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 MARISOL VASQUEZ PEREZ DE BOLLAT; JOSE MANUEL URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA MARIA MARTINEZ DE URIAS; SALOME OLMOS LOPEZ, individually and as next friend to Evila Floridalma Colaj Olmos and J.C.; J.C.; EVILA FLORIDALMA COLAJ OLMOS,
Plaintiffs-Appellees,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security; MARK A. MORGAN, Acting Commissioner of U.S. Customs & Border Protection; KENNETH T. CUCCINELLI II, 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
The Hon. Indira Talwani

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INTRODUCTION

This Court should reverse the district court's deeply flawed preliminary injunction barring the Department of Homeland Security (DHS) from returning plaintiffs to Mexico under the Migrant Protection Protocols (MPP). Plaintiffs' contrary arguments are unavailing.

First, plaintiffs attempt to defend the district court's holding that section 1225(b)(2)(C) does not apply to them because they were not "arriving on land," arguing that they were not "arriving" because they were apprehended very shortly "after they had crossed the border between ports of entry." Resp. Br. 23; *see also id.* at 23-25. But Congress expressly stated in section 1225 that contiguous-territory return is available *regardless* of whether an alien arrives at a "designated port of arrival." 8 U.S.C. § 1225(b)(2)(C). Plaintiffs claim that section 1225 distinguishes aliens who are "arriving" from those who are "present." Resp. Br. 22-25. But in the very first clause of section 1225, Congress defined "applicant for admission" as "[a]n alien present in the United States who has not been admitted *or who arrives* in the United States (*whether or not at a designated port of arrival*)," thereby making clear that aliens apprehended shortly after crossing the border illegally between ports are still arriving and are not "present" aliens. 8 U.S.C. § 1225(a)(1) (emphasis added). And as the Supreme Court just explained,

plaintiffs' position would "create a perverse incentive to enter at an unlawful rather than a lawful location." *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1983 (2020).

Plaintiffs respond that *Thuraissigiam* "has no bearing here because it concerned constitutional rights, not the meaning of any statute." Resp. Br. 29. That is incorrect: the Supreme Court discussed section 1225(a)(1) as support for its holding that aliens apprehended "shortly after unlawful entry" are treated "[t]he same" as aliens who arrive at a port of entry. *Thuraissigiam*, 140 S. Ct. at 1982-83. Moreover, *Thuraissigiam* undermines plaintiffs' contention that they were not "arriving" because immigration laws "have long differentiated between noncitizens who are already physically in the United States and those who are deemed to be outside the United States seeking admission." Resp. Br. 25-26. As the Supreme Court explained, the actual longstanding rule is that "an alien who is detained shortly after unlawful entry cannot be said to have effected an entry," and is instead deemed to be "on the threshold." *Thuraissigiam*, 140 S. Ct. at 1983 (citations omitted).

In addition, the district court's holding has been further undermined by the Board of Immigration Appeals (BIA), which has since construed section 1225 to mean that aliens like plaintiffs, who were apprehended shortly after crossing the border illegally, *are* "arriving on land" and subject to contiguous-territory return. *Matter of M-D-C-V-*, 28 I&N Dec. 18, 22-23 (BIA 2020). Plaintiffs claim that the

"government has waived and forfeited the argument" that the BIA's decision is entitled to *Chevron* deference. Resp. Br. 30. That argument is frivolous. The government could not have invoked *Chevron* deference before *Matter of M-D-C-V-* was decided, and it is well-settled that the BIA's interpretations of the Immigration and Nationality Act (INA) are entitled to *Chevron* deference, so no extensive argument is necessary on that point. Plaintiffs also invoke minor factual differences between this case and *Matter of M-D-C-V-*, but those purported differences have no bearing on the BIA's holdings that the statute permits contiguous-territory return for aliens like plaintiffs.

Second, plaintiffs defend the district court's conclusion that they are not aliens who are "described in subparagraph (A)," 8 U.S.C. § 1225(b)(2)(C), by pointing to 8 U.S.C. § 1225(b)(2)(B)(ii), which states that "[s]ubparagraph (A) shall not apply to an alien to whom paragraph [b](1) applies." 8 U.S.C. § 1225(b)(2)(B)(ii); Resp. Br. 18; *see also id.* at 17-20. Plaintiffs' reliance on section 1225(b)(2)(B)(ii) is misplaced. DHS has discretion to place aliens like plaintiffs into expedited removal proceedings, or instead to afford them full removal proceedings—as it did here. Section 1225(b)(1) therefore "applies" to aliens placed in expedited removal proceedings, which plaintiffs were not. *See* Opening Br. 35-37. Plaintiffs rely on *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018), Resp. Br. 20, but there, the Supreme Court simply observed that section

1225(b)(1) applies to aliens placed in expedited removal proceedings under section 1225(b)(1), unlike the plaintiffs here. Plaintiffs' reading of the statute makes no practical sense: it would exempt huge numbers of aliens from contiguous-territory return, and in some cases, it would do so *because* those aliens attempted to commit immigration fraud against the United States.

