No. 20-1554

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDRES OSWALDO BOLLAT VASQUEZ, individually and as next friend to Luisa Marisol Vasquez Perez de Bollat, and as father and next friend to A.B.; A.B.; LUISA M. VASQUEZ PEREZ DE BOLLAT; JOSE M. URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA M. MARTINEZ DE URIAS; SALOME OLMOS LOPEZ, individually and as next friend to Evila Floridalma Colaj Olmos and J.C., J.C.; EVILA F. COLAJ OLMOS
Plaintiffs-Appellees,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security; MARK A. MORGAN, Acting Commissioner of U.S. Customs and Border Protection; KENNETH T. CUCCINELLI, senior official in charge of U.S. Citizenship and Immigration Services; MATTHEW T. ALBENCE; WILLIAM P. BARR, Attorney General; PRESIDENT DONALD J. TRUMP,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
No. 1:20-cv-10566
The Hon. Indira Talwani

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In response to an unprecedented crush of illegal migration across the southern border, in December 2018, the Department of Homeland Security (DHS) implemented statutory authority to temporarily return to Mexico certain aliens who are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States" "pending" their removal proceedings. 8 U.S.C. § 1225(b)(2)(C). DHS's policy, the Migrant Protection Protocols (MPP), has been an indispensable tool in stemming the tide of unlawful migration at the southern border. It has realigned incentives to prevent aliens who have no legitimate basis for entering the United States from making the trek north, and it has restored integrity to the immigration system by reducing a backlog of cases so that asylum seekers with bona fide claims can proceed through the system more swiftly. *See, e.g.*, *DHS v. Thuraissigiam*, No. 19-161, --S. Ct.--, 2020 WL 3454809, at *5 (June 25, 2020).

After Plaintiffs—five inadmissible aliens apprehended immediately after crossing the border illegally—were placed in MPP and returned to Mexico, they sought a preliminary injunction barring their placement in MPP and mandating their return to the United States. The district court granted injunctive relief and preliminarily enjoined the application of MPP to Plaintiffs on two central grounds. First, based on the single word "arriving," the court concluded that DHS's

contiguous-territory return authority *can never apply to an alien who has made it on to United States soil*, reasoning that such an alien is not "arriving," but has arrived. Op. 16-17. The court therefore reasoned that the Plaintiffs here are not eligible for MPP because they were apprehended *after* illegally crossing the border. Op. 17. Only "applicants [who] are apprehended *while* crossing the border," the district court believed, "are 'arriving' applicants" who may be returned to Mexico under the authority of 8 U.S.C. § 1225(b)(2)(C). Op. 16. Second, the district court alternatively concluded that MPP may not be applied to aliens like Plaintiffs who could have been placed by DHS in expedited removal proceedings, even though DHS exercised its discretion *not* to place them in expedited removal proceedings. Op. 18-22. Section 1225(b)(2)(C) applies to an alien who has "a proceeding under section 1229a"—that is, a full removal proceeding, as opposed to an expedited removal proceeding. The district court acknowledged that the government had discretion to place Plaintiffs in full removal proceedings and placed them in full removal proceedings—not expedited removal proceedings. The district court concluded, however, that because Plaintiffs were *eligible* to be placed in expedited removal proceedings—a proceeding reserved for aliens who facially have no entitlement to be in the United States and who can be summarily removed—DHS was barred from exercising its authority under section 1225(b)(2)(C) to return them to Mexico under MPP.

The district court's injunction is deeply flawed and should be reversed.

First, the district court erred in concluding that Plaintiffs were not subject to the contiguous-return authority conferred in 8 U.S.C. § 1225(b)(2)(C) on the ground that they were apprehended "very soon" after they illegally crossed the border. A61 (Tr. 36:13-14). The contiguous-return authority in 8 U.S.C. § 1225(b)(2)(C) applies to aliens "described in subparagraph (A)," *id.*: "applicant[s] for admission" who are placed in full removal proceedings "under section 1229a." *Id.* § 1225(b)(2)(A). Applicants for admission are aliens "present in the United States who [have] not been admitted" or aliens "who arrive[] in the United States (whether or not at a designated port of arrival ...)." *Id.* § 1225(a)(1). The phrase "arriving on land" in 8 U.S.C. § 1225(b)(2)(C) thus does not exempt aliens from contiguous-territory return simply because they succeed in crossing the border illegally; rather, that phrase specifies a method of arrival—land, as opposed to sea or air. Plaintiffs are applicants for admission who were placed in full removal proceedings, and they entered the United States from Mexico by land. So they are aliens "described in subparagraph (A)" who were "arriving on land ... from a foreign territory contiguous to the United States" when they were apprehended, and the contiguous return provision can properly be applied to them. *Id.* § 1225(b)(2)(C). The district court's contrary ruling is irreconcilable with the plain text of the contiguous-return authority provision and disregards the text of the

statute, especially the express statement in section 1225(b)(2)(C) that contiguous-territory return applies "whether or not" an alien attempts to enter the United States at a port of entry or by illegally crossing the border. *Id.* Under the district court's reasoning, the only aliens who cross the border between ports of entry amenable to being returned under MPP are aliens who are apprehended at the *literal moment* that they are crossing the border. That is an absurd reading of a critical immigration tool, as that reading makes it virtually impossible for DHS to apply the contiguous-return authority to *any* aliens who cross the border between ports of entry. The decision below could also incentivize aliens to cross the border illegally. Under the district court's reasoning, aliens who legally seek to enter at a designated port of entry are subject to MPP, but aliens who cross the border illegally are, under the district court's ruling, largely insulated from MPP. Congress plainly intended no such thing. *See Thuraissigiam*, 2020 WL 3454809, at *18 (rejecting result that would "create perverse incentive to enter at an unlawful rather than a lawful location").

Second, the district court erred in holding, in the alternative, that 8 U.S.C. § 1225(b)(2)(C) did not apply to Plaintiffs because, even though they were placed in full removal proceedings, they were eligible to be placed in expedited removal proceedings. The contiguous-return authority applies to unadmitted aliens who are "described in" 8 U.S.C. § 1225(b)(2)(A): "applicant[s] for admission" (like

Plaintiffs), who (also like Plaintiffs) are "not clearly and beyond a doubt entitled to be admitted" and were placed in full removal proceedings under section 1229a. Plaintiffs are thus aliens "described in" section 1225(b)(2)(A) and can be returned to Mexico under section 1225(b)(2)(C). The district court's contrary holding relied on 8 U.S.C. § 1225(b)(2)(B)(ii), which states that "[s]ubparagraph (A) shall not apply to an alien ... to whom paragraph (1) [section 1225(b)(1), the expedited removal provision] applies." Op. 21 n.22. That conclusion is flawed. Section 1225(b)(1) "applies" only to an alien who is placed in expedited removal proceedings. It is undisputed that DHS possesses discretion to place aliens who could be placed in expedited removal proceedings, like Plaintiffs, in full removal proceedings instead. Op. 19, 21. So the only way to determine whether an individual is an alien "to whom paragraph (1) applies," 8 U.S.C. § 1225(b)(2)(B)(ii), is by examining whether the alien was actually placed in expedited removal proceedings or instead in full removal proceedings. All Plaintiffs were placed in full, not expedited, removal proceedings, so they are not aliens to whom paragraph (b)(1) applies, and are instead aliens "described in" section 1225(b)(2)(A). 8 U.S.C. § 1225(b)(2)(C). Indeed, the Supreme Court has already granted the government's motion to stay an injunction based on this same, alternative ground imposed by the Northern District of California and reinstated by the Ninth Circuit. *See Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020).

