UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANDRES OSWALDO BOLLAT VASQUEZ, et al.	)	
Plaintiffs,	)	
v.	)	C.A. No. 20-10566-IT
	)	(Leave to File in Excess of Page Limit
CHAD F. WOLF, Acting Secretary of Homeland Security, et al.	)	Granted April 24, 2020)
Defendants.	)	

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Luisa Marisol Vasquez de Bollat, A.B., Evila Floridalma Colaj Olmos, and J.C., nationals of Guatemala, and Rosa Maria Martinez de Urias, a national of El Salvador ("Plaintiffs"), unlawfully entered the United States through Mexico and were returned to Mexico pending removal proceedings pursuant to the Migrant Protection Protocols ("MPP"). Plaintiffs challenge their return to Mexico as contrary to the Immigration and Nationality Act ("INA") and implementing regulations, the Fifth Amendment Due Process clause and its Equal Protection component, the Administrative Procedure Act ("APA"), and the principle of non-refoulement. These claims are not likely to succeed on the merits. MPP is specifically authorized by the INA, and, as a general statement of policy, is exempt from notice-and-comment rulemaking. Further, Plaintiffs' non-refoulement claims and their claim that MPP is arbitrary and capricious in violation of the APA are insulated from judicial review. Plaintiffs' claims also fail on the merits. Finally, Plaintiffs have failed to show that the balance of the equities favors the injunction. The motion should be denied.

BACKGROUND

A. Statutory Authority

Congress has enacted a comprehensive collection of procedures governing the admission of aliens into the United States, enshrined in the INA, 8 U.S.C. § 1101 *et seq*. At issue in this case are the procedures that apply to aliens who are "applicants for admission," *i.e.*, those aliens present in the United States who have not been admitted or paroled and those who arrive in the United States whether or not at a port of entry. 8 U.S.C. § 1225(a)(1). If an immigration officer "determines" that such an alien is inadmissible, 8 U.S.C. §§ 1225(b)(1)(A)(i), (b)(2)(A), then the officer exercises discretion and may place the alien into, for example, either (1) expedited removal

under § 1225(b)(1), or (2) pursuant to § 1225(b)(2), removal proceedings before an immigration judge under § 1229a. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

Expedited removal, described in § 1225(b)(1), provides for the swift removal of aliens "without further hearing or review unless the alien indicates either an intention to apply for asylum under [§ 1158] or a fear of persecution," 8 U.S.C. § 1225(b)(1)(A)(i), if they are "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation," *Jennings*, 138 S. Ct. at 837 (citing 8 U.S.C. § 1225(b)(1)(A)(i) (in turn citing *id.* § 1182(a)(6)(C), (a)(7)). Removal proceedings under 8 U.S.C. § 1229a, on the other hand, apply to a "broader" category of aliens outlined in § 1225(b)(2)(A), which "serves as a catchall provision that applies to all applicants for admission not" placed in expedited removal proceedings. *Jennings*, 138 S. Ct. at 837. Any alien who "is not clearly and beyond a doubt entitled to be admitted . . . shall be detained for" a removal proceeding under § 1229a. 8 U.S.C. § 1225(b)(2)(A). Removal proceedings under § 1229a entail greater procedures, including a hearing before an immigration judge and a right to administrative appellate review by the Board of Immigration Appeals. *See* 8 U.S.C. § 1229a; 8 C.F.R. pts. 1003, 1240. It is well-settled that "DHS has discretion to put aliens in [§ 1229a] removal proceedings even though they may also be subject to expedited removal under [§ 1225(b)(1)(A)(i)]." *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011); *see also Matter of J-A-B- & I-J-A-*, 27 I. &. N. Dec. 168, 170 (BIA 2017).

Applicants for admission who are placed in removal proceedings are to be detained for the duration of their removal proceedings unless temporarily paroled. *Jennings*, 138 S. Ct. at 837, 842; 8 U.S.C. §§ 1225(b)(2)(A), 1182(d)(5). In addition, Congress also has provided that "[i]n the case of an alien described in subparagraph (A) [of § 1225(b)(2)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the

[Secretary of Homeland Security][1] may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C).

B. Factual Background

1. *Migrant Protection Protocols*

In December 2018, the Secretary of Homeland Security announced the implementation of MPP. Invoking the contiguous return authority in § 1225(b)(2)(C), MPP provides that certain aliens arriving in the United States by land from Mexico who are not admissible and who are placed in removal proceedings may be returned to Mexico pending their removal proceedings under § 1229a. *See* Ex. 1, DHS, *Policy Guidance for Implementation of the Migrant Protection Protocols* 1–2 (Jan. 25, 2019). Thus, under MPP, applicants for admission "are processed for standard removal proceedings, instead of expedited removal," and "wait in Mexico until an immigration judge" in the United States adjudicates their immigration cases. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019) ("*Innovation I*"). Immigration officers "exercise discretion" in deciding whom to place in MPP, but MPP is "categorically inapplicable to unaccompanied minors, Mexican nationals, applicants who are processed for expedited removal, and any applicant who is more likely than not to face persecution or torture in Mexico." *Innovation I*, 924 F.3d at 506; *see also* Ex. 2, CBP, *MPP Guiding Principles* at 1 (Jan. 28, 2019).

The discretionary authority underlying MPP is exercised to ensure that the United States has satisfied its non-refoulement obligations. *See* Ex. 3, USCIS, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols* at 2 (Jan. 28, 2019). Accordingly, aliens who express a fear of persecution or torture in Mexico,

[1] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. *See* 6 U.S.C. §§ 251, 552(d); *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

or a fear of return to Mexico, are referred for an interview with an asylum officer. *See id.* at 3. That interview, which assesses whether an alien would more likely than not be persecuted based on a protected ground or tortured if returned to Mexico, is conducted "in a non-adversarial manner, separate and apart from the general public," and the results of the interview "shall be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." *Id.* at 3–4. In conducting the interview, asylum officers are instructed to consider relevant factors, including whether "any alleged harm ... could occur in the region in which the alien would reside in Mexico, pending their removal proceedings, or whether residing in another region of Mexico to which the alien would have reasonable access could mitigate against the alleged harm." *Id.* at 4.

