No. 20-1554

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDRÉS 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; JOSÉ M. URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA M. MARTINEZ DE URIAS; SALOMÉ 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, senior official in charge of U.S. Immigration and Customs Enforcement; WILLIAM P. BARR, Attorney General; DONALD J. TRUMP, President

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
NO. 1:20-CV-10566

APPELLEES' RESPONSIVE BRIEF

Adam J. Kessel
Proshanto Mukherji
Jacob B. Pecht
Fish & Richardson P.C.
ONE Marina Park Drive
Boston, MA 02210
(617) 368-2180
kessel@fr.com

Matthew R. Segal
Adriana Lafaille
Kristin M. Mulvey
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations and Federal Register

INTRODUCTION

The U.S. Department of Homeland Security has adopted a policy of imperiling Central American migrants to deter them from seeking asylum in the United States. This policy, euphemistically entitled "Migrant Protection Protocols" (MPP), takes migrants who have entered the U.S. and expels them to Mexico, where they are mercilessly persecuted. But U.S. law permits such expulsion only when a noncitizen (1) "is arriving" from Mexico and (2) is not someone to whom the expedited removal statute "applies." 8 U.S.C. § 1225(b)(2). On those grounds, the district court preliminarily enjoined the MPP's application to five plaintiffs in this case—all of them asylum seekers forced into Mexico after they "arrived" in the U.S., and despite being persons to whom the expedited removal statute "applies." Because the district court's rulings are correct, and because applying the MPP to the plaintiffs was unlawful for additional reasons, the preliminary injunction should be upheld.

The MPP originates with President Trump's desire to deny asylum seekers the protection of U.S. law. In his first week in office, President Trump directed DHS "to ensure" that noncitizens be "returned" under 8 U.S.C. § 1225(b)(2)(C), which authorizes returning a noncitizen to a territory from which she "is arriving on land."[1]

[1] A100-107 (Executive Order 13767: *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017), whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/).

In December 2018, DHS began doing so. Rather than expel noncitizens via expedited removal or detain them during proceedings, 8 U.S.C. § 1225(b)(1), (b)(2)(A), it concocted something harsher. Invoking § 1225(b)(2)(C), the government used the MPP to force asylum seekers into Mexico, where they have been targeted for violence. In fact, that was the point. The MPP weeds out asylum seekers not by the strength of their asylum claims, but by their capacity to withstand being marched into Mexico with only the children in their care and the clothes on their backs. As the government all but concedes, the idea is to make the asylum process so excruciating that people abandon it. *See* Blue Br. 1, 10-11.

The MPP has now forced roughly 65,000 people into Mexico. Five of them are plaintiffs here (the "MPP Plaintiffs"). In 2019, the government made each of them walk over a bridge and into the Mexican state of Tamaulipas, where Central American migrants are hunted and kidnapped. A4-5. The MPP Plaintiffs, together with U.S.-based family members, filed this lawsuit in March 2020. JA14. By then, they had endured a combined 32 months of suffering in Mexico. JA32, 37, 39. One of them had been raped. A6.

The record does not disclose any legitimate benefit that the government has reaped from sowing this misery. And for several reasons, including but not limited to those given by the district court, as applied to the MPP Plaintiffs the MPP is not only ill-begotten but illegal.

First, the district court correctly ruled that the MPP Plaintiffs are not subject to § 1225(b)(2) at all, including the contiguous-return authority of § 1225(b)(2)(C), because they are instead persons to whom the expedited removal provision, § 1225(b)(1), applies. 8 U.S.C. § 1225(b)(2). The Ninth Circuit has reached this same holding. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *petition for cert. filed*, 2020 WL 1877955 (U.S. Apr. 10, 2020) (No. 19-1212).

Second, subjecting the MPP Plaintiffs to the MPP exceeded the temporal and geographic limits of the government's § 1225(b)(2)(C) authority. As to time, the district court correctly ruled § 1225(b)(2)(C) can be applied only to an alien who "is arriving" as opposed to those who, like the plaintiffs, had arrived and were physically present in the U.S. As to place, although the statute references potential applications of the government's contiguous-return authority "whether or not at a designated port of arrival," § 1225(b)(2)(C), binding regulations limit these applications to persons who, unlike the MPP Plaintiffs, "arrive[] at a land border port-of-entry." 8 C.F.R. § 235.3(d); *see also* 8 C.F.R. § 1001.1(q) (limiting "arriving alien[s]" to those "coming or attempting to come into the United States at a port-of-entry").

Third, the MPP violates the Administrative Procedure Act ("APA"). As a threshold matter, it is an unlawful substantive rule issued without notice and comment. The MPP is also impermissibly arbitrary and capricious because it does not serve its stated goal of discouraging fraudulent asylum claims and protecting

legitimate asylum seekers; instead, it endangers all asylum seekers and makes false the very notion that persecuted people can seek America's help.

In seeking a contrary result, the government battles the plain meaning of statutes and regulations—which permit the government to return only § 1225(b)(2) noncitizens to Mexico, and only when they are arriving at ports of entry—by insisting that doing what these provisions plainly say would be "absurd," "perverse," "preposterous," and lacking "sense." Blue Br. 4, 17, 24. The absurdity, in the government's view, is that under the district court's approach it could subject people like the MPP Plaintiffs to expedited removal, and it could detain them, but it could not employ a strategy of forgoing expedited removal and giving them full removal proceedings for the sole purpose of invoking contiguous return. Yet that is not absurd. From the standpoint of the statute and regulations, noncitizens receive no inherent windfall in facing the buzz saw of expedited removal, or the cages of immigration detention, rather than life in Mexico or Canada.

That outcome is absurd only from the standpoint of the MPP's architects. Through a policy that is not part of any statutory or regulatory design, they seek to use contiguous return as a weapon trained upon the most vulnerable and least able to withstand life in Mexico. They employ contiguous return to bludgeon people into abandoning asylum claims, and *to them* any limits on using this weapon feel absurd. But those feelings shed no meaningful light on the plain meaning of decades-old

statutes and regulations limiting the government's contiguous-return authority; they reveal only the cruel intentions animating the MPP.

STATEMENT OF THE ISSUES

I. In issuing a preliminary injunction halting the MPP's application to the five MPP Plaintiffs, did the district court correctly rule that they are likely to succeed in their claim that the MPP is unlawful as applied to them?

II. Did the district court correctly rule that the remaining preliminary injunction factors favored the MPP Plaintiffs?

STATEMENT OF THE CASE

I. The MPP Plaintiffs faced daily peril and destitution in Mexico.

This case is about three adults and two five-year-old children who fled death threats, persecution, and violence in Central America and came to the U.S. seeking asylum. JA31. All crossed the U.S. border without being seen or caught, and were apprehended sometime after, on U.S. soil. A4. Applying the MPP, DHS stripped them of all their possessions—even their shoelaces—and sent them to Matamoros, in the Mexican state of Tamaulipas. A4; JA112, 140; JA93-94.

Matamoros is one of the most dangerous places on Earth. The U.S. State Department gives it a "Level 4: Do Not Travel" warning—the same as North Korea,

Syria, and Afghanistan.[2] A4, 23. U.S. government employees there are forbidden to leave their houses between midnight and 6 a.m. or to travel between cities on internal roads. A4-5, 23. Central American asylum seekers in Matamoros are perfectly vulnerable, and hence perfect targets. They survive as they can in rented rooms or in makeshift tent encampments, without basic sanitation or facilities. A4, 6-9, 22-23; JA144. Local crime cartels view them as "subhuman 'merchandise,'" JA139, and target them for murder, torture, rape, kidnapping, and other violent assaults. JA142, 150-51. Even incomplete and fragmentary reports confirm over a thousand such assaults on asylum seekers returned to Mexico under the MPP through February 2020, including over 200 children kidnapped from their parents. *Id.*

That is what happened to the MPP Plaintiffs after they were forced into Mexico. They were variously raped, extorted, and made homeless. A5-6, 8, 22. For example, Ms. Colaj, the mother of five-year-old J.C., was raped by two men who previously demanded five thousand pesos. A6. Likewise, Ms. Martinez de Urias, a cancer survivor, was forced to sleep on a piece of cardboard with her young granddaughter, who had a heart defect. A8. Ms. Vasquez and her five-year-old son found a place to stay on the other side of Mexico, and, on one trip to court were

[2] U.S. Dep't of State—Bureau of Consular Affairs, Travel Advisories, travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/ (last visited July 27, 2020).

stopped at a checkpoint and threatened with the destruction of their documents granting them permission to stay in Mexico. A8. All lived in constant fear. A5-9. One little girl was "too sad to eat" after months of sleeping outside. A6-7.

II. The MPP is a dramatic change in the treatment of asylum seekers.

The MPP represents a recent and sweeping change in longstanding immigration law. Whereas Congress created an expedited removal system to quickly screen asylum seekers and remove individuals without valid asylum claims, the MPP eschews these procedures and forces migrants to live in peril or abandon their claims.