Third, plaintiffs devote a significant portion of their brief to urging this Court to affirm on alternative grounds. *See* Resp. Br. 32-52. The district court declined to rule on those grounds, but in any event, each of those arguments is meritless. Plaintiffs claim that, because of two regulations, contiguous-territory return can be applied only to aliens who enter at ports of entry. *See* Resp. Br. 32-42. But one of those regulations merely defines "arriving alien" "[a]s used in th[at] chapter" of the regulations, 8 C.F.R. § 1001.1(q), as "an applicant for admission coming or attempting to come into the United States at a port-of-entry," which does not change the express statutory text stating that contiguous-territory return is available whether or not the alien attempts to enter at a port of entry. The other regulation is permissive, stating that DHS "may" "[i]n its discretion" return aliens "who arrive[] at a land border port-of-entry from Canada or Mexico," 8 C.F.R. § 235.3(d). That regulation does not limit DHS's broader statutory authority to conduct contiguous-territory return under section 1225(b)(2)(C). Plaintiffs next claim that MPP was required to undergo notice and comment. Resp.

Br. 43-45. That is wrong because MPP is a "general statement[] of policy" exempt from notice and comment. 5 U.S.C. § 553(b)(A). And plaintiffs' claim that MPP is arbitrary and capricious and is "ill-suited to serve any legitimate objectives," Resp. Br. 51, *see also id.* at 45-52, ignores that MPP has been an indispensable tool in curbing the enormous flow of aliens attempting to illegally enter the United States on the southern border.

Finally, plaintiffs argue that the "record does not support" the government's "assertions" of harm, and they claim that the district court properly "took into account the likelihood that the government was violating § 1225" in evaluating the "equities and the public interest." Resp. Br. 53-54. Those arguments ignore the harm the preliminary injunction inflicts on the government, *see* Opening Br. 40-42, and plaintiffs offer no support for their assertion that it was proper for the district court to address the equities and public-interest factors in a single sentence that merely restated its conclusion that plaintiffs were likely to succeed on the merits. *See* A24 ("Moving the Returned Plaintiffs out of the constant danger they face 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.").

ARGUMENT

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

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 Contiguous-Territory Return Because They Were Not "Arriving on Land."

The district court erred when it held that plaintiffs were not subject to contiguous-territory return because they were apprehended shortly after illegally crossing the border and were thus not "arriving on land." *See* Opening Br. 20-34. Plaintiffs' contrary arguments, *see* Resp. Br. 22-32, lack merit.

Plaintiffs first argue that the district court's holding is correct because section 1225(b)(2)(C) uses the term "arriving" instead of the term "arrived." Resp. Br. 23-24. That simplistic reasoning misunderstands both the statutory structure and fundamental concepts of immigration law. By using the term "arriving" in section 1225(b)(2)(C), Congress achieved consistency with the definition of "applicant for admission" in section 1225(a)(1), which refers to an alien "present" in the United States without having been admitted "or who *arrives* in the United States (whether or not at a designated port of arrival)." 8 U.S.C. § 1225(a)(1) (emphasis added). And it makes sense that Congress would use the present-tense form "arriving" to refer to aliens who recently crossed the border unlawfully, because such aliens are deemed by law to still be "on the threshold" seeking

admission, and "cannot be said to have effected an entry." *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1982-83 (2020).

That conclusion is consistent with Congress's express provision extending contiguous-territory return authority "*whether or not*" an alien arrives at a port of entry. 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Plaintiffs make no serious effort to explain that statutory text; they propose that it becomes relevant only in the extraordinarily unusual circumstance where the government can manage to apprehend aliens at the very moment they cross the border. Resp. Br. 26. That is a preposterously narrow reading that Congress would not have intended, and it would "create a perverse incentive to enter at an unlawful rather than a lawful location." *Thuraissigiam*, 140 S. Ct. at 1983. Plaintiffs respond that the government can apprehend aliens "as they cross the border" using "new technologies," and "thousands of Border Patrol agents." Resp. Br. 26. But insofar as those technologies are "new," it only reinforces that Congress would not have intended plaintiffs' reading of the statute when it enacted section 1225(b)(2)(C) in 1996. And in any event, plaintiffs' argument ignores the fact that it is virtually impossible for DHS to apprehend aliens at the exact moment that "they start moving their foot across the border," A33:12-16, even with technological tools. At bottom, plaintiffs offer no reason why Congress would have expressly authorized the use of contiguous territory return for aliens who illegally cross the border, only

to then, in the same sentence, made that authority virtually impossible to exercise. *See McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000) ("[I]t is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.").

