UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANDRÉS OSWALDO BOLLAT VASQUEZ, et al., Plaintiffs, v. CHAD F. WOLF, et al., Defendants.	No. 20-cv-10566-IT **ORAL ARGUMENT REQUESTED** **LEAVE TO FILE GRANTED ON APRIL 13, 2020**

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

American laws and regulations codify the principle that our government cannot blind itself to the likely fate of the noncitizens it removes. Yet this case arises from a government program, which the Trump administration calls the "Migrant Protection Protocols" ("MPP"), that expels noncitizens into Mexico not only despite, but *because* of, the dangers that await them. The Plaintiffs are three Massachusetts residents and their five loved ones—including two young children—who have been unlawfully sent to Mexico under the MPP in an effort to deter them and others from seeking asylum in the United States. They seek preliminary injunctive relief to stop the MPP's application to their families and to bring them to safety while the merits of their asylum and related claims are adjudicated.

Under the MPP, the U.S. government expels asylum seekers into Mexico while their immigration cases are pending and instructs them to return to the border to attend court. Plaintiffs Luisa Marisol Vasquez Perez de Bollat, A.B., Rosa Maria Martinez de Urias, Evila Floridalma Colaj Olmos, and J.C. were subjected to this policy. In the summer and fall of 2019, the government forced each of them to walk over a bridge and into Tamaulipas, Mexico—one of the most dangerous places on earth. Tamaulipas is especially dangerous for Central American migrants, who are targeted so unfailingly that they cannot be safely on the street in broad daylight. As part of the MPP's scheme to subject migrants to conditions that will deter them from pursuing asylum claims, the above Plaintiffs have endured between six and eight months of danger and abject misery in Mexico simply for the chance to seek protection in the United States. Without relief from this Court, they stand to remain in Mexico for many more months.

The government pretends its policy "protect[s]" migrants. But the government knows that it does no such thing. Plaintiffs are likely to show that, as applied to Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C., the MPP is unlawful in at least five ways:[1]

1. It exceeds, in multiple respects, the government's legal authority to return noncitizens to contiguous foreign territory, codified at 8 U.S.C. § 1225(b)(2)(C). As the only Circuit to have analyzed the legality of the MPP held, the MPP violates 8 U.S.C. § 1225(b) because it applies the contiguous return provision of § 1225(b)(2) to noncitizens who are not subject to § 1225(b)(2) at all, but are instead subject to different procedures under § 1225(b)(1). *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1084-87 (9th Cir. 2020). The MPP's application to these Plaintiffs also violates § 1225(b)(2)(C)'s implementing regulation, which limits contiguous return to noncitizens who, unlike these Plaintiffs, arrived in the U.S. at ports of entry. *See* 8 C.F.R. § 235.3(d).

2. It violates the Administrative Procedure Act ("APA") because it is a substantive rule issued without notice and comment.

3. It is arbitrary and capricious under the APA because, among other reasons, it is not designed to serve its stated goal of discouraging fraudulent asylum claims and protecting legitimate asylum seekers; instead, the MPP is simply designed to endanger ***all*** asylum seekers to the point of making foolish and dangerous the very idea of seeking America's help.

4. It is motivated by animus and discriminatory intent against Central Americans and other people of color, in violation of the Equal Protection Clause.

5. As the Ninth Circuit also concluded, it impermissibly exposes these Plaintiffs to persecution in Mexico, in violation of the U.S. government's duty of non-refoulement. *See Innovation Law Lab*, 951 F.3d at 1093.

As shown below, these fatal defects with the MPP, as well as the other preliminary injunction factors, warrant a preliminary injunction ordering the Defendants to permit Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to enter the United States while their removal proceedings are litigated.

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[1] Plaintiffs contend that MPP is unlawful on additional grounds, e.g., because it violates the asylum provisions of the Immigration and Nationality Act (Count 2) and violates Plaintiffs' substantive due process rights (Count 7 ¶ 156), but have elected to press these five grounds in this motion, reserving all rights on their other challenges.

BACKGROUND

I. U.S. law implements the duty of non-refoulement and protects asylum seekers.

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."[2] The duty of non-refoulement is enshrined in U.S. law and is also a *jus cogens* rule of customary international law that U.S. courts must enforce.[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 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);

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[2] 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) [hereinafter 1951 Convention]. 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); *Devitri v. Cronen*, 289 F. Supp. 3d 287, 295 n.11 (D. Mass. 2018) (recognizing Convention "imposed a mandatory non-refoulement duty").

[3] *See generally* Jean Allain, *The* jus cogens *Nature of non-refoulement*, 13 Int'l J. Refugee L. (Issue 4) 533 (2002); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) ("[I]nternational law has an existence in the federal courts independent of acts of Congress."). Non-refoulement dates to the aftermath of World War II, when countries resolved to avoid repeating the harm inflicted on Jewish refugees who were refused protection and returned to the Nazis. *See Explaining the Concept of Refoulement*, Deutsche Welle (Aug. 7, 2014), dw.com/en/explaining-the-concept-of-refoulement/a-17767880.

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 in front of 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). The Department of Homeland Security ("DHS") may not summarily send individuals to a place where they fear persecution without these safeguards. 8 C.F.R. § 208.16(a); 8 C.F.R. § 208.31(a).

A similar process is designed to achieve both protection for asylum seekers and administrative expediency at the border. Since 1996, noncitizens who arrive in the United States without entry papers, or with papers obtained through fraud, are summarily removed through the "expedited removal" process. 8 U.S.C. § 1225(b)(1)(A)(i). Individuals who are caught shortly after crossing the border between ports of entry may also be subject to this process. 8 U.S.C. § 1225(b)(1)(A)(iii).[5] But recognizing that many *bona fide* asylum seekers might have no choice but to enter illegally or arrive without entry papers, U.S. law requires that those who express a fear of return to their countries or an intention to apply for asylum be provided with a "credible fear" interview by an asylum officer. 8 U.S.C. §§ 1225(b)(1)(A)-(B). Where the asylum officer does not find a credible fear, noncitizens are entitled to review by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). Individuals found to have a credible fear of persecution are not removed pursuant to an expedited procedure and are instead referred for full removal proceedings in which

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[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).

[5] *See also* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004); *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019) (enjoining expansion of expedited removal), *appeal pending*, No. 19-5298 (D.C. Cir.).

they may apply for asylum, withholding of removal, and other relief in front of an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30, 235.6.

