UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV13-03972-JAK (PLAx)	Date	December 27, 2013
Title	Isadora Lopez-Venegas, et al. v. Rand Beers, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE	
Andrea Keifer		Not Reported
Deputy Clerk		Court Reporter / Recorder
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
Not Present		Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT (Dkt. 35)**

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION (Dkt. 37)

I. Introduction

In this putative class action, 11 named individuals (the "Individual Plaintiffs") and three non-profit organizations (the "Organizational Plaintiffs") (collectively, "Plaintiffs"), bring certain claims arising from the administration of the voluntary departure program (the "Program") by immigration enforcement agencies in Southern California. FAC ¶¶ 1-6, Dkt. 28. Under the Program, non-citizens unlawfully residing in the United States may voluntarily agree to leave by signing their own expulsion orders. *Id*. Plaintiffs contend that, as administered in Southern California, the Program violates their rights under both the Constitution and the statutes and regulations that apply to the enforcement agencies. *Id*. Each of the plaintiffs seeks certain declaratory and injunctive relief; a subset of the Individual Plaintiffs seeks such relief on behalf of the putative class.

Defendants, each of whom is federal official, have brought a motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) ("Defendants' Motion"). Dkt. 35. Three Individual Plaintiffs, each of whom left the United States under the Program, have moved for a preliminary injunction (the "Preliminary Injunction Motion"). If granted, it would permit each to return to the United States pending either the completion of this litigation or a potential administrative process to determine whether each is eligible to remain here. Dkt. 37. A hearing on these matters was conducted on December 9, 2013 and they were taken under submission. For the reasons stated in this Order, Defendants' Motion to Dismiss is GRANTED IN PART AND DENIED IN PART and Plaintiffs' Motion for a Preliminary Injunction is DENIED.

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II. Factual Background

On June 4, 2013, Plaintiffs brought this putative class action. They allege that immigration enforcement agencies in Southern California regularly employ coercive, deceptive, and threatening tactics to pressure non-citizens into signing their own expulsion orders under the color of "voluntary departure." FAC ¶¶ 1-6, Dkt. 28. The Program, which is authorized by 8 U.S.C. § 1229c(a)(1), gives the Attorney General of the United States discretion to "permit an alien voluntarily to depart from the United States at the alien's own expense…in lieu of being subject to [removal proceedings before an immigration judge]." The statute provides that persons may be given up to 120 days to depart, subject to the discretion of the Attorney General, who may "for humanitarian purposes," extend the 120 day period to three years if certain conditions are met. 8 U.S.C. § 1229c(a)(2)(A)-(B).

Under the regulations governing the administration of voluntary departure:

> The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

8 C.F.R. § 240.25(c).

In Southern California, Form I-826 is used in connection with the voluntary departure procedure.[1] FAC ¶¶ 33-36, App. B. Form I-826 contains information that advises an individual who is allegedly unlawfully present in the United States of certain of his or her rights. It also allows such a person to select one of three options in response to the claim of illegal presence by checking a corresponding box on the form: (1) requesting a hearing before an immigration judge; (2) stating a fear of persecution upon return to another country; or (3) waiving rights and electing voluntary departure. *Id.* Plaintiffs allege that Defendants pre-check the third box of Form I-826 before presenting it to non-citizens. *Id.* ¶ 36. Further, Plaintiffs allege that neither the language of Form I-826 nor the oral disclosures by Defendants informed individuals about certain consequences of accepting voluntary departure. *Id.* ¶¶ 40, 150-53. In particular, Plaintiffs allege that neither Form I-826 nor Defendants explained to those who were to complete the Form that, a person who accepts voluntary departure after being unlawfully present in the United States for a year or more, will be unable to return to the United States for ten years (the "unlawful presence bar") pursuant to 8 U.S.C. § 1182(a)(9)(B)(i)(II). *Id.* ¶ 38. Finally, Plaintiffs allege that Defendants do not provide individuals effective access to counsel while they are deciding whether to accept voluntary departure. *Id.* ¶¶ 151-52.

[1] The use of Form I-826 is not limited to Southern California. *See Reyes-Sanchez v. Holder*, 646 F.3d 493 (7th Cir. 2011) (describing use of Form I-826 in Texas). However, the allegations in this action are limited to its use in Southern California.

The Individual Plaintiffs are 11 non-citizens who resided in Southern California prior to returning to Mexico through voluntary departure. FAC ¶¶ 42, 50, 57, 64, 71, 80, 88, 95, 101, 108, 115. Eight of the individual named Plaintiffs (the "Representative Plaintiffs") bring this action on behalf of a class of Mexican nationals who have elected voluntary departure under the jurisdiction of the San Diego Border Patrol, an office within U.S. Customs and Border Protection ("CBP"), or the U.S. Immigration and Customs Enforcement ("ICE") Field Offices in San Diego and Los Angeles. *Id.* at ¶ 164. The Individual and Representative Plaintiffs allege that agents of the San Diego Border Patrol, or officers of the San Diego and Los Angeles ICE Field Offices, pressured and/or coerced them into signing their own expulsion orders, and made misstatements and/or omissions, thereby failing to inform them of the legal consequences of agreeing to "voluntary departure." *Id*. at ¶¶ 36, 40, 44, 52, 59, 67, 75, 82, 90, 97, 150-53, 164.

Certain claims are also brought by three Organizational Plaintiffs: Coalition for Humane Immigration Rights of Los Angeles ("CHIRLA"); Pomona Economic Opportunity Center ("PEOC"), and San Bernardino Community Service Center ("SBCSC"). *Id*. at ¶¶ 21-23. These organizations are headquartered in Los Angeles, Pomona, and San Bernardino, respectively. *Id*. The Organizational Plaintiffs allege that, in order to address coerced and misinformed departures, they have had to expend resources in the form of time and transportation funds. *Id*. at ¶¶ 126, 129, 131, 137-38, 140, 143-45, 147. Because each has been required to divert resources from the advancement of its principal purposes, each argues that the Program has frustrated its core mission. *Id*. Each of the organizations alleges that it has received reports about, and assisted victims of, the Program. *Id*.

Plaintiffs' First Amended Complaint (the "FAC") names the following national, federal officials as Defendants: Rand Beers, Acting Secretary of the Department of Homeland Security; Thomas Winkowski, the Deputy Commissioner of CBP, who performs the duties of CBP Commissioner; and John Sandweg, Acting Director of U.S. Immigration and Customs Enforcement ("ICE"). *Id*. at ¶¶ 24-26. The FAC also names the following local, federal officials as Defendants: Paul Beeson, Chief Patrol Agent for CBP's San Diego Sector; Gregory Archambeault, ICE Field Office Director for San Diego; and Dave Marin, Acting ICE Field Office Director for Los Angeles. *Id.* at ¶¶ 27-30.

The FAC advances three causes of action against all Defendants in their official capacities: (i) violation of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq*.; (ii) violation of the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq*.; and (iii) violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *Id*. at ¶¶ 177-87. The FAC also includes a fourth claim, solely related to Plaintiff Yadira Felix, in which Plaintiffs allege that Defendants summarily expelled her from the United States, without using voluntary return procedures, in violation of her substantive right to Due Process under the Fifth Amendment. FAC ¶¶ 186-87.

Defendants' Motion seeks the dismissal of Plaintiffs' first, second, and third claims. Defendants do not seek dismissal of the Fifth Amendment claim brought by Felix. As noted, Plaintiffs move for a preliminary injunction allowing Plaintiffs Isidora Lopez-Venegas, Gerardo Hernandez-Contreras, and

Arnulfo Sierra ("PI Plaintiffs") to return to the United States without interference by Defendants and preventing Defendants from giving effect to the PI Plaintiffs' voluntary departure orders. Dkt. 37.[2]

III. Defendants' Motion to Dismiss

A. Legal Standard

Under Civil Rule 12(b)(6), a cause of action should be dismissed if it fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)) (internal quotation marks omitted). Plausibility is achieved when the pleadings contain factual elements that allow the court to draw a reasonable inference that misconduct occurred. *Id.* When a court considers a motion to dismiss, the court should first separate the "recitals of the elements of [an] action" from the factual allegations. *Id.* The court should then assume the factual allegations are true, and ignore the legal conclusions. *Id.* After eliminating the bare legal conclusions from the complaint, the court should review the factual allegations and "determine whether they plausibly give rise to an entitlement to relief." *Id.* The dismissal of a cause of action can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). Thus, where a set of facts, even if true, would not entitle the plaintiff to relief, dismissal is appropriate. *Id.*

A motion to dismiss under Civil Rule 12(b)(1) concerns a different issue: Whether the court has subject matter jurisdiction over the claims. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039-40 (9th Cir. 2003). Because federal courts are courts of limited jurisdiction, "a federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, dismissal is required under Rule 12(b)(1) when a suit is brought by a plaintiff who lacks Article III standing to bring the action. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109-10 (1998).

B. Standing of Organizational Plaintiffs

1. Legal Standard

An organization suing on its own behalf, like an individual plaintiff, must establish the "irreducible constitutional minimum of standing": (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). To establish injury in fact, an organization suing on its own behalf, rather than as a representative of its members, must show that it suffered "'both a

[2] Plaintiffs originally sought a preliminary injunction on behalf of Plaintiff Genaro Munoz-Florez. However, as a result of Defendants' presentation of documents establishing that Munoz-Florez was removed pursuant to a formal removal order, Dkt. 44-2, Munoz-Florez has withdrawn his request for preliminary injunctive relief. Dkt. 45.

diversion of its resources and a frustration of its mission.'" *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest ("Trabajadores")*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Hous. of Marin v. Combs,* 285 F.3d 899, 905 (9th Cir. 2002)); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). However, an organization cannot "manufacture injury" by "choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Trabajadores,* 624 F.3d at 1088. Rather, "[a]n organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Id.* at 1088 n.4.

To establish causation, a party's injury must be "fairly traceable" to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *See Larson v. Valente*, 456 U.S. 228, 239 (1982). As to the redress of injury, a plaintiff must establish that its injury is "likely to be redressed by a favorable decision;" mere speculation does not suffice. *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 38, 44 (1976).

The determination of standing on a motion to dismiss is made based on the pleadings. If the pleading requirements are satisfied, standing can remain a potential issue for trial. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation."). Thus, if an organizational plaintiff has adequately pleaded the standing requirements, the Rule 12(b)(1) motion should be denied with the issue reserved for potential additional adjudication. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) (affirming finding that organizational plaintiff had standing on the basis of the plaintiff's allegations in the complaint, and noting that the organizational plaintiff would have to "demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation.").