Plaintiffs next claim that "the district court's conclusion is supported by the statutory structure" because "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,'" and so section 1225(b)(2)(C)'s use of that term (according to plaintiffs) does not cover aliens apprehended within the United States. Resp. Br. 24; *see also id.* at 24-25. Plaintiffs are wrong. *See* Opening Br. 29-30. Section 1225(b)(1) describes aliens who are "arriving *in* the United States," 8 U.S.C. § 1225(b)(1)(A)(i), and does not provide that an alien ceases to be "arriving" and becomes "present" the moment he sets foot in the United States. That much is clear from Congress's definition of "applicant for admission" as an alien who is either "present" without having been admitted "or who arrives in the United States (whether or not at a designated port of arrival)." 8 U.S.C. § 1225(a)(1). The unmistakable import of that statutory text is that an alien who recently crossed the border unlawfully is "apprehended in the very act of attempting to enter this country" and has not made an entry. *Thuraissigiam*, 140 S. Ct. at 1970, 1982. And interpreting "arriving" in section 1225(b)(1) to include aliens who recently crossed

the border does not render section 1225(b)(1)'s reference to aliens who are "physically present" "nugatory" as plaintiffs suggest. Resp. Br. 25. As an initial matter, plaintiffs do not explain why "arriving in the United States" for purposes of section 1225(b)(1) must be interpreted in the same manner as the different statutory text in section 1225(b)(2)(C), namely "arriving on land (whether or not at a designated port or arrival)"). As the government explained, that language in section 1225(b)(2)(C) simply specifies a method of arrival. *See* Opening Br. 16-17. But even if these portions of sections 1225(b)(1)(A)(i) and 1225(b)(2)(C) had the same meaning, that would not make any part of section 1225(b)(1) superfluous because under the government's interpretation of the term "arriving," an alien who has lived in the United States for a year, for example, would no longer be "arriving in the United States," but could be placed in expedited removal proceedings in an exercise of DHS's discretion as an alien not "physically present in the United States continuously" for two years or less. 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

Plaintiffs also claim that *Thuraissigiam* "has no bearing here because it concerned constitutional rights, not the meaning of any statute." Resp. Br. 29. But that argument contradicts how plaintiffs have litigated this case from the start. Plaintiffs argue (as they did below) that "[i]mmigration laws have long differentiated between noncitizens who are already physically in the United States and those who are deemed to be outside the United States seeking admission." *Id.*

at 25-26; JA258 n.2. The district court invoked the same "longstanding distinction," which it purported to find in cases like *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), and reasoned that section 1225 "expressly tracks that division." A14-15. But *Thuraissigiam* explained that, in fact, the longstanding rule of immigration law is just the opposite of what plaintiffs and the district court claim: "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.'" 140 S. Ct. at 1982-83 (quoting *Zadvydas*, 533 U.S. at 693). And the Supreme Court pointed to the definition of applicant for admission in section 1225(a)(1), discussed above, as support for that holding. *See id.*

Even if the plain meaning of the statutory text and *Thuraissigiam* did not require reversal, reversal would be required by the BIA's construction of the statute in *Matter of M-D-C-V-*, which held that aliens apprehended shortly after crossing the border illegally *were* "arriving on land." 28 I&N Dec. at 22-23. Plaintiffs respond that *Matter of M-D-C-V-* is not entitled to "*Chevron* deference" because the "government has waived and forfeited th[at] argument." Resp. Br. 30. That is not remotely correct. Plaintiffs recognize that *Matter of M-D-C-V-* "was decided" on July 14 "after the government filed its opening brief," *id.*, so the government could not have made a *Chevron* deference argument either below or in its opening brief. The waiver doctrine does not require litigants to be prescient. Plaintiffs further contend that giving *Chevron* deference to *Matter of M-D-C-V-*