Because the "likelihood of success on the merits is the most important of the four preliminary injunction factors," and because the district court ruled on the merits "in error," the "district court has abused its discretion" and this Court must, on that ground alone, "reverse" and "remand to the district court for any further proceedings." *Doe v. Trustees of Boston College*, 942 F.3d 527, 533, 536 (1st Cir. 2019) (reversing and vacating "grant of preliminary injunction" where district court erroneously concluded that plaintiffs had demonstrated a likelihood of success on the merits). In any event, the remaining preliminary injunction factors also favor the government, as the district court's ruling places unfounded limits on the government's ability to address the crisis at the southern border, a harm that will become even more acute in the event that other courts rely on the district court's reasoning to enjoin MPP. And the district court gave no meaningful consideration to the public interest and balance of equities factors; it instead subsumed those considerations within its flawed merits analysis, *see* Op. 24.

This Court should reverse the decision below.

STATEMENT OF JURISDICTION

Plaintiffs invoked 28 U.S.C. §§ 1331, 2201-2202, and 5 U.S.C. § 701 as the basis for jurisdiction below. Compl. ¶ 20 (JA19). The district court issued its preliminary-injunction order on May 14, 2020, and the government filed a timely

notice of appeal. JA276. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

I. Whether the district court erred in granting a preliminary injunction barring the government from returning five aliens to Mexico under the authority of 8 U.S.C. § 1225(b)(2)(C), on the grounds that: contiguous-territory return does not apply to aliens like Plaintiffs who succeed in crossing the border illegally, Op. 16; and Plaintiffs were not aliens "described in subparagraph (A)," 8 U.S.C. § 1225(b)(2)(C), because, even though they were placed in full removal proceedings, they were eligible to be placed in expedited removal proceedings.

II. Whether considerations of harm and the equities favor the government where the district court's decision places unfounded limitations on a critical tool that has proved indispensable to the Executive Branch in combating the crisis on the southern border.

STATEMENT OF THE CASE

A. Legal Background

1. Governing Law

Exercising its "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden," *Kleindienst v. Mandel*, 409 U.S. 753, 766 (1972), Congress has, in the Immigration

and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, established comprehensive procedures governing aliens' admission into and removal from the United States. At issue in this appeal is a procedure set forth in 8 U.S.C. § 1225, which establishes rules governing "applicants for admission"—aliens who are present in the United States without having been admitted or who arrive in the United States, either at or between ports of entry. 8 U.S.C. § 1225(a)(1). Federal immigration law does not distinguish between aliens who arrive at a port of entry versus those who are apprehended shortly after illegally crossing the border—both are "applicants for admission," 8 U.S.C. § 1225(a)(1); *Thuraissigiam*, 2020 WL 3454809, at *3.

For applicants for admission, "the [g]overnment must determine" at the outset whether aliens who arrive at or between ports of entry are "admissible." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). If an immigration officer determines that an alien is inadmissible, then that officer must then determine what type of immigration proceeding the alien should be placed in: (1) expedited removal proceedings, *see* 8 U.S.C. § 1225(b)(1), or (2) full removal proceedings, *see id.* § 1225(b)(2). *Jennings*, 138 S. Ct. at 837. Expedited removal, codified at section 1225(b)(1), provides for the swift removal of aliens who are "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation" "without further hearing or review." *Id.* If an alien placed in

expedited removal proceedings indicates an "intention to apply for asylum or a credible fear of persecution," that alien is entitled to a credible-fear interview (and, depending on the results of that interview, further immigration proceedings). *Id.*; *see also* 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4).

A broader category of aliens, outlined in section 1225(b)(2)(A), may be placed in full removal proceedings. Section 1225(b)(2)(A) provides that if an "applicant for admission" is "not clearly and beyond a doubt entitled to be admitted," then the alien "shall be detained for a proceeding under section 1229a of this title" to determine removability. Full removal proceedings include a hearing before an immigration judge, an opportunity for review by the Board of Immigration Appeals (BIA), and the option to seek judicial review in a federal court of appeals. *See id.* § 1229a. It is well settled that "DHS has discretion to put aliens in [full] removal proceedings even though they may also be subject to expedited removal." *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011).

Congress provided that applicants for admission who are placed in full removal proceedings must be "detained for" the duration of their "removal proceedings," unless they are paroled "for urgent humanitarian reasons or significant public benefit." *Jennings*, 138 S. Ct. at 837, 842; 8 U.S.C. § 1225(b)(2)(A); *id.* § 1182(d)(5). As an alternative to mandatory detention,

however, Congress has provided that certain aliens who are "arriving on land" from a contiguous territory may be temporarily returned to Mexico or Canada pending their full removal proceedings. Section 1225(b)(2)(C) provides: "In the case of an alien described in subparagraph (A) [of section 1225(b)(2)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under section 1229a of this title." *Id.* § 1225(b)(2)(C).[1]

2. Migrant Protection Protocols (MPP)

On December 20, 2018, the DHS Secretary announced MPP. JA232.[2] Under MPP, the Secretary explained that DHS would exercise its contiguous-territory-return authority in section 1225(b)(2)(C) to "return[ ] to Mexico" certain aliens—among those "arriving in or entering the United States from Mexico" "illegally or without proper documentation"—"for the duration of their immigration proceedings." *Id.* MPP aims "to bring the illegal immigration crisis under control" by, among other things, reducing "one of the key incentives" for

[1] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of DHS. *See Thuraissigiam*, 2020 WL 3454809, at *4 n.3.

[2] In this brief, "JA" refers to the joint appendix, while "A" refers to the addendum.

illegal immigration: the ability of aliens to "stay in our country" during immigration proceedings "even if they do not actually have a valid claim to asylum" to then abscond into the United States instead of appearing for immigration proceedings. JA232-33. The Secretary made "clear" that she was undertaking MPP "consistent with all domestic and international legal obligations," and emphasized that, for aliens returned to Mexico, the Mexican government has "commit[ted] to implement essential measures on their side of the border." JA233; JA203-04.