2. Application

a) Injury in Fact

Defendants argue that the Organizational Plaintiffs "have failed to sufficiently allege that the Government's use of voluntary return perceptibly hinders their operations, and the harm they allege is too speculative to create standing." Dkt. 35 at 15. Plaintiffs respond that the harms the have alleged are sufficient to create standing under prevailing Ninth Circuit case law, citing, specifically, *Comite de Jornaleros v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011)).

(1) Arguments Applying to All Organizations

Defendants make two arguments that apply to all Organizational Plaintiffs. *First*, Defendants assert that the Organizational Plaintiffs have alleged abstract injury to their social interests, but fail to allege that

Defendants' conduct thwarts any "specific programs intended to integrate immigrants." Dkt. 35 at 17-18. Furthermore, Defendants argue that the activities of the Organizational Plaintiffs have not changed; rather, they continue to advocate social goals. Defendants add that the Program does not impair these activities. The "[O]rganizational Plaintiffs cannot, therefore, claim injury and standing merely from doing their jobs." Dkt. 35 at 18 (citing *Humane Soc'y of the U.S. v. Vilsack*, --- F. Supp. 2d ---, 2013 WL 5346065, at *16 (D.D.C. Sept. 25, 2013) ("Lobbying is what these organizations do, so being prompted to do it can hardly qualify as an injury that confers constitutional standing.").

Defendants' interpretation of the injury-in-fact requirement is not consistent with the controlling Supreme Court and Ninth Circuit precedent. In *Havens*, the Supreme Court found that an organization whose mission was promoting equality in housing had standing because the defendant's allegedly discriminatory practices frustrated the organization's "efforts to assist equal access in housing." 455 U.S. at 368. *Havens* concluded that "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." 455 U.S. at 368. Similarly, the Ninth Circuit has found that organizations concerned with the rights of immigrants and day laborers have standing to challenge policies affecting the populations they seek to serve. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (organization whose mission was to "strengthen and expand the work" of day laborer groups sufficiently alleged that challenged ordinance frustrated its mission because it prevented day laborers from making their availability to work known to potential employers); *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 748 (9th Cir. 1992) (organization whose aim was to "assist [] refugee clients" sufficiently alleged that EOIR's inadequate translation policy frustrated its goals).

Each Organizational Plaintiff has alleged facts sufficient to show that it has diverted resources in response to Defendants' conduct in connection with the Program. Thus, the Organizational Plaintiffs allege that each has expended organizational time, funds, and resources to: (i) "inform community members of the dangers of administrative voluntary departure"; (ii) "advis[e] workers who were being detained that they had the right to decline to sign any documents including voluntary departure forms;" (iii) offer "Know Your Rights" presentations to community members which included discussions of voluntary departure; and (iv) create printed materials and videos to educate immigrants about their rights in connection with voluntary departure. FAC ¶¶ 124-48. The Organizational Plaintiffs also allege that if they did not expend resources on these activities, they could direct them to more proactive advocacy in other areas. FAC ¶¶ 130, 139, 147.

These allegations are sufficient to establish organizational standing; Plaintiffs need not, as Defendants suggest, allege harm to specific programs. *See Valle del Sol Inc.*, 732 F.3d at 1018-19 ("Despite Arizona's arguments that the organizational plaintiffs' statements of injury are too vague to sustain standing, we have found organizational standing on the basis of similar organizational affirmations of harm.") (*citing Fair Hous. Council of San Fernando Valley,* 666 F.3d at 1219 (finding standing at the preliminary injunction stage based on FHC's statements that it "investigated Roommate's alleged violations and, in response, started new education and outreach campaigns targeted at discriminatory

roommate advertising"); *Smith v. Pac. Props & Dev. Corp.,* 358 F.3d 1097, 1105 (9th Cir.2004) (finding standing where an organization alleged that, "in order to monitor the violations and educate the public regarding the discrimination, [it] has had ... to divert its scarce resources from other efforts ... to benefit the disabled community in other ways")).

Second, Defendants argue that an organizational plaintiff cannot create injury in fact merely by voluntarily "spending money fixing a problem that otherwise would not affect the organization at all." Dkt. 35 at 19 (*quoting Trabajadores*, 624 F.3d at 1088). Defendants contend that the Organizational Plaintiffs have done just that, when "[a]fter many years of educating immigrants about alleged abuses by immigration authorities, *id.* ¶¶ 134, 142, CHIRLA, SBCSC, and PEOC decided that their education and advocacy efforts should address voluntary return, a 'problem that otherwise would not affect the organization[s] at all.'" Dkt. 35 at 19 (*quoting Trabajadores*, 624 F.3d at 1088). However, each Organizational Plaintiff alleges that it began diverting resources in response to the specific concerns of the communities each seeks to serve.[3]

(2) CHIRLA

(a) Frustration of Mission

Plaintiffs define CHIRLA's mission as "advancing the human and civil rights of immigrants and fully integrating immigrants into Los Angeles and California." FAC ¶ 131. This mission includes, "promoting harmonious multi-ethnic and multi-racial human relations, empowering all immigrants and their allies to build a more just and humane society." *Id*. ¶ 123. Plaintiffs contend that Defendants' conduct has frustrated CHIRLA's mission because "the manner in which [the Program] is administered results in swift and arbitrary expulsion of immigrants, which fractures families and communities." Dkt. 41 at 37. Thus, Defendant's conduct allegedly prevents CHIRLA "from effectively following up with the most affected members of Los Angeles' immigrant community about whether they were subjected to racial profiling or other mistreatment at the hands of local law enforcement and immigration enforcement authorities." FAC ¶ 124. Defendants respond to CHIRLA's allegations by arguing that CHIRLA's mission has not been frustrated; rather, CHIRLA can still follow up with these individuals even if they reside in Mexico. Dkt. 35 at 16.

Defendants' argument is unpersuasive. CHIRLA's alleged goal of advancing the rights of "all immigrants" and integrating immigrants into local communities is frustrated by the Program. Thus, CHIRLA contends that the Program is operated in violation of the civil rights of such immigrants and has them removed from their respective local communities. Although CHIRLA may be able to locate individuals in Mexico who have voluntarily departed from the United States, this would require significant effort and resources that could otherwise be allocated to more direct efforts to serve the immigrant communities in Southern California.

[3] This issue is discussed further in Section III.B.2.a *infra*.

(b) Diversion of Resources

Plaintiffs allege that CHIRLA has diverted resources in response to Defendants' conduct in the following ways: (i) expending resources to inform community members of the dangers of administrative voluntary departure, FAC ¶ 124; (ii) assisting a particular U.S. citizen who was allegedly expelled from the United States improperly pursuant to the Program, *id.* ¶ 125; (iii) spending organizational time and transportation funds responding to immigration raids in Van Nuys, California and Fullerton, California and informing workers of their right to decline voluntary departure, *id.* ¶ 126; (iv) offering "Know Your Rights" presentations to community members about the consequences of signing voluntary departure forms, *id.* ¶ 126, 129; and (v) establishing a free referral and information hotline and responding to calls regarding voluntary departure, *id.* ¶ 127. Certain of these activities were not created in direct response to the Program. For example, the free referral and information hotline and Know Your Rights presentations appear to address a number of issues common to Southern California immigrant communities. However, several of CHIRLA's allegations, *i.e.*, that it expended resources responding to immigration raids and informing community members about voluntary departure, are sufficient to establish, at the pleading stage, a diversion of resources in response to the Defendants' alleged conduct.

As noted above, Defendants contend that CHIRLA and the other Organizational Plaintiffs cannot create injury in fact by voluntarily "spending money fixing a problem that otherwise would not affect the organization at all." Dkt. 35 at 19 (quoting *Trabajadores*, 624 F.3d at 1088). However, Plaintiffs' allegations establish that CHIRLA's decision to allocate resources to address the Program arose out of specific harms to those whom the organizations sought to serve. CHIRLA began expending resources to investigate and respond to Defendants' alleged conduct in 2007 "when a woman told a CHIRLA community organizer that she signed a voluntary departure form because immigration enforcement officers yelled at her and threatened her." FAC ¶ 125. Its subsequent efforts to inform community members about voluntary departure have been a response to immigration raids in 2008 and 2009, which allegedly affected the communities served by CHIRLA.

Furthermore, Plaintiffs contend they have sufficiently alleged a diversion of resources because, although CHIRLA and the other Organizational Plaintiffs are generally proactive groups, Defendant's conduct has required them to turn to reactive measures. Dkt. 41 at 35. Thus, each of the Organizational Plaintiffs claims that it has been compelled to provide community education and to engage in rapid response in an attempt to prevent coerced voluntary departures. Each contends that this has adversely affected its ability to engage in proactive advocacy. FAC ¶¶ 126-129, 137-138, 143-145. These allegations are sufficient to establish standing at the pleading stage. *Comite*, 657 F.3d at 943 (organization had standing because it diverted resources from proactive "core organizing activities" to reactively "assisting day laborers during their arrests and meeting with workers"); *Combs*, 285 F.3d at 905 (organization had standing where its resources were diverted from its proactive mission of

"outreach and education to the community regarding fair housing" to reactively "investigating and other efforts to counteract [defendant's] discrimination").

(3) PEOC

(a) Frustration of Mission

PEOC's mission is defined as "advanc[ing] the rights of day laborers and encourag[ing] them to organize to protect their rights as workers." FAC ¶ 133. PEOC "serves a community of citizens and non-citizens alike, including Mexican nationals." *Id.* ¶ 133. Here, the nexus between Defendants' alleged conduct and an interference with PEOC's mission is somewhat tenuous. Thus, the voluntary departure process does not directly bear on the working conditions of day laborers in Los Angeles and Riverside or the ability of such persons to organize to protect their rights as workers. However, the FAC alleges that PEOC's mission of "improving overall conditions for day laborers" is frustrated because border patrol agents target laborers organized at certain corners and because at least one of PEOC's key labor organizers has allegedly been coerced into accepting voluntary departure. *Id.* ¶¶ 134, 138, 140. Based on these allegations, PEOC has adequately pleaded a frustration of its mission as a result of Defendants' alleged conduct.

(b) Diversion of Resources

Plaintiffs have adequately pleaded facts that, if established, would show that PEOC has diverted resources to address Defendants' alleged conduct. PEOC asserts that it has diverted resources by: (i) researching immigration law and voluntary departure, FAC ¶ 136; (ii) presenting "Know Your Rights" presentations at day laborer corners addressing voluntary departure, *id.* ¶ 137; and (iii) spending organizational time and transportation funds to reach affected day laborers after immigration raids on day laborer sites, *id.* ¶ 138. PEOC contends that, had it not been required to use resources to undertake these activities in response to the Program, it would have directed them toward proactive advocacy designed to improve economic opportunity for day laborers. *Id.* ¶ 139.