A. U.S. law implements the duty of non-refoulement.

This country's core commitment to refugees is the duty of non-refoulement, under which the U.S. may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."[3] U.S. law implements its non-refoulement duty in part through a protection called "withholding of removal," which prevents noncitizens from being sent to a country where they are "more likely than not" to

[3] U.N. Convention Relating to the Status of Refugees, art. 33, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force April 22, 1954). The U.S. bound itself to the substantive provisions of the 1951 Convention when it acceded to the 1967 U.N. Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (entered into force October 4, 1967). *See also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987).

face persecution on account of one of the protected grounds. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b). Even in contexts in which the law does not provide the immediate opportunity for a noncitizen to apply for withholding of removal in a full immigration removal proceeding, noncitizens who fear persecution in a country to which the United States wishes to send them are entitled to a fear screening. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b); 8 C.F.R. § 208.31.[4] At that screening, if an asylum officer finds a "reasonable fear" of persecution, the noncitizen proceeds to a full withholding of removal proceeding with an immigration judge. 8 C.F.R. § 208.31(e). If not, the noncitizen is entitled to review of the negative determination by an immigration judge. 8 C.F.R. § 208.31(g). DHS may not summarily send individuals to places where they fear persecution without these safeguards. *Id.* §§ 208.16(a), 208.31(a).

The operative immigration statute, the Illegal Immigration Reform and Immigration Responsibility Act, was passed in 1996 and created a system to screen asylum seekers at the border and summarily remove those lacking valid claims. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 302, 309(b), 110 Stat. 3009, 583, 625 (1996) ("IIRIRA"). As relevant here, IIRIRA addressed the inspection of two primary categories of inadmissible noncitizens at

[4] This occurs in the context of "reinstatement" of someone's previous removal order if they unlawfully re-enter and the "administrative removal" of noncitizens with certain criminal convictions. *See also* 8 C.F.R. §§ 208.16, 238.1(b)(2)(i), (f)(3).

the border. The first category, addressed in 8 U.S.C. § 1225(b)(1), includes noncitizens that are inadmissible because they are carrying fraudulent documents or no visa documents. *See* 8 U.S.C. § 1182(a)(6)(C), 1182(a)(7). The second category, addressed in § 1225(b)(2), is a catchall; it includes all applicants for admission that are "not clearly and beyond a doubt entitled to be admitted," except crewmen, § 1225(b)(1) noncitizens, and stowaways.

Section 1225(b)(1) creates an "expedited" removal procedure for (b)(1) noncitizens. Expedited removal may be used on (b)(1) noncitizens unless they are found to have a "credible fear of persecution." *See* 8 U.S.C. §§ 1225(b)(1)(A)(ii), (b)(1)(B). Alternatively, the government may exercise prosecutorial discretion to give (b)(1) noncitizens the benefit of the full removal procedures described in 8 U.S.C. § 1229a. A19. By contrast, (b)(2) noncitizens must be placed in § 1229a removal proceedings. 8 U.S.C. § 1225(b)(2)(A).

IIRIRA also provided a mechanism known as "contiguous return" for (b)(2) noncitizens, which is at issue here. Contiguous return allows the government to return certain (b)(2) noncitizens to contiguous territory while their § 1229a removal proceedings are pending. Contiguous return cannot be applied to (b)(1) noncitizens, and can be applied only to a (b)(2) noncitizen "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).

Although the statute says that contiguous return may be applied to a (b)(2) noncitizen "who is arriving on land (whether or not at a designated port of arrival)," 8 U.S.C. § 1225(b)(2)(C), the Immigration and Naturalization Service (whose functions have since been transferred to DHS) limited contiguous return to (b)(2) noncitizens who arrive "at a port of entry" through two regulations. *See* 62 Fed. Reg. 10312 (March 6, 1997). First, it defined "arriving alien," as "an alien who seeks admission to or transit through the United States, as provided in 8 CFR part 235, ***at a port-of-entry.***" *Id*. at 10330 (emphasis added). In its current form, this definition reads "an applicant for admission coming or attempting to come into the United States ***at a port-of-entry***." 8 C.F.R. § 1001.1(q) (emphasis added). Second, it issued a regulation stating, "[i]n its discretion, the Service may require any alien who appears inadmissible and ***who arrives at a land border port-of-entry*** from Canada or Mexico, to remain in that country while awaiting a removal hearing." 8 C.F.R. § 235.3(d) (emphasis added). In adopting these limitations, the INS "extensively considered" alternative definitions of "arriving alien," including a proposal to include noncitizens apprehended within 24 hours of crossing the border. 62 Fed. Reg. 10312, 10312-313. But it rejected this time-based proposal and codified a definition of an "arriving alien" and a contiguous return provision that were limited to noncitizens arriving at ports of entry. *See id.*; 8 C.F.R §§ 235.3(d), 1001.1(q).

B. The MPP expels vulnerable asylum seekers to Mexico.

DHS announced the MPP, a sweeping change in immigration policy, through a December 2018 press release. A2; JA232-34. Under the MPP, noncitizens "arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico pursuant to Section 235(b)(2)(C) for the duration of their . . . removal proceedings." JA202. In a document that the government first revealed in supplemental briefing in the district court, DHS instructed that "agents may consider an alien to be arriving on land for purposes of the MPP if the alien is encountered within 96 hours of the alien's crossing the land border." JA249.

The MPP asserts that "[v]ulnerable populations will get the protection they need while they await a determination in Mexico." JA234. This has not happened. A6-7, JA145, 161-63. Although the MPP nominally includes a system to screen out asylum-seekers who may suffer persecution in Mexico, it is designed to offer far less protection than U.S. law offers to noncitizens who are removed through summary procedures like expedited removal or the reinstatement of a removal order. *See* A25 n.27. Although the government asserts that the MPP is a "critical" and "vital" tool that has proved "indispensable" to addressing what it calls a "crisis" on the southern border, Blue Br. 4, 7, 24, 41, the record does not contain support for these claims.

III. The preliminary injunction.

In March 2020, the MPP Plaintiffs sued, together with three relatives in Massachusetts. The district court entered a preliminary injunction on May 14, 2020, ordering DHS to rescind the order returning the MPP Plaintiffs to Mexico. A1.

The district court concluded that applying contiguous return to the MPP Plaintiffs likely violated IIRIRA for two reasons. First, the district court recognized that IIRIRA consistently distinguishes between "arriving" aliens and those already "present" within the U.S., and only authorizes contiguous return for the "arriving" class. A10-22. Accordingly, it concluded that the MPP could not be applied to the MPP Plaintiffs, who had finished "arriving" and were "present" in the U.S. when apprehended. A14-18.

Second, the court held that IIRIRA authorizes contiguous return only for § 1225(b)(2) noncitizens, whereas the MPP Plaintiffs—who lacked entry documents—fell within the plain language of § 1225(b)(1). A18-22. The district court rejected the government's argument that DHS could transmute § 1225(b)(1) noncitizens into § 1225(b)(2) noncitizens simply by placing them in full rather than expedited proceedings. A20.

Finally, the district court held that the MPP Plaintiffs satisfied the remaining preliminary injunction factors. A22-24. After reviewing the "daily peril" facing the MPP Plaintiffs, the court found "a high likelihood they will suffer irreparable harm

should the preliminary injunction not issue," and that the balance of equities and the public interest "outweighs the government's or the public's interest in the continued application of the MPP to these five noncitizens." A23-24. The MPP Plaintiffs were permitted to enter the U.S. and join their families in Massachusetts while their removal proceedings continue. *See* A24-25.

SUMMARY OF THE ARGUMENT

This Court should uphold the district court's preliminary injunction.

I. The district court correctly concluded that the MPP Plaintiffs are likely to succeed on the merits of their claim that returning them to Mexico was unlawful.

First, MPP Plaintiffs are not in the right category of noncitizens. Under IIRIRA, applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1225(b)(1) covers noncitizens who either lack entry documents or whose documents were fraudulently obtained. *See* 8 U.S.C. § 1225(b)(1)(A)(i). IIRIRA's contiguous return provision is specifically limited to § 1225(b)(2) noncitizens, *see* § 1225(b)(2)(C), and so does not apply to the MPP Plaintiffs, who undisputedly lacked entry documents and thus fall under (b)(1). The government's response—that DHS, not Congress, decides what statutory paragraph applies to each noncitizen—contradicts the statutory text, the Supreme Court's decision in *Jennings*, and common sense.

Second, the district court correctly held that, in returning the MPP Plaintiffs to Mexico, the government disregarded the temporal limitations that IIRIRA places on its contiguous return power. The contiguous return provision provides that the power applies only to a noncitizen "who *is arriving* on land." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). The distinction between noncitizens who are "arriving" and those who have entered illegally and are present in the U.S. without inspection runs throughout immigration law and IIRIRA. *Compare* 8 U.S.C. § 1225(b)(1)(A)(i), (b)(1)(A)(ii) (referring to "an alien . . . who is *arriving*"), with § 1225(b)(1)(A)(iii) (referring to "*other* aliens" who are "physically *present* in the United States."). The district court correctly determined that the MPP Plaintiffs were not "arriving" but were already present when apprehended. The immigration officers who examined two of the MPP Plaintiffs after their entry reached the same conclusion. A97, 101; JA118, 272. Both were correct: the MPP Plaintiffs had crossed the border and were inside the United States. A60–61. They were not "arriving"; if anything, they had "arrived."