would "retroactively justif[y]" a government action that was unlawful at the time it was made." Resp. Br. 30. That is also incorrect. *Matter of M-D-C-V-* reinforces the legality of DHS's determination at the time it returned plaintiffs to Mexico that they were "arriving on land." *See* JA249 n.2 ("'Arriving on land,' in this context, refers both to those in the process of crossing the land border, as well as those encountered reasonably proximate to crossing the land border between ports of entry."). Plaintiffs cite *Enamorado-Rodriguez v. Barr*, 941 F.3d 589, 597 n.2 (1st Cir. 2019), *see* Resp. Br. 30, but that case is inapposite. The government there filed a Rule 28(j) letter about issues that were "not before the Court" and were not raised in the "government's brief." *Enamorado-Rodriguez*, 941 F.3d at 597 n.2. By contrast, whether plaintiffs were "arriving on land" when apprehended is squarely before this Court, and the government devoted a significant part of its opening brief to this issue. *See* Opening Br. 20-34.

Plaintiffs further assert that "*Matter of M-D-C-V-* provides no reasoning to defer to on the questions here." Resp. Br. 30; *see also id.* at 30-31. Plaintiffs are wrong. In the event this Court concludes that the term "arriving" in section 1225(b)(2)(C) is ambiguous, the BIA in *Matter of M-D-C-V-* explains why plaintiffs were "arriving" when apprehended and that reasoning is entitled to *Chevron* deference. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999). Specifically, the BIA "note[d] that both section [1225](a)(1), which defines an

'applicant for admission,' and section [1225](b)(2)(C), which provides for the return of aliens to contiguous countries, specify that the statutory provision has effect, whether or not [the alien's arrival is] at a designated port of arrival." 28 I&N Dec. at 22-23. The BIA understood that the clear import of those provisions was Congress's decision to extend contiguous-territory return to aliens apprehended shortly after crossing the border illegally between ports of entry. Plaintiffs suggest that the facts of "this case" are materially different, Resp. Br. 31 (emphasis omitted), but as the district court recognized below, there is "no dispute" that plaintiffs illegally crossed the border "and were apprehended very soon thereafter." A61:10-14. Plaintiffs finally argue that *Matter of M-D-C-V-* applies section 1225(b)(2)(C) "in a manner contrary to its plain meaning" so "no deference is warranted." Resp. Br. 31. As the government has demonstrated, however, plaintiffs' reading of "arriving on land" fails to take seriously the statutory text and flouts the immigration principle that aliens apprehended shortly after crossing illegally are deemed not to have entered the United States. *See* Opening Br. 20-34.

Plaintiffs also claim that the "fact" that "the immigration officers who examined two of the MPP Plaintiffs" checked a box on their Notices to Appear (NTA) stating that they were not "arriving alien[s]" but rather "alien[s] present in the United States who ha[ve] not been admitted or paroled," Resp. Br. 27, supports the district court's construction of "arriving on land" in section 1225(b)(2)(C). But

the NTAs have no bearing on the meaning of the statutory text, and DHS had no obligation to check any of the three boxes on the NTA. *See Matter of M-D-C-V-*, 28 I&N Dec. at 21. Because plaintiffs did not enter at a port of entry, they are not "arriving aliens" for purposes of certain immigration regulations, *see* 8 C.F.R. § 1001.1(q); Opening Br. 32-34, but that does not change the fact that they fit the statutory description of aliens eligible for contiguous-territory return in section 1225(b)(2)(C).

Plaintiffs next contend that the set of guiding principles DHS has issued to its agents that "[i]n general, and on an individualized basis, [border patrol] 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, is "indefensible" and an improper "rule." Resp. Br. 28; *see also id.* at 28-29. But these principles do not set forth any binding legal rule; rather, they outline practical guidance to assist border patrol agents in implementing MPP. *See* JA249 ("Agents should make those determinations based on the facts and circumstances presented by a particular case when determining whether an alien is amenable to the MPP."). Moreover, far from being "indefensible," Resp. Br. 28, these guiding principles comport with *Matter of M-D-C-V-*, *see* 28 I&N Dec. at 22-23, because aliens who have been here illegally and for a few days or less have not established an entry into the United States. And DHS's decision to generally limit the application of

MPP to aliens encountered within 96 hours of crossing the border ensures that individuals present for "decades after building a life in this country," Resp. Br. 25, will not be subject to MPP.