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

Notwithstanding the United States' legal commitment to fulfill the duty of non-refoulement and to protect asylum seekers, DHS announced the MPP in a December 2018 press release. Under the MPP, individuals "arriving in or entering the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings."[6] The press release explained that, in implementing the policy, the government would detain asylum seekers at the border, schedule their removal hearings, expel them to Mexico, and require them to present themselves at the border to attend court.[7]

DHS did not promulgate any regulations or engage in any formal rulemaking process prior to adopting the MPP. And although the agency purports to agree that it may not send noncitizens to Mexico if they would face persecution there, it does not apply its customary "reasonable fear" regulations—the standard otherwise applied to ensure compliance with the "non-refoulement" duty in the summary removal context.

Instead, in a January 2019 "guidance" document, DHS described a newly-minted interview process unlike any in U.S. law.[8] Under these new mandatory procedures, asylum officers must

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[6] Press Release, Kirstjen M. Nielsen, Sec'y, DHS, Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration: Announces Migration Protection Protocols (Dec. 20, 2018), dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration [hereinafter Dec. 2018 Press Release].

[7] *Id.*

[8] *See* U.S. Citizenship and Immigration Services ("USCIS") Policy Memorandum, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, PM-602-0169 (January 28, 2019), uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf [hereinafter USCIS Policy Memorandum].

determine whether noncitizens who express a fear of return to Mexico will "more likely than not" experience persecution there on account of a protected ground—a standard five-times higher than "reasonable fear," as that term is regulatorily defined, and identical to the showing required to prevail on the ***merits*** of a withholding of removal claim after a full evidentiary hearing in front of an immigration judge.[9] These MPP non-refoulement interviews bear little resemblance to "reasonable fear" screenings and provide no opportunity for review by an immigration judge.

The MPP is a result of President Trump's January 2017 Executive Order directing that noncitizens "described in" § 1225(b)(2)(C) be "returned to the territory from which they came" pending their removal proceedings.[10] It also implements President Trump's specific directive that DHS simply stop allowing migrants at the Southern border to enter the U.S. to seek asylum.[11] Former DHS Secretary Kirstjen Nielsen acknowledged that the MPP is an "unprecedented action" taken in response to court decisions the government deems "misguided" and to laws that are "outdated."[12] These decisions and laws, the government claims, permit the "exploit[ation]" of

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[9] *Compare id. with* 8 C.F.R. § 208.16(b) ("more likely than not" standard in withholding of removal) *with* 8 C.F.R. § 208.31 (reasonable fear interviews). A "reasonable fear" is a "reasonable possibility" that a noncitizen would be persecuted, 8 C.F.R. § 208.31(c), a standard that is interpreted to be satisfied when a noncitizen demonstrates a ten percent chance of persecution. *See* USCIS, Reasonable Fear FAQ, uscis.gov/faq-page/reasonable-fear-faq#t12808n40174 (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).
[10] 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/ [hereinafter Executive Order 13767].
[11] Julie H. Davis & Michael D. Shear, *Border Wars: Inside Trump's Assault on Immigration* 334-37 (2019) (Trump "gave Nielsen a direct order: Do not let any more people in"; he "wanted the troops to keep the 'illegals' out at all costs").
[12] Press Release, Kirstjen M. Nielsen, Sec'y, DHS, Migrant Protection Protocols (Jan. 24, 2019), dhs.gov/news/2019/01/24/migrant-protection-protocols [hereinafter Jan. 2019 Press Release].

"asylum loopholes" by "[i]llegal aliens" and "fraudsters."[13] According to the government, the credible fear assessments provided for by Congress allow too many noncitizens into the U.S. based on claims that are later denied.[14] DHS asserted that, by prohibiting asylum seekers from entering and remaining in the U.S. prior to a "final decision" on the merits of their immigration cases, the "MPP will reduce the number of aliens taking advantage of U.S. law."[15] And by limiting the number who avail themselves of U.S. laws, the government claimed it would "more effectively assist legitimate asylum-seekers."[16]

III. Central American migrants subject to the MPP are persecuted in Tamaulipas and Mexico.

Approximately 60,000 asylum seekers and migrants, including 16,000 children, have been sent to Mexico under the MPP.[17] In July 2019, DHS expanded the MPP to the northeastern Mexican state of Tamaulipas, one of the most dangerous places in the world.[18] In the border city of Matamoros, thousands of migrants—including hundreds of children—sleep outside in an

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[13] Dec. 2018 Press Release, *supra* n.5.
[14] Jan. 2019 Press Release, *supra* n.10.
[15] *Id.*
[16] *Id.*
[17] Human Rights First, *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger* (Jan. 20, 2019), humanrightsfirst.org/campaign/remain-mexico [hereinafter HRF Delivered to Danger]; *see also* Reuters and Joseph Zeballos-Roig, *Trump's Immigration Crackdown Forced 16,000 Children, Including 500 Babies, to Wait for Weeks or Months in Mexico*, Business Insider (Oct. 11, 2019), businessinsider.com/exclusive-us-migrant-policy-sends-thousands-of-babies-and-toddlers-back-to-mexico-2019-10.
[18] Lizbeth Diaz, *Two More Border Cities Added to U.S.-Mexico Asylum Program,* Reuters (June 23, 2019), reuters.com/article/us-usa-immigration-mexico/two-more-border-cities-added-to-us-mexico-asylum-program-sources-idUSKCN1TO0Y5; Human Rights Watch, *We Can't Help You Here: U.S. Returns of Asylum Seekers to Mexico* (July 2, 2019), hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico.

overcrowded encampment that fails to meet basic humanitarian standards. Martin Aff. ¶¶ 62-63; Kizuka Aff. ¶¶ 44-47.[19]

The U.S. State Department has assigned Tamaulipas a "Level 4: Do Not Travel" warning—the same as Iraq, North Korea, Syria, Somalia, Yemen, and Afghanistan—and has barred U.S. government employees from traveling between cities in Tamaulipas using interior highways and from being outside between midnight and 6am in Matamoros.[20] Central American and other migrants bear the brunt of these dangers and face persecution throughout Mexico and especially in Tamaulipas. Martin Aff. ¶¶ 6, 8, 28-36; Kizuka Aff. ¶ 9-15, 19-27.