PEOC's allegations support the claim that it did not voluntarily divert these resources to address a problem that otherwise would not affect the organization. Rather, it became involved in this issue in response to concerns about the effect of the Program on the day laborer community. This involvement was caused by a series of raids on day laborer sites in 2009, including one that resulted in a day laborer leader of PEOC allegedly signing a voluntary departure form "under pressure and mistreatment by Border Patrol." FAC ¶ 134. Like CHIRLA, PEOC has adequately pleaded a diversion of resources as a result of Defendants' alleged conduct.

(4) SBCSC

(a) Frustration of Mission

SBCSC's mission is defined as "advocating on behalf of indigent and low-income immigrants," FAC ¶ 142, and promoting "access to the legal system and [] robust procedural protection for indigent and low-income immigrants," *id.* ¶ 147. Plaintiffs contend that, because voluntary departure "effectively denies access to the legal system, including the protections afforded by removal proceedings," *id.*, SBCSC's mission has been frustrated. The allegations of the FAC are sufficient to support a claim that Defendants' conduct directly frustrated SBCSC's purpose. Thus, it is alleged that the Program limits the procedural protections immigrants receive when they are charged with residing in the country unlawfully. Plaintiffs allege that, as a result of Defendants' conduct, non-citizens have been denied a meaningful opportunity to obtain counsel, were not fully informed of their procedural rights, and were coerced into leaving the country without adequate due process. In addition, the Program allegedly limited the access of immigrants to the legal system because Defendants allegedly encouraged or coerced immigrants to forgo the opportunity to appear before an immigration judge.

(b) Diversion of Resources

Because the voluntary departure program goes to the heart of SBCSC's mission, its allegations of diversion of resources are somewhat less compelling than those of the other Organizational Plaintiffs. However, SBCSC has sufficiently alleged a diversion of resources to establish standing at this stage of the proceedings. These allegations include: (i) it spent more time and resources responding to calls when individuals had been pressured to sign voluntary departure forms, FAC ¶ 144; and (ii) it created and made presentations regarding the consequences of the Program. *Id.* ¶ 145. Moreover, Plaintiffs allege that, absent the Program, SBCSC would have directed these resources to proactive advocacy regarding conditions of immigrant detention and the availability of bond hearings for persons in removal proceedings. *Id.* ¶ 146. As noted above, allegations of diversion of resources from proactive advocacy to reactive measures have been found sufficient to establish injury in fact. *See Comite*, 657 F.3d at 943; *Combs*, 285 F.3d at 905.

Plaintiffs also allege that SBCSC did not voluntarily divert its resources, but instead did so as a response to the calls and reports about coercion in the voluntary departure process. FAC ¶ 144. The Ninth Circuit has held that, when members of a group voice concerns to an organization, which responds by investigating and seeking to address the behavior that caused such reports, the organization has standing. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (finding standing where the organization's members' overwhelming concerns about the effects of a challenged law led to diversion of staff and resources to educate their members about the law); *Combs*, 285 F.3d at 905 (plaintiff organization responded to citizen complaints and alleged injury beyond litigation expenses).

* * *

For the foregoing reasons, each of the Organizational Plaintiffs has, for purposes of opposing a motion to dismiss, alleged injury sufficient to establish standing on its own behalf.

b) Causation and Redressability

Defendants argue that the Organizational Plaintiffs have failed to establish standing because any alleged injury cannot be traced to the Program. Defendants argue that CHIRLA, SBCSC, and PEOC only speculate that, placing illegal aliens in formal removal proceedings instead of having them choose voluntary departure, would result in more illegal aliens remaining in the country, which would work to the benefit of CHIRLA, SBCSC and PEOC. Dkt. 35 at 20-21.

Defendants' argument misapplies the causation and redressability requirements needed to establish organizational standing. The Organizational Plaintiffs are not prevented from furthering their missions because of the immigration status of some of their members; rather, each alleges that its mission has been impaired because Defendants allegedly employed coercive practices that required each of the Organizational Plaintiffs to respond and divert resources from its core activities. Thus, the fact that a change to Defendants' conduct may not result in more immigrants remaining in the country does not defeat the causation and redressability requirements. Rather, a clear link between the harm and Defendants' alleged conduct has been alleged that is redressable through these proceedings. If Defendants ceased to engage in the allegedly unlawful voluntary departure practices, each of the Organizational Plaintiffs could redirect its resources to the advancement of its core mission. Thus, the causation and redressability requirements have been met.

C. Standing of Plaintiffs to Seek Prospective Injunctive and Declaratory Relief

1. Legal Standard

"A plaintiff must demonstrate standing separately for each form of relief sought." *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185 (2000). Thus, "a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment." *Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010) (*citing Friends of the Earth*, 538 U.S. at 185-86; *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

When a plaintiff seeks prospective equitable relief, the standing analysis involves two distinct components. *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999). First, courts consider the constitutional requirements for standing, under which a plaintiff must show a credible threat of future injury that is sufficiently concrete and particularized to meet the "case or controversy" requirement of Article III. *See Lyons*, 461 U.S. at 101-04. Second, courts consider whether a plaintiff has established an entitlement to prospective equitable relief. *See id.* at 111; *Hodgers-Durgin*, 199 F.3d at 1042. To establish entitlement to a prospective injunction, a plaintiff must establish both a likelihood

of future injury and an imminent threat of irreparable harm. *Lyons*, 416 U.S. at 111. And, "where the named plaintiffs fail to establish imminent injury for the purposes of injunctive relief, their related claims for declaratory relief must be dismissed as unripe." *Id.* at 367. Finally, alleged injuries to unnamed members of a proposed class are irrelevant to standing. *See Hodgers-Durgin*, 199 F.3d at 1045.

2. Application

Defendants argue that Plaintiffs have not established standing to seek prospective relief. Thus, they contend that the Individual Plaintiffs have not alleged that they are likely to be coerced into choosing voluntary return again in the imminent future. Defendants add that "any such allegation would rely on a string of contingencies unlikely to occur." Dkt. 35 at 21.

Defendants' argument is persuasive as to the Individual Plaintiffs, each of whom has made allegations about a single interaction with either Border Patrol agents or ICE officers. Thus, with the exception of Felix, each alleges that, during that interaction, he or she was coerced into choosing voluntary departure. *See* FAC ¶¶ 44-46, 52-54, 59-60, 67-68, 75-76, 82-83, 91-91, 97-98, 111-112, 117-118. Each Individual Plaintiff has failed to allege, however, that he or she will again interact with either a Border Patrol agent or an ICE officer, and be coerced again into accepting a voluntary departure. Moreover, a single occurrence is insufficient to establish a likelihood that the challenged action will occur again in the future. *See, e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("[p]ast exposure to illegal conduct does not in itself show a . . . case or controversy" sufficient to support a prospective injunction); *Hodgers-Durgin*, 199 F.3d at 1044 (finding it "not sufficiently likely" that plaintiffs who had been stopped only once would be stopped again).[4]

Indeed, for any of the Individual Plaintiffs to be harmed in the future, he or she would have to: "(i) either illegally reenter the United States or enter lawfully and overstay their lawful admission; (ii) be encountered by Border Patrol or ICE; (iii) be detained due to a lack of lawful presence; and (iv) be coerced by Border Patrol agents or ICE officers into choosing voluntary return, despite knowing about the voluntary return process and the rights they could waive by choosing voluntary return again." Dkt. 35 at 23. Furthermore, each of the Individual Plaintiffs has alleged that it was his or her prior alleged experience in connection with the Program that led each to bring claims in this action. That each now has this alleged knowledge of, and experience with, the Program, also raises serious doubts as to the

[4] Plaintiffs argue that the Individual Plaintiffs face a real and immediate threat of repeated injury if there is no prospective relief. Dkt. 41 at 38. "This is established by (a) the fact that the Individual Plaintiffs came into contact with Defendants in the context of a wide variety of daily activities . . .; (b) Defendants' use of pre-checked boxes on the Form I-826 . . .; (c) Defendants' undue pressure on individuals to sign the Form I-826 . . .; (d) Defendants' interference with individuals' access to counsel before execution of the I-826 form from . . .; and (e) the expulsion of persons from the United States even though the person did not actually execute an I-826 form." Dkt. 41 at 38. However, none of these allegations establishes that these alleged harms are likely to recur. The severity of the claimed legal violation is not probative of the likelihood that it will recur.

possibility of future injury. For all of these reasons, the Individual Plaintiffs cannot demonstrate a likelihood of future harm based on such a series of unlikely events. *See Nelsen v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990) ("Both the Supreme Court and [the Ninth] circuit have repeatedly found a lack of standing where the litigant's claim relies upon a chain of speculative contingencies.").

Defendants' argument does not have the same force with respect to the Organizational Plaintiffs. Defendants' conduct allegedly frustrates their respective core missions and requires each to divert resources to protect and educate the populations it serves. Therefore, the Organizational Plaintiffs are likely to be harmed by the continued use of the Program because these same effects will continue. Indeed, Defendants do not dispute that, if the Organizational Plaintiffs have alleged sufficient injury to establish standing, they have also demonstrated a likelihood of future harm. *See Valle del Sol Inc.*, 732 F.3d at 1018-19 (organizational plaintiffs had standing to support a preliminary injunction when they clearly showed that the law complained of "perceptibly impaired" their ability to carry out their missions); *cf. Fair Housing Council of San Fernando Valley*, 666 F.3d at 1219 (concluding that the organizational plaintiffs had standing because they were compelled to expend resources on education and outreach campaigns to counteract defendant's discriminatory advertising); *Comite*, 657 F.3d at 943-44 (concluding that the organizational plaintiff had standing because enforcement of the complained of ordinance caused the organization to research the enforcement of the ordinance and assist day laborers who had been arrested).

Because the Organizational Plaintiffs have standing for prospective relief, Plaintiffs can seek prospective injunctive and declaratory relief. *See Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.").

