospective class members are likely to suffer irreparable harm in the absence of relief from this Court, the Court should grant the Motion.

III. CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the Court amend the preliminary injunction to enjoin and restrain Defendants from engaging in the identified practices, in order that the status quo be maintained as to prospective class members until the Court is able to rule on the merits.

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Respectfully submitted,

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