Moreover, DHS's own regulations bar the return of the MPP Plaintiffs to Mexico because they crossed the border between ports of entry. There are two regulations—one defining "arriving alien," 8 C.F.R. § 1001.1(q), and one addressing contiguous return, *id.* § 235.3(d)—that independently limit contiguous return to noncitizens who come to the U.S. at a "port of entry." During the notice-

and-comment process, DHS *rejected* expanding the definition to noncitizens who crossed between ports of entry. Having promulgated regulations limiting its authority, DHS must follow them, and could not contiguously return the MPP Plaintiffs, who did not cross at a port of entry.

Third, the MPP violates the APA. The MPP abandons regulations and creates new substantive rules without notice and comment. The MPP is also impermissibly arbitrary and capricious because it abandons prior limitations on the government's authority to send people to third countries and to countries where they may be persecuted, and it does not serve its stated goal of discouraging fraudulent asylum claims and protecting legitimate asylum seekers; instead, it endangers all asylum seekers and makes violence, abuse, and fear a precondition to seeking asylum in this country.

II. The district court correctly held that the potential for irreparable harm, the balance of relevant hardships, and the public interest, weighed in favor of the MPP Plaintiffs. Their interest in escaping rape, crime, and constant fear in Mexico outweighs the government's interest in keeping them there.

STANDARD OF REVIEW

When reviewing the award of a preliminary injunction, this court "examine[s] legal questions de novo, findings of fact for clear error, and the balancing of the four factors for abuse of discretion." *CVS Pharm., Inc. v. Lavin*, 951 F.3d 50, 55 (1st Cir.

2020) (citations omitted). The preliminary injunction may be affirmed on any grounds supported by the record. *S.E.C. v. Fife*, 311 F.3d 1, 8 (1st Cir. 2002).

ARGUMENT

I. Plaintiffs demonstrated a likelihood of success on the merits.

The district court correctly concluded that § 1225(b)(2)(C) could not be applied to the MPP Plaintiffs. The contiguous return provision provides:

> **Treatment of aliens arriving from contiguous territory**
>
> In the case of 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, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

8 U.S.C. § 1225(b)(2)(C). It authorizes returning to Mexico noncitizens who are *both* (1) "described in" § 1225(b)(2)(A) and (2) "arriving" from Mexico by land. The district court correctly held that the MPP Plaintiffs were neither. Even if that were not the case, binding regulations and the APA provide sound bases to affirm the injunction below.

A. Section 1225(b)(1), not § 1225(b)(2), "applies" to the MPP Plaintiffs.

The district court correctly concluded that the government was not authorized to return the MPP Plaintiffs to Mexico because they are people "to whom" § 1225(b)(1) "applies," and consequently, to whom the provisions of § 1225(b)(2)—including the contiguous return provision, of § 1225(b)(2)(C)—do not "apply." *See*

8 U.S.C. § 1225(b)(2)(B)(ii); A18-22. The Ninth Circuit has reached the same conclusion. *Innovation Law Lab*, 951 F.3d at 1073.

This point boils down to what it means for a statutory "paragraph"—specifically, the expedited removal provision of § 1225(b)(1)—to "apply" to certain people. Here is how the statutory pieces fit together:

1. **§ 1225(b)(2)(C)**: The contiguous return provision, § 1225(b)(2)(C), applies only to "an alien described in subparagraph (A)," *i.e.*, § 1225(b)(2)(A).
2. **§ 1225(b)(2)(A):** An alien described in subparagraph 1225(b)(2)(A), in turn, is an "applicant for admission" who, upon "seeking admission" is determined to be "not clearly and beyond a doubt entitled to be admitted," but this description is "[s]ubject to subparagraph (B)," *i.e.*, § 1225(b)(2)(B).
3. **§ 1225(b)(2)(B):** Subparagraph 1225(b)(2)(B), in turn, provides an "Exception" under which § 1225(b)(2)(A) "shall not apply to an alien … to whom paragraph (1) applies," *i.e.*, § 1225(b)(1).
4. **§ 1225(b)(1)**: Section 1225(b)(1) provides for expedited removal of "an alien . . . who is inadmissible under" § 1182(a)(6)(C) (*e.g.*, someone engaged in "fraud or misrepresentation") or § 1182(a)(7) (*e.g.*, someone lacking a "valid entry document").

Through immigration law's characteristic Rube Goldberg processes, the thrust of these provisions is that if a noncitizen is someone to whom the expedited removal paragraph at § 1225(b)(1) "applies" (point 4 above), then the noncitizen falls under the exception listed in § 1225(b)(2) (point 3), is not covered by the first subparagraph of § 1225(b)(2) (point 2), and thus is not subject to the contiguous return provision, § 1225(b)(2)(C) (point 1). Or, more simply, when the expedited removal paragraph at § 1225(b)(1) "applies" to particular noncitizens, they are excepted from § 1225(b)(2), including its subparagraph permitting return to contiguous territory.

Consistent with this text and structure, the Supreme Court has made clear that applicants for admission inspected by immigration officers "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings*, 138 S. Ct. at 837. Which paragraph applies depends on the reach of the statutory text rather than discretionary enforcement decisions by government officials. "Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation," and provides expedited removal procedures. *See id.*

Section 1225(b)(2) deals with the "[i]nspection of *other* aliens," *i.e.*, those not addressed in § 1225(b)(1). Section 1225(b)(2) "serves as a catchall provision" and "applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here)." *Jennings*, 138 S. Ct. at 837. Section 1225(b)(2)

generally applies to noncitizens with valid entry documents who may be inadmissible for any other reason—such as a criminal conviction or likelihood of becoming a public charge, *see* 8 U.S.C. § 1182(a)(2), (4)—and requires these noncitizens to be placed into removal proceedings to determine their admissibility.

Here, the MPP Plaintiffs were found to lack valid entry documents under § 1182(a)(7), A4, and were thus undisputedly "covered by" the expedited removal paragraph, 1225(b)(1), *see Jennings*, 138 S. Ct. at 837. It follows that this paragraph of § 1225(b) "applies" to them. Accordingly, the district court correctly concluded that this paragraph "applies" to them, that paragraph 1225(b)(2) does not, and that they are not subject to contiguous return under 1225(b)(2)(C).

The government's contrary interpretation is incorrect. It argues that the expedited removal "paragraph . . . applies" within the meaning of § 1225(b)(2)(B)(ii) only when the authority conferred by that paragraph *has been exercised* by DHS. Blue Br. 34-40. Citing a BIA case affirming DHS's prosecutorial discretion to place noncitizens into regular removal proceedings under 8 U.S.C. § 1229a even when Congress mandated expedited removal, the government contends that the MPP Plaintiffs became noncitizens "described in" § 1225(b)(2)(A) when the government forwent expedited removal under § 1225(b)(1) and returned them to Mexico under § 1225(b)(2)(C). *See* Blue Br. 35-36 (citing *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011)).

The government erroneously interprets the text and context. *First*, it misconstrues the plain meaning of "to whom paragraph (1) applies" by confusing the executive's role with that of Congress. Congress, not DHS, determines the people to whom a statutory *paragraph* applies, including the noncitizens to whom § 1225(b)(1) applies. And § 1225(b)(2) excludes noncitizens to whom a "paragraph," namely § 1225(b)(1), "applies," *see* 8 U.S.C. § 1225(b)(2)(B)(ii)—not noncitizens to whom § 1225(b)(1)'s procedures "have been applied" or "are being applied" by the executive branch. The government's argument conflicts with *Jennings*, which confirms that paragraph "1225(b)(1) *applies to* aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation," without regard to whether DHS has in fact placed them into expedited removal proceedings. 138 S. Ct. at 837.

Second, the government's insistence that paragraph § 1225(b)(1) does not apply to the MPP Plaintiffs relies on a claim—which the government deems "uncontroverted"—that they were placed into removal proceedings "under section 1225(b)(2)." Blue Br. 35-38. But this claim has been controverted by the Plaintiffs (JA267), and rejected by the district court (A21), because it is mistaken. Section 1225(b)(2) is not a *grant* of authority to place noncitizens into removal proceedings at all, but a requirement that DHS do so in certain circumstances. Just as it may do in the case of any removable noncitizen apprehended in the United States—whether

in Boston or near the border—DHS placed the MPP Plaintiffs into removal proceedings under 8 U.S.C. § 1229a, served them with Notices to Appear under 8 U.S.C. § 1229, and determined their custody under 8 U.S.C. § 1226. *See* 8 C.F.R. § 239.1 (listing officials who may initiate removal proceedings); *id.* § 287.3(b).[5]

Third, the government argues it "cannot be right" that § 1225(b)(1) noncitizens—who lack admission documents or have engaged in fraud—"have a stronger entitlement to remain in the United States for their removal proceedings than" § 1225(b)(2) noncitizens. But Congress determined that § 1225(b)(1) noncitizens would have no entitlement to a removal proceeding or to remain in the United States at all. Instead, Congress provided for their expedited removal, unless they demonstrated a "significant possibility" of establishing eligibility for asylum. 8 U.S.C. § 1225(b)(1)(B)(v). It is DHS, not Congress, that is now choosing to bypass expedited removal and give full removal proceedings to § 1225(b)(1) noncitizens who have not passed "credible fear" screenings, only to seek to expel them to a migrant camp in Mexico in an effort to cause so much pain that they abandon their asylum claims. Congress's actions are not illogical; the government's are.