Thus far, DHS has found that MPP is accomplishing its stated goals, as "DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." Ex. 4, *Assessment of the Migrant Protection Protocols (MPP)* (Oct. 28, 2019) at 2. In addition, "MPP returnees with meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States." *Id.* at 3.

2. *Ms. Vasquez, A.B., Ms. Colaj, J.C., and Ms. Martinez*

Ms. Vasquez and her five year old son, A.B., are citizens of Guatemala who entered the United States through Mexico unlawfully on September 18, 2019 near Hidalgo, Texas. Dkt. 29-7. On September 20, 2019, they were given Notices to Appear, placed in removal proceedings under 8 U.S.C. § 1229a, and processed under MPP. *Id.*; Dkt. 1 ¶ 69; Dkt. 29-8. Several days later, Ms. Vasquez and A.B. were returned to Matamoros, Mexico. Dkt. 29-2 ¶ 12. Ms. Vasquez alleges that she told an American official that she and A.B. would "not be safe in Mexico or Guatemala." *Id.*

¶ 5. Ms. Vasquez and A.B. were represented by counsel and attended immigration hearings in October 2019 and February 2020. *Id.* ¶¶ 26, 28-29.

Ms. Colaj and her five year old daughter, J.C., are citizens of Guatemala who entered the United States through Mexico unlawfully on July 27, 2019 near Hidalgo, Texas. Dkt. 29-7. On July 28, 2019, they were given Notices to Appear, placed in removal proceedings under 8 U.S.C. § 1229a, and processed under MPP. *Id.*; Dkt. 1 ¶ 113. Ms. Colaj and J.C. were returned to Matamoros, Mexico and have remained in an encampment there since July 2019. Dkt. 29- 6 ¶¶ 13-14. In October 2019, Ms. Colaj was raped by two men who had previously asked her for money. *Id.* ¶¶ 22-24. After the assault, Ms. Colaj attended her first immigration hearing. *Id.* ¶¶ 27-28. Through counsel, she requested and was provided with an interview with an asylum officer to determine whether it was more likely than not that she or J.C. would be persecuted on account of a protected ground or tortured in Mexico. *Id.* ¶ 29. The asylum officer determined that Ms. Colaj did not establish she was more likely than not to face persecution based on a protected ground or torture in Mexico. Ex. 5, MPP Assessment Notice at 1. In November 2019, Ms. Colaj requested and was provided with a second non-refoulement interview, which her counsel attended. Dkt. 29-6 ¶ 33. The asylum officer again determined that Ms. Colaj did not establish she was more likely than not to face persecution on account of a protected ground or torture in Mexico. Ex. 5 at 2.

Ms. Martinez, a citizen of El Salvador, entered the United States through Mexico unlawfully on September 24, 2019 near Hidalgo, Texas. Dkt. 29-7. On September 25, 2019, she was processed under MPP and given a Notice to Appear, placing her in removal proceedings under 8 U.S.C. § 1229a. *Id.*; Dkt. 29-8. Ms. Martinez was returned to Matamoros, Mexico and remained in an encampment there until November 2019. Dkt. 29-4 ¶¶ 13-14, 25. After her first immigration hearing, where she was represented by counsel, Ms. Martinez attempted to enter the United States

without authorization a second time, which she did in January 2020. *Id.* ¶¶ 23, 25-29. She was returned to Matamoros, Mexico in January 2020. *Id.* ¶ 31. Ms. Martinez attended a second hearing in February 2020, where she was again represented by counsel. *Id.* ¶ 35. Ms. Martinez, through counsel, requested and was provided with an interview with an asylum officer to determine whether it was more likely than not that she would be persecuted on account of a protected ground or tortured in Mexico. *Id.* ¶ 37. The officer determined that she did not establish it was more likely than not that she would be persecuted or tortured in Mexico. Ex. 6, MPP Assessment Notice.

STANDARDS

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A court may issue a preliminary injunction only when the movant demonstrates that: (1) plaintiff is likely to succeed on the merits; [2] (2) it is likely plaintiff will be irreparably injured if a preliminary injunction is not granted; (3) the balance of equities tips in its favor; and (4) an injunction will further the public interest. *Id.* at 20.

ARGUMENT

I. Plaintiffs are unlikely to succeed on the merits

For the reasons explained below, none of Plaintiffs' claims are likely to succeed on the merits, and Plaintiffs' motion for a preliminary injunction should be denied.

A. MPP is authorized by the INA

1. MPP applies to aliens who may also be subject to expedited removal

Section 1225(b)(2)(C) authorizes DHS to return "an alien described in subparagraph (A)

[2] "[T]he likelihood of success on the merits, 'is the main bearing wall of the four-factor framework.'" *Cognitive Edge Pte Ltd. v. Code Genesys, LLC*, No. 1:19-cv-12123, 2019 WL 5803420, at *1 (D. Mass. Nov. 7, 2019) (citing *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996)).

who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States." 8 U.S.C. § 1225(b)(2)(C). "[S]ubparagraph (A)," in turn, applies to any alien who "is not clearly and beyond a doubt entitled to be admitted" and is "detained for proceedings under section 1229a." *Id.* § 1225(b)(2)(A). The contiguous-return authority in § 1225(b)(2)(C) thus straightforwardly applies to all unadmitted aliens who arrive in the United States on land from a contiguous territory and are placed in § 1229a removal proceedings in accordance with § 1225(b)(2)(A). It is well-settled that "DHS has discretion to place aliens" in § 1229a removal proceedings under § 1225(b)(2) "even though they may also be" eligible for placement in expedited removal proceedings under § 1225(b)(1). *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. at 523. It follows that DHS's exercise of discretion governs whether applicants for admission are placed in expedited removal proceedings under § 1225(b)(1) or § 1229a removal proceedings under § 1225(b)(2).