On April 8, 2019, a district court in the Northern District of California issued a nationwide injunction of MPP based, in part, on the second ground for the injunction at issue in this appeal. *See Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1123-36, 1130 (N.D. Cal. 2019). After a divided Ninth Circuit panel affirmed the imposition of the nationwide injunction, the Ninth Circuit subsequently narrowed the scope of the injunction, before the Supreme Court stayed the injunction in its entirety, pending the disposition of the government's petition for a writ of certiorari. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020) ("*Innovation II*"); *Innovation Law Lab v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020); *Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020). The government filed its petition for a writ of certiorari on April 10, 2020. *See Wolf v. Innovation Law Lab*, No. 19-1212 (Apr. 10, 2020).

B. Factual Background

Plaintiffs are five aliens who illegally "crossed the U.S.-Mexico border," Compl. ¶ 64 (JA31), before being apprehended "very soon thereafter," A61 (Tr. 36:13-14) and detained by DHS. Compl. ¶ 64 (JA31). Each Plaintiff was placed in full removal proceedings "under 8 U.S.C. § 1229a." Op. 4. Thereafter, DHS exercised its discretion under section 1225(b)(2)(C) to temporarily return Plaintiffs to Mexico under MPP. *Id.*

As relevant here, Plaintiffs claimed that MPP could not lawfully be applied to them because: (1) section 1225(b)(2)(C) applies "only to noncitizens who presented themselves at a port of entry," *i.e.*, aliens defined by regulation as "arriving aliens," 8 C.F.R. § 1001.1(q), rather than aliens (like Plaintiffs) who are apprehended after unlawfully crossing the United States between ports of entry; and (2) section 1225(b)(2)(C) does not apply to aliens who (again, like Plaintiffs) were placed into full removal proceedings but were eligible to be placed in expedited removal proceedings. Compl. ¶¶ 125-26 (JA41). Plaintiffs filed a preliminary-injunction motion based on these (and other) claims. *See* JA50-85.

During oral argument on the preliminary-injunction motion, the district court raised the issue, not raised by Plaintiffs, whether plaintiffs were "arriving" within the meaning of section 1225(b)(2)(C). A33 (Tr. 8:5-16), A38-39. The court asked

the parties to file supplemental briefs on this issue, among others. A58-59 (Tr. 33:11-34:9).

The district court then granted the preliminary-injunction motion (A1-25). First, the court held that "at the time of" Plaintiffs' "apprehension by CBP [U.S. Customs and Border Protection], they were not 'arriving on land,'" and so could not be subjected to contiguous return under section 1225(b)(2)(C). Op. 18; *see* Op. 14-18. The court claimed to locate a "longstanding distinction in our immigration law between noncitizens who have entered the United States, even if unlawfully, and those who remain at the threshold," Op. 14, and concluded that the term "arriving" in section 1225(b)(2)(C) limits the provision to aliens at the threshold. Op. 15, 17-18. The court also thought that the "contiguous return provision ... contains no language providing for return of individuals who are already present in the United States," "[i]n contrast" to the "expedited removal provision at § 1225(b)(1)," which provides that DHS, in its discretion, may subject aliens who have not been "physically present in the United States continuously for [a] two-year period" to expedited removal. Op. 15. The court also noted that the term "arriving aliens" is defined by regulation as aliens "crossing the border at a port of entry or interdicted at sea," and that the contiguous-return statute contained a "plain distinction between 'arriving aliens' and those present in the United States." Op. 17. The court thus concluded that "if applicants are apprehended while they

are "crossing the border (whether or not at a check point), they are 'arriving' applicants under the statute, and if apprehended at some point thereafter, they are not 'arriving.'" Op. 16.

Second, "as an alternative ground" for its decision, the court held that Plaintiffs were "explicitly excluded from the group of 'other aliens' described in § 1225(b)(2)(A) because they are applicants 'to whom paragraph (1) applies.'" Op. 18 (quoting 8 U.S.C. § 1225(b)(2)(B)(ii)); *see* Op. 18-22. The court noted that "[a] section (b)(1) applicant is one who is initially inadmissible due to fraud, misrepresentation, or lack of valid documentation," and when such applicants are "arriving in the United States, they are placed into what are known as 'expedited removal' proceedings ... or the Secretary of Homeland Security exercises prosecutorial discretion and places them in 'standard' removal proceedings under 8 U.S.C. § 1229a." Op. 19 (internal quotations omitted). "Section (b)(2)," according to the court, "serves as a catchall provision and applies to all applicants for admission not covered by 8 U.S.C. § 1225(b)(1)." *Id.* (internal quotation omitted). The court held that Plaintiffs were "(b)(1) applicants" because "[s]ection (b)(1) applicants are not defined by the proceedings to which they are ultimately subject[ed] but rather, by their status as noncitizens" that "lacked valid entry documents." Op. 20. The court acknowledged that DHS "does, indeed, have the discretion to place § (b)(1) applicants into standard § 1229a removal proceedings,"

but held that this discretion did not change the "underlying category" that Plaintiffs belonged to. Op. 21. The court thus concluded that "[b]ecause the [r]eturned Plaintiffs are applicants for admission described in § (b)(1), they are not subject to the contiguous return provision at 8 U.S.C. § 1225(b)(2)(C), which applies only to applicants for admission described in § (b)(2)(A)." *Id.*

Finally, the court concluded that the remaining injunctive factors favored Plaintiffs because they were likely to suffer irreparable harm in the absence of injunctive relief, Op. 22-24, and because "[m]oving" Plaintiffs "out of the constant danger they face [in Mexico] outweighs the government's or the public's interest in the continued application of the MPP to these five noncitizens, in light of the likelihood of success of Plaintiffs' claim that MPP is inconsistent with 8 U.S.C. § 1225." Op. 24.

SUMMARY OF THE ARGUMENT

This Court should reverse the preliminary injunction.

I. The district court erred on the merits.

A. The district court erred in holding that section 1225(b)(2)(C) distinguishes aliens who are "arriving" from those who have crossed the border illegally. The text of the statute expressly rejects that distinction. Congress provided that the contiguous-return authority can be applied to an "alien described in subparagraph (A) who is arriving on land (*whether or not at a designated port of*

arrival) from a foreign territory contiguous to the United States." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Aliens "described in subparagraph (A)" are "applicant[s] for admission" who are placed in full removal proceedings "under section 1229a." *Id.* § 1225(b)(2)(A). The statute then defines "applicants for admission" as "alien[s] present in the United States who [have] not been admitted or who arrive[] in the United States (whether or not at a designated port of arrival) ... ." *Id.* § 1225(a)(1). The statute thus applies to the Plaintiffs by its terms: they are all indisputably aliens who are applicants for admission placed in full removal proceedings who crossed the U.S.-Mexico land border, and the fact that they entered the United States by crossing the border illegally rather than at a port of entry makes no legal difference.