D. Plaintiffs' Claims

Defendants move to dismiss three of Plaintiffs' causes of action: (i) the departure of individual Plaintiffs through a voluntary return process other than that specified in 8 C.F.R. § 240.25 violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq., FAC ¶¶ 177-79; (ii) the return of the individual Plaintiffs to Mexico pursuant to voluntary return violates the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, et seq., including 8 U.S.C. § 1229c(a)(1), because departure was not fully voluntary and occurred without Plaintiffs' full knowledge of their legal rights, FAC ¶¶ 180-82; and (iii) the voluntary return procedures violate the Due Process Clause of the Fifth Amendment because Plaintiffs' waiver of their legal rights was not knowing and voluntary, FAC ¶¶ 183-85.

1. Second Cause of Action: Violation of 8 U.S.C. § 1229c

Plaintiffs contend that the Program violates 8 U.S.C. § 1229c, which requires that any such return be knowing and voluntary. *See* FAC ¶¶ 180-82. Defendants contend that 8 U.S.C. § 1229(c) does not provide a private right of action. That argument is persuasive.

To provide the basis of a cause of action, a "statute must either explicitly create a right of action or implicitly contain one." *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230 (9th Cir. 2008). The parties do not dispute that 8 U.S.C. § 1229c does not create an express, private right of action. The question is whether a private remedy is implied by the statute. Factors relevant in determining whether a statute provides an implied right of action include: (i) whether the plaintiff is one of the class for whose benefit the statute was enacted; (ii) whether Congress intended to create or deny such a remedy; (iii) whether a private right of action is consistent with the underlying purpose of the legislative scheme; and (iv) whether the cause of action is one traditionally relegated to state law. *See Cort v. Ash*, 422 U.S. 6 (1975). However, the second factor is of primary importance. *See Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted.").

8 U.S.C. § 1229c(a)(1) provides that, "The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title." Plaintiffs contend that this provision creates a private right of action because the first and third *Cort* factors are met: Aliens are the beneficiaries of the statute, and the structure of the statute provided no alternative method of enforcement. Plaintiffs add that Congress expressly removed a private right of action from § 1229c(f), but did not do so as to § 1229c(a)(1). Plaintiffs contend that this shows that Congress intended to allow private suits to enforce § 1229c(a)(1). *See* 8 U.S.C. 1229c(f) (exempting voluntary departure decisions made by immigration judges from judicial review, without mention of administrative voluntary departure under subsection (a)).

Since *Cort,* the Supreme Court and Ninth Circuit have emphasized that the primary inquiry is whether Congress intended to create a private right of action. *Opera Plaza Residential Parcel Homeowner's Ass'n v. Hoang*, 376 F.3d 831, 835 (9th Cir. 2004) ("The question is not simply who would benefit from the law, but whether Congress intended to confer federal rights upon those beneficiaries."). Here, the statute does not reflect congressional intent to create such a right.

First, the statute focuses on the persons regulated rather than the individuals protected, *see, e.g.*, 8 U.S.C. § 1229c(a)(1) ("The Attorney General may . . ."). The Supreme Court has explained that this lack of "rights-creating language" is critical to an interpretation of Congressional intent. *See Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (a statute "phrased as a directive to federal agencies" rather than focusing on the rights of individuals protected did evidence congressional intent to create a private right of action); *accord In re Digimarc Corp.*, 549 F.3d at 1232 ("[T]he 'rights-creating' language so critical to the Court's analysis. . . is 'completely absent.'"). *Second*, there is no other language in Section 1229c that shows that Congress intended to create an implied private cause of action. Indeed, as Plaintiffs concede, the only portion of Section 1229c addressing judicial review expressly deprives courts of jurisdiction over certain claims related to voluntary departure. *See* 8 U.S.C. § 1229c(f). *Finally*, Plaintiffs have not pointed to any legislative history that could support the claim that Congress intended

to create a private right of action. For these reasons, Defendants' Motion is GRANTED as to Plaintiffs' second cause of action.

2. Third Cause of Action: Fifth Amendment Due Process

a) Constitutional Avoidance

Plaintiffs' third cause of action alleges that Defendants' administration of the Program violates the Fifth Amendment. Thus, they contend that the Fifth Amendment requires that a waiver of rights by an individual in connection with his or her expulsion from the United States must be knowing and voluntary, and that the Program impedes and violates that right. FAC ¶ 184.

Defendants argue that this claim should be dismissed under the doctrine of constitutional avoidance. Dkt. 35 at 16-17 (citing *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (Courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.")). Defendants observe that Plaintiffs' claims under 8 U.S.C. § 1229c(a)(1) and the Fifth Amendment are duplicative. Thus, each requires that an election of voluntary departure be knowing and voluntary. Although Defendants contend that 8 U.S.C. § 1229c(a)(1) does not provide a private right of action, they argue that Plaintiffs "have an avenue for bringing their second cause of action in conjunction with the APA." Dkt. 35 at 27. Therefore, Defendants assert, the Fifth Amendment claim should be dismissed.

Defendants' position is unpersuasive for two reasons. *First*, the constitutional avoidance doctrine does not mandate the dismissal of a claim. Rather, it requires a court to address "the immigration statutes and INS regulations first, instead of after its discussion of the Constitution." *Jean v. Nelson*, 472 U.S. 16 846, 854 (1985). Thus, dismissal of Plaintiffs' constitutional claim is inappropriate at this stage in the proceedings on this ground because it cannot be determined whether it will need to be addressed later in the case. *Second*, Defendants' argument lacks force because the Court has dismissed Plaintiffs' second cause of action. Even if Plaintiffs can raise their 8 U.S.C. § 1229c(a)(1) claim under the APA, such claims are subject to different, more deferential standards than constitutional claims. Thus, later in the proceedings, it could be determined that Defendants' conduct does not violate the APA, but does violate the Fifth Amendment. For this additional reason, the doctrine of constitutional avoidance does not mandate dismissal of Plaintiffs' third cause of action at this stage of the proceedings.

b) Whether Plaintiffs Pleaded Sufficient Facts to show Departure was Involuntary or Unknowing

Defendants contend that Plaintiffs' Fifth Amendment claim should be dismissed because the FAC does not plead facts sufficient to show that departure was involuntary or unknowing.[5]

(1) Knowledge

For waiver of a judicial forum to be knowing, "the choice must be explicitly presented . . . and the [individual] must explicitly agree to waive the specific right in question." *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 (9th Cir. 1998) (addressing the knowledge requirement in the context of agreements to arbitrate disputes arising under the Americans with Disabilities Act). Thus, an individual cannot make a knowing choice to accept voluntary departure unless there has been full disclosure of the material consequences of that decision. *United States v. Ramos*, 623 F.3d 672, 682-82 (9th Cir. 2010) (waiver of a right to appeal deportation order is not intelligent if necessary translation has not been provided); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006) (remanding to district court to determine whether petitioner knowingly and voluntarily signed voluntary departure form). A Central District court has previously found the precursor to Form I-826 deficient for failing to communicate information about a the right to apply for asylum prior to signing a voluntary departure form. *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376 (C.D. Cal. 1982).

Plaintiffs allege that Defendants failed to inform the Individual Plaintiffs that, if they accepted voluntary departure, they would not be permitted to return to the United States for ten years under 8 U.S.C. § 1182(a)(9)(B)(i)(II), and they would lose certain opportunities to seek to obtain legal status and remain in the United States through proceedings before an immigration judge. Dkt. 41 at 14. Plaintiffs allege that Form I-826 does not disclose the ten-year bar and that Defendants did not orally disclose this consequence to the Individual Plaintiffs. FAC App. B, ¶¶ 44, 52, 59, 67, 75, 82, 90, 97, 111, 162. Furthermore, Plaintiffs allege that Form I-286 and Defendants failed to inform the Individual Plaintiffs of the possibility that each could seek to remain in the United States through an adjustment of status that could be sought through proceedings before an immigration judge pursuant to 8 U.S.C. § 1229(b), adjustment of status under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255(a) and asylum, among other forms of relief. FAC ¶ 38-39, 44, 52, 59, 67, 75, 82, 90, 97, 111, 117.

Plaintiffs also argue that the decision of each of the Individual Plaintiffs to sign their respective, voluntary departure forms was not knowing because Defendants made materially misleading statements to each of them in connection with their respective execution of the form. For example, Plaintiffs allege that Defendants told Lopez-Venegas she could simply adjust her status from Mexico because her 11-year old son is a U.S. citizen. FAC ¶ 44. However, the applicable immigration law

[5] Defendants advance this argument as to Plaintiffs' second and third causes of action. However, because the second cause of action, under 8 U.S.C. § 1229c(a)(1) has been dismissed, Defendants' argument is addressed only with respect to Plaintiffs' Fifth Amendment claim.

would not have permitted her to do this for ten years, both because of the aforementioned unlawful presence bar and because one can only adjust status through a child who is at least 21 years old. Plaintiffs allege that other Individual Plaintiffs were also advised that they could readily and promptly obtain legal status after their returns to Mexico notwithstanding the presence of the ten-year unlawful presence bar. FAC ¶¶ 44, 52, 59, 67, 75, 82, 90, 97, 111, 151.

Defendants' alleged statements are distinguishable from those at issue in *Orantes.* There, the defendants provided only the disadvantages to the individuals, *i.e.*, that they would not be released on bail pending deportation hearings or adjudication of asylum applications. As a result, the court held that "without any offsetting notice of rights" such one-sided descriptions are improper. 541 F. Supp. at 373. Here, Plaintiffs make a contrary allegation. Thus, they allege that Defendants presented a favorable picture of voluntary departure, while neglecting to inform individuals of the adverse consequences of choosing that path. This is sufficient to form the basis for a waiver that was not informed and intelligent.