[5] If the government were right to suggest that § 1225(b)(2)(C) provides the only authority to put people in removal proceedings, it would have to terminate the proceedings of thousands of deportable noncitizens who do not even arguably fall under § 1225(b)(2), including noncitizens admitted to the U.S. and now charged as deportable under 8 U.S.C. § 1227.

B. IIRIRA and binding regulations prohibited returning the MPP Plaintiffs to Mexico because they were not "arriving" and did not appear at ports of entry.

When DHS forced the MPP Plaintiffs into Mexico, it violated statutory and regulatory provisions that set both temporal and geographic limits on its authority to return noncitizens to contiguous territory. As to time, because Congress authorized contiguous return only in the case of a noncitizen who "is arriving" on land, § 1225(b)(2)(C), the district court correctly held that Congress had not authorized the return of the MPP Plaintiffs, who were not "arriving" when they were apprehended, but had instead arrived and were thus "present" in the U.S. A14-18. But even if the statute's *temporal* limitations did not categorically exclude the MPP Plaintiffs—though they do—two regulations limit § 1225(b)(2)(C)'s *geographic* application. Because these regulations conclusively limit contiguous return to noncitizens arriving "at a port of entry," DHS lacked the authority to apply § 1225(b)(2)(C) to the MPP Plaintiffs, who entered between ports of entry.

1. IIRIRA did not authorize the government to return the MPP Plaintiffs to Mexico because they were not "arriving."

The district court correctly held that IIRIRA permitted DHS to apply its contiguous return authority only to noncitizens who are "arriving" in the United States, not those who—like the MPP Plaintiffs—had crossed the border and were already "present."

a. An "arriving" noncitizen is someone not yet inside the United States.

The district court correctly held that because § 1225(b)(2)(C) applies only to noncitizens who are "arriving," it may not be applied to those who, like the MPP Plaintiffs, were apprehended after they had crossed the border between ports of entry. While those who appear at a port of entry are indisputably "arriving" under IIRIRA,[6] the question here is whether the MPP Plaintiffs fall into the narrower category of noncitizens who could be deemed to be "arriving on land . . . not at a designated port of arrival" under § 1225(b)(2)(C). As the district court rightly concluded, once noncitizens can be said to have "arrived" within our borders, they are no longer "arriving." A14-18.

First, the text of IIRIRA makes this distinction clear through its use of the present participle. "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). Here, "arriving" describes an act in the process of occurring. If Congress had meant the section to cover aliens who had completed their arrival, it could have used the past tense verb

[6] *See Matter of M-D-C-V-*, 28 I&N Dec. 18, 24 (BIA 2020); 8 C.F.R. § 1001.1(q). Such noncitizens are deemed to be standing on the threshold; until they are free from restraint, they are not deemed to have "entered" even though technically on U.S. soil. *See United States v. Kavazanjian*, 623 F.2d 730, 736-37 (1st Cir. 1980).

"arrived," as it did elsewhere in IIRIRA.[7] Even if, as the government argues, the "arriving" language of § 1225(b)(2)(C) is used to provide the "method and place of arrival," Blue Br. 21, that would still not account for Congress' use of "arriving" rather than "arrived."

Second, the district court's conclusion is also supported by the statutory structure. As the district court observed, construing the words "is arriving" to signify noncitizens who are in the process of crossing the border is consistent with IIRIRA's distinction between aliens who are "arriving" and those who are already "present" in the United States. A15. "[I]dentical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995). As pertinent here, the term "arriving" is used in the expedited removal provision, § 1225(b)(1), to mean someone who is not yet "physically present in the United States." *Compare* § 1225(b)(1)(A)(i), (b)(1)(A)(ii) (referring to "an alien . . . who is *arriving*"), with § 1225(b)(1)(A)(iii) (referring to "*other* aliens" who are "physically *present* in the United States."). This distinction is critical, because any

[7] *See, e.g.*, 8 U.S.C. § 1225a(a)(3)(A) (specifying data collection on "the foreign airports which served as last points of departure for aliens who arrived by air at United States ports of entry without valid documentation"); *id.* § 1231(b)(1)(B) ("If [an] alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States … removal shall be to the country in which the alien boarded the vessel . . . ."); *see also* IIRIRA § 301 (providing that, for battered spouses or children, certain provisions "shall not apply to an alien who . . . first arrived in the United States before the title III–A effective date").

"arriving" alien (other than one who passes an asylum screening) can be subject to expedited removal, whereas this can be done to "other aliens … physically present in the United States" only in specifically-defined circumstances. If "is arriving" were read to encompass noncitizens who were already inside the United States, as the government suggests (Blur Br. 20-22), then § 1225(b)(1)(A)(i) would cover *all* noncitizens, and Congress's instructions regarding "other aliens" in § 1225(b)(1)(A)(iii), including those "physically present," would be rendered nugatory.[8]

Indeed, IIRIRA provides no other natural place to draw the boundary between "arriving" and "present." If, as the government argues, the words "is arriving" in § 1225(b)(2)(C) do not "impose[] a limitation on the contiguous-return authority," it is not clear what would prevent any person who had ever entered the U.S. without documentation from being marched into Mexico at any moment—even decades after building a life in this country. *See* A29, 32-33, 39-40.

Third, the district court's interpretation is also supported by history. Immigration laws have long differentiated between noncitizens who are "already

[8] The government spills much ink arguing that the MPP Plaintiffs are "applicants for admission." *See, e.g.*, Blue Br. at 3, 8, 16, 26, 29. That is undisputed, but also irrelevant. As the statute reveals, there are two types of applicants for admission, those who are "present" without admission and those who "arrive." 8 U.S.C. § 1225(a)(1); *see also* 62 Fed. Reg. 444, 444-45 (Jan. 3, 1997).

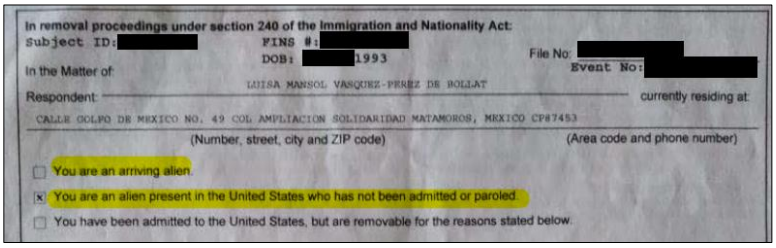
physically in the United States" and those who are deemed to be "outside the United States seeking admission." *See Landon v. Plasencia*, 459 U.S. 21, 26 (1982).

The government argues that the district court rendered superfluous the statutory phrase "whether or not at a designated port of arrival" and produced an "absurd" result. Blue Br. 4, 21-24, 30. The government has provided no evidence that it cannot apprehend or surveil aliens at the border, particularly when it has tens of thousands of Border Patrol agents backed up by "long-range reconnaissance equipment acquired from the U.S. military," "landbased radar systems," and other "[n]ew technologies."[9] In any event, as the district court found, even assuming *arguendo* that "[t]hat DHS does not commonly apprehend noncitizens in the act of crossing," this "does not convert the phrase 'whether or not at a designated port of arrival' into surplusage." A16. These words empower the government to apply expedited return if it can apprehend aliens as they cross the border. To the extent that is a small number of people, that is hardly absurd. After all, the INS's own regulations limited the number to zero. *See* 8 C.F.R. §§ 235.3(d), 1001.1(q). The government's present argument, in effect, calls its own regulations absurd.

[9] Robert D. Schroeder, *Holding the Line the 21st Century*, U.S. CUSTOMS AND BORDER PROTECTION at 6, 10, cbp.gov/sites/default/files/documents/Holding%20the%20Line_TRILOGY.pdf.

b. The MPP Plaintiffs were "present without inspection," and not "arriving," and were improperly returned to Mexico.

The district court correctly determined that the MPP Plaintiffs were not "arriving" but had already arrived when apprehended, based on the parties' concession that the plaintiffs were apprehended after they had entered the United States. A17-18; A60-61. In fact, the immigration officers who examined two of the MPP Plaintiffs, Ms. Vasquez and A.B., specifically concluded that they were *not* "arriving alien[s]," but rather "alien[s] present in the United States who ha[ve] not been admitted or paroled." A92, JA118.


In removal proceedings under section 240 of the Immigration and Nationality Act:
Subject ID: [redacted] FINS #: [redacted]
DOB: [redacted]1993 File No: [redacted]
Event No: [redacted]
In the Matter of:
Respondent: LUISA MANSOL VASQUEZ-PEREZ DE BOLIAT currently residing at:
CALLE GOLFO DE MEXICO NO. 49 COL AMPLIACION SOLIDARIDAD MATAMOROS, MEXICO CP87453
(Number, street, city and ZIP code) (Area code and phone number)
☐ You are an arriving alien.
☒ You are an alien present in the United States who has not been admitted or paroled.
☐ You have been admitted to the United States, but are removable for the reasons stated below.