The district court believed that applicants for admission are "arriving applicants under the statute" only if they are "apprehended while crossing the border"—that is, at the very moment they are crossing. Op. 16; A33 at 12:16 ("So the person is interceded as they are swimming across the Rio Grande, 'is arriving,' … . But they have two feet on one side of the border, and then they start moving their foot across the border. That person 'is arriving.'"). That construction contradicts the plain text just described. Instead, the phrase "arriving on land" in 8 U.S.C. § 1225(b)(2)(C) simply specifies a method of arrival—land, as opposed to sea or air. The district court's reasoning would make it virtually impossible for

DHS to apply section 1225(b)(2)(C) to aliens who (like Plaintiffs) illegally cross the border between ports of entry, and thereby contradicts Congress's express determination that contiguous-territory return should not depend on "whether or not" an alien enters the United States "at a designated port or arrival." 8 U.S.C. § 1225(b)(2)(C). The district court's construction also makes no practical sense, as it "create[s]a perverse incentive to enter at an unlawful rather than a lawful location." *Thuraissigiam*, 2020 WL 3454809, at *18.

B. The district court also erred in holding in the alternative, that Plaintiffs could not be returned under 8 U.S.C. § 1225(b)(2)(C) because they were eligible to be placed in expedited removal proceedings. The statute provides that contiguous-territory return may be applied to aliens "described in subparagraph (A)," 8 U.S.C. § 1225(b)(2)(C)—that is, "applicant[s] for admission" placed in full removal proceedings "under section 1229a." *Id.* § 1225(b)(2)(A). It is undisputed that Plaintiffs are applicants for admission who were each placed in full removal proceedings under section 1229a. So they were all lawfully returned to Mexico under MPP.

The district court held that Plaintiffs are not aliens "described in subparagraph (A)," *id.* § 1225(b)(2)(C), because they were eligible to be placed in expedited removal proceedings and are thus subject to a carve-out from section 1225(b)(2)(A) as aliens to whom the expedited removal statute, section 1225(b)(1),

"applies," *id.* § 1225(b)(2)(B)(ii). Op. 19-20. As the district court noted, however, DHS possesses discretion to place aliens, like Plaintiffs, who are eligible to be placed in expedited removal proceedings in full removal proceedings instead. Op. 19 ("When such applicants are 'arriving in the United States,' they are placed into what are known as 'expedited removal' proceedings unless … the Secretary of Homeland Security exercises prosecutorial discretion and places them into 'standard' removal proceedings under 8 U.S.C. § 1229a."). Because DHS has discretion to place aliens eligible for expedited removal, like Plaintiffs, in full removal proceedings, expedited removal "applies" only to aliens who DHS actually places into expedited removal proceedings in an exercise of DHS's discretion. Here, DHS placed Plaintiffs in full removal proceedings. And once Plaintiffs were placed in full removal proceedings, the expedited removal provision did not "appl[y]" to them and they were amenable to being returned under MPP.

II. Because the "[l]ikelihood of success is the main bearing wall of the four-factor framework" in assessing preliminary injunctions, and the district court erroneously held that Plaintiffs were likely to succeed on the merits, this Court should reverse the decision below and "vacate the injunction" on that ground alone. *Doe v. Trustees of Boston College*, 942 F.3d 527, 533 (1st Cir. 2019). The remaining injunctive factors also favor the government, as the injunction limits the

Government's ability to use a vital tool to address the crisis at the southern border, and undermines the efficient administration of the immigration laws.

STANDARD OF REVIEW

This Court reviews a grant of a preliminary injunction for abuse of discretion; however, a district court "necessar[ily] abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *United States v. Kayser-Roth Corp.*, 272 F.3d 89, 100 (1st Cir. 2001).

ARGUMENT

This Court should reverse the district court's preliminary-injunction order. Plaintiffs' claims fail on the merits: Congress expressly authorized the government to return Plaintiffs to Mexico pending their removal proceedings. Both of the district court's determinations to the contrary are incorrect because they conflict with the statutory text. And other considerations also weigh against any injunctive relief here.

I. The District Court Erred in Holding that Plaintiffs Are Likely To Succeed on the Merits.

A. The District Court Erred in Holding That Plaintiffs Are Not Subject to the Contiguous-Return Authority on the Ground that Plaintiffs Were Not "Arriving on Land" When They Were Apprehended.

The district court erred in holding that Plaintiffs are not subject to MPP because they were apprehended immediately after they snuck cross the United States border unlawfully. The court reasoned that "if applicants are apprehended while crossing the border (whether or not at a check point), they are 'arriving' applicants under the statute" and thus subject to contiguous-territory return, but "if apprehended at some point thereafter, they are not 'arriving'" and so are not subject to contiguous-territory return. Op. 16; A33 at 12:16 ("So the person is interceded as they are swimming across the Rio Grande, 'is arriving,' … . But they have two feet on one side of the border, and then they start moving their foot across the border. That person 'is arriving.'").

The district court's holding cannot be reconciled with the plain text of the statute. The INA authorizes contiguous-territory return for aliens "described in subparagraph (A) [of section 1225(b)(2)], who [are] arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States." 8 U.S.C. § 1225(b)(2)(C). Aliens "described in subparagraph (A)," are "applicant[s] for admission" who are not "clearly and beyond a doubt entitled to be

admitted" and who are placed in full removal proceedings. *Id.* § 1225(b)(2)(A). And "applicant[s] for admission" are aliens who are "present in the United States who [have] not been admitted or who arrive[] in the United States." *Id.* § 1225(a)(1); Op. 15. The contiguous-return authority in section 1225(b)(2)(C) thus applies to applicants for admission—that is, aliens who are unlawfully present in or arriving in the United States—regardless of whether they arrived at a "port of arrival," so long as they are placed in full removal proceedings in accordance with section 1225(b)(2)(A) and their method of arrival from a contiguous territory is by land. Congress did not exempt from contiguous-territory return aliens who are physically within the United States after illegally crossing the border; the phrase "arriving" in 8 U.S.C. § 1225(b)(2)(C) instead modifies "on land" and "from" a contiguous foreign territory, and simply specifies a method and place of arrival. No precedent supports the district court's contrary construction. *See Cruz v. DHS*, No. 19-cv-2727, 2019 WL 8139805, at *4 (D.D.C. Nov. 21, 2019) (denying preliminary injunction based on claim that alien who illegally crossed the U.S.-Mexico border was not arriving on land); JA241-42. "Each of the Returned Plaintiffs crossed the border from Mexico into the United States," and thus entered the United States by land. Op. 4. So each of the Plaintiffs were "arriving on land" when they were apprehended shortly after crossing the U.S.-Mexico border. A61 at 12:14 ("[T]here's no dispute that the individuals had entered the U.S. and were

apprehended very soon thereafter."). Plaintiffs are plainly subject to the contiguous-return provision, and the district court erred in ruling that MPP cannot be applied to them.