Central American migrants are readily identified and targeted for violence in Tamaulipas. Martin Aff. ¶¶ 9-10, 30-31; Kizuka Aff. ¶¶ 9-13. Criminal cartels hunt and kidnap migrants who are awaiting their asylum hearings. Martin Aff. ¶¶ 28-36. As of February 28, 2020, Human Rights First has identified over 1,000 public reports of murder, torture, rape, kidnapping, and other violent assaults against asylum seekers returned to Mexico under the MPP[21]—a gross underreporting. Kizuka Aff. ¶¶ 8, 44; *see also* Martin Aff. ¶¶ 45-46. In Matamoros, cartel watchmen observe the

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[19] *See also* UNICEF, *Mexico: An estimated 700 migrant children stranded in Matamoros near U.S. border* (Feb. 1, 2020), unicef.org/press-releases/mexico-estimated-700-migrant-children-stranded-matamoros-near-us-border; Nomaan Merchant, *Tents, Stench, Smoke: Health Risks are Gripping Migrant Camp*, Associated Press (Nov. 14, 2019), apnews.com/337b139ed4fa4d208b93d491364e04da. Cited affidavits and exhibits are attached to the Lafaille Affidavit accompanying this submission. "Bollat Aff.," "Vasquez Aff.," "Urias Aff.," "Martinez Aff.," "Olmos Aff.," and "Colaj Aff." refer respectively to the affidavits of Plaintiffs Mr. Bollat, Ms. Vasquez, Mr. Urias, Ms. Martinez, Mr. Olmos and Ms. Colaj, attached therein.

[20] U.S. Dep't of State—Bureau of Consular Affairs, *Mexico Travel Advisory*, travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last visited April 7, 2020) [hereinafter Mexico Travel Advisory].

[21] Human Rights First, "Publicly reported cases of violent attacks on individuals returned to Mexico under the 'Migrant Protection Protocols'," (Feb. 28, 2020), humanrightsfirst.org/sites/default/files/Publicly%20Reported%20MPP%20Attacks%20-%2028%20Feb%202020.pdf; HRF Delivered to Danger, *supra* n.16.

movements of migrants near the encampment, and migrants are frequently victims of kidnapping and physical and sexual assault. Martin Aff. ¶ 43; Kizuka Aff. ¶¶ 23-24. Mexican authorities offer little protection, and often work with cartels. Kizuka Aff. ¶¶ 14, 21, 26-27, 35.[22] Central American migrants are seen as second-class citizens against whom crime can be committed without being noticed or punished. Martin Aff. ¶¶ 9-10, 30-31. Migrants avoid going out on the street due to the imminent risk of kidnapping, extortion, and violence. Martin Aff. ¶ 33, 43; Kizuka Aff. ¶ 22.

Conditions for migrants in Matamoros are only going to worsen with the inevitable spread of the novel coronavirus among the camp site, as widespread social distancing is virtually impossible in the bustling camp of small tents. And with just 25 ventilators and 11 intensive care beds, Matamoros' public hospitals are extremely poorly equipped to treat a large outbreak of a disease which has challenged even the best-resourced health systems.[23]

FACTS

Plaintiffs Luisa Marisol Vasquez Perez de Bollat and A.B., Rosa Maria Martinez de Urias, and Evila Floridalma Colaj Olmos and J.C. all fled persecution and threats against their lives in Central America and crossed the U.S.-Mexico border to seek safety in the United States. Ms. Colaj and her daughter J.C. entered the United States in July 2019; Ms. Vasquez and her son A.B., and Ms. Martinez entered in September 2019. Under the MPP, each was sent back to Mexico, where

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[22] Mexican officials have even threatened to separate kids at the encampment from their parents. Reynaldo Leyaños Jr., *Mexican Official Tries To Move Asylum-Seekers Stuck In Tent Camps*, NPR (Nov. 9, 2019), npr.org/2019/11/09/777686672/mexican-official-tries-to-move-asylum-seekers-stuck-in-tent-camps.

[23] Julia Love & Mica Rosenberg, *Sprawling Mexican border camp ill-prepared for coronavirus*, Reuters (Mar. 22, 2020), reuters.com/article/us-health-coronavirus-mexico-matamoros/sprawling-mexican-border-camp-ill-prepared-for-coronavirus-idUSKBN2190ZD. Some in Matamoros, including the president of the local chamber of commerce, have begun to call for sealing off the encampment and deporting its inhabitants. Kizuka Aff. ¶ 52.

their lives and well-being are in daily peril. Vasquez Aff. ¶¶ 2-12; Martinez Aff. ¶¶ 3-13; Colaj Aff. ¶¶ 3-13.

After crossing the border and being apprehended by U.S. Customs and Border Protection ("CBP"), Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. were issued Notices to Appear in immigration court for removal proceedings. Ex. 7.[24] But CBP officials also issued them notices stating that they had been "identified for processing under the Migrant Protection Protocols." *See* Ex. 8. These notices stated that they would be sent to Mexico and could not return to the United States until it was time to report to the port of entry for their respective first hearings. *Id.* The notices provided that they could consult with counsel "through any available mechanism," including at the hearing facility on the day of their respective hearings, "at a location in Mexico of [their] choosing" or by phone or email, or another "remote communication method of [their] choosing." *Id.* As the notices explained, to pursue their claims for protection Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. would have to appear for their respective court dates by presenting themselves at a bridge connecting Matamoros, Mexico to Brownsville, Texas at 4:30am—a time when U.S. government officials are not permitted to be outside in Matamoros due to safety concerns. *Id.*; Vasquez Aff. ¶¶ 2-12; Martinez Aff. ¶¶ 3-13; Colaj Aff. ¶¶ 3-13.[25]

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[24] These Notices to Appear are facially invalid because CBP failed to check any box that would specify the type of proceeding each of the Plaintiffs is in. *See* Ex. 7; 8 C.F.R. § 1003.15(b). Moreover, CBP automatically fills in the same address for each migrant in MPP—corresponding to a migrant shelter about five miles from the bridge CBP uses to send migrants to Matamoros—without regard for where a migrant will actually stay. *See* Ex. 7; Gobierno del Estado de Tamaulipas, *Hospedaje y Alimentación* (listing migrant shelters, including at address listed on Plaintiffs' Notices to Appear), tamaulipas.gob.mx/migrantes/hospedaje-y-alimentacion/.

[25] At least one of the Plaintiffs was also issued a notice under the detention and release provisions of 8 U.S.C. § 1226(a) stating that CBP had decided not to detain her, but that she was instead being "[r]eleased" under conditions—the condition presumably being her return to Mexico. Ex. 9. This notice falsely informed her that she could appeal that determination to an immigration judge, *see id.*, even though review of the decision to send her to Mexico under MPP was not in fact available.