Plaintiffs also allege that Border Patrol agents failed to state that the Individual Plaintiffs could contact attorneys, and failed to provide names of attorneys or non-profit legal service providers, FAC ¶ 44, 52, 59, 67, 75, 82, 90, 97, 111, 117. Form I-826, which was presented to each of the Individual Plaintiffs, informs aliens that they have a right to consult an attorney. However, Plaintiffs contend that the Individual Plaintiffs were not provided meaningful access to an attorney given that they were detained by immigration authorities and were unable to contact any counsel. *Id.*

Plaintiffs have alleged sufficient facts to support a claim that Plaintiffs' waiver of their right to appear before an immigration judge was not a fully informed decision as required by the Fifth Amendment. Plaintiffs have pleaded facts that, if established, would show that the Individual Plaintiffs were not informed about a serious, direct and adverse consequence of their choice to elect voluntary departure. Furthermore, Plaintiffs have pleaded sufficient facts to show that each of the Individual Plaintiffs was not provided effective access to counsel before choosing to forgo the right to appear before an immigration judge. *See Orantes–Hernandez*, 541 F.Supp. at 386 (the INS is obligated to provide a legal services list before offering voluntary departure to a class member). In sum, Plaintiffs have pleaded sufficient facts to support their claim that the waiver was not "knowing" as required to satisfy constitutional Due Process standards.[6]

[6] Defendants contend that, as in the context of a guilty plea, Plaintiffs are not entitled to information about the collateral effects of a decision to depart voluntarily from the United States. Dkt. 42 at 8. (citing *United States v. King*, 618 F.2d 550, 552 (9th Cir. 1980) (courts need to inform defendant only of the direct consequences of a guilty plea, not the possible collateral consequences). This argument does not merit dismissal of Plaintiffs' Fifth Amendment claim. *First*, as discussed in Section IV.B.2.a, *infra*, it is not clear that the direct/collateral consequences distinction applies in the voluntary departure context. *Second*, at this stage of the proceedings, Plaintiffs have pleaded sufficient facts to support a claim that the unlawful presence bar is a direct consequence of the voluntary departure process. Although the operation of the unlawful presence bar depends on the length of an alien's unlawful presence in the United States, and is, therefore, not per se applicable to all non-citizens, it was a direct consequence to each of the Individual Plaintiffs in this action.

(2) Voluntariness

An individual's waiver of rights must be voluntary. In determining whether a waiver is voluntary, courts consider several factors, including the individual's subjective state of mind, the presence of a coercive atmosphere, whether an attorney was present, the methods the government used to induce the waiver, and the characteristics of the individual, including the person's age, level of education and business experience. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (citations omitted) (voluntariness of consent to search depends in part on the possibly vulnerable state of the person who consents); *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991) (voluntariness of waiver of *Miranda* rights decided by considering police methods that produced waiver); *Jones v. Taber*, 648 F.2d 1201, 1205 (9th Cir. 1981) (presence of a coercive atmosphere is a significant factor in considering voluntariness of a prisoner's agreement to release potential defendants from liability for an alleged beating that occurred while he was imprisoned). "Tactics need not be violent or physical in nature to be deemed coercive. Psychological coercion is equally likely to result in involuntary statements, and thus is also forbidden." *Collazo*, 940 F.2d at 416.

Plaintiffs allege that the consent to departure by each of the Individual Plaintiffs was not voluntary because Defendants created a coercive atmosphere in which the Individual Plaintiffs were particularly vulnerable. In particular, Plaintiffs allege that Defendants coerced Individual Plaintiffs by: (i) repeated directives to sign Form I-826; (ii) presentation of I-826 forms that had already been pre-checked to select voluntary departure; and (iii) making threats to Individual Plaintiffs, including separation from their children, and prolonged detention if voluntary departure were not accepted. FAC ¶¶ 44, 46, 52, 54, 59-60, 67-68, 76, 82-83, 88, 90, 91, 97, 106, 111-112, 117-118. Furthermore, Plaintiffs allege that several of the Individual Plaintiffs were subjectively vulnerable, and that all lacked the advice of counsel in connection with their respective decisions to accept voluntary departure.

Defendants respond that the allegations of coercion are insufficient as a matter of law to show that Plaintiffs' acceptance of departure was involuntary. Defendants contend that "the only actual threat that six individual Plaintiffs allege is that they were told if they failed to sign the Form I-826, they "could be detained for several months," and that they were not informed that they could be released on their own recognizance." Dkt. 35 at 34 (citing FAC ¶¶ 44, 52, 59, 75, 90, 111). Defendants contend that these allegations fail to state a claim because threats to exercise lawful rights or prerogatives do not constitute duress, and the INA provides for the lawful detention of aliens pending a determination of their removability, 8 U.S.C. § 1226(a). *Id*. (citing *Hisel v. Upchurch*, 797 F. Supp. 1509, 1525 (D. Ariz. 1992) (threat by assistant attorneys general that a prisoner might be transferred to another state if he did not sign a release did not constitute duress because the transfer was within the discretion of the prison official). Finally, Defendants argue that the warnings on the Form I-826 undermine Plaintiffs' claims of coercion. *See United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990) (finding knowing waiver because "[the defendant] knew he was giving up possible appeals, even if he did not know exactly what the nature of those appeals might be").

Although the warnings on Form I-826 are properly considered in connection with the allegations as to coercion, an assessment of all of the allegations shows that they are sufficient to support a claim that the election of voluntary departure by the Individual Plaintiffs was the result of coercion. *See Orantes*, 541 F. Supp. at 359 (coercive techniques "ranging from subtle persuasion to outright threats and misrepresentations" in addition to lack of notice of rights demonstrated that plaintiff's election of voluntary departure was not, in fact, voluntary). In *Orantes* plaintiffs established claims of physical abuse, misrepresentations about their right to apply, and eligibility, for asylum, confidentiality of their asylum claims, and omissions during their interactions with INS agents. 541 F. Supp. at 359-62. The Individual Plaintiffs here do not allege that they were threatened with physical violence, but that Defendants failed to disclose material information, misrepresented Plaintiffs' ability to seek reentry into the United States, and imposed psychological coercion in the form of presentation of the pre-checked box on Form I-826. Although each of these allegations, in isolation, may not be sufficient to establish coercion, collectively they are sufficient in connection with the motion to dismiss.[7]

3. First Cause of Action: Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (D)

a) Legal Standard

Under the APA, courts are to "hold unlawful and set aside" any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). In addition, courts "shall set aside agency actions that are 'without observation of procedure required by law,' 5 U.S.C. 706(2)(D), as well as those found to be substantively defective." *Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 306 (9th Cir. 1980). In applying this standard, a court must be "highly deferential, presuming the agency action to be valid," and the court must not "substitute its judgment for that of the agency." *J&G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1051 (9th Cir. 2007) (quotations omitted).

The voluntary departure process is governed by 8 U.S.C. § 1229c(a)(1) and the corresponding regulation, 8 C.F.R. § 240.25(c). As noted above, 8 U.S.C. § 1229c(a)(1) provides that "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under [8 U.S.C. § 1229a] . . . if the alien is not deportable under [8 U.S.C. §§ 1227(a)(2)(A)(iii) or 1227(a)(4)(B)]." The statute further provides that

[7] Defendants also contend that certain Individual Plaintiffs cannot show that any procedural violation caused any prejudice because there was no denial of a plausible ground for relief. Dkt. 35 at 17, n.7 (citing *Padilla v. Ashcroft*, 334 F.3d 921, 924-25 (9th Cir. 2003) ("As a predicate to obtaining relief for a violation of procedural due process rights in immigration proceedings, an alien must show the violation prejudiced him."). However, in order to demonstrate prejudice, the Individual Plaintiffs need demonstrate only a "plausible ground for relief." Plaintiffs have pleaded sufficient facts to show that each had plausible grounds for relief from removal from the United States. FAC ¶¶ 49, 56, 63, 70, 79, 86, 93, 100, 114, 121 (noting that Plaintiffs could have, *inter alia,* sought cancellation of removal, adjustment of status based on their children who are U.S. citizens and adjustment of status through the Provisional Unlawful Presence Waiver).

"permission to depart voluntarily . . . shall not be valid for a period exceeding 120 days." *Id.* § 1229c(a)(2).

8 C.F.R. § 240.25(c) provides:

> The authorized officer, in his or her discretion, *shall specify the period of time permitted for voluntary departure*, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure *shall be communicated in writing on Form I–210*, Notice of Action--Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

The regulations also provide that DHS "may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien's timely departure from the United States, including the posting of bond, continued detention pending departure, and removal under safeguards." 8 C.F.R. § 240.25(b) (emphasis added).

b) Application

Plaintiffs allege that Defendants' conduct violated 8 C.F.R. § 240.25. FAC ¶¶ 177-79. Specifically, Plaintiffs allege that: (i) Border Patrol and ICE officers improperly have failed to exercise their discretion to allow aliens up to 120 days after processing to depart voluntarily; and (ii) these officers improperly use Form I-826, rather than Form I-210, for processing aliens eligible for voluntary return. *Id.* ¶¶ 32-34 & Prayer for Relief ¶ 6.

Defendants respond that these claims fail as a matter of law. Thus, they argue that 8 C.F.R. § 240.25 does not mandate either a case-by-case determination as to whether to allow an alien additional time to depart the United States or the use of Form I-210 for the Individual Plaintiffs. Defendants also contend that Plaintiffs have failed to allege any prejudice from the allegedly improper use of Form I-826. Dkt. 35 at 36.

(1) Failure to Specify Time for Departure

8 C.F.R. 240.25(c) requires an authorized officer to *"specify the period of time permitted for voluntary departure."* Plaintiffs allege that Defendants have violated that requirement by failing to specify a time period within which Plaintiffs had to depart voluntarily from the United States. FAC ¶ 122; Dkt. 41 at 27. Instead, Plaintiffs allege that "each Individual Plaintiff was expelled from the United States immediately." FAC ¶ 122.

Defendants respond that the practice of detaining aliens pending voluntary return under safeguards complies with 8 C.F.R. § 240.25. Dkt. 35 at 38. Thus, they contend that 8 C.F.R. § 240.25(b) explicitly allows Defendants to "attach to the granting of voluntary departure any condition it deems necessary to

ensure the alien's timely departure," including "continued detention pending departure" and "removal under safeguards." *See* 8 C.F.R. § 240.25(b).

A construction of these two provisions based on their collective terms shows that Plaintiffs have failed to allege that Defendant's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Plaintiffs allege that they were "expelled from the United States immediately"; however, this allegation does not establish that Defendants did not specify a time for departure *at all*; rather, it establishes that Defendants specified a very short time period for Plaintiffs' departure. Although 8 C.F.R. 240.25(c) requires an authorized officer to specify the period of time permitted for voluntary departure, it does not state that the officer must permit any particular period of time. Moreover, 8 C.F.R. § 240.25(b) allows Defendants to detain aliens such as the Individual Plaintiffs, pending their departure. Defendants have done just that. Thus, Plaintiffs have failed to allege facts that would show Defendants' actions were "not in accordance with the law" with respect to the challenged conduct.

(2) Use of Form I-210

Plaintiffs claim that DHS violates 8 C.F.R. § 240.25(c) when Border Patrol agents and ICE officers use Form I-826, rather than Form I-210, to process voluntary returns to Mexico. Defendants contend that 8 C.F.R. § 240.25(c), when read in light of 8 C.F.R. § 240.25(b), implies that the use of Form I-210 is only required when an officer allows an alien time to depart without safeguards. Thus, the "decision regarding voluntary departure" referenced in subsection (c) refers only to cases where DHS decides to allow voluntary return without safeguards." Dkt. 35 at 39.