In any event, even assuming, *arguendo*, that the term "arriving" imposed a limitation on the contiguous-return authority, as the district court concluded, Op. 14-18, because there is "no dispute" that Plaintiffs were apprehended "very soon" after they illegally crossed the border, A36:13-14, Plaintiffs were in the process of "arriving" when they were apprehended. As the Supreme Court recently held, an alien "apprehended" inside the United States "25 yards from the border," is "apprehended in the very act of *attempting to enter this country*." *Thuraissigiam*, 2020 WL 3454809, at *3, *8 (emphasis added). Similarly, because Plaintiffs were apprehended "very soon" after illegally crossing the border, A61:14, they were also apprehended in the midst of "attempting to enter this country," *Thuraissigiam*, 2020 WL 3454809, at *8 and were therefore "arriving." *Thuraissigiam* quite clearly rejected the notion, embraced by the district court, that only aliens literally apprehended at the exact moment in time they are illegally crossing the border—such as aliens "interceded as they are swimming across the Rio Grande," A33:12-13—are in the process of attempting to enter the country. *See* A33:19 (noting district court's view that an individual present in the United States for "ten minutes" is no longer arriving, but has instead "arrived").

The conclusion that Plaintiffs were "arriving on land" is the only reading of the statute that is faithful to the statutory text of section 1225(b)(2)(C). The contiguous-return authority applies to aliens "described in subparagraph (A)" "arriving on land" "from a foreign territory contiguous to the United States" "whether or not at a designated port of arrival." 8 U.S.C. § 1225(b)(2)(C). The phrase "whether or not at a designated port of arrival" becomes insignificant if aliens are deemed not to be "arriving on land" when they were apprehended after—rather than at the precise moment of—crossing the border. The district court reasoned that its interpretation of "arriving" still rendered the phrase "whether or not at a designated port of arrival" operative because "if applicants are apprehended while crossing the border (whether or not at a check point), they are 'arriving' applicants under the statute, and if apprehended at some point thereafter, they are not 'arriving.'" Op. 16. But the district court failed to recognize that, as a practical matter, it is very often impossible for DHS to apprehend an alien who crosses the border between ports of entry at the precise moment in time the crossing occurs. If an alien with "two feet" inside the U.S.-Mexico border who is apprehended instantaneously once one of his or her feet reach U.S. soil is no longer arriving, A33:14-15, while an alien with both feet on the Mexican side of the border has not started the process of arriving, *see id.* at 8:14-16, and the only aliens who are "arriving on land" are aliens who "start moving their foot across the

border," *id.*, then DHS cannot realistically apply section 1225(b)(2)(C) to aliens who cross the border between ports of entry. The district court's holding is an absurd view of the contiguous-return provision: it would mean that an alien who would be subject to that provision could effectively evade it simply by placing one foot over the border illegally rather than lawfully entering at a port of entry. Congress surely did not adopt so preposterous a view for an authority that is a critical tool of immigration enforcement. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (rejecting proposed statutory interpretation that would render text "insignificant, if not wholly superfluous"); *Little People's School, Inc. v. United States*, 842 F.3d 570, 574 (1st Cir. 1988) (rejecting proposed "reading" of statute that made "little sense").

The district court treated as dispositive the fact that Plaintiffs "were apprehended after they crossed the border," Op. 17, based on a perceived "longstanding distinction in our immigration law between noncitizens who have entered the United States, even if unlawfully, and those who remain at the threshold." Op. 14. The district court relied on *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), which recognized that once an alien is admitted to the United States and has "effected an entry into the United States," his or her status changes for purposes of the Due Process Clause. The district court then concluded that section 1225 "expressly tracks" the "distinction" it identified. Op. 14-15. But the scope of

Plaintiffs' rights under the Due Process Clause does not answer the question whether they were "arriving on land" as a *statutory* matter, and *Zadvydas* does not speak to or address the statutory issue here. Indeed, when Congress enacted section 1225 as part of the Illegal Immigrant Reform and Immigration Responsibility Act of 1997 (IIRIRA), Congress "did not categorize aliens based on whether they have *entered* the country or not," but instead focused on "whether the aliens are seeking initial *admission* to the United States." *Castro v. DHS*, 835 F.3d 422, 449 n.31 (3d Cir. 2016) (emphasis in original); *see also Thuraissigiam*, 2020 WL 3454809, at *18 ("[A]n alien who tries to enter the country illegally is treated as an 'applicant for admission' and an alien who is detained shortly after unlawful entry cannot be said to have effected an entry." (quoting 8 U.S.C. § 1225(a)(1)).

In any event, even if decisions addressing the due-process rights of aliens were a useful analog, the Supreme Court recently and emphatically repudiated the "distinction" the district court purported to rely on. In *Thuraissigiam*, the Supreme Court considered the argument that the general rule that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" is inapplicable to aliens who have made it "into U.S. territory before [being] caught." *Thuraissigiam*, 2020 WL 3454809, at *18. The Supreme Court then "reject[ed]" that view, and critically held that "an alien who tries to enter the country illegally is treated as an 'applicant for admission,' and an alien who is

detained shortly after unlawful entry cannot be said to have 'effected an entry,'" within the meaning of *Zadvydas*. *Id.* (quoting 8 U.S.C. § 1225(a)(1)). Instead, aliens like Plaintiffs are "on the threshold," despite their physical presence in the United States. *Id.* *Thuraissigiam* makes clear that the INA itself rejects the court's distinction: aliens at ports of entry and those apprehended shortly after crossing the border illegally are both applicants for admission potentially subject to expedited removal and contiguous territory return. *Id.* at *3-*4.

Thuraissigiam underscores that the relevant distinction for purposes of the Due Process Clause is not between aliens who are physically present in the United States and those who are not, but rather aliens who are unadmitted—even if physically present—and those who are admitted. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953) ("[H]arborage at Ellis Island is not an entry into the United States."); *Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) ("As an unadmitted alien present in the United States, Albathani's due process rights are limited."); *see also Zadvydas*, 533 U.S. at 682 ("Aliens who have not yet gained

initial admission to this country would present a very different question.").[3] So the district court's view that Plaintiffs were not aliens "who remain at the threshold" because of their brief physical presence in the United States was incorrect, as was its conclusion that 8 U.S.C. § 1225 differentiates between aliens based on a "longstanding distinction" that relies entirely on physical presence. Op. 14-15.