Ms. Vasquez, Ms. Martinez, and Ms. Colaj were all afraid of returning to Mexico—and Ms. Vasquez and Ms. Colaj even told CBP of their fear—but CBP sent them back to Mexico without conducting non-refoulement interviews. Ms. Vasquez, Ms. Martinez, and Ms. Colaj were not told and did not know that they could request to have these interviews, and that, if DHS found it more likely than not that they would face persecution or torture in Mexico, they could not be sent there. Vasquez Aff. ¶¶ 5-11; Martinez Aff. ¶¶ 11-12; Colaj Aff. ¶¶ 8-10. Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. had never been to Matamoros when the United States first sent them there. Vasquez Aff. ¶ 14; Martinez Aff. ¶ 15; Colaj Aff. ¶ 14.

With nowhere to stay, Ms. Colaj and J.C. slept outside by the side of the road for approximately a month before someone gave them a tent. J.C. was just four years old. For more than eight months, Ms. Colaj and J.C. have slept outside near the foot of the bridge, afraid to go beyond the encampment and onto the streets of Matamoros, and terrified, each night, that someone will come into their tent and harm them. They live without access to basic sanitation and hygiene, and have endured temperatures above 100 degrees and slept outdoors through nights as cold as 37 degrees.[26] J.C. is often sick. Colaj. Aff. ¶¶ 1, 14-21, 36-49.

In October, Ms. Colaj was raped. Two days later, she attended a court hearing in Brownsville, Texas and had a non-refoulement interview. Even though she told a U.S. official what had happened to her, she and J.C. were sent back to Mexico. *Id.* ¶¶ 22-31.

Ms. Martinez, who was sent to Matamoros with a five-year-old granddaughter who has a heart condition, also had nowhere to go. She and her granddaughter slept outside on a piece of cardboard for days, until someone gave them a tent. In November, concerned that her

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[26] AccuWeather, Matamoros, Tamaulipas reports for Aug. & Nov. 2019, accuweather.com/en/mx/matamoros/235982/august-weather/235982?year=2019 and accuweather.com/en/mx/matamoros/235982/november-weather/235982?year=2019.

granddaughter would not endure the conditions at the Matamoros encampment, Ms. Martinez tried to enter the United States again. The attempt led to a months-long ordeal in Tamaulipas. After she and her granddaughter crossed the river again in January 2020, she was sent back to Matamoros, this time alone. In February, she attended court and had a non-refoulement interview. Although she told U.S. officials about her experiences, she was returned to Matamoros, where she is homeless and terrified. Martinez Aff. ¶¶ 4, 14-41.

Ms. Vasquez and A.B. live in hiding in Matamoros. For approximately six months, they rented a room in the home of a friend of her husband's in Sinaloa, a state approximately 800 miles away on the opposite coast of Mexico. There, they regularly heard gun shots and had to stay inside the house most of the time. To go to court, they had to travel a full day and pass through cartel-controlled territory. On one of their trips from Sinaloa to Matamoros for a court hearing, a Mexican official threatened to rip up Ms. Vasquez and A.B.'s paperwork despite their nominal permission to remain in Mexico. In March, Ms. Vasquez's husband found a place for her and A.B. to stay in Matamoros. They are in hiding there, afraid to go outside. Vasquez Aff. ¶¶ 19-32.

After being sent to Matamoros under the MPP, Ms. Vasquez, A.B., and Ms. Martinez, have now been in Mexico for longer than six months; Ms. Colaj, and J.C. have been in Mexico for more than eight months. *See* Ex. 7. On each court date, they must present themselves—often at 4:30 in the morning—at the bridge to Brownsville, Texas, where they attend court by way of a video screen. After their hearings, they are escorted back to Matamoros, Mexico. Ex. 8; Vasquez Aff. ¶ 28; Martinez Aff. ¶¶ 23-24, 38; Colaj Aff. ¶ 28. In the meantime, their lives are in peril, and Mexican authorities will not protect them. *See, e.g.*, Kizuka Aff. ¶¶ 26-27. And they must endure conditions that make it exceedingly difficult for them to survive, let alone prepare to testify in

immigration court. *See, e.g.*, Martin Aff. ¶¶ 42-44, 59-64; Kizuka Aff. ¶¶ 9-27; Vasquez Aff. ¶¶ 26, 34; Martinez Aff. ¶ 36.[27]

Ms. Vasquez and A.B., Ms. Martinez, and Ms. Colaj and J.C. are all scheduled for final removal hearings in May 2020. Vasquez Aff. ¶ 33; Martinez Aff. ¶ 35; Colaj Aff. ¶ 35. But their ordeals are likely far from over. If these hearings are not rescheduled due to the coronavirus pandemic, their applications for protection from removal will be decided by an immigration judge at that time. But due to the government's July 2019 ban on asylum for migrants who did not first apply in a third country,[28] an immigration judge likely will not grant them asylum in the first instance. Instead, these Plaintiffs will likely be considered only for withholding of removal, which has a much higher standard of proof than asylum,[29] and they may need to preserve their potential eligibility for asylum through appeal. But an appeal by either side stands to leave these Plaintiffs waiting in Mexico for many more months. Meanwhile, in Massachusetts, Plaintiffs Andrés Oswaldo Bollat Vasquez, José Manuel Urias Martinez, and Salomé Olmos Lopez struggle to provide for their loved ones who are in Mexico, and live with the agony of knowing that their family members are not safe. Bollat Aff. ¶¶ 6-8; Urias Aff. ¶¶ 6-8; Olmos Aff. ¶¶ 5-8.

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[27] *See generally,* Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* (Oct. 1, 2019), humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf (discussing reports that local Mexican law enforcement authorities operate with the cartels to target migrants in at least some instances).

[28] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829, 33830 (July 16, 2019) [hereinafter July 2019 Asylum Ban]; *see also* Human Rights First, Trump Administration's Third-Country Asylum Ban that Will Return Refugees to Danger (Sept. 2019), humanrightsfirst.org/sites/default/files/Third-Country-Transit-Ban.pdf.

[29] Withholding of removal requires demonstrating persecution is "more likely than not" to occur, a standard significantly higher than asylum. See *Cardoza-Fonseca*, 480 U.S. at 423-24. The immigration judge may also consider them for relief under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force Jun. 6, 1987).