It is uncontroverted that Plaintiffs were placed in § 1229a removal proceedings under § 1225(b)(2), not expedited removal proceedings under § 1225(b)(1). [3] Dkt. 29-2 ¶ 28, 29-4 ¶ 23, 29-6 ¶ 27. As applicants for admission who were "not clearly and beyond a doubt entitled to be admitted," Plaintiffs were accordingly placed in a "removal proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A). The plain text of § 1225(b)(2)(C) makes clear that it may be applied to all unadmitted aliens who, like Plaintiffs, are "described in subparagraph (A)," *i.e.*, unadmitted aliens placed in § 1229a removal proceedings. *Id.* § 1225(b)(2)(C). Because Plaintiffs "arrive[d] on land ... from a foreign territory contiguous to the United States," the statutory contiguous-return authority applies to Plaintiffs by its express terms. *Id.*

[3] In a footnote, Plaintiffs contend a number of the Notices to Appear were "facially invalid" and that one Plaintiff was issued a notice that she was detained under § 1226(a) but they do not explain the legal significance with respect to this motion. Dkt. 28 at 16 n. 24-25.

Plaintiffs contend that DHS may not exercise its contiguous return authority because—despite the fact that Plaintiffs are in § 1229a removal proceedings—they *could* have been subjected to expedited removal under § 1225(b)(1), and thus, "[s]ubparagraph (A)" of § 1225(b)(2) does not "appl[y]" to them, preventing them from being returned to Mexico under § 1225(b)(2)(C). 8 U.S.C. § 1225(b)(2)(B)(ii). The flaw in this argument is that the question of whether § 1225(b)(1) or § 1225(b)(2) "applies" to an alien is determined by whether DHS exercises its discretion to place an alien in one procedure or the other. The aliens amenable to each type of proceeding overlap—indeed, § 1225(b)(2) can be applied to all aliens to whom § 1225(b)(1) can be applied. Aliens eligible for expedited removal under § 1225(b)(1) can still be processed for § 1229a removal proceedings under § 1225(b)(2). That is what happened here, and because a discretionary decision was made to place Plaintiffs in § 1229a removal proceedings under § 1225(b)(2), it follows, *a fortiori*, that § 1225(b)(1) does not "appl[y]" to them. 8 U.S.C. § 1225(b)(2)(B)(ii). Section 1225(b)(2)(B)(ii) does not carve out from § 1225(b)(2)(C) aliens who could have been placed in expedited removal. Section 1225(b)(2)(B)(ii) instead serves a clarifying function: Section 1225(b)(1) mandates that aliens placed in expedited removal proceedings shall be removed "without further hearing or review," while § 1225(b)(2)(A) provides that any alien who is "not clearly and beyond a doubt entitled to be admitted" (a category that includes all aliens eligible for expedited removal) is entitled to be placed in full removal proceedings. 8 U.S.C. § 1225(b)(2)(A); *see Cruz v. DHS*, C.A. No. 19-cv-2727, 2019 WL 8139805, at *5 (D.D.C. Nov. 21, 2019) ("Instead, the Department of Homeland Security exercised its discretion to place Cruz in full removal proceedings. I share the Ninth Circuit's doubt that Subsection (b)(1) applies to the plaintiff merely because Subsection (b)(1) could have applied to him.")). In the absence of § 1225(b)(2)(B)(ii), then, an alien placed in expedited removal proceedings and ordered summarily

removed would simultaneously be eligible for a removal proceeding under § 1229a, complete with a hearing. To eliminate that incongruent result, Congress included § 1225(b)(2)(B)(ii), which makes clear that an alien placed in expedited removal is not entitled to a § 1229a removal proceeding and its attendant procedural safeguards.

Plaintiffs ask this Court to follow the Ninth Circuit's recent split decision in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020) ("*Innovation II*"), *pet. for cert. filed*, No. 19-1212 (Apr. 10, 2020), which restored a nationwide injunction of MPP imposed by a district court in the Northern District of California. *See* Dkt. 28 at 21-22. That decision provides no support for Plaintiffs' position, as the Ninth Circuit made the same fundamental error that Plaintiffs ask this Court to make. The Ninth Circuit concluded that the contiguous-return authority in section 1225(b)(2)(C) "does not apply to § (b)(1) applicants." *Innovation II*, 951 F.3d at 1085. That conclusion, however, is question-begging, because it does not resolve the crux of the claim, which is whether a "(b)(1) applicant," *id.*, is an individual *actually placed* in (b)(1) proceedings, or an individual *eligible to be placed* in (b)(1) proceedings, but who is placed in proceedings pursuant to § 1225(b)(2) instead. As the government has demonstrated, the statutory text compels the latter conclusion. Indeed, on another occasion, the Ninth Circuit has explicitly recognized, consistent with BIA precedent, *see Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. at 523, that "[t]he government has discretion to place noncitizens in standard removal proceedings even if the expedited removal statute could be applied to them," *Flores v. Barr*, 934 F.3d 910, 916 (9th Cir. 2019), a conclusion that refutes the notion that aliens like Plaintiffs are (b)(1) applicants simply because subsection 1225(b)(1) "could be applied to them." *Id.*[4] The Ninth Circuit attempted to

[4] Indeed, in *Innovation II*, the Ninth Circuit acknowledged that a "§ b(1) applicant may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government." *Innovation II*, 951 F.3d at 1084.

justify its strained interpretation of the statute by contending that Congress would not have wanted to return "bona fide asylum seekers under § (b)(1)." *Innovation II*, 951 F.3d at 1087. That argument ignores the fact that there is no asylum-seeker exception to § 1225(b)(2)(C) and that, under the Ninth Circuit's logic, individuals who attempt to defraud the immigration system have a stronger entitlement to remain in the United States for their removal proceedings than individuals who do not. That cannot be right.