The district court also attached importance to the "regulatory definition" of the term "arriving aliens," which is "crossing the border at a port of entry." Op. 16; 8 C.F.R. § 1001.1(q) ("The term arriving alien means an applicant for admission coming or attempting to come to the United States at a port-of-entry."). But section 1225(b)(2)(C) does not use the term "arriving alien," and the statutory text unambiguously extends contiguous-territory return to aliens who did not enter at a port of entry, so the regulatory provision cited by the district court is completely inapposite. Additionally, the district court itself clearly held that section 1225(b)(2)(C) is not limited to "arriving aliens." Since "arriving aliens" are defined by regulation as aliens attempting to enter the United States at a port-

[3] In fact, *Mezei*, which both the Plaintiffs and the district court relied on, JA258, Op. 14, established the entry doctrine, whereby an unadmitted alien's "presence in the country [is] immaterial," because unadmitted aliens are "still in theory of law at the boundary line and ha[ve] gained no foothold in the United States." *Albathani*, 318 F.3d at 375. *Thuraissigiam* specifically reinforced this principle, holding that it is irrelevant if an "alien is on U.S. soil" so long as the alien is an unadmitted applicant for admission. 2020 WL 3454809, at *18.

of-entry, *see* 8 C.F.R. § 1001.1(q), and because the district court held that section 1225(b)(2)(C) could be applied to aliens that cross the border between ports of entry—albeit at the precise moment of "crossing the border," Op. 16—its holding plainly did not limit the application of section 1225(b)(2)(C) to the regulatory definition of "arriving aliens." A37 at 24 ("[T]he statute on its face is broader than that."). To the extent that the district court supported its decision based on what it perceived was a "plain distinction" between " 'arriving aliens' and those present in the United States," Op. 17, that line of reasoning is foreclosed by the text of section 1225(b)(2)(C), which is not limited to "arriving aliens" as that term is defined by regulations. Moreover, if section 1225(b)(2)(C) can only be applied to "arriving aliens" as the regulations use that term—"an applicant for admission coming or attempting to come to the United States at a port-of-entry," 8 C.F.R. § 1001.1(q)—then it cannot be applied to any alien that crosses the border *between* ports of entry. That view would again contravene the text of section 1225(b)(2)(C), which provides that the contiguous-return authority applies "whether or not" the alien enters "at a designated port of arrival."

The district court further emphasized the distinction between aliens "present in the United States" and aliens who "arrive[] in the United States" in other provisions of section 1225, concluding "that the term 'arriving'" as used in section 1225(b)(2)(C) "cannot be understood to include noncitizens 'present' for less than

two years." Op. 15; 8 U.S.C. § 1225(a)(1); *id.* § 1225(b)(1)(A)(iii)(II). In particular, the district court relied on "the expedited removal provision, 8 U.S.C. § 1225(b)(1)," and the category of aliens eligible for expedited removal, Op. 15. That reliance was misplaced. First, the district court again ignored that section 1225(b)(2)(C) applies to aliens "described in subparagraph (A)," a category that includes applicants for admission placed in full removal proceedings who are "present" or who "arrive[] in the United States." 8 U.S.C. §§ 1225(b)(2)(C), 1225(a)(1). Second, the sole discussion of aliens who are "physically present" in section 1225(b)(1) arises in an inapposite context, namely the group of aliens who are potentially amenable to expedited removal based on a "designation" made by DHS in its "sole and unreviewable discretion," *id.* § 1225(b)(1)(A)(iii)(I). The district court interpreted "§ 1225(b)(1)" as subdividing aliens into two categories: aliens who are "present," defined as aliens physically in the United States "for less than two years," and aliens who are "arriving," that is, aliens apprehended "while crossing the border." Op. 15-17. But the text of section 1225(b)(1) does not support this conclusion. Section 1225(b)(1) can be applied to aliens "arriving in the United States" or aliens who have not been "physically present in the United States continuously for [a] 2-year period." 8 U.S.C. § 1225(b)(1)(A)(i)-(iii). No part of this text defines the term "present" as encompassing all aliens physically in the United States for less than two years, or the term "arriving" as excluding all

aliens who have reached United States soil, and the district court offered no explanation for how the definition of the term "arriving in the United States" in section 1225(b)(1) has any bearing on whether Plaintiffs were "arriving on land" for purposes of the contiguous-return authority.

In fact, the district court's conclusion fails on its own terms because the very provisions of the INA that the district court relied on reference aliens arriving *in* the United States. *See* 8 U.S.C. §§ 1225(b)(1)(A)(i), (ii) ("If an immigration officer determines that an alien ... who is arriving *in the United States* ... is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officers shall order the alien removed from the United States without further hearing or review." (emphasis added)); 8 U.S.C. § 1225(a)(1) ("An alien ... who arrives in the United States ... shall be deemed for purposes of this chapter an applicant for admission.").

Ultimately, the overarching error the district court committed was construing the term "arriving" in isolation separate and apart from the complete statutory phrase "arriving on land." *See* Op. 16; *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (rejecting argument to interpret statute based on "isolated words" instead of "text in context" because the Supreme Court "has long refused to construe words in a vacuum," and because it is a "fundamental cannon of statutory

construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Finally, the district court's preliminary injunction on this arriving-on-land ground was procedurally improper—and should be reversed—because Plaintiffs did not make this claim in either their complaint or their preliminary-injunction motion. Plaintiffs instead claimed that the contiguous-return statute is limited by regulation because it categorically applies only to "arriving aliens," as defined by 8 C.F.R. § 1001.1(q)—that is, aliens who enter the United States at a port of entry. Compl. ¶ 125 (JA41); JA74 ("The INS's definition of 'arriving alien' foreclosed that possibility."). Only after the district court *sua sponte* raised the issue of whether Plaintiffs were "arriving" as a statutory matter independent of any regulations during oral argument, *see* A33:5-20, A37:10-14, did Plaintiffs defend this claim in a post-argument supplemental brief that the court ordered the parties to prepare. *See* JA257-59.[4] The district court thus improperly deviated from the

[4] Confirmation that this claim is different from any claim raised in the complaint or the preliminary-injunction motion is that Plaintiffs' "arriving alien" claim is based entirely on the regulatory definitions of "arriving aliens," Compl. ¶¶ 61, 125 (JA29, 41), and alleges that 8 U.S.C. § 1225(b)(2)(C) does not apply to aliens who enter between ports of entry, *see* JA74, while the district court concluded that, in theory, its holding did not foreclose application of the contiguous-return authority to aliens who attempt to enter the United States between ports of entry. Op. 16; Op. 22 n.23 ("Plaintiffs also argue that extant regulations limit the contiguous return authority to (b)(2) noncitizens arriving at a port of entry ... . The court does not reach those arguments.").

principle of "party presentation" by enjoining Defendants on a basis that it—instead of Plaintiffs—injected into this case. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 1581-82 (2020) (holding that where "appeals panel intervened" by "order[ing] further briefing" on a claim not initially raised by the parties and the litigant successfully adopted that claim "without elaboration" that was "suggested by the panel," "the Ninth Circuit's "transformation of [the] case [went] well beyond the pale"); *see also Thuraissigiam*, 2020 WL 3454809, at *12 ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). The need to abide by the principle of party presentation is heightened in the preliminary-injunction context, where "[t]he party seeking the preliminary injunction bears the burden of establishing" an entitlement to an injunction, and the "sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *Esso Standard Oil Co. (Puerto Rico) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006) (affirming denial of preliminary injunction because litigant "had not shown a substantial likelihood of success on the merits"); *see also Colvin v. Caruso*, 605 F.3d 282, 300 (6th Cir. 2010) ("Colvin had no grounds to seek an injunction pertaining to allegedly impermissible conduct not mentioned in his original complaint."); *Kaimowitz v. Orlando, Fla.*, 122 F.3d 41, 43 (11th Cir.