ARGUMENT

Preliminary injunctive relief is warranted because Plaintiffs are "likely to succeed on the merits," they will "suffer irreparable harm in the absence of preliminary relief," the "balance equities tips in [their] favor," and "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. Plaintiffs are likely to succeed on the merits of their claim that requiring Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to remain Mexico is unlawful.

Plaintiffs are likely to succeed on the merits of their claims that subjecting Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to continued exile in Mexico violates the statutory and regulatory authority governing return to contiguous territory, the APA's notice-and-comment provision and proscription of arbitrary and capricious government conduct, equal protection, and the legal protection against sending noncitizens to places where they will be persecuted.

A. Subjecting plaintiffs to the MPP is unlawful because they are not subject to 8 U.S.C. § 1225(b)(2)(C). [Count 1]

DHS contends that its authority to implement the MPP derives from 8 U.S.C. § 1225(b)(2)(C), which permits the "return" of certain "arriving" aliens to a contiguous territory from which they arrived by land. It provides:

> (C) 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.

For two reasons, § 1225(b)(2)(C) does not apply to Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. First, the noncitizens "described in subparagraph (A)"—to whom the contiguous return authority may be applied—exclude migrants like Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. who came to the U.S. illegally or without entry documents and are consequently

subject to the procedures of § 1225(b)(1). Second, notwithstanding the statute's reference to arriving aliens "whether or not at a designated port of entry," the regulation implementing § 1225(b)(2)(C) permits the contiguous return *only* of noncitizens who presented themselves at ports of entry. Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. did not.

1. Section 1225(b)(2)(C) does not apply to individuals who are subject to the procedures of § 1225(b)(1).

Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. are not subject to 8 U.S.C. § 1225(b)(2)(C) because that authority does not apply to migrants who fall under § 1225(b)(1). 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 v. Rodriquez*, 138 S. Ct. 830, 837 (2018). This categorization affects whether an applicant may be subject to the MPP. The contiguous return authority of § 1225(b)(2)(C) applies only to individuals subject to § 1225(b)(2); there is no comparable authority for noncitizens who, like the Plaintiffs above, are subject to § 1225(b)(1).

The only appellate court to examine the question has held that the MPP does not comply with § 1225(b). In *Innovation Law Lab v. Wolf*, the Ninth Circuit considered "whether a § (b)(1) applicant may be 'returned' to a contiguous territory under § 1225(b)(2)(C). That is, may a § (b)(1) applicant be subjected to a procedure specified for a § (b)(2) applicant?" 951 F.3d 1073, 1084 (9th Cir. 2020). The court concluded they may not. "A plain-meaning reading of § 1225(b)—as well as the Government's longstanding and consistent practice up until now—tell us that the answer is 'no.'" *Id.* The court explained:

> There are two categories of "applicants for admission" under § 1225. § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).
>
> Applicants described in § 1225(b)(1) are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof.

> Applicants described in § 1225(b)(2) are in an entirely separate category. In the words of the statute, they are "other aliens." § 1225(b)(2) (heading). Put differently, again in the words of the statute, § (b)(2) applicants are applicants "to whom paragraph [(b)](1)" does not apply. § 1225(b)(2)(B)(ii). That is, § (b)(1) applicants are those who are inadmissible on either of the two grounds specified in that subsection. Section (b)(2) applicants are all other inadmissible applicants.

Id. at 1083. Section 1225(b)(2), including the contiguous return authority, thus applies not to asylum seekers who come to the United States without papers—like the Plaintiffs at issue here, *see* Ex. 7—but to noncitizens who present valid entry documents but are not clearly entitled to admission for reasons such as criminal history, visa violations, likelihood of becoming a public charge, or prior immigration violations. *See Innovation Law Lab*, 951 F.3d at 1086-87 (noting "§ (b)(2) applicants include spies, terrorists, alien smugglers, and drug traffickers"); *see generally* 8 U.S.C. § 1182(a).

As the Ninth Circuit held, the statutory text is clear: applicants "to whom paragraph (1) applies" may not be subject to § 1225(b)(2)(A), and only noncitizens subject to § 1225(b)(2)(A) can be returned to foreign contiguous territory under § 1225(b)(2)(C). *See* § 1225(b)(2)(B)(ii). DHS had no authority to subject Plaintiffs to contiguous return because they are applicants "to whom paragraph (1) applies." *Id.* Although DHS opted not to subject them to the expedited removal procedures of § 1225(b)(1), the question is not whether the expedited removal procedures of paragraph (1) *have been applied* to them, but whether paragraph (1) "applies." Plainly, it does, and consequently, the contiguous return authority of § 1225(b)(2)(C) does not.

2. Section 1225(b)(2)(C) does not apply to noncitizens who entered the United States between ports of entry.

Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. are not subject to § 1225(b)(2)(C) because they were detained after entering the country between ports of entry, and because they are not "arriving" aliens within the meaning of § 1225(b)(2)(C). *See* Ex. 7.

First, although § 1225(b)(2)(C) includes language referencing noncitizens who crossed the border "whether or not" at ports of entry, the executive could and did limit the scope of its authority by promulgating a regulation that bars the application of § 1225(b)(2)(C) to noncitizens who crossed between ports of entry. Section 1225(b)(2)(C) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which instructed the Attorney General to "promulgate regulations to carry out this subtitle by no later than 30 days before" the statute's April 1, 1997 effective date. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 302, 309(b), 110 Stat. 3009 (1996). Section 1225(b)(2)(C) did not require the return of any noncitizen to Canada or Mexico. Instead, § 1225(b)(2)(C) provided the executive with discretion that it was free to limit, including by regulation.

And limit its own discretion is what the executive did. On March 6, 1997, as part of regulations it recognized as "necessary" to implement IIRIRA,[30] the Immigration and Naturalization Service ("INS") enacted a regulation implementing § 1225(b)(2)(C)'s contiguous-return authority by applying it *only* to noncitizens arriving at land border ports of entry. That regulation provides:

> 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).