Plaintiffs finally contend that it was proper for the district court to enjoin the government based on their claim that they were not "arriving" because, according to plaintiffs, they raised this claim "in their opening brief below" and "presented it more fully at oral argument." Resp. Br. 31; *see also id.* at 31-32. Plaintiffs are wrong. Both citations that plaintiffs rely on pertain to their claim that section 1225(b)(2)(C) cannot be applied between ports of entry, which, as the government has demonstrated, is distinct from the district court's holding that section 1225(b)(2)(C) can be applied between ports of entry only to aliens who are in the literal process of crossing the border. *See* JA71 ("Section 1225(b)(2)(C) does not apply to noncitizens who entered the United States between ports of entry."); A43:11-13 ("[T]hat choice was to define 'arriving' to include only people who arrived at the port of entry."); *see also* Opening Br. 31-32 n.4. Plaintiffs do not dispute that they did not plead the claim that they were not "arriving" in their Complaint, nor do they contest that a court cannot issue an injunction based on a claim that is not pleaded in the Complaint. *See* Opening Br. 32-33. So the district court's inherent "power to identify and apply the proper construction of governing law," Resp. Br. 32, *see also id.* at 31-32, is beside the point.

B. The District Court Erred in Holding that Plaintiffs are Exempt from Contiguous-Territory Return Merely Because They *Could Have Been* Placed In Expedited Removal Proceedings.

As the government has explained, plaintiffs are applicants for admission who were not "clearly and beyond a doubt entitled to be admitted," 8 U.S.C. § 1225(b)(2)(A), and were placed in full removal proceedings under section 1229a, so they are aliens "described in subparagraph (A)," 8 U.S.C. § 1225(b)(2)(C), and are subject to contiguous-territory return. *See* Opening Br. 34-40. Plaintiffs' contrary arguments, *see* Resp. Br. 16-21, are flawed.

Plaintiffs' argument hangs 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 [b](1) applies." According to plaintiffs, because they "were found to lack valid entry documents," they are "covered by the expedited removal paragraph" and thus "paragraph [(b)(1)] 'applies' to them." Resp. Br. 19; *see also id.* at 19-21. Plaintiffs are wrong. They do not dispute that subparagraph (A) of section 1225(b)(2) also describes aliens who "lack valid entry documents," *id.* at 19, because section 1225(b)(2)(A) can be applied to any "applicant for admission" who is not "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). Section 1225(b)(2)(A) is thus "broader" than section 1225(b)(1) and "serves as a catchall provision." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Because the categories of aliens amenable to section 1225(b)(1) and section 1225(b)(2)(A)

overlap, whether section 1225(b)(1) "applies" to an alien depends on whether DHS exercises its prosecutorial discretion to place that alien in expedited removal proceedings. *See* Opening Br. 34-36. But none of the plaintiffs were placed in expedited removal proceedings. And because they were each placed in full removal proceedings, they are not aliens to whom section 1225(b)(1) "applies." 8 U.S.C. § 1225(b)(2)(B)(ii). Plaintiffs' argument ignores that section 1252(b)(2)(B)(ii) simply clarifies that aliens "subject to expedited removal under section [1225](b)(1)(A)(i) are not *entitled* to [full removal] proceedings, *not* that these classes of aliens may not be placed in such proceedings." *Matter of E-R-M & L-R-M-*, 25 I&N Dec. 520, 523-24 (BIA 2011) (emphasis in original); Opening Br. 37.

Plaintiffs contend that the "government's argument conflicts with *Jennings*," based on the statements in *Jennings* that "[s]ection 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation" and that section 1225(b)(2) "applies to all applicants for admission not covered by § 1225(b)(1)." *Jennings*, 138 S. Ct. at 837; Resp. Br. 19-20. Plaintiffs are incorrect. Both statements describe aliens who are *actually* placed in expedited removal proceedings. There is no indication that the Court in *Jennings* viewed aliens (like plaintiffs) who were eligible to be placed in expedited removal proceedings, but placed in full removal proceedings instead, as being

"covered by § 1225(b)(1)." *Jennings*, 138 S. Ct. at 837; *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 509 (9th Cir. 2019) ("*Innovation I*") ("Our interpretation is also consistent with *Jennings* . . . . [O]ur interpretation more closely matches the Court's understanding of the mechanics of § 1225(b), as it is attentive to the role of the immigration officer's initial determination under § 1225(b)(1) and to § 1225(b)(2)'s function as a catchall. For the foregoing reasons, we conclude that DHS is likely to prevail on its contention that § 1225(b)(1) 'applies' only to applicants who are processed under its provisions.").

Plaintiffs further claim that "[s]ection 1225(b)(2) is not a grant of authority to place noncitizens into removal proceedings at all." Resp. Br. 20; *see also id.* at 20-21. That argument is irrelevant, however, because even if section 1225(b)(2) was not the mechanism that placed plaintiffs in full removal proceedings, plaintiffs are still aliens "described in" subparagraph (A) of section 1225(b)(2), and are thus eligible for contiguous-territory return. 8 U.S.C. § 1225(b)(2)(C).