A97, JA118 (excerpt; emphasis added); A101, JA272 (same). This concession is binding.

While the officers who examined the other MPP Plaintiffs neglected to fill out this portion of the paperwork, JA120–122, the government has never argued that their circumstances of arrival are distinct from Ms. Vasquez or A.B.[10] Because the

[10] The government has no evidence of exactly when or where the MPP Plaintiffs were apprehended; it relies instead on one word taken out of context from a *question* asked by the district court. Blue Br. 3, 12, 21-22, 28 (citing A61).

Plaintiffs were apprehended after they had entered the United States, they are not "arriving" and could not be subjected to § 1225(b)(2)(C).

Moreover, sending the MPP Plaintiffs to Mexico resulted from the application of an improper rule. While the government attempts to characterize its apprehensions of the MPP Plaintiffs as occurring "'very soon'" or "immediately" after they entered the United States, Blue Br. 1, 20-22 (quoting A61:14), the actual timing is not in the record and did not factor into DHS's decision to place them in MPP. Plaintiffs were placed in MPP based solely on DHS's determination that they had been arrested within *96 hours* of crossing the border. JA237-38, 249. But the government never mentions the "Muster MPP Guiding Principles" setting forth that improper rule. *See* JA249. Nor does it make any attempt to defend the rule as a permissible interpretation of the statute. In the district court, the plaintiffs only learned that this was the basis for their placement in MPP when the government revealed that in its supplemental brief. JA237-38.[11]

This 96-hour rule is indefensible. Even if IIRIRA's line between those who are "arriving" and those who are "present" could stretch modestly beyond the "exact moment" a noncitizen's feet first touch U.S. soil, *see* Blue Br. 22-23, it cannot be said that a noncitizen continues to "arrive" and is still not "present" in the United

[11] By email, government counsel represented to Plaintiffs that the document dates to July 16, 2019.

States after 96 hours.[12] Because the government relied on an invalid legal rule in placing the MPP Plaintiffs in MPP, the decision must be vacated. *See Ananeh-Firempong v. INS*, 766 F.2d 621, 629 (1st Cir. 1985).

c. *Thuraissigiam* and *Matter of M-D-C-V-* do not alter this result.

After the district court granted the preliminary injunction, the Supreme Court decided *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020), and the BIA decided *Matter of M-D-C-V-*, 28 I&N Dec. 18 (BIA 2020). In *Thuraissigiam*, the Supreme Court held that a noncitizen who was apprehended 25 yards from the border has "only those rights regarding admission that Congress has provided by statute." 140 S. Ct. at 1983. That holding has no bearing here because it concerned constitutional rights, not the meaning of any statute.

In *Matter of M-D-C-V-*, the BIA rejected a noncitizen's argument that § 1225(b)(2)(C) did not apply because she had entered the United States between ports of entry. In a letter filed under Rule 28(j), the government contends the decision is entitled to *Chevron* deference. For several reasons, that is not so.

[12] For example, in a case involving the separate issue of when a noncitizen's "entry" is complete for purposes of a smuggling prosecution, this Court concluded that a defendant who transported noncitizens a few hours after they crossed the border illegally could be convicted of assisting illegal entry, but the Court distinguished cases involving assistance "days" after a noncitizen crossed the border. *See Dimova v. Holder*, 783 F.3d 30, 39 (1st Cir. 2015).

First, the government has waived and forfeited the argument—raised in one sentence of its Rule 28(j) letter—that *Chevron* deference applies. *See* Rule 28(j) Letter at 2. "A party cannot normally raise a new issue in a Rule 28(j) filing." *United States v. Barbour*, 393 F.3d 82, 94 (1st Cir. 2004). Moreover, "a party forfeits a claim on appeal where she failed to raise it with some effort at developed argumentation." *In re FBI Distrib. Corp.*, 330 F.3d 36, 41 n.6 (1st Cir. 2003). Although *Matter of M-D-C-V-* was decided after the government filed its opening brief, the government declined Plaintiffs' invitation to seek to supplement or amend that brief to develop arguments and provide Plaintiffs a fair opportunity to respond. *See* Opp. to Motion for Extension at 5-6.

Second, deference is unwarranted because *Matter of M-D-C-V-* was decided after DHS sent the MPP Plaintiffs to Mexico. Even if the BIA had advanced a reasonable interpretation, it could not retroactively justify a government action that was unlawful at the time it was made. *See Enamorado-Rodriguez v. Barr*, 941 F.3d 589, 597 n.2 (1st Cir. 2019); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency").

Third, Matter of M-D-C-V- provides no reasoning to defer to on the questions here. The noncitizen in *Matter of M-D-C-V-* was apprehended 20 yards from the border and on the same day as she crossed it. 28 I&N Dec. at 23. The BIA had "little

difficulty" in holding that the respondent was "arriving." *Id.* But the BIA did not uphold the 96-hour rule applied to the MPP Plaintiffs in *this* case, find that the MPP Plaintiffs were "arriving," or provide reasoning that could be used to answer that question in this case. The Board did state that § 1225(b)(2)(C) (without reference to the regulations) is not limited to the port of entry and that it contains some "temporal or geographic limit" in its application. *Id.* at 23-24. These are not interpretations that the Plaintiffs dispute, but they do not help resolve this case.

Fourth, for the reasons above, § 1225(b)(2)(C)'s application is limited to those who are "arriving" and not yet "present" inside U.S. borders. Because *Matter of M-D-C-V-* applies § 1225(b)(2)(C) in a manner contrary to its plain meaning, no deference is warranted. *See Succar v. Ashcroft*, 394 F.3d 8, 29 (1st Cir. 2005).

d. Plaintiffs' claim was properly before the court.

The government's argument that the "party presentation" doctrine bars this court from interpreting the key term, "arriving," is incorrect. *First*, the plaintiffs raised this argument in their opening brief below—which said they "are not 'arriving' aliens within the meaning of § 1225(b)(2)(C)," JA71—and presented it more fully at oral argument and in response to supplemental briefing ordered by the district court. A42-43; JA257-259. *Second*, as a matter of law, a district court can ask the parties to file supplemental briefs on relevant legal issues. The Supreme Court has never "suggested that the party presentation principle constrains a court's

fundamental obligation to ascertain controlling law[, and a] party's failure to identify the applicable legal rule certainly does not diminish a court's responsibility to apply that rule." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 980-81 (4th Cir. 2015). Rather, courts retain "the independent power to identify and apply the proper construction of governing law," which includes the power to ask for supplemental briefing. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581–82 (2020), does not support the government. There, the court of appeals (1) took the dispositive issue away from the parties and instead had *amici* brief it; and (2) did so in "an appellate forum," thus preventing the district court from addressing the issue. That is not the case here.

2. Regulations foreclose applying contiguous return to noncitizens who entered between ports of entry.

Even if § 1225(b)(2)(C)'s "arriving by land" formulation applied to the MPP Plaintiffs, two regulations—one defining "arriving alien," 8 C.F.R. § 1001.1(q), and one addressing contiguous return, 8 C.F.R. § 235.3(d)—*independently* prohibited the government from returning the MPP Plaintiffs to Mexico. Congress required the INS to "promulgate regulations to carry out" sections 301 to 309 of IIRIRA, which include the contiguous return provision. *See* IIRIRA §§ 302, 309(b). In rulemaking, the INS expressly *rejected* time-based definitions of "arriving," *see* 62 Fed. Reg. 10312, 10313 (Mar. 6, 1997), and instead defined "arriving" noncitizens as those who arrive *at the port of entry*, 8 C.F.R. § 1001.1(q). Similarly, in a separate

regulation, the INS limited its contiguous return authority to the port of entry. *Id.* § 235.3(d). These regulations prohibited returning the MPP Plaintiffs to Mexico.

a. An "arriving" noncitizen is one who appears at a port of entry.

The INS has limited the universe of noncitizens it can deem to be "arriving" for purposes of § 1225(b)(2)(C) through a regulation that defines "arriving alien" by referencing people at ports of entry:

> The term arriving alien means an applicant for admission *coming or attempting to come into the United States at a port-of-entry*, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. . . .

8 C.F.R. § 1001.1(q) (emphasis added); *see also id.* § 1.2.[13]

The limitation reflects the INS's judgment about the best way to implement IIRIRA. In its 1997 proposed regulations, the INS acknowledged that IIRIRA described two types of applicants for admission, *i.e.*, (1) noncitizens who were "arriving" and (2) those who were "present" without being admitted. 62 Fed. Reg. 444, 444–45 (Jan. 3, 1997). As relevant to the land border, the agency sought comment on its proposal to limit an "arriving alien" to someone presenting at the

[13] The 1997 definition referred to "an alien who seeks admission to or transit through the United States . . . at a port-of-entry." *See* 62 Fed. Reg. at 10330.

port of entry, while noting that it would also be possible for the term to include "individuals crossing a land border between ports-of-entry." *Id.* at 445.