This "land border port-of-entry" limitation was intentional. In promulgating the 1997 rule, the INS made clear that 8 C.F.R. § 235.3(d) "implements" § 1225(b)(2)(C), and it described the

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[30] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444 (Jan. 3, 1997).

contiguous-return authority as applying to "an applicant for admission arriving at a land border port-of-entry."[31] The INS also explained that it had "extensively considered" the application of other provisions of § 1225(b) to noncitizens arriving between land border ports of entry and noted that "the statute seemed to differentiate more clearly between aliens at ports-of-entry and those encountered elsewhere in the United States."[32] This limitation is logical. It respects the longstanding distinction in immigration law between those who have entered the country and those deemed to be knocking on its door at a port of entry;[33] it accounts for the practical difference between turning back noncitizens at a ports of entry and seizing, detaining, and expelling them into foreign cities; and it recognizes that illegal border crossers without valid asylum claims are already subject to the harsh possibility of expedited removal.

Not surprisingly, after President Trump's January 2017 Executive Order directing a broad application of the contiguous return authority of § 1225(b)(2)(C),[34] DHS recognized that the potentially broad scope of statutory authority had been narrowed by federal regulation. It thus added amending 8 C.F.R. § 235.3(d) to its regulatory agenda. According to DHS, in light of the President's order requiring it to "ensure that aliens described in [8 U.S.C. § 1225(b)(2)(C)] are returned to the territory from which they came pending a formal removal proceeding," the agency would amend § 235.3(d) "so that it is consistent with this requirement."[35] DHS anticipated

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[31] 62 Fed. Reg. at 445.
[32] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10313 (March 6, 1997).
[33] Before 1996, for example, individuals who had entered the country, even illegally, were subject to "deportation" proceedings, whereas those who arrived at a port of entry were subject to "exclusion" proceedings. *See Kawashima v. Holder*, 565 U.S. 478, 481 n.2 (2012).
[34] Executive Order 13767, *supra* n.9.
[35] Office of Information and Regulatory Affairs, Spring 2017 Unified Agenda, DHS/USCBP, RIN 1651-AB13, reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1651-AB13.

publishing a proposed rule by October 2017.[36] DHS continued to list this change to § 235.3(d) on its regulatory agenda in the fall of 2017, the spring of 2018, and in the fall of 2018, each time anticipating that it would publish an interim final rule in the coming months.[37] But in December 2018, DHS announced the MPP, and in January 2019, the administration began implementing the program. In the spring of 2019, with thousands of people having been returned to Mexico and violations of § 235.3(d) in full swing, DHS quietly removed its planned amendment to § 235.3(d) from its regulatory agenda.[38]

Regulations have the force of law. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Having limited itself in 8 C.F.R. § 235.3(d) to applying its contiguous-return authority only to noncitizens at ports of entry, the executive is bound by that limitation.

Second, § 1225(b)(2)(C) did not authorize returning Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to Mexico because it applies only to noncitizens "arriving on land," and the agency has defined the term "arriving" to refer to noncitizens at ports of entry or interdicted at sea. 8 C.F.R. § 1001.1(q). Congress' statutory language suggests that the INS might have defined "arriving aliens" to include certain noncitizens entering between ports of entry, and it *could have* applied § 1225(b)(2)(C) to *them*, but the INS's definition of an "arriving alien" foreclosed that possibility. The agency thus limited its contiguous-return authority to those at ports of entry, just as it did in 8 C.F.R. § 235.3(d).

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[36] *Id.*
[37] *See* Office of Information and Regulatory Affairs, Unified Agenda and Regulatory Plan Search Results for RIN-1651-AB13, reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=1651-AB13.
[38] *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.

B. Implementing the MPP without notice and comment violated the APA. [Count 4]

The government's implementation of the MPP also violated the APA's notice-and-comment requirement. *See* 5 U.S.C. § 553. Notice and comment rulemaking is required when an agency implements a substantive 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." *N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 70 (1st Cir. 2018) (quoting *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992)) (internal quotation marks omitted).

DHS's implementation of the MPP violated notice-and-comment requirements for two reasons. *First*, DHS abandoned and violated its longstanding regulations, *see, e.g.*, 8 C.F.R. § 235.3(d), by applying the MPP to noncitizens who entered between ports of entry. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (notice-and-comment required if agency "adopt[s] a new position inconsistent with any of the Secretary's existing regulations").

Second, the MPP departs from "reasonable fear" regulations and requires an entirely new fear screening process. Although inadequate, the fear screening procedure created by the MPP is mandatory.[39] By requiring immigration officers to apply these fear-screening procedures to noncitizens who express a fear, and prohibiting the return of any noncitizens found to satisfy these heightened standards, DHS has created new "rights," "duties," and "obligations" that are "not outlined" in any existing law. *N.H. Hosp. Ass'n*, 887 F.3d at 70. These mandates are not "merely a clarification or explanation of an existing statute or rule," but rather an entirely new rule that—like other fear screening procedures, *see* 8 C.F.R. §§ 208.30, 208.31—must be implemented

[39] CBP, *MPP Guiding Principles: Guiding Principles for Migrant Protection Protocols* (Jan. 28, 2019), cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf (noncitizen who expresses fear of persecution in Mexico "will be referred to a USCIS asylum officer for screening").

through formal rulemaking.[40] *See Convaleciente*, 965 F.2d at 1178 (quoting *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 664-65 (D.C. Cir. 1978)).

C. The MPP is arbitrary and capricious in violation of the APA. [Count 5]

The MPP is unlawfully arbitrary and capricious. The APA requires the Court to "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). A rule is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider;" "failed to consider an important aspect of the problem;" or "offered an explanation of its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mgrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983); *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (agency must exercise discretion in reasoned manner). The MPP, including the government's decision to expand it to Tamaulipas, resoundingly fails that test.

First, the MPP is fundamentally ill-suited to achieving its stated goals of protecting legitimate asylum seekers while reducing fraudulent claims. *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 vet for or deter fraudulent claims specifically. Instead, the mechanism employed by the MPP is to inflict so much suffering and danger on migrants that they will find it unbearable to pursue asylum, regardless of the merits of their claims. If anything, the MPP is more likely to discourage meritorious asylum claims because the hardships inflicted by the MPP will exact the heaviest toll on asylum seekers who are

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[40] Although the district court in the *Innovation Law Lab* matter held "it was more likely than not that the MPP should have been adopted through notice-and-comment rulemaking," the Ninth Circuit resolved the case in the plaintiffs' favor on other grounds and did not reach this issue. 951 F.3d at 1082.

most genuinely vulnerable and traumatized—a mechanism that obviously contradicts the MPP's stated goal of protecting migrants. The MPP cannot possibly claim to "protect" genuine asylum seekers like Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. because it is nothing more than a choice to lock asylum seekers out and abandon the protections for them in U.S. law.