Defendants' interpretation is not supported by the plain language of the regulations. 8 C.F.R. 240.25(c) states that "*[e]very* decision regarding voluntary departure *shall* be communicated in writing on Form I-210." (Emphasis added). Section 240.25(c) is not limited to unconditional, voluntary departures. Instead it applies to "every decision" regarding voluntary departure. Moreover, Section 240.25(c) is not discretionary; rather, officers "shall" use Form I-210. Plaintiffs have pleaded sufficient facts to show that Defendants' use of Form I-286 rather than I-210 amounts to agency action "not in accordance with law." Plaintiffs have, therefore, stated a claim under the APA, 5 U.S.C. 706(2)(A); 706(2)(D), with respect to this alleged misconduct by Defendants.[8]

[8] Defendants also argue that the technical violation of Section 240.25(c) resulting from use of Form I-826 is harmless error, citing 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."); *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009). Plaintiffs argue that the violation is prejudicial because Form I-210 includes fields requiring that an officer state a future departure date, whereas Form I-286 does not. Dkt. 41 at 29. Plaintiffs contend that if officers had been required to fill out Form I-210, it would have been more likely that non-citizens would have been provided with sufficient time to consult with immigration attorneys or otherwise correct any errors relevant to their immigration status prior to leaving the United States. *Id.* at 30. In connection with the present motion to dismiss, it is not appropriate to seek to determine whether the claimed error was prejudicial.

E. Conclusion

For the foregoing reasons, Defendants' Motion under 12(b)(1) is DENIED, and Defendants' Motion under 12(b)(6) is GRANTED IN PART. Thus, it is GRANTED as to Plaintiffs' second cause of action under 8 U.S.C. § 1229c(a)(1) and DENIED as to Plaintiffs' causes of action under the APA and the Fifth Amendment.

IV. Plaintiffs' Motion for a Preliminary Injunction

A. Legal Standard

A court may grant a preliminary injunction if the moving party establishes: (i) a substantial likelihood of success on the merits; (ii) irreparable injury will result absent an injunction; (iii) the threatened injury from the action to be enjoined outweighs the damage the proposed injunction may cause the non-moving party who will be enjoined; (iv) the proposed injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "In all cases, the burden of persuasion remains with the party seeking preliminary injunctive relief." *Wetzel's Pretzels, LLC v. Johnson*, 797 F. Supp. 2d 1020, 1024 (C.D. Cal. 2011); *West Point–Pepperell, Inc. v. Donovan,* 689 F.2d 950, 956 (11th Cir. 1982). "Because a preliminary injunction is an extraordinary remedy, courts require the movant to carry its burden of persuasion by a 'clear showing.'" *City of Angoon v. Marsh,* 749 F.2d 1413, 1415 (9th Cir. 1984)).

In the preliminary injunction context, "it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial," particularly "where the relief afforded, rather than preserving the status quo, completely changes it. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir. 1963). The Ninth Circuit defines the "status quo" as "the last uncontested status which preceded the pending controversy." *Id.* at 809.

B. Application

1. The Nature of the Injunctive Relief Requested

The PI Plaintiffs are three Individuals -- Lopez-Venegas, Sierra, and Hernandez-Contreras – each of whom has school-aged children. Due to their respective voluntary departures, Sierra and Hernandez-Contreras are separated from their children and partners, who continue to reside in the United States. Lopez-Venegas's son, who has Asperger's Syndrome, has returned to Mexico with her because she is his sole caretaker. These three plaintiffs seek an injunction permitting their return to the United States "without any interference by the government pending trial on the merits" and prohibiting Defendants from giving effect to their voluntary departure agreements.

A preliminary injunction can take two forms: A prohibitory injunction prohibits a party from taking action and "preserve[s] the status quo pending a determination of the action on the merits. . . A mandatory injunction 'orders a responsible party to take action.' " *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). Plaintiffs characterize the requested relief as a return to the status quo because the "the last uncontested status which preceded the pending controversy" occurred when Plaintiffs were in the United States, albeit unlawfully. *Tanner*, 316 F.2d at 809. Defendants argue that Plaintiffs are seeking a mandatory injunction, *i.e.,* one that would order Defendants to restore the Individual Plaintiffs physically and legally to their respective positions in the United States prior to their respective departures.

Although Plaintiffs attempt to characterize the requested relief as a prohibitory injunction, their position is neither logical nor supported by the governing Ninth Circuit case law. *In Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co*., the defendant had distributed its own version of an allegedly infringing dietary supplement prior to the commencement of the litigation. The district court ordered the defendant to recall the product. The Ninth Circuit modified the injunction, stating, "the recall order at issue did not operate simply to preserve the status quo, or to restrain Marlyn from further acts of possible infringement, because it involved products no longer within Marlyn's possession. In short, the district court's order was something more than a prohibitory preliminary injunction." 571 F.3d at 879.

Here, the injunctive relief requested would require Defendants to "take action" in that they would have to allow the PI Plaintiffs to re-enter the United States. This would entail coordination and specific affirmative conduct in connection with the re-entry of each of the Individual Plaintiffs, who could not otherwise enter the United States from Mexico. Thus, as Defendants point out, records are maintained about those who agree to voluntary departures. Such persons are not permitted to return to the United States absent some change in their immigration status that is reflected in the federal records maintained about them. Thus, if such a person, *e.g.,* Lopez-Venegas, Sierra, or Hernandez-Contreras, sought to reenter the United States, he or she would be turned away at the proposed point of entry. This result would not change absent an affirmative act by the United States, expressly permitting reentry, notwithstanding the current immigration status of each moving party. Although the affirmative relief sought may not prove to be as burdensome as what would have resulted from the injunction in

Marlyn Nutraceuticals, Defendants would nevertheless be required to take affirmative action. Notwithstanding Plaintiffs' word play as to the nature of the requested relief, this would be a mandatory injunction.

In general, mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980). Thus, Plaintiffs must demonstrate a strong likelihood of success on the merits and meet a high threshold of irreparable harm for injunctive relief to be warranted here.

2. Likelihood of Success on the Merits

For purposes of the Preliminary Injunction Motion, Plaintiffs rely on only one claim: The PI Plaintiffs' choice of voluntary departure was not "knowing" because Defendants failed to inform them of the ten-year unlawful presence bar before they elected voluntary departure. Dkt. 37-1 at 6. As a result, the PI Plaintiffs assert that they have established a likelihood of success on their claims that Defendants' conduct violated their rights under 8 U.S.C. § 1229 and the Fifth Amendment. As noted above, Plaintiffs cannot establish a likelihood of success on their claim under 8 U.S.C. § 1229 because that statute does not provide a private right of action. Thus, the following discussion addresses only the viability of the PI Plaintiffs' Fifth Amendment claim.

It is presently undisputed that Defendants did not inform the PI Plaintiffs, either through Form I-826 or verbal communications, of the unlawful presence bar. Rather, Defendants dispute whether this failure made PI Plaintiffs' decision to forgo formal immigration proceedings a knowing waiver. Further, Defendants contend that Plaintiffs cannot establish a likelihood of success on the merits because there remain factual issues as to whether the PI Plaintiffs were subjectively aware of the unlawful presence bar, and because the PI Plaintiffs were not prejudiced by any lack of knowledge of the unlawful presence bar.[9]

a) Fifth Amendment Due Process Waiver Standard

It is "well established that aliens facing deportation from this country are entitled to due process rights under the Fifth Amendment." *Walters v. Reno*, 145 F.3d 1032, 1037 (9th Cir. 1998); *see also Mathews v. Diaz,* 426 U.S. 67, 77 (1976). These "[c]onstitutional rights may ordinarily be waived [only] if it can be established by clear and convincing evidence that the waiver is voluntary, knowing, and intelligent." *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997).

These principles have been applied by the Ninth Circuit in the context of a non-citizen's waiver of his right to formal immigration proceedings. *See United States v. Ramos*, 23 F.3d 672, 682-82 (9th Cir.

[9] Although Defendants' Motion to Dismiss challenges the standing of the Individual Plaintiffs to seek prospective injunctive relief, Defendants do not challenge their standing to seek preliminary injunctive relief.

2010) (plaintiff's waiver of right to appeal deportation order must be both "considered and intelligent"). The Ninth Circuit has likened the acceptance of a voluntary departure to "a plea bargain in which the alien gives up any expectation that he alien can 'illegally reenter and resume a period of continuous physical presence.'" *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006). As the Ninth Circuit has explained:

> [I]f voluntary departure is accepted in lieu of being placed in deportation or removal proceedings, the alien agrees to relinquish the right to present a claim for relief that might otherwise allow the alien to stay in the United States. Given the consequences of an agreement to accept voluntary departure, such an agreement, like a plea agreement, should be enforced against an alien only when the alien has been informed of, and has knowingly and voluntarily consented to, the terms of the agreement.

Id.

In the criminal context, a plea is considered knowing if the defendant has been advised of the "direct consequences of his plea." *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011). A defendant need not be advised of "all the possible collateral consequences" of his plea. *Id.* The Ninth Circuit has not specifically addressed whether the "direct/collateral consequences" distinction applies to knowing acceptance in the voluntary departure context. However, some cases suggest that the direct/collateral distinction should be considered in the immigration context. For example, in *Ungo v. Beechie*, 311 F.2d 905 (9th Cir. 1963), the Ninth Circuit stated, "Appellant having knowingly and intentionally waived his right to become an American citizen, we think it need not also appear that he was expressly advised of *all the consequences which might flow from that waiver* under other provisions of the Immigration and Nationality Act." 311 F.2d at 907 (emphasis added).