Plaintiffs finally claim that because "Congress determined that § 1225(b)(1) noncitizens would have no entitlement to a removal proceeding or to remain in the United States at all," "[i]t is DHS, not Congress, that is now choosing to bypass expedited removal and give full removal proceedings to § 1225(b)(1) noncitizens" —actions that plaintiffs assert are "illogical." Resp. Br. 21. As noted, plaintiffs are incorrect that they are "§ 1225(b)(1) noncitizens," *id.*, because they were

placed in full removal proceedings, not expedited removal proceedings. And plaintiffs offer no response to the government's showing that it is implausible that Congress intended to exempt aliens from contiguous-territory return because they attempted to commit immigration fraud. *See* Opening Br. 39.

C. None of the Other Claims Plaintiffs Raise on Appeal Provide Alternative Grounds for Affirmance.

Plaintiffs also ask this Court to affirm based on the merits of a number of claims that the district court did not reach. *See* Resp. Br. 32-52; A22 n.23 ("The court does not reach these arguments."). Plaintiffs provide no reason as to why this Court should reach these claims, and this Court, "engaged in appellate review" should not "consider issues that were not passed upon below," *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 735 (1st Cir. 2016). In any event, none of these arguments provides a sound alternative ground for affirmance.

1. Plaintiffs claim that, notwithstanding the statutory text, contiguous-territory return is limited to aliens arriving at ports of entry because of two regulations. Resp. Br. 32-42. Plaintiffs are incorrect.

a. Plaintiffs first argue that the phrase "arriving on land" in section 1225(b)(2)(C) is limited to the definition of "arriving alien[s]" in 8 C.F.R. § 1001.1(q) "[a]s used in th[at] chapter" of the regulations: aliens "who appear[] at a port of entry." Resp. Br. 33; *see also id.* at 33-36. That argument fails for the simple reason that the plain text of section 1225(b)(2)(C) applies to aliens

"*whether or not*" they appear at a "designated port of arrival" and the term "arriving alien" is absent from section 1225(b)(2)(C). 8 U.S.C. § 1225(b)(2)(C) (emphasis added); *see* Opening Br. 33-34; *Matter of M-D-C-V-*, 28 I&N Dec. at 24 ("[W]hen Congress enacted section [1225](b)(2)(C) in 1996, it included aliens '(whether or not at a designated port of arrival),' which is clearly broader than the historical understanding of 'arriving aliens,' as well as the regulatory definition at 8 C.F.R. § 1001.1(q)."). The regulatory definition of "arriving alien" thus does not limit the statutory authority in section 1225(b)(2)(C).

Plaintiffs offer no response to the plain text of section 1225(b)(2)(C) extending to aliens who enter between ports of entry, nor do they offer a rejoinder to the fact that when Congress wanted to specify that a provision of the INA was limited to "arriving aliens," it did so. *See* Opening Br. 33-34. Plaintiffs instead claim that this Court has construed a different statute, 8 U.S.C. § 1229c, which "uses 'arriving' in a manner that parallels § 1225(b)(2)(C)'s text and title" "to refer to an 'arriving alien' as defined" by 8 C.F.R. § 1001.(q). Resp. Br. 35; *see also id.* at 35-36. That argument is wrong for two reasons. First, 8 U.S.C. § 1229c lacks the phrase "whether or not at a designated port of arrival," statutory text that repudiates plaintiffs' proposed interpretation of section 1225(b)(2)(C). 8 U.S.C. § 1229c instead discusses aliens "arriving in the United States and with respect to whom" full removal proceedings are "initiated." 8 U.S.C. § 1229c(a)(4). Second,

plaintiffs rely on *Akinfolarin v. Gonzales*, 423 F.3d 39, 45 (1st Cir. 2005), but *Akinfolarin* did not hold that the term "arriving" in 8 U.S.C. § 1229c "refer[s] to an 'arriving alien.'" Resp. Br. 35. Instead, the alien there claimed that she was improperly classified as an "arriving alien," but this Court declined to "reach the question" because this issue was never raised below. *Akinfolarin*, 423 F.3d at 45.