Second, the MPP hastily departs from the carefully calibrated scheme adopted by Congress *for this very same population*. *See Innovation Law Lab*, 951 F.3d at 1087 (noting § 1225(b)(1) "contains detailed provisions for processing asylum seekers"). Congress already addressed the need to distinguish legitimate asylum seekers and remove fraudulent ones through the expedited removal and credible fear screening process of 8 U.S.C. § 1225(b)(1). DHS has arbitrarily disregarded that thought-out scheme, which it views as "outdated,"[41] in favor of a reckless experiment with the lives of tens of thousands of vulnerable people.

Third, the reasons for DHS's need to depart from this longstanding system for handling asylum seekers at the border do not support its implementation of the MPP, or are disingenuous. A central reason provided for DHS's dissatisfaction with the credible fear process provided for by Congress in 8 U.S.C. § 1225(b)(1) is the slow pace of removal proceedings for those who pass credible fear screenings.[42] But the calendaring of removal proceedings is entirely within the executive's control. 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 State Farm,* 463 U.S. at 49-51 (decision arbitrary and capricious where agency failed to consider viable alternative); see *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 23 (1st Cir. 1999).

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[41] Jan. 2019 Press Release.
[42] Dec. 2018 Press Release, *supra* n.5.

Fourth, the MPP is an unreasoned and wholesale departure from the reasonable fear procedures that the government previously determined to be the appropriate way to ensure compliance with international obligations and permit a "fair and expeditious resolution" of claims in the context of "streamlined removal processes."[43] *See State Farm*, 463 U.S. at 42 ("an agency changing its course . . . is obligated to supply a reasoned analysis"). Unlike reasonable fear interviews, the MPP's non-refoulement procedures apply the "more likely than not" standard that U.S. law reserves for a *final* adjudication of withholding of removal claims by an immigration judge after a full hearing. *See* 8 C.F.R. § 208.16. The MPP's non-refoulement procedures are also entirely devoid of the procedural protections of the reasonable fear process, including the opportunity to have counsel present and to present evidence, the creation of a written summary of facts reviewed by the noncitizen and of a written decision, and the right to review by an immigration judge.[44] 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.[45] DHS has failed to explain how such drastically reduced procedures could protect against refoulement.

Fifth, beyond dispensing with screening procedures the agency previously thought necessary whenever *any* noncitizen claimed a fear of removal to *any* country, the MPP dispenses with these procedures in a program entirely targeted at non-Mexican migrants, substantially *all* of whom have a reasonable fear of persecution in Mexico. *See* Kizuka Aff. ¶¶ 9-12; Martin Aff. ¶¶ 9-10; 30-34. In October 2019, amid news reports of killings and violence against migrants affected

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[43] Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8493 (Feb. 19, 1999) (enacting 8 C.F.R. § 208.31).
[44] USCIS Policy Memorandum, *supra* n.7.
[45] *Id.*

by its policies, DHS doubled down on its decision to limit the number of non-refoulement interviews by declining to ask migrants whether they had a fear of return.[46]

Sixth, in July 2019, DHS recklessly expanded the MPP and its non-refoulement procedures into Tamaulipas, an area the U.S. State Department advises people to avoid and assigns the same "Level Four" danger warning as Iran, North Korea, Afghanistan, and Syria. DHS persists in returning migrants to Matamoros and other parts of Tamaulipas despite reports of rampant violence against migrants and frequent mentions of kidnappings in its own immigration court proceedings. *See, e.g.*, Kizuka Aff. ¶¶ 27, 34. DHS also fails to take basic precautions that might marginally increase migrants' safety. It forces those appearing in court to be at the Gateway to the Americas Bridge in Matamoros at 4:30 a.m., a requirement U.S. officials would be prohibited from complying with because of its danger. *See* Ex. 8. And U.S. officers expel asylum seekers in a manner that marks them as migrants cast out by the United States—including by removing the laces from their shoes. Kizuka Aff. ¶¶ 12-13; Martin Aff. ¶ 31; Vasquez Aff. ¶ 4; Martinez Aff. ¶ 8; Colaj Aff. ¶ 14.

Seventh, DHS abandoned the regulation governing return to Mexico, 8 C.F.R. § 235.3(d), which limits contiguous return to noncitizens at the port of entry. DHS also abandoned, without explanation, its own prior guidance with respect to application of the contiguous return provision, which altogether barred the provision's application unless "the alien's claim of fear of persecution or torture does not relate to Canada or Mexico."[47]

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[46] Press Release, Assessment of Migrant Protection Protocols (MPP), DHS (Oct. 28, 2019), dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf [hereinafter DHS Assessment of MPP].
[47] *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).

D. The MPP is motivated by animus, in violation of equal protection. [Count 6]

The MPP is motivated by animus and discriminatory intent against Central Americans and other people of color, in violation of the Equal Protection Clause. President Trump has repeatedly communicated his animus towards Central American asylum seekers seeking protection in the United States. He has suggested harming them by electrifying the border wall, fortifying it with an alligator moat, installing spikes on top to pierce human flesh, and having soldiers shoot migrants' legs to slow them down and keep them out of the United States.[48] President Trump has also asked why the United States would accept more people from Haiti, El Salvador, and other nations predominately inhabited by people of color, rather than people from countries like Norway.[49]

The MPP is a product of that animus. It implements President Trump's Executive Order 13767 and his specific command that that DHS keep out Central American asylum seekers,[50] and it does so by intentionally harming asylum seekers. It has also been accompanied by a slew of measures designed to discredit and dismantle the asylum system[51] and restrict every kind of legal immigration.[52] Because the MPP is the product of invidious animus, the Equal Protection Clause prohibits it from continuing. *See*, *e.g.*, *United States v. Windsor*, 570 U.S. 744, 769-70 (2013);

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[48] 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.

[49] *See* Ryan T. Beckwith, *President Trump Called El Salvador, Haiti 'Shithole Countries': Report*, TIME (Jan. 11, 2018), time.com/5100058/Donald-trump-shithole-countries/.

[50] Davis & Shear, *Border Wars* 334-37.

[51] *See, e.g.*, *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (enjoining ban on asylum for border crossers); July 2019 Asylum Ban, *supra* n.28; *see also* Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 11:02 AM), twitter.com/realdonaldtrump/status/1010900865602019329.