1997) ("A district court should not issue an injunction when the injunction in question is not of the same character, and deals with a matter lying outside the issues in the suit.").

To the extent that Plaintiffs ask this Court to affirm based on the claim they did plead and raise, namely that the application of section 1225(b)(2)(C) is limited based on the regulatory definition of "arriving aliens," Compl. ¶ 125 (JA41); JA74, and cannot be applied to aliens who cross the border between ports of entry, the district court, in the first instance, should evaluate that claim. *See Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 735 (1st Cir. 2016) ("As a general matter, federal courts of appeals, engaged in appellate review, are understandably reluctant to consider issues that were not passed upon below."). If this Court considers that claim, it should reject it because: (1) "arriving alien" is defined by regulations as an alien who enters at a port of entry, but the text of section 1225(b)(2)(C) applies "whether or not" the alien entered "at a designated port of arrival"; and (2) multiple provisions of section 1225 mention "arriving aliens," *see* 8 U.S.C. §§ 1225(a)(2), 1225(c)(1), but the phrase "arriving alien" does not appear anywhere in section 1225(b)(2)(C), which is further evidence that Congress did not intend for the application of section 1225(b)(2)(C) to be limited to "arriving aliens." *See DHS v. MacLean*, 574 U.S. 383, 391 (2015) (holding that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it

in another," and thus, "Congress's choice to say 'specifically prohibited by law,' rather than 'specifically prohibited by law, rule, or regulation,' suggests that Congress meant to exclude rules and regulations").

B. The District Court Erred in Holding that The Contiguous-Return Authority Cannot Be Applied To Aliens, Like Plaintiffs, Who Are Eligible to be Placed in Expedited Removal Proceedings But Are Placed in Full Removal Proceedings.

The district court erred in holding, "as an alternative ground," that because Plaintiffs were eligible to be placed in expedited removal proceedings, they could not be returned under MPP. Op. 18-22.

Section 1225(b)(2)(C) authorizes DHS to return "an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States." 8 U.S.C. § 1225(b)(2)(C). "[S]ubparagraph (A)," in turn, applies to any applicant for admission who "is not clearly and beyond a doubt entitled to be admitted" and is "detained for a [full removal] proceeding under section 1229a." *Id.* § 1225(b)(2)(A). The contiguous-return authority in section 1225(b)(2)(C) thus applies to all unadmitted aliens who arrive in the United States on land from a contiguous territory and are placed in full removal proceedings in accordance with section 1225(b)(2)(A). It is well settled that "DHS has discretion to place aliens" in full removal proceedings under section 1225(b)(2) "even though they may also

be" eligible for placement in expedited removal proceedings under section 1225(b)(1). *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011). It follows that grounds for inadmissibility and DHS's exercise of discretion based on those grounds govern whether applicants for admission are placed in expedited removal proceedings under section 1225(b)(1) or full removal proceedings under section 1225(b)(2).

It is uncontroverted that Plaintiffs, as applicants for admission who were "not clearly and beyond a doubt entitled to be admitted," were placed in full removal proceedings under section 1225(b)(2), not expedited removal proceedings under section 1225(b)(1). Op. 4; 8 U.S.C. § 1225(b)(2)(A). The plain text of 1225(b)(2)(C) makes clear that it may be applied to all unadmitted aliens who, like Plaintiffs, are "described in subparagraph (A)," *i.e.*, unadmitted aliens placed in full removal proceedings. *Id.* § 1225(b)(2)(C). The contiguous-return authority thus plainly applies to Plaintiffs. *See Cruz*, 2019 WL 8139805, at *5 ("[T]he Department of Homeland Security exercised its discretion to place Cruz in full removal proceedings. I ... doubt that Subsection (b)(1) applies to the plaintiff merely because Subsection (b)(1) could have [been] applied to him.").

The district court acknowledged that DHS possessed "discretion" to place Plaintiffs "into standard § 1229a proceedings." Op. 19, 21. The court nonetheless held that Plaintiffs were excepted from the application of MPP because of section

1225(b)(2)(B), which delineates three situations in which section 1225(b)(2)(A) "shall not apply." Relevant here, subsection (ii) of section 1225(b)(2)(B) states that "[section 1225(b)(2)(A)] shall not apply to an alien to whom paragraph [(b)](1) applies." 8 U.S.C. § 1225(b)(2)(B)(ii). The district court concluded that section 1225(b)(1) necessarily "applie[d]" to Plaintiffs, Op. 21-22 n.22, and thus held that they could not be returned under section 1225(b)(2)(C).

The flaw in this argument is that section 1225(b)(1), the expedited removal provision, does not apply to Plaintiffs because none of them were placed in expedited removal proceedings. The aliens amenable to expedited and full removal proceedings overlap. Indeed, section 1225(b)(2) can be applied to all aliens to whom section 1225(b)(1) can be applied—as the district court acknowledged. Op. 21; Op. 19 (noting that DHS possesses "prosecutorial discretion" to "place[]" aliens initially determined to be inadmissible due to "lack of valid documentation" in "standard removal proceedings under 8 U.S.C. § 1229a"). And, by extension, aliens eligible for expedited removal under section 1225(b)(1) can be processed for full removal proceedings under section 1225(b)(2). *See id.* That is what happened here, and because a discretionary decision was made to place Plaintiffs in full removal proceedings under section 1225(b)(2), it follows that section 1225(b)(1) does not "appl[y]" to Plaintiffs. 8 U.S.C. § 1225(b)(2)(B)(ii).