Following a comment period, the INS opted against defining "arriving alien" to include individuals crossing between ports. "After carefully considering" statutory references to "arriving aliens," the agency "felt that the statute seemed to differentiate more clearly between aliens at ports-of-entry and those encountered elsewhere in the United States." 62 Fed. Reg. at 10312-10313. In concluding that only aliens coming or attempting to come through ports of entry would be considered "arriving," the agency expressly rejected a proposal to instead "include aliens who have been present for less than 24 hours in the United States without inspection and admission." *Id*. at 10313. The agency reasoned:

> The Department extensively considered this [24-hour rule] and similar options, such as a distance-based distinction. For the reasons discussed below relating to the decision not to apply the expedited removal provisions at this time to certain aliens who entered without inspection, and considering the difficulty not only in establishing that the alien entered without inspection, but also in determining the exact time of the alien's arrival, the Department continues to believe the position taken in the proposed rule is correct and will not modify this definition in the interim rule.

62 Fed. Reg. at 10313; *see Make the Rd. N.Y. v. Wolf*, No. 19-5298, 2020 WL 3421904, at *2 (D.C. Cir. June 23, 2020) (explaining INS rejected expanding "arriving alien" because of implementation difficulties). While the agency was

willing to revisit this port-of-entry limitation after "early implementation," 62 Fed. Reg. at 10313, it never did so.

Here, because the MPP Plaintiffs were not "coming or attempting to come into the United States at a port-of-entry" when they were apprehended in 2019, they were not "arriving aliens" under 8 C.F.R. § 1001.1(q), and were therefore not "arriving by land" within the meaning of § 1225(b)(2)(C). It was unlawful for the government to return them to Mexico.

The government below and the BIA in *Matter of M-D-C-V-* contend that the definition of an "arriving alien" has no bearing on § 1225(b)(2)(C) because that statute references "aliens arriving" and "an alien . . . who is arriving on land." *See* JA185; *Matter of M-D-C-V-*, 28 I&N Dec. at 24. Quite the opposite. In explaining the need to define an "arriving alien" in light of IIRIRA, the INS noted "[s]everal sections of the statute . . . refer to arriving aliens." *See* 62 Fed. Reg. at 10312. But it cited three examples, only *one* of which uses the exact term "arriving alien"; the others contain variations—*e.g.*, "aliens arriving" and "an alien who is arriving." *See* 8 U.S.C. §§ 1182(a)(9), 1229c, 1231 (INA §§ 212(a)(9), 240B, and 241, respectively); IIRIRA §§ 301, 304, 305. One of those provisions, 8 U.S.C. § 1229c, uses "arriving" in a manner that parallels § 1225(b)(2)(C)'s text and title. That provision's exclusion from voluntary departure of "an alien who is arriving in the United States" has been held by this Court to refer to an "arriving alien" as defined

in 8 U.S.C. § 1001.1(q). *Akinfolarin v. Gonzales*, 423 F.3d 39, 45 (1st Cir. 2005).[14] The nearly identical language in § 1225(b)(2)(C) should too.

b. The contiguous return regulation permits contiguous return only at ports of entry.

When it defined "arriving alien" by reference to people coming to ports of entry, the INS simultaneously implemented § 1225(b)(2)(C) by issuing a regulation that authorizes contiguous return only of noncitizens arriving at ports of entry:

> Service custody. The Service will assume custody of any alien subject to detention under paragraph (b) or (c) of this section. In its discretion, the Service may require any alien who appears inadmissible *and who arrives at a land border port-of-entry* from Canada or Mexico, to remain in that country while awaiting a removal hearing. Such alien shall be considered detained for a proceeding within the meaning of section 235(b) of the Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.

8 C.F.R. § 235.3(d) (emphasis added). By its plain terms, this regulation is the agency's pronouncement of what is "[i]n its discretion" and limits that discretion to the decision whether to return inadmissible noncitizens who arrive "at a land border port-of-entry." And precisely because the contiguous-return statute allows for the broader discretion to return noncitizens "whether or not at a designated port of arrival," *see* § 1225(b)(2)(C), the regulation's use of "at" in place of "whether or not at" can be read only to disclaim any authority to return aliens who are "not at" ports of entry. Standing alone, and certainly in combination with the definition of "arriving

[14] *See also Matter of Arguelles-Campos*, 22 I&N Dec. 811, 823 (BIA 1999).

alien," the text of § 235.3(d) makes clear that the government may return only noncitizens who arrive at ports of entry.

To the government, that is all a big coincidence. In its view, the INS announced a port-of-entry rule to define "arriving alien" for purposes of multiple statutes that use iterations of the term "arriving," *see* 8 C.F.R. 1001.1(q), but any resemblance to the words "alien . . . who is arriving" in § 1225(b)(2)(C) is just happenstance. Blue Br. 33. And in the district court, it suggested that the exclusive focus on ports of entry in the only regulation that mentions the government's contiguous-return authority is, once again, happenstance. According to the government, a regulation saying the government "may" return noncitizens arriving at ports of entry is "silent" as to, and therefore does not rule out, returning noncitizens entering between ports of entry. *See* JA182–85; *see also Matter of M-D-C-V-*, 28 I&N Dec. at 23-27.

But construing language stating that the government "may do X" as if it were authorizing the very thing *not* described, instead of ruling it out, would contradict common English usage. It would also invite chaos. For example, surely the contiguous-return statute itself cannot be read to permit DHS to return a noncitizen who is *not* "described in subparagraph (A)" or is *not* "arriving on land," because that would render superfluous the words that Congress actually wrote to describe precisely when the authority could be used. 8 U.S.C. § 1225(b)(2)(C). And when the

statute says the government "may return the alien to that [contiguous] territory," surely it is not indifferent as to whether the government may instead return the noncitizen to France, or China, or the moon. By saying what the government "may" do, it is necessarily saying what the government "may not" do.

The same goes for § 235.3(d). By saying the government may return an "alien who . . . arrives at a land border port-of-entry," notwithstanding the statutory allowance for some broader application between ports of entry, the regulation rules out that broader application. And by reading § 235.3(d) to permit the contiguous return of an "alien who . . . arrives at a land border port-of-entry *and also one who does not*," the government ignores the considered choice made by the INS and inserts into the regulation the very authority that the INS left out.

Indeed, if there are noncitizens who are *not* described in § 235.3(d) yet subject to contiguous return, then those noncitizens would presumably be free from the application of that regulation's final two sentences, which provide that noncitizens subject to contiguous return after arriving at the port of entry will be deemed to be detained for purposes of the custody mandate of § 1225(b)(2)(A), and may be ordered removed *in absentia* if they fail to appear for their hearings. But it is implausible that the INS silently authorized the return of noncitizens arriving

between ports of entry while making detention compliance and *in absentia* arrangements only for noncitizens arriving at ports of entry.[15]

In addition to being incorrect, the government's arguments concerning § 235.3(d) appear to have been minted for litigation. When it enacted § 235.3(d), the INS not only limited the definition of an "arriving alien" to noncitizens at ports of entry, but also implemented its new expedited removal authority *only* as to noncitizens at the port of entry. 62 Fed. Reg. at 10313-14. While the INS later extended expedited removal, *see, e.g.*, 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004), it never expanded § 235.3(d) to reach noncitizens between ports of entry. But it seems to have considered doing so. In 2017, before the MPP began, DHS announced plans to amend § 235.3(d) to make it "consistent" with President Trump's January 2017 order directing broad use of § 1225(b)(2)(C).[16] DHS did not remove § 235.3(d) from the regulatory agenda until the spring of 2019, after MPP had come to be

---

[15] *Accord* 62 Fed. Reg. at 445 (describing its proposed § 235.3(d) by saying that it "implements" § 1225(b)(2)(C) by "stat[ing] that an applicant for admission arriving at a land border port-of-entry and subject to a removal hearing under section 240 of the Act may be required to await the hearing in Canada or Mexico"); *M-D-C-V-*, 28 I. & N. Dec. at 25 (referencing the INS's "long-standing" pre-IIRIRA practice of contiguous return that was limited to land border ports of entry).

[16] Office of Information and Regulatory Affairs, Spring 2017 Unified Agenda, DHS/USCBP, RIN 1651-AB13, reginfo.gov/public/do/eAgendaView Rule?pubId=201704&RIN=1651-AB13; Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017), whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/.

implemented and violations of § 235.3 had presumably begun.[17] The government apparently decided that it was advantageous to seek forgiveness instead of permission; it now uses the fact that its (illegal) policy is already underway to argue that *the government* is harmed when courts enjoin it. *See* Opp. to Motion for Extension at 1, 3.

Matter of M-D-C-V- does not alter this conclusion. DHS violated §§ 1001.1(q) and 235.3(d) when it sent the MPP Plaintiffs to Mexico in 2019, and the Board's interpretation of those regulations in July 2020 cannot retroactively legalize DHS's actions. *See Enamorado-Rodriguez*, 941 F.3d at 597 n.2. More important, because the meaning of these regulations is plain, *Matter of M-D-C-V-* is wrong and not entitled to *Auer* deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

c. DHS is bound by its regulations.