Moreover, even though the Ninth Circuit held that MPP "so clearly violates" the INA in denying the Government's motion to stay its decision, *Innovation Law Lab v. Wolf*, 951 F.3d 986, 989 (9th Cir. 2020), the Supreme Court later granted the Government's motion to stay the Ninth Circuit's decision, with only one Justice noting that she would have denied the stay request. *See Wolf v. Innovation Law Lab*, No. 19A960 (Mar. 11, 2020). The government accordingly established a "fair prospect that a majority of the [Supreme] Court will vote to reverse" the Ninth Circuit's decision. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Additionally, the Ninth Circuit disregarded its own persuasive, prior published decision holding, in response to a motion to stay the injunction imposed by the district court, that MPP is statutorily authorized by the INA because it can be applied to all aliens "processed in accordance with § 1225(b)(2)(A)" even if "subsection (b)(1) *could have been* applied" to those aliens—the exact argument Plaintiffs make here. *Innovation I*, 924 F.3d at 509 (emphasis in original). That motions panel decision was correct.

Because Plaintiffs were placed in § 1229a removal proceedings, not expedited removal proceedings under § 1225(b)(1), DHS properly exercised its statutory authority to return them to Mexico under MPP.

2. MPP is not limited to aliens who entered the United States at ports-of-entry

Plaintiffs' assertion that § 1225(b)(2)(C) is limited to aliens who arrive at "ports of entry," Dkt. 28 at 22, is similarly unavailing and is belied by the unambiguous statutory text. The text of § 1225(b)(2)(C), which is the source of the contiguous return authority, applies to aliens "who … arriv[e] on land (*whether or not at a designated port of arrival*)." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). The plain language of the statute could not be clearer and encompasses both those who arrive at ports-of-entry, and those who enter between ports-of-entry, like Plaintiffs.

Plaintiffs concede that the statute "includes language referencing noncitizens who crossed the border 'whether or not' at ports-of-entry." Dkt. 28 at 23. Plaintiffs nevertheless insist that 8 C.F.R. § 235.3(d) narrowed the statutory authority in 8 U.S.C. § 1225(b)(2)(C). *Id.* at 16-17. Plaintiffs are wrong. The regulation only addresses one part of the statutory authority in § 1225(b)(2)(C) in discussing aliens who enter at ports-of-entry but is entirely silent regarding the statutory authority in § 1225(b)(2)(C) that applies to aliens who enter between ports-of-entry. That regulatory silence is not a "limit[ation]," as Plaintiffs contend, Dkt. 28 at 23, because it does not in any way disavow the full scope of the statutory text of § 1225(b)(2)(C). Moreover, the regulation is phrased in permissive instead of mandatory terms: "In its discretion, the Service *may* require any alien who appears inadmissible and who arrives at a land border port-of-entry ... to remain in that country while awaiting a removal hearing." 8 C.F.R. § 235.3(d) (emphasis added). This discretionary language buttresses the conclusion that the regulation is silent as to aliens who do not arrive at ports-of-entry. In view of that regulatory silence, the plain text of the statute, which clearly addresses this issue, controls. *See Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004) ("We first ask whether Congress has directly spoken to the precise question at issue."); *Santana v. Holder*, 731 F.3d 50, 55 (1st Cir. 2013) ("If the statute is clear in its meaning, we must

give effect to the unambiguously expressed intent of Congress.").

The regulation is thus a non-binding interpretive rule. *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 8 (1st Cir. 1997) ("[I]nterpretive regulations are not conclusive."); *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992) ("An interpretive rule creates no law and has no effect beyond the statute."); *Mass. Public Interest Research Grp., Inc. v. U.S. Nuclear Regulatory Comm'n*, 852 F.2d 9, 16 (1st Cir. 1988) (regulation providing "that the Director *may* institute a proceeding . . . as appropriate" was "entirely permissive") (emphasis in original); *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007) (noting that an "interpretive regulation" is a "kind of regulation that may be used, not to fill a statutory 'gap,' but simply to describe an agency's view of what a statute means"). Section 235.3(d)'s pronouncement that DHS, in its discretion, "may require" certain aliens who "arrive[] at a land border port-of-entry" to await § 1229a proceedings in Canada or Mexico does not bear the hallmarks of a legislative regulation: it does not "purport[] to impose legally binding obligations or prohibitions on regulated parties," nor would it "be the basis for an enforcement action for violations of those obligations or requirements." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014); *see also Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). It does not require any alien to act or refrain from acting in any manner, nor is there any way an alien could violate it. It also does not subject any new category of aliens, beyond those described in § 1225(b)(2)(C), to the possibility of return to Canada or Mexico. If the language of 8 C.F.R. § 235.3(d) governs anyone, it governs DHS—but DHS is not a regulated party, and the mere fact that a regulation "set[s] forth the Secretary's official position" on how DHS should exercise its discretion in one particular set of circumstances—aliens who arrive at ports of entry—does not make it "conclusive." *Reich*, 126 F.3d at 8.

Plaintiffs rely heavily on regulatory history and other extra-textual sources to urge a contrary conclusion. *See* Dkt. 28 at 23-25. Such reliance is misplaced: "[a]lthough history can illuminate ambiguous language in some circumstances, relying so heavily on extra-statutory sources to read silence or ambiguity into seemingly clear text runs counter to well-settled modes of interpretation." *Santana*, 731 F.3d at 58. In any event, the regulatory history confirms that the regulation is best read not as a "limitation," Dkt. 28 at 23, but simply as identifying the most likely situation where the agency would exercise its statutorily conferred return-to-territory powers with respect to aliens arriving at ports-of-entry, without excluding the possibility of other applications. The preamble explained: "The proposed regulation implements a new provision added to [§ 1225(b)(2)] to state that an applicant for admission arriving at a land border port-of-entry and subject to a removal hearing under [§ 1229a] may be required to await the hearing in Canada or Mexico. This simply *adds to statute* and regulation a long-standing practice of the [former INS]." 62 Fed. Reg. 444-01, 445 (proposed Jan. 3, 1997) (emphasis added). Thus, the regulation was not intended to narrow the agency's statutory authority under § 1225(b)(2).

Similarly, the fact that DHS considered amending 8 C.F.R. § 235.3(d), but ultimately determined it was not necessary to do so, Dkt. 28 at 24-25, proves nothing, as it does not support an inference that DHS viewed the regulation as narrowing the scope of the statute. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Plaintiffs do not explain how the fact that DHS removed the amendment from its regulatory agenda, *id.* at 25, has any bearing on how this Court should interpret 8 C.F.R. § 235.3(d).