The district court fundamentally misunderstood the modest role played by section 1225(b)(2)(B)(ii), which does not carve out from section 1225(b)(2)(C) aliens who could have been placed in expedited removal. Section 1225(b)(2)(B)(ii) instead serves a clarifying function: section 1225(b)(1) mandates that aliens placed in expedited removal proceedings shall be removed "without further hearing or review," while section 1225(b)(2)(A) provides that any alien who is "not clearly and beyond a doubt entitled to be admitted" (a category that includes all aliens eligible for expedited removal) shall be placed in full removal proceedings. *Id.* § 1225(b)(2)(A). Without section 1225(b)(2)(B)(ii), then, an alien placed in expedited removal proceedings and ordered summarily removed would arguably be simultaneously entitled to a full removal proceeding, complete with a hearing. To eliminate that potentially incongruous result, Congress included section 1225(b)(2)(B)(ii), which makes clear that an alien who is placed in expedited removal is not entitled to a full removal proceeding and its attendant procedural safeguards. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. at 523; Op. 21.

The district court reasoned, however, that "[s]ection (b)(1) applicants are not defined by the proceedings to which they are ultimately subject, but rather by their status as noncitizens arriving or present in the United States for less than two years" who are inadmissible by virtue of "lack[ing] valid entry documents." Op.

20. That is incorrect: aliens who lack valid entry documents and are eligible to be placed in expedited removal proceedings can, in an exercise of DHS's discretion, be placed in full removal proceedings, Op. 19, which is what occurred here. Section 1225 does not set up immutable, fixed categories of aliens. Rather, Congress preserved DHS's inherent prosecutorial discretion to choose whether to apply section 1225(b)(1)'s expedited removal procedure to a particular applicant for admission, or whether, as here, instead to treat that particular alien as an "applicant for admission" who is not "clearly and beyond a doubt entitled to" admission and afford him a full removal proceeding under section 1225(b)(2)(A).

The district court's conclusion that Section 1225(b)(2)(B)(ii) renders Section 1225(b)(2)(A) inapplicable to all aliens *eligible* for expedited removal is inconsistent with its concession that DHS has the discretion to place an alien eligible for expedited removal into full removal proceedings under Section 1225(b)(2)(A). The district court sought to avoid this problem by contending that DHS did not place Plaintiffs in full removal proceedings "under or pursuant to § 1225(b)(2)," Op. 21, but that conclusion does not withstand scrutiny, as the court failed to identify any mechanism *other than* Section 1225(b)(2)(A) by which Plaintiffs could have been placed into full removal proceedings.

The Ninth Circuit's divided decision in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) ("*Innovation II*"), *petition for certiorari filed*, *Wolf v.*

Innovation Law Lab, No. 19-1212 (Apr. 13, 2020), which restored a previously stayed nationwide injunction of MPP imposed by a district court in the Northern District of California does not provide a sound basis for the district court's conclusion, *see* Op. 19, 21. The Ninth Circuit made the same fundamental error that the district court did here. The Ninth Circuit concluded that the contiguous-return authority in section 1225(b)(2)(C) "does not apply to § (b)(1) applicants." *Innovation II*, 951 F.3d at 1085. That conclusion is wrong for the reasons demonstrated above.

The Ninth Circuit attempted to justify its interpretation of the statute by contending that Congress would not have wanted to return to Mexico "bona fide asylum seekers under § (b)(1)." *Innovation II*, 951 F.3d at 1087. That argument ignores the fact that there is no asylum-seeker exception to section 1225(b)(2)(C) and that eligibility for expedited removal simply has nothing to do with whether an alien seeks asylum. Moreover, under the Ninth Circuit's logic, individuals who attempt to defraud the immigration system have a stronger entitlement to remain in the United States for their removal proceedings than individuals who do not. That cannot be right.

Indeed, the Supreme Court granted the government's application to stay the Ninth Circuit's decision, with only one Justice noting that she would have denied the stay request. *Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020). The

government thus established a "fair prospect that a majority of the [Supreme] Court will vote to reverse" the Ninth Circuit's decision. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The Ninth Circuit also disregarded its own persuasive, prior published stay-stage decision that held, while granting a motion to stay the injunction imposed by the district court, that MPP is likely statutorily authorized by the INA because it can be applied to all aliens "processed in accordance with § 1225(b)(2)(A)" even if "subsection (b)(1) *could have been* applied" to those aliens—the precise issue here. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019) ("*Innovation I*") (emphasis in original). That motions-panel decision was correct to grant a stay on that reasoning.

II. The Remaining Considerations Weigh Against a Preliminary Injunction.

Because neither of the two grounds for the decision below supports the district court's conclusion that Plaintiffs demonstrated a likelihood of success on the merits, "[t]here is no need to say more": the district court's issuance of the preliminary injunction constitutes an "abuse[] of discretion" and this Court must "vacate the injunction" and reverse the decision below. *Doe v. Trustees of Boston College*, 942 F.3d 527, 533 (1st Cir. 2019).

If this Court were to reach the remaining factors in the preliminary injunction calculus, however, those factors would also support the government.

The preliminary injunction rests on clear errors of law and "prevent[s] the Government from pursuing" the objective underpinning MPP: increasing border security by realigning incentives to stem the flow of unchecked migration at the southern border. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). The restrictions the preliminary injunction places on the government also flout "Congress's judgment" that section 1225(b)(2)(C) can be used as a tool to alleviate the "unacceptable burden on [the] immigration system" created by the migration crisis at the southern border. *Thuraissigiam*, 2020 WL 3454809, at *2; *id.* ("Most asylum claims, however, ultimately fail, and some are fraudulent."). MPP specifically addresses—and ameliorates—these same concerns. JA234 ("As we implement, illegal immigration and false asylum claims are expected to decline."); *id.* ("More attention can be focused on more quickly assisting legitimate asylum-seekers, as fraudsters are disincentivized from making the journey."); JA217 ("MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system.").

Furthermore, courts must be mindful of the "public consequences in employing the extraordinary remedy of an injunction." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). If other courts were to rely on the decision below to reach the same result—based on the same incorrect reading of section 1225—then the government's ability to use MPP, which has become a vital tool to increase border

security, would be crippled. The government's interest is thus "an urgent objective of the highest order" that is harmed by the preliminary injunction the district court entered. *Trump*, 137 S. Ct. at 2088.

The balance of equities and the public interest also favor the government, given its "weighty" "interest in efficient administration of the immigration laws at the border." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). That interest is particularly strong given MPP's effectiveness in reducing the strain at the border and restoring integrity to the immigration system. The district court concluded that the equities and public interest favored the Plaintiffs "in light of the likelihood of success of Plaintiffs' claim that the MPP is inconsistent with 8 U.S.C. § 1225." Op. 24. That holding improperly collapses the equities and public interest factors into whether Plaintiffs demonstrated a likelihood of success on the merits—which is a separate inquiry—and ignores the government interests that the injunction harms. *See Winter*, 555 U.S. at 26 ("Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the [d]istrict [c]ourt addressed these considerations in only a cursory fashion.").

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and vacate the preliminary injunction.

Dated: June 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of First Circuit Rule 32(a)(7) because it contains 9831 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 28 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I certify that on June 26, 2020, I filed and served the foregoing document with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system to the following:

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