b. Plaintiffs next argue that that section 1225(b)(2)(C) is limited by "a regulation that authorizes contiguous return only of noncitizens arriving at ports of entry." Resp. Br. 36; *see also id.* at 36-42. The regulation in question, 8 C.F.R. § 235.3(d), provides that DHS "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." Plaintiffs are incorrect that this regulation limits the scope of section 1225(b)(2)(C). The regulation addresses how DHS may exercise its discretion regarding the statutory authority in section 1225(b)(2)(C) as to aliens who enter at ports of entry, but is silent regarding the statutory authority in section 1225(b)(2)(C) that applies to aliens who enter between ports of entry. That silence does not limit the statutory authority in section 1225(b)(2)(C) that extends to aliens who enter between ports of entry because it does not disavow that statutory authority, and instead specifies what DHS "may," in its discretion, do. *See Matter of M-D-C-V-*, 28 I&N Dec. at 24-25 ("[T]hose regulations are permissive, not proscriptive. They provide that DHS

'may' require aliens who arrive at a land border port of entry to remain in Canada or Mexico, but they do not limit that practice *only* to those aliens . . . . We should be reluctant to read a regulation as foreclosing the DHS from taking action that the statute clearly gives it the authority and discretion to carry out." (emphasis in original)).

The authority that plaintiffs rely on, *see* Resp. Br. 41-42, is inapposite. In *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1111, 1113 (D.C. Cir. 1974), the D.C. Circuit considered the Parole Board's promulgation of a regulation that was a "rigid structuring of the Board's discretion" and held that that regulation was a "self imposed control[]" on the Board's discretion. By contrast, 8 C.F.R. § 235.3(d) does not constrain DHS's authority to effectuate the statutory authority in section 1225(b)(2)(C).

Plaintiffs claim that "[b]y saying what the government 'may' do" the regulation "is necessarily saying what the government 'may not' do." Resp. Br. 38; *see also id.* at 37-38. That is wrong: section 1225(b)(2)(C) clearly applies to aliens who enter between ports of entry and 8 C.F.R. § 235.3(d) does not limit that authority. Plaintiffs also argue that it is significant that DHS "seems to have considered" amending 8 C.F.R. § 235.3(d). Resp. Br. 39; *see also id.* at 39-40. But such "inaction lacks persuasive significance because several equally tenable

inferences may be drawn from such inaction." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

2. Plaintiffs additionally claim that the "government's implementation of the MPP violated the" "notice and comment requirement" imposed by the Administrative Procedure Act (APA). Resp. Br. 43; *see also id.* at 43-45. They are wrong. Aliens are subject to MPP only if officers "in an exercise of discretion" "determine[] [that they] should be subject to the MPP process," and officers "retain discretion to process aliens for MPP or under other procedures . . . on a case-by-case basis." JA207. So MPP is exempt from notice-and-comment rule-making as a "general statement[] of policy," 5 U.S.C. § 553(b)(A), because it "advise[s] the public prospectively of the manner in which the agency proposes to exercise [its] discretionary power" under section 1225(b)(2)(C). *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (citations omitted). The Ninth Circuit motions panel in *Innovation I* reached this conclusion. *See Innovation I*, 924 F.3d at 509 ("The MPP qualifies as a general statement of policy because immigration officers designate applicants for return on a discretionary case-by-case basis."). And the Ninth Circuit merits panel did not disturb this conclusion in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) ("*Innovation II*"). *See* Opening Br. 39-40.

Plaintiffs nevertheless contend that "DHS also implemented a new substantive standard, allowing contiguous return of noncitizens encountered within

96 hours of the alien's crossing the land border," and contend that this "standard" necessitated notice and comment. Resp. Br. 43-44. But DHS established no such "substantive standard." *Id.* Instead, DHS reinforced the discretion that pervades MPP by providing 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. Agents should make those determinations based on the facts and circumstances presented by a particular case." JA249 (emphasis added).

Plaintiffs also argue that the procedures that DHS has adopted to assess whether aliens amenable to MPP fear persecution or torture if returned to Mexico (non-refoulement procedures) "create obligations on DHS that trigger notice and comment." Resp. Br. 44. But a set of procedures that an agency establishes as one component of a discretionary policy simply advises how the agency "proposes to exercise [its] discretionary power," without imposing enforceable obligations on the agency itself or on regulated parties. *Lincoln*, 508 U.S. at 197. An additional reason that the non-refoulement procedures plaintiffs challenge is exempt from the APA is that they are "rules of agency organization, practice, or procedure," 5 U.S.C. § 553(b)(A), that DHS has, in its discretion, devised.