Finally, if Plaintiffs were correct that the regulation conclusively limited DHS's discretion to use the return authority, it would conflict with the statute. At that point, the statute would control. *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982) ("This Court has firmly rejected

the suggestion that a regulation is to be sustained simply because it is not technically inconsistent with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design."); *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."); *Santana*, 731 F.3d at 61 ("Given our conclusion that the plain meaning of the statute controls, we need not address the reasonableness of the regulation."). The far better reading, however, is the one that the Government advocates for, which interprets the regulation according to its plain text as not conflicting with the statute.

The Court should also reject Plaintiffs' reliance on 8 C.F.R. § 1001.1(q) to attempt to cabin DHS's statutory authority under § 1225(b)(2)(C). Plaintiffs argue that because 8 C.F.R. § 1001.1(q) defines the term "arriving alien," in pertinent part, as an applicant for admission at a port-of-entry, and § 1225(b)(2)(C) contains the word "arrive," the return authority is limited to aliens who apply for admission at a land port-of-entry. Dkt. 28 at 25. The statutory text does not support this argument because, as noted, the text clearly applies to aliens in removal proceedings whether or not they arrive at a port-of-entry. The term "arriving alien" does not appear anywhere in § 1225(b)(2)(C) like it does in other parts of § 1225. *See, e.g.*, 8 U.S.C. § 1225(c)(1); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

B. MPP is not a legislative rule requiring notice and comment

Plaintiffs argue that MPP needed to undergo notice and comment for two reasons. Dkt. 28 at 26. They are wrong on both scores. First, Plaintiffs rehash their argument that MPP conflicts with 8 C.F.R. § 235.3(d). Dkt. 28 at 26. As the Government has demonstrated, however, the

statutory return authority applies to aliens who entered between ports-of-entry. The regulation does not narrow that authority, so no "inconsisten[cy]" warranting notice-and-comment exists. *Id.*; *cf. N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 70 (1st Cir. 2018).

Second, Plaintiffs argue that MPP "departs from 'reasonable fear' regulations" in the form of an "entirely new rule." Dkt. 28 at 26. But their premise is flawed because MPP is not a substantive rule that needed to undergo notice-and-comment rulemaking: it does not "create[] rights, assign[] duties, or impose[] obligations, the basic tenor of which is not already outlined in the law itself." *N.H. Hosp. Ass'n*, 887 F.3d at 70; *Chrysler Corp.*, 441 U.S. at 302. Rather, it is a "general statement[] of policy," exempt from notice-and-comment procedures. 5 U.S.C. § 553(b)(B); *N.H. Hosp. Ass'n*, 887 F.3d at 70; *see also Conserv. Law Found., Inc. v. Longwood Venues & Destinations, Inc.*, 422 F. Supp. 2d 435, 451-452 (D. Mass. 2019). A general statement of policy "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993).

Applying these principles, MPP is a statement of policy not subject to the APA's notice-and-comment requirements, as the Ninth Circuit has already found. *See Innovation I*, 924 F.3d at 509-510 ("MPP qualifies as a general statement of policy because immigration officers designate applicants for return on a discretionary case-by-case basis."). The Ninth Circuit did not disturb this conclusion in *Innovation II*. *See* 951 F.3d at 1082 ("We do not reach the question of whether they have shown a likelihood of success on their claim that ... MPP should have been adopted through notice-and-comment rulemaking."). Aliens who are "amenable to the [MPP] process" will be returned to a contiguous country only after an exercise of discretion in an individual case: if he or she is one "who in an exercise of *discretion* the officer determines should be subject to the MPP process." *See* Ex. 2 at 1 (emphasis added). Officers are not required to return any alien: "Officers,

with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g. expedited removal), on a case-by-case basis." *Id.* Even for those who are "more likely than not to face persecution or torture in Mexico" and thus not subject to return under MPP, "[o]fficers retain all existing discretion to process (or re-process) the alien for any other available disposition, including expedited removal, [notice to appear], waivers, or parole." *Id.* at 2.

Plaintiffs argue that because the non-refoulement screening procedures are "mandatory," notice-and-comment was nonetheless a requirement. Dkt. 28 at 26. However, one aspect of a general statement of policy cannot be isolated. In *Regents of the University of California v. DHS*, 908 F.3d 476 (9th Cir. 2018), the Ninth Circuit held that the rescission of the Deferred Action for Childhood Arrivals ("DACA") program was a "general statement of policy" exempted from notice-and-comment rulemaking. *Id.* at 512-14. The court in *Regents* noted that the rescission made "rejection" of certain DACA applications "mandatory," but the agency retained "the background principle of deferred action as an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis." *Id.* at 513. Like the rescission of the DACA program, MPP—despite having "mandatory features"—is "an act of prosecutorial discretion meant to be applied only on an individualized case-by-case basis." *Regents*, 908 F.3d at 513; *see also Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1186-87 (9th Cir. 2019) (finding the presence of "mandatory . . . language" did not render document a "legislative rule" because of the "significant discretion retained by agencies and their analysts").

Finally, Plaintiffs are misguided to suggest that the non-refoulement screening procedures in MPP "depart[] from the 'reasonable fear' regulations" found at 8 C.F.R. § 208.31 because those regulations apply only to aliens ordered removed under 8 U.S.C. § 1228(b) and whose removal has been reinstated under 8 U.S.C. § 1231(a)(5). Dkt. 28 at 26; *cf. N.H. Hosp. Ass'n*, 887 F.3d at

70. There is no reason why the procedures underpinning *temporary return* to a contiguous country to await § 1229a removal proceedings, at issue here, must be identical to the procedures used to permanently remove aliens pursuant to other statutory procedures. Plaintiffs offer no coherent reason why the procedures used in an entirely different statutory context apply here.