The direct/collateral distinction generally does not, however, appear in the Ninth Circuit's discussion of waiver in the immigration context. For example, in *United States v. Ramos*, 623 F.3d 672, 683 (9th Cir. 2010), the Ninth Circuit found that a noncitizen's waiver of rights through a Stipulated Removal form was not knowing because "[t]he government failed to give Ramos a competent explanation of the Stipulated Removal form in a language he could understand," and "failed to advise him adequately of the consequences of his waiver of appeal." *Id.* at 681-83. There was no discussion in *Ramos* regarding whether these consequences were "direct" or "indirect." *Id*. Similarly, in *Walters*, the Ninth Circuit considered whether certain forms the government served on non-citizens at risk of deportation "apprise[d] the alien of the drastic consequences regarding deportation," and whether they were "confusing" or "affirmatively misleading." 145 F.3d at 1043.

b) Application

(1) Whether PI Plaintiffs are Likely to Show their Waiver was "Knowing"

In determining whether Plaintiffs have established that their election of voluntary departure was not "knowing," the starting point is the "central tenet of constitutional law that 'courts indulge every reasonable presumption against waiver.'" *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997) (quoting *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177 (1937)). Under this standard, and in the absence of clear precedent establishing that the direct/collateral distinction applies here, the PI Plaintiffs need not establish that the unlawful presence bar was a "direct" consequence of voluntary departure. Rather, in the immigration context, the Ninth Circuit has considered the totality of circumstances in determining whether a waiver was knowing. *See Walters,* 145 F.3d at 1042 ("[T]he district court properly evaluated [the document forms] in light of all the relevant circumstances and correctly determined 'that a confluence of factors' rendered them constitutionally inadequate."); *Ungo v. Beechie*, 311 F.2d 905 (9th Cir. 1963) (concluding that a waiver was considered after noting that appellant was "an intelligent person, a college graduate" and had where the content of the relevant immigration statute was clearly printed on the form). Moreover, the government bears the burden of proving, by "clear and convincing evidence" that there was a knowing waiver.

Plaintiffs argue that Defendants had an obligation to advise them about the unlawful presence bar because it is a severe penalty. Dkt. 46 at 8. The Ninth Circuit has found certain printed forms inadequate to provide the basis for a knowing waiver. This results if the forms "do not apprise the alien of the drastic consequences regarding deportation." *Walters*, 145 F.3d at 1042. In *Walters*, the Ninth Circuit held that forms issued to non-citizens charged with civil document fraud failed adequately to advise them that, if they failed to request a separate hearing on the document fraud charges, they would be found deportable and excludable on that basis without a further opportunity to challenge that determination in their immigration proceedings. 145 F.3d 1032 (9th Cir. 1998).[10] "Informing an alien that a final order under § 247C will result in a finding of deportability and permanent excludability, and in most instances immediate deportation, is necessary in order to ensure that the alien understands that he must request a separate hearing . . . . Otherwise, the alien has no reason to know that by waiving his opportunity for a document fraud hearing, he is waiving his right to a meaningful deportation hearing." *Id.* at 1043. Similarly, the PI Plaintiffs had no reason to know that by waiving their right to appear before an immigration judge, they were also waiving their right to seek reentry into the United States for a period of ten years. There is no dispute that Form I-826 does not mention the ten-year unlawful presence bar, and, at present, there is no dispute that Defendants did not inform Plaintiffs about it. Nor, at present, is there any evidence that any of the Individual Plaintiffs had subjective knowledge of the ten-year unlawful presence bar.

[10] The court also rejected the government's argument that the deportation consequence was a "collateral consequence" that did not have to be disclosed because the statute at issue specifically provided that "[a]n alien who is subject to a final order [on document fraud charges] is deportable." 8 U.S.C. § 1251(a)(3)(C)(i). *Id.* at 1042.

Furthermore, the government's obligation to advise an individual of the consequences of the waiver of a right is heightened where, as here, the individual is detained. *See Jones v. Tabor*, 48 F.2d 1201 (9th Cir. 1981) (stating that a prisoner's release of claims against prison officials must be examined with "particular care" because of "the claimant's dependence on potential defendants"). Here, the PI Plaintiffs were detained at the time they signed the voluntary departure form and did not have the assistance of counsel in deciding whether to accept voluntary departure. Although Form I-826 informs an individual of his or her right to consult with counsel, the PI Plaintiffs were not provided a list of service providers to contact. Because none of the PI Plaintiffs had retained counsel, each was dependent upon Defendants to provide complete and accurate information as to the consequences of accepting voluntary departure.

Even if the Court assumes that the direct/collateral consequence distinction applies, Plaintiffs may nonetheless be able to establish that they did not knowingly accept voluntary departure. The Ninth Circuit has established that a consequence is direct if it is "definite, immediate, and largely automatic." *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988). By contrast, a consequence is collateral if it is not an automatic consequence of waiver, such as when the consequence "is in the hands of another government agency or in the hands of the defendant himself." *Id.* Here, Defendants contend that the only direct consequences of the waiver were: (i) the waiver of the right to a hearing before an immigration judge; and (ii) Plaintiffs' physical return to Mexico under safeguards. Plaintiffs concede that they were informed of both of these consequences. By contrast, Defendants argue that the unlawful presence bar depends on a condition that is independent of the voluntary departure process: the length of time that the non-citizen has been unlawfully present in the United States. The unlawful presence bar is set forth in 8 U.S.C. § 1182(a)(9)(B):

> (1) If an alien is unlawfully present in the United States for more than 180 days and less than one year, and he voluntarily departs the United States, then he is inadmissible for a period of 3 years; and
> (2) If an alien is unlawfully present in the United States for one year or more, and he departs or is removed from the United States, then he is inadmissible for a period of 10 years.

Thus, the unlawful presence bar is not an automatic consequence of a voluntary departure as to every non-citizen: such a person who has been present in the United States for only 180 days does not face a bar to reentry. Moreover, the unlawful presence bar is not a penalty that is specifically tied to the voluntary departure process. Rather, it applies when a non-citizen voluntarily leaves the United States for any reason.

Although the unlawful presence bar is not imposed on every non-citizen who elects voluntary departure, it was a "definite, immediate, and largely automatic" consequence to the PI Plaintiffs, each of whom had lived in the United States unlawfully for at least a year. Thus, as to these Plaintiffs, the consequence

was direct: as soon as each of them accepted voluntary departure and was removed from the United States by Defendants, the bar applied.

Furthermore, this is not a case in which the application of the unlawful presence bar was contingent on the exercise of discretion by another government agency or by the conduct of the Plaintiffs. Rather, Defendants are responsible for administering the unlawful presence bar. *Cf. United States v. Delgado-Ramos*, 625 F.3d 1237, 1239 (9th Cir. 2011) (concluding that, in criminal plea, immigration consequences of plea are collateral in part because "deportation is not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility"). As to the PI Plaintiffs, the bar was an automatic and direct, consequence of their waivers. Therefore, the evidence presented at this time shows that it was more likely than not that Defendants' failure to inform the PI Plaintiffs of this consequence, even under the standard proposed by Defendants, meant that the PI Plaintiffs did not knowingly elect voluntary departure.

Defendants also argue that Plaintiffs cannot establish a likelihood on the merits because they fail to establish that they did not have subjective knowledge of the unlawful presence bar. Dkt. 44 at 19 (citing *Jones*, 648 F.2d at 1203 ("There are both subjective and objective aspects" of a determination whether a waiver was "voluntary, deliberate, and informed")). However, two of the PI Plaintiffs have declared that they were unaware of the ten-year bar. *See* Hernandez-Contreras Decl. ¶ 10, Dkt. 36-6 ("If I had known about these ten years of separation [from my family], I would have withstood the pressure to sign the paper and would have demanded to see an immigration judge."); Sierra Decl. ¶ 12, Dkt. 37-7 (same). Plaintiff Lopez-Venegas's declaration is not precise as to this point. She states, "The agents never explained to me that by signing the paper, I would be prohibited from returning to the United States for ten years." Lopez-Venegas Decl. ¶ 13, Dkt. 37-9. However, Defendants have not presented any contrary evidence to establish that the PI Plaintiffs knew of the unlawful presence bar.[11]

(2) Whether Plaintiffs were Prejudiced by their Lack of Knowledge of the Unlawful Presence Bar

Although Plaintiffs have shown a likelihood of success on the merits of the claim that they did not make a knowing decision as to voluntary departure, Defendants have raised significant issues with respect to whether Plaintiffs' can demonstrate a causal connection between Defendants' action and any resulting injury to the PI Plaintiffs. The unlawful presence bar prohibits only *lawful* readmission for a ten-year period. *See* 8 U.S.C. § 1182(a)(9)(B) (listing "classes of aliens ineligible for visas or admission"). Defendants contend that none of the PI Plaintiffs possesses a lawful basis for readmission to the United

[11] Defendants contend that Sierra should have known of the unlawful presence bar because records indicate that he previously had voluntarily returned to Mexico in January 2003 and reentered the United States unlawfully the next day. *See* Dkt. 44, Exh A-5, Form I-213. However, this does not necessarily establish that Sierra was aware of the unlawful presence bar. Moreover, any contention that he "should have known" is a non sequitur: whether a person should know about the consequences of a waiver does not relieve the government of an existing obligation to inform him of the consequences.

States. Dkt. 44 at 14. Thus, even if each had been aware of the unlawful presence bar and was fully informed of its consequences at the time of their respective voluntary departures, the PI Plaintiffs may have elected voluntary departure because the unlawful presence bar would not have affected their ability to reenter the United States.

This is a significant issue. None of the PI Plaintiffs has alleged that he or she currently possesses a valid visa for reentry that the unlawful presence bar rendered void. Furthermore, although each of the PI Plaintiffs has a child who is a U.S. citizen, none will be old enough to sponsor the readmission of his or her parent for seven to ten years. Thus, but for the unlawful presence bar, only Hernandez-Contreras could have sought readmission to the United States through a petition for an immediate relative immigrant visa made by his wife, who is a U.S. citizen. *See* 8 U.S.C. § 1151(b)(2)(A)(i). Generally, "[a]s a predicate to obtaining relief for a violation of procedural due process rights in immigration proceedings, an alien must show that the violation prejudiced him" or her. *Padilla v. Ashcroft*, 334 F.3d 921, 924-25 (9th Cir. 2003). In this context, it has not been shown that Lopez-Venegas and Sierra can establish prejudice. Thus, neither has shown the likelihood of success on the merits of their respective claims that his or her lack of knowledge of the unlawful presence bar was material because neither could have "lawfully" reentered the United States during the relevant 10-year period. Hernandez-Contreras has demonstrated that the unlawful presence bar could impede his ability to obtain a visa that would permit his reentry.

Because of these causation issues, Defendants have raised significant issues as to whether all of the PI Plaintiffs are likely to succeed on the merits of their respective claims based solely on their claimed lack of knowledge of the ten-year unlawful presence bar at the time that each agreed to a voluntary departure. Thus, although the PI Plaintiffs may prevail on the merits after the full factual record is developed, there remain uncertainties as to their ultimately probability of success on the narrow basis under which the PI Plaintiffs seek preliminary injunctive relief.