Having promulgated regulations limiting its authority, the executive is bound to follow them. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Carranza v. INS*, 277 F.3d 65, 69 (1st Cir. 2002). Below, the government suggested that even if the regulations are interpreted as the plaintiffs suggest, they can safely be ignored on the theory that they would be in conflict with the statute, or

[17] *See* Office of Information and Regulatory Affairs, Spring 2019 Unified Agenda, DHS/USCBP, RIN 1651-AB13, reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1651-AB13.

that they are regulations are nonbinding interpretive rules. JA183–84. Both theories are incorrect.

Plaintiffs' interpretation of the regulations does not conflict with § 1225(b)(2)(C) because the statute does not *mandate* anyone's return. It simply provides discretion that the agency was free to limit. *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) (Secretary of State "was bound by the regulations which he himself had promulgated . . . even though without such regulations he could have" acted in summary fashion); *Service v. Dulles*, 354 U.S. 363, 372 (1957) (regulations constrained Secretary of State's broad discharge authority).

Nor are the regulations nonbinding interpretive rules. Sections 235.3(d) and 1001.1(q) are legislative rules because they were issued "pursuant to a grant of lawmaking power" in IIRIRA, which required the INS to undertake rulemaking. *See Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983); IIRIRA § 309. The INS codified them, reflecting its intent to give them the force of law. *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).[18] Moreover, the INS declared its intent to "implement," not interpret, IIRIRA. *See* 62 Fed. Reg. at 10312; *see La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir.

[18] The INS itself acknowledged that codifying the implementing regulations for IIRIRA gave them the "force of law." *See* INS, Asylum Division, Basic Law Manual: U.S. Law and INS Refugee/Asylum Adjudications 2 (Nov. 1994), 1995 WL 1789054, play.google.com/books/reader?id=G0fpQ8mnNS8C&pg=GBS.PA11-IA11.

1992) (noting importance of agency's expressed intent). Plainly, the INS did not merely *interpret* "arriving on land (whether or not at a designated port of arrival)" to mean "arrives at a land border port-of-entry." *See Citizens to Save Spencer Cty. v. U.S. Envtl. Prot. Agency*, 600 F.2d 844, 879 (D.C. Cir. 1979) (finding rules legislative where they could not "have been derived by mere 'interpretation'"). Rather, the agency exercised its judgment by creating "self imposed controls" on the power that Congress provided. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). This supplementation of the statute is the basic hallmark of a legislative rule. *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992).

Finally, even if the rules were interpretive, DHS could not simply ignore them. Agencies must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015). And an agency that is changing course must, at a minimum, "display awareness that it is changing position" and "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

C. Plaintiffs are also likely to prevail on the merits of their APA claim.

The injunction below may be affirmed on the additional grounds that (1) the MPP's implementation has violated the APA's notice and comment requirements; and (2) the MPP is arbitrary and capricious.

1. Implementing the MPP without notice and comment violated the APA.

The government's implementation of the MPP violated the APA's notice and comment requirement. 5 U.S.C. § 553. Notice and comment are required to implement a legislative rule—*i.e.*, "one that creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself." *New Hampshire Hosp. Ass'n v. Azar*, 887 F.3d 62, 70 (1st Cir. 2018) (citation omitted). Notice and comment were required here for two reasons.

First, as Plaintiffs have already demonstrated, notice and comment were required to abandon prior legislative rules that limit the contiguous return authority to noncitizens who arrive at the port of entry. *See* 8 C.F.R. §§ 235.3(d), 1001.1(q); *Aviators for Safe & Fairer Regulation, Inc. v. F.A.A.*, 221 F.3d 222, 227 (1st Cir. 2000). Moreover, under the CBP's "Muster MPP Guiding Principles," DHS also implemented a new substantive standard, allowing contiguous return of noncitizens "encountered within 96 hours of the alien's crossing the land border," with consideration of any "unique circumstances in which an alien . . . has credibly demonstrated that he or she has reached his or her intended destination in the United

States." JA249 & n.2. Even if it were not inconsistent with existing regulations—though it is—the 96-hour rule creates "self-imposed controls" on the agency's exercise of its authority, *see Pickus*, 507 F.2d at 1113, and "supplement[s]" rather than merely interprets, the statute. *Nat'l Family Planning*, 979 F.2d at 237. Notice and comment were thus required.

Second, the MPP's non-refoulement provisions—while employing woefully inadequate standards—also create obligations on DHS that trigger notice and comment. Under the MPP, if a noncitizen "affirmatively states that he or she has a fear of persecution or torture in Mexico," that noncitizen "*will be referred* to a USCIS asylum officer for screening." JA207 (emphasis added); *see also* JA212. And if that officer then determines that the noncitizen will more likely than not be persecuted or tortured in Mexico—a factual inquiry—the officer has no discretion: the noncitizen may not be processed for MPP. JA207-08. These provisions, which are essential to the operation of MPP, "create[] rights, assign[] duties, or impose[] obligations, the basic tenor of which is not already outlined in the law itself," thus requiring notice-and-comment rulemaking. *Convaleciente*, 965 F.2d at 1178.[19]

For the same reasons, the government's argument below (at JA186-87) that the MPP is merely a "general statement[] of policy" and thus exempt from the notice-

[19] The Ninth Circuit has not reached a precedential decision on whether the MPP's non-refoulement procedures should have been adopted through notice-and-comment rulemaking. *Innovation II*, 951 F.3d at 1082.

and-comment requirements fails. A general statement of policy "is one that first, does not have a present-day binding effect, that is, it does not impose any rights and obligations, and second, genuinely leaves the agency and its decisionmakers free to exercise discretion." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (internal citations and quotations omitted). "The most important factor" in distinguishing a legislative rule from a general statement of policy "concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). Those real-world legal effects exist here: the MPP subjects a new category of noncitizens to return to Mexico by abandoning prior legislative rules, and imposes duties on immigration officers with regard to those who would face persecution.

2. The MPP and its application are arbitrary and capricious.

The MPP is arbitrary and capricious. Agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. The agency's approach "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang v. Holder*, 565 U.S. 42, 55 (2011). And an

agency that is changing course must, at a minimum, "display awareness that it is changing position." *Fox*, 556 U.S. at 515. The MPP fails at every turn. It dramatically expands the agency's claimed authority to employ contiguous return under § 1225(b)(2)(C); it jettisons longstanding procedures for protecting noncitizens from persecution in the countries to which the United States sends them; and it does not balance legitimate interests such as "protecting" asylum seekers, but seeks instead to harm and deter them regardless of the merits of their claims.

a. DHS silently expanded its contiguous return authority.

The MPP effected an unacknowledged and considerable expansion of DHS's contiguous return authority by sweeping in noncitizens who entered the United States between ports of entry. Even if notice and comment were not needed to abandon the port-of-entry limitation of 8 C.F.R. §§ 235.3(d) and 1001.1(q), or to create newly-minted "guidance" permitting a vast contiguous return program including those detained within 96 hours of crossing the border—though they were—DHS was still required to acknowledge and provide a reasoned explanation for this change. *Fox*, 556 U.S. at 515.

b. The MPP unreasonably abandoned longstanding non-refoulement procedures.

To develop a far-reaching contiguous return program, the MPP also abandoned longstanding DHS procedures that protect noncitizens who may be persecuted in the countries to which the United States is sending them. Plaintiffs

pointed to evidence that, in previous applications of § 1225(b)(2)(C) to asylum-seekers from a third country, DHS simply avoided employing contiguous return unless "the alien's claim of fear of persecution or torture does not relate to Canada or Mexico."[20] DHS could have continued its apparent policy of exempting noncitizens with a fear of persecution in Mexico from § 1225(b)(b)(C). But DHS did not do that. Instead, DHS determined that it would individually screen claims of fear, but would do so in the least protective way possible, abandoning the procedures the agency has long used to permit a "fair and expeditious resolution" of claims in the context of "streamlined removal processes." *See* 64 Fed. Reg. 8478, 8479, 8493 (Feb. 19, 1999) (enacting 8 C.F.R. § 208.31); A25 n.27.

MPP non-refoulement screenings bear little resemblance to the "reasonable fear" interviews used in connection with the "reinstatement" of someone's previous removal order if they unlawfully re-enter. *See* 8 C.F.R. §§ 208.16, 208.31. For example, the MPP's non-refoulement procedures employ a standard that is five times higher than reasonable fear, allowing migrants to avoid return to Mexico only if they show that they are "more likely than not" to be persecuted there, JA213, a standard normally reserved for final adjudications of withholding of removal claims after a

[20] *See* Memorandum from Jayson Ahern, Assistant Comm'r, Office of Field Operations, CBP, Treatment of Cuban Asylum Seekers at Land Border Ports of Entry IPP 05 1562 (June 10, 2005), included in 2006 Detention and Deportation Officers' Field Manual, 2014 WL 7152108.

full hearing. *See* 8 C.F.R. § 208.16.[21] The MPP's non-refoulement procedures also lack the procedural protections of the reasonable fear process, including the right to review by an immigration judge. A25 n.27; JA212-13; 8 C.F.R. § 208.31(g). Asylum officers conducting MPP interviews must further put their thumbs on the scale by "tak[ing] into account" the United States' "expectation" that the Mexican government will uphold its own humanitarian commitments to migrants subject to the MPP. JA213.