C. MPP does not violate the Equal Protection Component of the Fifth Amendment Due Process Clause

Plaintiffs' equal protection claim also fails because they do not identify a *single* piece of evidence that MPP is the byproduct of discriminatory animus. Plaintiffs do not—and cannot—contend that MPP, on its face, singles out any particular class of aliens for disfavored treatment. It applies to "all citizens and nationals of countries other than Mexico . . . arriving in the United States by land from Mexico—illegally or without proper documentation." Ex. 1 at 1. Instead, Plaintiffs rely upon a series of statements attributed to the President of the United States about "Central American asylum seekers" generally that have nothing to do with MPP specifically. Dkt. 28 at 31.

The Supreme Court has adopted a highly deferential standard of review in such circumstances, considering only whether a challenged admission policy "is plausibly related to the Government's stated objective" and upholding it "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018); *see also Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006) ("The Supreme Court has long held that judicial review of line-drawing in the immigration context is deferential."). Plaintiffs have failed to show that MPP cannot be reasonably understood to result from its stated and constitutional grounds: (1) reducing illegal immigration and false asylum claims, (2) preventing aliens from disappearing into the United States before a decision may be rendered in their removal proceeding, (3) allowing the Government to focus its attention on more

quickly assisting legitimate asylum seekers, (4) clearing a massive asylum backlog, and (5) ensuring that vulnerable populations are protected while awaiting a determination in Mexico. *See* Ex. 7, Press Release, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (Dec. 20, 2018). This is especially true because after nine months of observation, DHS reaffirmed that MPP has been an "indispensable tool" in achieving these aims and in "addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." Ex. 4 at 2. For this reason, Plaintiffs' equal protection claim is unlikely to succeed. *See Cruz*, 2019 WL 8139805, at *5 ("MPP clearly relate[s] to several such goals, including, among others, reducing false asylum claims and preventing aliens from disappearing into the United States before a court has rendered a decision on their asylum claims. Accordingly, Cruz's equal protection claim is unlikely to succeed on the merits.").

D. The INA forecloses judicial review of Counts 3, 5, and 7 claiming that MPP is arbitrary and capricious and violates non-refoulement obligations

In addition to arguing that MPP violates the INA, Plaintiffs contend that its procedures run contrary to principles of non-refoulement and that it is arbitrary and capricious in violation of the APA. Dkt. 28 at 27-30, 32-34. But Plaintiffs will not succeed because the Secretary's decision to return Plaintiffs to Mexico under MPP—and the procedures followed in making that decision—are barred from judicial review under 8 U.S.C. § 1252(a)(2)(B)(ii).

Section 1252(a)(2)(B)(ii) broadly precludes judicial review of the Secretary's denials of discretionary decisions or actions. It says: "Notwithstanding any other provision of law (statutory or nonstatutory) . . . and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review . . . any . . . decision or action of . . . the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of . . . the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii).

The Secretary's return decisions under MPP meet these criteria. The decision to exercise the contiguous return authority is "specified . . . to be in the discretion of" of the Secretary. *Id.* § 1252(a)(2)(B)(ii). The statute provides that "the [Secretary] *may* return the alien to that territory pending a proceeding under section 1229a of this title." *Id.* § 1225(b)(2)(C) (emphasis added); *M & K Engineering Inc. v. Johnson*, 814 F.3d 481, 485 (1st Cir. 2016) ("By using the precatory term 'may,' rather than the directory term 'shall,' Congress [in 8 U.S.C. § 1155] indicated its intent to make [the decision] discretionary.") (quoting *United States v. Aponte-Guzman*, 696 F.3d 157, 160 (1st Cir. 2012)). Because the return authority is left to the discretion of the Secretary, the INA proscribes judicial review of return decisions, including review of Plaintiffs' claim that MPP is arbitrary and capricious under the APA. *See* 5 U.S.C. § 701(a) (APA does not apply to "agency action" that "is committed to agency discretion by law" or if "statutes preclude judicial review"); *Cowels v. FBI*, 936 F.3d 62, 66 (1st Cir. 2019).

Further, the INA's bar on judicial review is not limited to the actual return decisions themselves but also covers the procedures used to arrive at return determinations. *See Poursina v. USCIS*, 936 F.3d 868, 875 (9th Cir. 2019) ("The essence of Poursina's complaint is that USCIS should have exercised its discretion [differently], and his various claims simply repackage that core grievance .... [S]uch a determination is not a purely legal decision, but rather a core exercise of the discretion that the statute vests in the government."); *Cruz*, 2019 WL 8139805, at *4 ("I agree with the government that [the] claim that the MPP violates international law principles of non-refoulement falls squarely within the bar on judicial review, because with this claim Cruz is challenging the actual substance of the [Secretary's] discretionary choice to [return] Cruz to Mexico."); *see also Bourdon v. Dep't of Homeland Sec.*, 940 F.3d 537, 545 (11th Cir. 2019). Here, Plaintiffs challenge the procedures used to arrive at the decisions to return them to Mexico and

make various policy objections to MPP under the guise of an APA challenge. Dkt. 28 at 27-30, 32. Under § 1252(a)(2)(B)(ii), however, those procedures and policy objections are unreviewable. Indeed, the applicability of § 1252(a)(2)(B)(ii) is underscored by Plaintiffs' request "to be processed out of the MPP," Dkt. 28 at 33, because they believe that the Secretary incorrectly exercised his discretion, a challenge that is squarely foreclosed by the bar on judicial review in § 1252(a)(2)(B)(ii).

E. Plaintiffs' claims fail on the merits

Even if this Court did have jurisdiction over Plaintiffs' non-refoulement and arbitrary and capricious claims (Counts 3, 5, and 7), they fail on the merits.