3. Irreparable Injury

Plaintiffs assert three irreparable injuries: *First*, Plaintiffs contend that the deprivation of a constitutional right is an irreparable harm. It "is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury. *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). As explained earlier, the PI Plaintiffs have made a showing that they may have been deprived of their constitutional right to a removal hearing; however, there remain issues as to whether they will succeed on the merits. To the extent the PI Plaintiffs can establish a constitutional harm, the continued deprivation of this right through trial constitutes irreparable injury.

Second, Plaintiffs contend that there is irreparable harm to Hernandez-Contreras and Sierra as parents because of their separation from their minor children. Hernandez-Contreras states that his wife, who remains in the United States with their two minor children, has struggled to provide and care for them by herself, and that his son has had trouble eating and sleeping as a result of the separation from his

father. Similarly, Sierra declares that his partner has had difficulty caring for their two daughters without Sierra's assistance and that his separation from his family has been devastating for all of them.

Third, Plaintiffs argue that the children of each PI Plaintiff are experiencing educational difficulties as a result of the voluntary departures. Thus, Lopez-Venegas's contends that her son, who is autistic, is suffering because he now resides with her in Mexico where he cannot receive the same effective education that was provided to him in California. Hernandez-Contreras has presented evidence that his six-year-old daughter has been doing poorly in school since his departure, and that she has told her teachers that she cannot focus because she misses him. Hernandez-Contreras Decl. ¶ 5; Vasquez Decl. ¶ 11. Since Sierra's voluntary departure, his 14-year-old daughter, a student at a special school for high achieving youth, has received her first failing grades.. Sierra Decl. ¶ 6.

The Ninth Circuit has held that "separation from family members, medical needs, and potential economic hardship" are important irreparable harm factors in the context of motions for stays of orders of removal. *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011); *see also Abbassi v. I.N.S.*, 143 F.3d 513, 514 (9th Cir. 1998) ("We evaluate stay requests under the same standards employed by district courts in evaluating motions for preliminary injunctive relief.").[12] District courts considering preliminary injunctive relief in other contexts have found that the separation of a parent and child as well as loss of educational opportunity constitutes irreparable harm. *See Nicholson v. Williams*, 203 F. Supp. 2d 153, 257 (E.D.N.Y. 2002) (injunction was appropriate because "[e]ven relatively short separations may hinder parent-child bonding, interfere with a child's ability to relate well to others, deprive the child of the essential loving affection critical to emotional maturity, and interfere substantially with schooling and necessary friendships"); *LIH ex rel. LH v. New York City Bd. of Educ.*, 103 F. Supp. 2d 658, 665 (E.D.N.Y. 2000) ("No level of monetary damages could possibly compensate these students for the educational opportunities they will lose").

Defendants contend that the separation of parents and children should not be a basis for a preliminary injunction. However, in support, Defendants cite cases in which courts have held that family separation does not give rise to relief *on the merits* for purposes of contesting removal. Dkt. 44 at 23 (citing *Mamanee v. INS*, 566 F.2d 1103, 1105 (9th Cir. 1977) (deportation of the parent of a U.S. citizen would not result in unconstitutional de fact deportation of her child). Thus, Defendants have not established that these harms may not properly be considered in the irreparable harm analysis.

The separation of spouses, life-partners and children are serious harms. They are an important factor in the analysis of the irreparable harm component of the requested preliminary injunction. The Court is also mindful, however, of certain modest, countervailing factors: (i) the parents and children here may communicate frequently by telephone or over the Internet; (ii) the children here may travel to Mexico during school breaks to visit their parents for up to several weeks each year while this action is pending; and (iii) such arrangements as to child custody are commonly applied in Family Law cases in

[12] Although courts apply a similar test in the stay of removal context, the Ninth Circuit has observed that a stay is less coercive and disruptive than an injunction. *Leiva-Perez*, 640 F.3d at 966.

which parents who have separated or divorced reside in different states or countries, but share physical and legal custody of their children.

Further, some of the more specific evidence as to other aspects of the claimed irreparable is not comprehensive or compelling. Thus, Lopez-Venegas has not established a sufficient factual record as to what educational resources are available to her son at schools in Mexico. And, Hernandez-Contreras and Sierra have not presented evidence to establish that any decline in their children's educational performance is due solely to the separation from their respective parents. "Because a preliminary injunction is an extraordinary remedy, courts require the movant to carry its burden of persuasion by a 'clear showing.'" *City of Angoon v. Marsh,* 749 F.2d 1413, 1415 (9th Cir. 1984)).

4. Balance of Hardships

For the reasons stated above, the PI Plaintiffs have demonstrated some harm both in the form of constitutional injury and harm to themselves, their spouses, life partners and children. Defendants, however, have a strong interest in enforcing immigration laws. In the event Plaintiffs' requested injunction were granted, Defendants could pursue formal removal proceedings against the PI Plaintiffs. However, this would require the government to expend additional resources to allow Plaintiffs to return to the United States and to address their unlawful presence through removal proceedings and possible detention. Furthermore, as noted below, this would result in the PI Plaintiffs obtaining, through a preliminary injunction, the ultimate relief that they seek in this action.

Defendants contend that the PI Plaintiffs' claim of hardship is undermined because their claimed lack of knowledge about the ten-year bar caused no harm. Thus, had any of the PI Plaintiffs been advised of the bar, he or she would have learned that it applied to a limited type of "lawful" reentry for which none would have been eligible during the ten-year period. However, as discussed in Section IV.B.2.b, *supra*, this argument applies only to Sierra and Lopez-Venegas. Hernandez-Contreras, by contrast, can demonstrate potential prejudice from the alleged failure to inform about the unlawful presence bar. Thus, but for the unlawful presence bar, he alone among the PI Plaintiffs could presently seek reentry through an immediate relative visa. Therefore, although Lopez-Venegas and Sierra cannot show prejudice, Hernandez-Contreras was disadvantaged by the unlawful presence bar. These facts tip the balance of hardships in Defendants' favor as to Sierra and Lopez-Venegas, but in Plaintiffs' favor as to Hernandez-Contreras.

Defendants further contend that any prejudice to the PI Plaintiffs is offset by the ability of each to seek a waiver of the unlawful presence bar. Under 8 U.S.C. § 1182 (a)(9)(B)(v), the Attorney General has the "sole discretion to waive [the unlawful presence bar] in the case of an immigrant who is the spouse or son or daughter of a United States citizen . . . if it is established to the satisfaction of the Attorney General that the refusal of admission . . . would result in extreme hardship to the citizen." This provision only allows the spouse or child of a U.S. citizen to seek waiver. Once again, only Hernandez-Contreras is eligible to seek such a waiver; neither Lopez Venegas nor Sierra is married to a U.S. citizen. Thus,

although Hernandez-Contreras is the only PI Plaintiff who can demonstrate harm from the unlawful presence bar, he also has a potential offsetting remedy.

The waiver of the unlawful presence bar is a discretionary remedy that cannot be judicially reviewed. *See* 8 U.S.C. § 1182(a)(9)(B)(v) ("No court shall have jurisdiction to review a decision or action by the Attorney General regarding waiver under this clause."). It would require Hernandez-Contreras to show "extreme hardship." For this reason, whether Hernandez-Contreras will be able to obtain this waiver is uncertain.[13] By contrast, to seek reentry through an immediate relative visa, Hernandez-Contreras would only have to establish the relationship with his U.S. citizen wife and submit the required documentation. *See* 8 U.S.C. § 1151(b)(2)(A)(i); 8 C.F.R. § 204.2. Thus, the availability of a discretionary waiver of the unlawful presence bar offsets to some degree the harm to Hernandez-Contreras that resulted from the failure to inform him of the unlawful presence bar.

Defendants also argue that, if the preliminary injunction is granted, the PI Plaintiffs will have been granted the ultimate relief sought in their complaint and their individual claims will become moot. "[I]t is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir. 1963). Although this is not a "hard and fast rule[], to be rigidly applied to every case," *id.* at 809, this consideration has force here. Were the preliminary injunction granted, the PI Plaintiffs would be returned to the United States, and their right to formal immigration proceedings would be restored should Defendants pursue formal immigration proceedings.

Finally, as noted, mandatory injunctions are generally "not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980). Although the injuries identified by the PI Plaintiffs are significant and are ones for which monetary relief may be inadequate,[14] this is a factor in the application of the balancing of the hardships test. Consideration of all of the foregoing shows that the balancing of the hardships does not tip in the favor of the PI Plaintiffs.

5. Public Interest

"Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.2d 815, 826 (9th Cir. 2005). Plaintiffs argue that the public interest favors granting the preliminary injunction because constitutional rights are at issue. Defendants contend that the public interest disfavors granting the injunction for the same reasons discussed, *supra*, Section VI.B.3.

[13] Neither party has submitted evidence as to how often waiver of the unlawful presence bar is granted.
[14] Indeed, Plaintiffs are not seeking monetary relief. *See* FAC, Dkt. 27.

The allegations of constitutional deprivations are significant. Equally significant is the public interest in the proper enforcement of immigration laws and the finality of immigration proceedings. Thus, the public interest does not clearly favor preliminary injunctive relief.

C. Conclusion

"A preliminary injunction is an extraordinary remedy never awarded as of right. . . . In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. Here, a consideration of all of the preliminary injunction factors shows that the PI Plaintiffs have not established the necessary elements for the issuance of the requested relief. *First*, the PI Plaintiffs are seeking a mandatory injunction. In general, mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases." *Anderson v. United States*, 612 F.2d at 1114. *Second*, the PI Plaintiffs are seeking the full relief to which they may have been entitled if successful on the merits. It is usually not proper to grant such relief in the preliminary injunction context. *See Tanner Motor Livery, Ltd.*, 316 F.2d at 808-09. *Third*, Lopez-Venegas and Sierra have not shown a likelihood of success on the merits given that they cannot show that they have been prejudiced by their lack of knowledge of the ten-year unlawful presence bar. *Fourth*, the PI Plaintiffs have shown some measure of irreparable harm in the form of constitutional injury and, in the cases of Hernandez-Contreras and Sierra, separation from their children. However, these harms do not override the failure to have met the other elements that must be shown to establish the basis for the issuance of the requested preliminary injunction. *Finally*, although Hernandez-Contreras has presented the most persuasive evidence as to likelihood of success on the merits, the balance of hardships does not tip in his favor, because he can seek alternative relief by seeking admission through a waiver of the unlawful presence bar.

For all of the foregoing reasons, the Preliminary Injunction Motion is DENIED.

V. Conclusion

For the reasons stated in this Order, Defendants' Motion to Dismiss is GRANTED IN PART AND DENIED IN PART and Plaintiffs' Motion for a Preliminary Injunction is DENIED.

IT IS SO ORDERED.

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