[52] *See* Peniel Ibe, *Trump's Attacks on the Legal Immigration System Explained*, American Friends Service Committee (Nov. 27, 2019), afsc.org/blogs/news-and-commentary/trumps-attacks-legal-immigration-system-explained.

Lawrence v. Texas, 539 U.S. 558, 576 (2003); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

E. Keeping Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. in the MPP is inconsistent with non-refoulement obligations because they have faced, and will likely to continue to face, persecution in Mexico. [Count 3, Count 7 ¶ 155]

Forcing Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to remain in Mexico violates the duty of non-refoulement, under which the United States "shall not expel or return ('refouler')" refugees to a country where they will face persecution.[53] *See Innovation Law Lab*, 951 F.3d at 1088 (holding that the MPP's fear screening procedures violate the duty of non-refoulement). That duty is codified at 8 U.S.C. § 1231(b)(3) and is a *jus cogens* norm of customary international law.[54]

As the Ninth Circuit found in *Innovation Law Lab*, the MPP's procedures are woefully inadequate to protect against refoulement. *See Innovation Law Lab*, 951 F.3d at 1087-93. Under the MPP, migrants are interviewed about their fear of returning to Mexico only if they volunteer that they are afraid of return; they must meet the same more-likely-than-not standard required in full removal proceedings, and they are not entitled to review by an immigration judge. *Id.* at 1088-89. Not surprisingly, few migrants are processed out of the MPP as a consequence of non-refoulement assessments. *See* Kizuka Aff. ¶¶ 37-43.[55] These inadequacies are an intended consequence, not an accidental byproduct, of the MPP, which is manifestly *designed* to give migrants no meaningful path to protection in the United States. Indeed, the MPP is even harsher in its implementation than on paper, as CBP officers routinely fail to refer asylum seekers for fear screenings even when they affirmatively express a fear of return. Kizuka Aff. ¶ 38; *see* Vasquez Aff. ¶ 5; Colaj Aff. ¶ 8.

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[53] 1951 Convention, *supra* n.1, Art. 33.
[54] *See supra* n.2.
[55] *Cf.* DHS Assessment of MPP, supra n.47 (reporting positive fear finding in 13% of MPP non-refoulement screenings).

As a consequence of these failures, Plaintiffs were all sent to Tamaulipas without any non-refoulement inquiry despite their fears and the systemic targeting of Central American migrants there and elsewhere in Mexico. Vasquez Aff. ¶ 11; Martinez Aff. ¶ 12; Colaj Aff. ¶ 10. Like other migrants, Plaintiffs were hunted from the moment they stepped foot in Matamoros. Ms. Colaj and Ms. Martinez were harmed and threatened by people who understood that Central American migrants in Mexico can be harmed without consequences, and U.S. officials sent Ms. Colaj and Ms. Martinez back to Mexico even *after* learning of these experiences. Colaj Aff. ¶¶ 22-26; Martinez Aff. ¶¶ 37, 38. Ms. Vasquez and A.B. escaped physical harm only by immediately leaving Tamaulipas and living substantially in hiding. *See* Vasquez Aff. ¶¶ 19-21.

Plaintiffs Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. are entitled to be processed out of the MPP because they have demonstrated that their "life or freedom would be threatened" on account of their national origin, ethnicity, gender, and status as migrants. *See Dahal v. Barr*, 931 F.3d 15, 22 (1st Cir. 2019). There is a "pattern or practice of persecution" of Central American and other asylum seekers in Mexico, especially women and children. 8 C.F.R. § 208.16(b)(2) (noncitizens may not be returned to country having "pattern and practice" of persecution of a protected class to which they belong); *see* Kizuka Aff. ¶¶ 9-12; Martin Aff. ¶¶ 9-10; 30-34. Even if that were not the case, Plaintiffs have suffered past persecution—including horrific acts of violence—and are entitled to a presumption that their life or freedom would be threatened in Mexico on account of a protected ground. *See* 8 C.F.R. § 208.16(b)(1)(i). They have been repeatedly warned to avoid being out on the streets or allowing others to hear their accent, and they avoided further violence only by following that advice to the extent possible. Vasquez Aff. ¶¶ 14, 22, 32; Martinez Aff. ¶¶ 16, 39; Colaj Aff. ¶ 15, 39-40. Because Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. have been, and will continue to be, persecuted in Mexico on account

of a protected ground, Plaintiffs are likely to prevail on their claim that forcing them to remain in Mexico violates U.S. and international law.

Alternatively, Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. must be permitted to be in the United States until they can be provided with an adequate non-refoulement procedure. At a minimum, the U.S.'s statutory protection of the duty of non-refoulement, and the Due Process Clause, give Plaintiffs the right to a fair process to determine whether they may be returned to Mexico. *See* 8 U.S.C. § 1231(b)(3); *Arevalo v. Ashcroft*, 344 F.3d 1, 11, 14 (1st Cir. 2003); *Jimenez v. Nielsen*, 334 F. Supp. 3d 370, 386 (D. Mass. 2018). Instead of providing that process, U.S. authorities sent Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to Mexico without *any* evaluation of their fear of persecution there, and later provided Ms. Martinez, Ms. Colaj and J.C. with interviews under standards and procedures designed to keep them in Mexico. Plaintiffs are entitled to adequate non-refoulement procedures, which must employ a standard no higher than "reasonable fear" and provide for review by an immigration judge. *See* 8 C.F.R. §§ 208.16(a), 208.31; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

II. Plaintiffs prevail on the remaining preliminary injunction factors.

Plaintiffs have not only overcome "the main bearing wall of the four-factor framework" by showing a likelihood of success on the merits, *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996), but they also meet the burden of demonstrating the remaining preliminary injunction factors: "(2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, *i.e.*, the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004) (quoting *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004)) (additional citations and internal quotation marks omitted).

Plaintiffs have demonstrated that they will suffer irreparable harm because their lives and well-being are at risk every day that Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. remain in Mexico. While a preliminary injunction may well save Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. from significant harm or even death, its impact on the government will be minimal. Permitting these Plaintiffs to remain in the U.S. during their immigration proceedings is also in the public interest. It will reunite multiple families desperate for relief and stop the application of an unlawful government policy in this one case. Preliminary injunctive relief is therefore warranted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants be enjoined from continuing to apply the MPP to Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C., and consequently, be required to parole them into the United States. Alternatively, Plaintiffs request an adequate fear screening following the reasonable fear standards and procedures of 8 C.F.R. § 208.31, including review by an immigration judge.

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Respectfully submitted,

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