1. Non-refoulement

MPP satisfies the United States' non-refoulement obligations.[5] MPP applies only to non-Mexicans, not Mexicans fleeing persecution or torture in Mexico. MPP provides a procedure whereby any non-Mexican who is determined to "more likely than not" "face persecution on account of a protected ground or torture in Mexico" will not be subject to the MPP. Ex. 2. Aliens can raise such a claim at any time they are in the United States, including "before or after they are processed for MPP or other disposition," after "return[ing] to the [port of entry] for their scheduled hearing," or in transit to or at their immigration proceedings.[6] *Id*. Upon referral, asylum officers

[5] Plaintiffs cite to *Mathews v. Eldridge*, 424 U.S. 319 (1976) to argue that they are entitled to additional non-refoulement procedures. Dkt. 28 at 34. But because Plaintiffs have not been admitted to the United States, they are entitled only to the process designated by Congress. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Albathani v. INS*, 318 F. 3d 365, 375 (1st Cir. 2003).

[6] In response to the public health emergency caused by the COVID-19 virus, government agencies have implemented temporary measures that may impact aliens' ability to arrive at, enter, or be introduced into the United States, or that impact the conduct of immigration proceedings. Some of those temporary measures impact aliens processed through MPP. The government's response to the emergency is fluid, and measures attributable to the emergency are not at issue in this case.

conduct an "MPP assessment interview in a non-adversarial manner, separate and apart from the general public." Ex. 3. All assessments must "be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." *Id*.

Further, the process is non-adversarial and no statute or international obligation requires any specific procedure (including that counsel be present) before DHS makes a determination to temporarily return an alien to the non-home country from which he has arrived. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (BIA 2014) (determination of refugee status "is left to each contracting State"). DHS's determinations regarding whether an alien is more likely than not to face persecution or torture in Mexico in the context of MPP are not subject to review by an immigration judge. The statute and international obligations do not require that form of process.

The crux of Plaintiffs' claim is that the non-refoulement procedures in MPP do not mirror the statutorily mandated proceedings in removal and expedited removal proceedings, respectively, including review by an immigration judge, and that MPP's non-refoulement proceedings deviate from procedures codified at 8 U.S.C. § 1231(b)(3). Dkt. 28 at 32. This argument is unavailing because these procedures are applicable to proceedings regarding the removal of an alien from the United States, not the temporary *return* of an alien to a third country. An order of removal and temporary return are not synonymous, and the considerations entailed by each course of action are fundamentally different and distinct. In the INA, Congress explicitly distinguished between return and removal, specifically outlining the process for "remov[ing]" an alien "without further hearing or review," 8 U.S.C. § 1225(b)(1)(A) (expedited removal), initiating full "removal proceedings" against aliens, 8 U.S.C. § 1229a(1), and temporarily returning an alien to the contiguous territory from where that alien arrived pending removal proceedings, 8 U.S.C. § 1225(b)(2)(C).

Thus, the fact that Congress chose to provide certain procedures applicable to remove an alien, and did not include those procedures in § 1225(b)(2)(C), means that there is no basis to interpose procedures applicable to removal proceedings in the return context. [7] This is especially true because the omission of review by an immigration judge in § 1225(b)(2)(C) was intentional; "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *DHS v. MacLean*, 574 U.S. 383, 391 (2015).

The Ninth Circuit's conclusion in *Innovation II* that § 1231(b)(3)(A) is "not limited to [removal] proceedings," 951 F.3d at 1089, is wrong and should not be followed here. The plain text of § 1231 is clear that it only concerns removal proceedings, not return. The Ninth Circuit ascribed importance to the fact that "Congress intended" the precursor to § 1231 to "parallel" Article 33 of the Refugee Convention and that "Article 33 is a general anti-refoulement provision, applicable whenever an alien might be returned to a country where his or her life or freedom might be threatened on account of a protected ground." *Id.* That conclusion glosses over the fact that Article 33 is not self-executing, *Garcia v. Sessions*, 856 F.3d 27, 42 (1st Cir. 2017), and thus "can only be enforced pursuant to legislation" that carries it "into effect." *Medellin v. Texas*, 552 U.S. 491, 505 (2008). Here, that legislation explicitly limits § 1231 to removal proceedings. Moreover, the Ninth Circuit's reasoning fails on its own terms, because even if § 1231 did apply, 8 U.S.C. § 1231(h) makes clear that "[n]othing in this section shall be construed to create any substantive or *procedural* right or benefit that is legally enforceable by any party." (emphasis added). The only other basis for the Ninth Circuit's holding was to credit the plaintiffs' declarations, *see id.* at 1091-93, but even if those declarations were relevant, properly examined evidence, such declarations,

[7] In any event, aliens who are subject to reinstatement of removal under 8 U.S.C. § 1231(a)(5), 8 C.F.R. § 241.8 must affirmatively state a fear of removal in order to be afforded a reasonable fear interview. 8 C.F.R. § 208.31(a).

like Plaintiffs' declarations in this case, *see* Dkt. 28 at 33, fail to identify a *legal* basis for Plaintiffs' position.

Plaintiffs also assert that they "have been, and will continue to be, persecuted in Mexico." Dkt. 28 at 33-34. This argument asks this Court to second-guess the results of Plaintiffs' non-refoulement interviews, where Ms. Colaj and Ms. Martinez were not found to face a likelihood of torture or persecution on account of a protected ground if returned to Mexico, and to bypass the process entirely for Ms. Vasquez. And it necessarily entails asking this Court to disturb the discretionary determinations made by the Secretary in this case. As noted above, the Court lacks the authority to make such a determination.

2. *MPP is not arbitrary and capricious in violation of the APA*

Review of agency action to determine if it is arbitrary and capricious is "highly deferential" and an agency's determination will be upheld "if it is supported by *any* rational view of the record." *Cowels*, 936 F.3d at 67 (emphasis added). Applying that narrow review standard, Plaintiffs' claims fail. Plaintiffs first assert that "MPP does nothing to vet for or deter fraudulent claims specifically." Dkt. 28 at 27. To the contrary, DHS has specifically found that because of MPP, "aliens without meritorious claims…are beginning to voluntarily return home" because MPP realigns incentives so that those without meritorious claims do not attempt to enter the United States. Ex. 4 at 3. Relatedly, although Plaintiffs assert that MPP fails to protect "legitimate asylum seekers," Dkt. 28 at 27, because of MPP, asylum seekers with "meritorious claims can be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States." Ex. 4 at 3. Indeed, MPP may be applied to all amenable aliens placed in § 1229a removal proceedings, not just "asylum seekers," Dkt. 28 at 28, so it does not "lock asylum seekers out." *Id.*

Second, Plaintiffs assert that MPP departs from expedited removal processes. Dkt. 28 at 28. This argument is nothing more than a non-sequitur; simply because expedited removal is one tool DHS can use to swiftly remove aliens, that does not foreclose DHS from using other statutorily-authorized tools to respond to the crisis on the border. And Plaintiffs' assertion that MPP improperly departs from the scheme for the "very same population" of aliens placed in expedited removal proceedings, *id.* (emphasis omitted), again overlooks the fact that MPP can be applied to any amenable alien placed in § 1229a removal proceedings, including Plaintiffs, not just aliens who are eligible to be placed in expedited removal proceedings.