3. Plaintiffs also argue that MPP is "arbitrary and capricious" in violation of the APA. Resp. Br. 45; *see also id.* at 45-52. Plaintiffs argue that the non-refoulement procedures used in MPP "abandon longstanding DHS procedures

that protect noncitizens who may be persecuted in the countries to which the United States is sending them." *Id.* at 46; *see also id.* at 46-48. Plaintiffs are incorrect. As an initial matter, the treaty obligations that give rise to non-refoulement obligations are not "self-executing," *Garcia v. Sessions*, 856 F.3d 27, 42 (1st Cir. 2017), and so "can only be enforced pursuant to legislation" that carries them "into effect." *Medellin v. Texas*, 552 U.S. 491, 505 (2008). No legislation implements non-refoulement obligations in the context of contiguous-territory return. Section 1231—which by its plain terms governs removal, *not* temporary return—provides that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). But section 1231(h) makes clear that "[n]othing in this section shall be construed to create any substantive or procedural right that is legally enforceable." 8 U.S.C. § 1231(h). Similarly, no legally enforceable obligation exists to challenge MPP's non-refoulement procedures.

Even if plaintiffs' challenge were cognizable, it would fail. The premise of plaintiffs' claim is that "MPP non-refoulement screenings bear little resemblance to" "interviews used in connection with the reinstatement of someone's previous removal order if they unlawfully re-enter." Resp. Br. 47; *see also id.* at 47-48. But

temporary return to a contiguous territory that an alien has transited through, at issue here, is different from removal of an alien to his or her home country, and the agency was entitled to rely on that difference in crafting non-refoulement procedures under MPP. Plaintiffs' assertion that DHS provided no explanation as to how MPP's non-refoulement procedures "could protect against refoulement," Resp. Br. 48, is wrong. Any alien who "affirmatively states that he or she has a fear . . . of return to Mexico, whether before or after they are processed for MPP" is entitled to a non-refoulement interview where an asylum officer "asses[es] whether it is more likely than not that the alien would be persecuted in Mexico on account of" a protected characteristic or tortured. JA207, JA212. The interview is conducted in "a non-adversarial manner, separate and apart from the general public." JA212. "The officer should also confirm that the alien has an understanding of the interview process," *id.*, and the asylum officer's assessment is reviewed by a "supervisory asylum officer." JA213. Moreover, the agency has explained why the non-refoulement procedures that MPP uses differ from procedures used in the removal context: "[the agency] strongly believes that if DHS were to change its fear-assessment protocol . . . the number of fraudulent or meritless fear claims will significantly increase. This prediction is, in large part, informed by [the agency's] experience conducting credible fear screenings for aliens subject to expedited removal." JA222.

Plaintiffs next claim that "MPP does nothing to identify meritorious claims or deter fraudulent claims specifically" and that it is motivated by "animus." Resp. Br. 50; *see also id.* at 49-51. They are wrong on both fronts. First, MPP has been "an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system," and as a result of MPP, apprehensions of aliens illegally crossing the border are decreasing, while asylum seekers with legitimate claims "can be granted relief or protection within months, rather than remaining in limbo for years." JA217-18. Second, Plaintiffs' claim that MPP is motivated by animus, *see* Resp. Br. 49-50, relies on statements "remote in time and made in unrelated contexts" that are not "probative of" the motivation behind MPP. *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1916 (2020). Plaintiffs also cursorily argue that MPP is arbitrary and capricious because it "abandon[s] the port-of-entry limitation[s]" in 8 C.F.R. §§ 235.3(d) and 1001.1(q). Resp. Br. 46. As the government has demonstrated, however, no such limitations exist.

II. The Remaining Considerations Weigh Against a Preliminary Injunction.

The balance of harms favors the government because the preliminary injunction places unfounded limits on a critical immigration tool that has effectively stemmed the tide of unchecked migration at the border. *See* Opening Br. 40-42.

Plaintiffs argue that "the record does not support" this claim but they are incorrect. The record demonstrates that "MPP has been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." JA217. Plaintiffs also argue that the district court was "entirely correct" to take into account "the likelihood" of success on the merits in "its discussion of the equities and the public interest." Resp. Br. 54. But the Supreme Court has emphasized the "importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction" as separate factors, and an injunction that "address[es] these considerations in only a cursory fashion" and does not "give serious consideration" to these factors is improper. *Winter v. NRDC*, 555 U.S. 7, 26-27 (2008). The single sentence the district court devoted to these factors here likewise does not show serious consideration of either the equities or the public interest, especially since the district court merely repurposed its holding that plaintiffs were likely to succeed on the merits in assessing these factors. *See* A24 ("Moving the Returned Plaintiffs out of the constant danger they face 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.").

CONCLUSION

This Court should reverse the decision below and vacate the preliminary injunction.

Dated: August 10, 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 6497 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 August 10, 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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