DHS failed to explain how such drastically reduced procedures could protect against refoulement, particularly given that it would be sending thousands of vulnerable migrants to exceptionally dangerous territories. *See* JA210-14; *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1910-15 (2020); *N.L.R.B. v. Beverly Enterprises Massachusetts, Inc.*, 174 F.3d 13, 23 (1st Cir. 1999); *State Farm*, 463 U.S. at 42, 49-51 ("an agency changing its course . . . is obligated to supply a reasoned analysis"). The MPP's use of contiguous return, absent the longstanding fear screening procedures for protecting refugees, is arbitrary and capricious.

[21] A "reasonable fear" is a "reasonable possibility" that a noncitizen would be persecuted, 8 C.F.R. § 208.31(c), a standard that is satisfied when a noncitizen has a ten percent chance of persecution. *See* USCIS, Questions and Answers: Reasonable Fear Screenings, uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings (reasonable fear applies same standard as "well-founded fear" in asylum context); *Cardoza-Fonseca*, 480 U.S. at 440 ("well-founded fear" satisfied with ten percent chance of persecution).

c. The MPP was not designed to "protect[]" asylum seekers with legitimate claims, but to deter and keep out all asylum seekers.

Rather than serve legitimate interests balanced by Congress in 8 U.S.C. § 1225, the MPP unlawfully aims to punish all asylum seekers in order to carry out President Trump's desire to exclude people based on their race and national origin. President Trump ordered DHS to invoke its contiguous-return authority in January 2017. Executive Order, *supra* n.1. Before DHS carried out that command, President Trump reportedly suggested keeping out Central American migrants by electrifying the border wall, creating an alligator moat, installing spikes on top to pierce human flesh, and having soldiers shoot migrants in their legs.[22] And until a court put a stop to it, the administration adopted a policy of punishing migrants by taking away their children, with no plan to reunite them. *Ms. L v. ICE*, 302 F. Supp. 3d 1149, 1155-68 (S.D. Cal. 2018). Then, in January 2019, the administration announced that it was implementing the MPP in the face of "[m]isguided court decisions and outdated laws."[23] These are the words of a government that sees cases and statutes as obstacles, not guideposts. The plaintiffs are therefore likely to show that the driving

[22] Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants' Legs, Build Alligator Moat:Behind Trump's Ideas for Border*, N.Y. Times (Oct. 2, 2019), nytimes.com/2019/10/01/us/politics/trump-border-wars.html.

[23] Press Release, Kirstjen M. Nielsen, Sec'y, DHS, Migrant Protection Protocols (Jan. 24, 2019), dhs.gov/news/2019/01/24/migrant-protection-protocols.

force behind the MPP is not a humanitarian crisis on the U.S. border, *contra* Blue Br. 6, 10, 19, 41, but instead an animus crisis in the U.S. government.

The policy actualizing this animus has now sent 65,000 people to live in peril and poverty while awaiting court hearings.[24] While the administration claimed that the MPP would sharpen its focus on legitimate asylum seekers while deterring fraudulent claims, JA234, the MPP is fundamentally ill-suited to that asserted goal. *See Chem. Mfrs. Ass'n v. EPA* 28 F.3d 1259, 1267 (D.C. Cir. 1994) (agency approach was inconsistent with agency's own stated intentions, making it arbitrary and capricious). The MPP does nothing to identify meritorious claims or deter fraudulent claims specifically. Indeed, it abandons the factors that Congress wanted the agency to consider—such as whether individuals have committed fraud and whether they have a credible fear—in favor of a strategy of harming all asylum seekers regardless of these factors. *State Farm*, 463 U.S. at 43.

To the extent that the MPP "works" as a deterrent, it is precisely because it inflicts arbitrary suffering and danger on migrants, and at such a large scale, that significant numbers will find it unbearable to pursue asylum. In this system, an individual's likelihood of pursuing asylum depends on their capacity to withstand suffering in Mexico, not the actual merits of their asylum claim. If anything, the

[24] Human Rights First, *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger* (last updated May 13, 2020), humanrightsfirst.org/campaign/remain-mexico.

MPP is more likely to discourage meritorious asylum claims because it may exact the heaviest toll on asylum seekers who are vulnerable rather than comfortable.

Not surprisingly, MPP is ill-suited to serve any legitimate objectives. For example, according to DHS, a central benefit of the MPP is its ability to provide faster removal proceedings and thereby benefit those with meritorious asylum claims. JA218, 234. But the calendaring of removal proceedings is entirely within the executive's control and has nothing to do with a noncitizen's location. DHS has chosen to schedule MPP hearings on a comparatively faster calendar, but failed to consider or explain why it could not do so without sending asylum seekers to their peril in Mexico between court dates. *See Regents*, 140 S. Ct. at 1910-13 (2020) (decision arbitrary and capricious where agency failed to consider alternative that was within ambit of existing policy); *State Farm*, 463 U.S. at 49-51 (same).

In short, while the government claimed that "vulnerable populations will get the protection they need" while in Mexico and that the MPP would benefit "legitimate" asylum seekers, JA234, the MPP can achieve its true aim—deterring asylum seekers—only if this claim is false. The agency's explanation for the MPP is "implausible" and arbitrary and capricious. *State Farm*, 463 U.S. at 43. And the MPP is not "tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system" generally and asylum laws in

particular, but is instead intended to prevent migrants from receiving the protections of asylum laws. *See Judulang*, 565 U.S. at 55. It is arbitrary and capricious.

II. The district court correctly applied the remaining preliminary injunction factors.

With likelihood of success on the merits serving as "the main bearing wall of the four-factor framework," *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996), the remaining factors are the potential for irreparable harm, the balance of relevant hardships, and the public interest. *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004); *see* A17-18, 21-24. Irreparable harm is particularly important, and the final two factors "merge when the government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 434-35 (2009). The district court correctly ruled that all of these factors favor the MPP Plaintiffs, primarily because they faced profound suffering and peril in Mexico.

Most important, the district found that, while in Mexico, the MPP Plaintiffs "face[d] daily peril such that there is a high likelihood they will suffer irreparable harm" without a preliminary injunction. A24. The court noted that the MPP Plaintiffs' personal, sworn accounts of that peril were "unrebutted and . . . supported by affidavits from employees of two nongovernmental organizations," as well as the U.S. State Department's own dire warnings about "'crime and kidnapping'" in Tamaulipas. A23. Reviewing those personal accounts, the court observed: "While they wait for their removal proceedings to progress, Ms. Vasquez and her now-five-

year-old son, A.B., venture out of their Matamoros housing only to buy groceries for fear of the violence outside." A22. Likewise, the court noted that "Ms. Martinez is living in the migrant encampment without even her own tent for shelter" and "Ms. Colaj reports that she has been raped and threatened with death while staying in the migrant encampment, and that she and her five-year-old daughter, J.C., continue to live there, sleeping in a tent." *Id*. at A22-23.

The government has nothing to say about irreparable harm. Its brief neither describes what exactly befell the MPP Plaintiffs in Mexico nor attempts to rebut the district court's particularized findings concerning irreparable harm if they had remained in Mexico. It is easy to see why.

With respect to the equities and public interest, the district court supportably found that those factors also favored preliminary injunctive relief. The court noted that "the constant danger" confronting the MPP Plaintiffs outweighed the government's narrow interest in "the continued application of the MPP to these five noncitizens." A24. In response, the government posits that *it* suffers inequities from not being able to apply the MPP to the five MPP Plaintiffs in this case because the MPP has been an "indispensable" and "vital" tool for "reducing the strain at the border and restoring integrity to the immigration system." Blue Br. 41-42. The record does not support these assertions.

Nor does the record support the government's claim that the district court "improperly collapse[d] the equities and public interest factors" into the merits. Blue Br. 42. In referencing "the constant danger" confronting the MPP Plaintiffs, the district court was necessarily incorporating its detailed irreparable harm findings into its discussion of the equities and the public interest. And to the extent that the court's consideration of the public interest also took into account the likelihood that the government was violating § 1225, that approach was entirely correct. *See Innovation II*, 951 F.3d at 1094 ("[T]he public also has an interest in ensuring that 'statutes enacted by [their] representatives' are not imperiled by executive fiat." (citing *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (other citations omitted)).

CONCLUSION

For the reasons above, the preliminary injunction should be affirmed.

Dated: July 27, 2020

Respectfully submitted,

/s/Adam J. Kessel

Adam J. Kessel
Proshanto Mukherji
Jacob B. Pecht
Fish & Richardson P.C.
ONE Marina Park Drive
Boston, MA 02210
(617) 368-2180
kessel@fr.com

Matthew R. Segal
Adriana Lafaille
Kristin M. Mulvey
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org
Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because:

1. This document contains 12,985 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Rule of Appellate Procedure 32(f).

2. The document complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/Adam J. Kessel

CERTIFICATE OF SERVICE

I certify that on July 27, 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:

Archith Ramkumar, Archith.Ramkumar@usdoj.gov

Erin E. Brizius, Erin.E.Brizius2@usdoj.gov

Rayford A. Farquhar, Rayford.farquhar@usdoj.gov

/s/Adam J. Kessel