Third, Plaintiffs assert that the reasons behind MPP are "disingenuous." Dkt. 28 at 28. This is a textbook example of an impermissible request for this Court to "substitute its judgment for that of the agency" because it "disagrees with the agency's conclusions." *P.R. Tel. Co. v. Telecomm. Reg. Bd. of P.R.*, 665 F.3d 309, 319 (1st Cir. 2011). Instead, the "agency's actions are presumed to be valid; if the agency's decision is supported by a rational basis," it must be upheld. *Id.* Here, a rational basis exists: MPP has restored integrity to the system and individuals processed in MPP receive initial immigration court hearings within two to four months. Ex. 4 at 3. This is in stark contrast with those not processed for MPP and released into the interior who "must wait years for adjudication of their claims." *Id.* Plaintiffs fault DHS for allegedly failing to consider adding resources to increase the pace of removal proceedings for those placed in expedited removal who pass credible fear screenings, Dkt. 28 at 28, but DHS made clear in enacting MPP that the existing tools for dealing with illegal immigration by releasing individuals within the United States were not working. *See* Ex. 7 at 2-3.

Fourth, Plaintiffs repeat their assertion that MPP improperly uses different standards than the reasonable fear process. Dkt. 28 at 29. As the Government has demonstrated, because return is

fundamentally different from removal, there is no requirement that the procedures used to return aliens mirror procedures used in the reasonable fear context.

Fifth, Plaintiffs accuse the agency of "doubl[ing] down" on its "decision to limit the number of non-refoulement interviews by declining to ask migrants whether they had a fear of return." Dkt. 28 at 30. But based on the agency's experience, "if DHS were to change its fear-assessment protocol to affirmatively ask an alien amenable to MPP whether he or she fears return to Mexico, the number of fraudulent or meritless fear claims will significantly increase," a prediction informed by the agency's "experience conducting credible fear screenings for aliens subject to expedited removal." Ex. 4 at 7. The agency's "experience and expertise" command deference. *Estate of Aitken v. Shalala*, 986 F. Supp. 57, 61 (D. Mass. 1997).

Sixth, Plaintiffs claim that MPP was "recklessly expanded" into particularly dangerous areas of Mexico. Dkt. 28 at 30. As an initial matter, MPP's expansion is limited to areas of the United States, not Mexico, and the expansion was undertaken with the understanding that "MPP returnees in Mexico are provided access to humanitarian care and assistance, food and housing, work permits, and education." Ex. 4. Moreover, MPP non-refoulement interviews take into account conditions in Mexico. When making non-refoulement assessments, asylum officers should consider "reliable assessments of current country conditions in Mexico," whether "any alleged harm . . . could occur in the region where the alien would reside in Mexico, pending removal proceedings, or whether residing in another region in Mexico to which the alien would have reasonable access could mitigate against the alleged harm" Ex. 3. Thus, the agency specifically instructed officers to consider conditions in particular places in Mexico when conducting non-refoulement assessments.

Plaintiffs also repeat their meritless argument that DHS "abandoned the regulation governing return," Dkt. 28 at 30, and contend that DHS abandoned a statement in a 2005 memo about the application of § 1225(b)(2)(C) to certain Cuban asylum seekers. That certain Cuban asylum seekers were, at one point, subject to the contiguous return authority if, among other factors, they had "valid immigration status in Mexico or Canada" and their "claim of fear of persecution does not relate to Mexico or Canada" has no bearing on Plaintiffs, who are citizens of Guatemala and El Salvador, and never would have been subject to the cited policy. Moreover, as discussed above, MPP is "categorically inapplicable . . . to any applicant who is more likely than not to face persecution or torture in Mexico." *Innovation I*, 924 F.3d at 506; *see also* Ex. 2 at 1.

II. The remaining factors weigh against a preliminary injunction

Plaintiffs have not satisfied the remaining preliminary injunction factors. *Winter*, 555 U.S. at 20. Plaintiffs' delay in seeking relief undercuts their claims of irreparable harm. *See Oxford Immunotec Ltd. v. Qiagen, Inc.*, 271 F. Supp. 3d 358, 368 (D. Mass. 2017); *see also Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) ("Courts have found that '[a]n unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.'") (internal quotation marks omitted). Plaintiffs were returned to Mexico pending removal proceedings pursuant to MPP in July and September of 2019. Dkt. 1 ¶¶ 68, 101, 112. All were represented by counsel since the fall of 2019. Dkts. 29-2, 29-4, 29-6. Plaintiffs did not file their complaint until March 20, 2020. *Id.*; Dkt. 8. Plaintiffs then filed their motion for preliminary injunction on April 13, 2020. Dkt. 27. These delays indicate the absence of any imminent and irreparable harm. *See Oxford Immunotec Ltd.*, 271 F. Supp. 3d at 368; *Cruz*, 2019 WL 8139805, at *6.

Moreover, Plaintiffs fail to show that the injunction would further the public interest and not injure other parties. DHS has a very strong interest in the administration of its immigration laws. *See Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998). And DHS has observed that MPP is accomplishing its stated goals, as "DHS has observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." Ex. 4 at 2. In addition, "MPP returnees with meritorious claims" are being "granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States." *Id.* at 3.

CONCLUSION

In light of the foregoing, this Court should deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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