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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

(Motion for leave to file excess pages granted Dec. 24, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

On May 14, 2020, this Court ordered the government to remove five plaintiffs from the "Migrant Protection Protocols" ("MPP") so they could seek asylum from within the United States. ECF No. 45. Plaintiffs now seek this same relief for seven additional noncitizens who—along with their Massachusetts family members—have recently joined this case as co-plaintiffs. ECF No. 73. These noncitizens, like those who were the subject of the Court's previous injunction, were apprehended and placed in the MPP after they had entered the United States between ports of entry. They are therefore not subject to the contiguous return authority of 8 U.S.C. § 1225(b)(2)(C), on which the government relied in sending them to Mexico.

The December 22, 2020 Amended Complaint added three families to this case. All of them face pressing threats to their safety and well-being:

- Plaintiff Nora Idalia Alvarado Reyes lived at the migrant camp in Matamoros with her two young children for nearly a year, until the deteriorating security situation and oncoming cold weather became too much. The children are now in Massachusetts with their father. And the family faces both the harsh realities of Ms. Reyes' life at the camp and the pleas of three children—ages 11, 8, and 4—who need their mother. Lafaille Decl. Ex. 2 at ¶¶ 18-32 ("Ex. 2"); Lafaille Decl. Ex. 1 at ¶¶ 8-10 ("Ex. 1"); Lafaille Decl. Ex. 11A at ¶¶ 14-15 ("Ex. 11A"); Lafaille Decl. Ex.12A at ¶¶ 8-9 ("Ex. 12A").

- Plaintiffs Hermes Arnulfo López Merino and María de la Cruz Abarca de López have lived in a dilapidated house in Matamoros for more than one year with their three daughters—ages 13, 10 and 7. In one room, the roof has fallen in and they can look out at the sky. Even when Mr. López was working seven days a week, the family barely got by and sometimes had only bread to eat. On December 13, 2020, Mr. López lost his job. The family has been going to bed early and getting up later in order to make it easier to eat only once or twice per day. Lafaille Decl. Ex. 4 at ¶¶ 16-28 ("Ex. 4").

- Plaintiff Miriam Yanett Zuniga Posadas was sent to Nuevo Laredo with her three children. They had repeated, terrifying run-ins with cartels. In one recent encounter, a cartel member menacingly stroked her daughter's face and told her she was beautiful. Although Ms. Zuniga's children—ages 17, 7 and 7—are now in Massachusetts in the care of their aunt, they know how dangerous Nuevo Laredo is and fear they will never see their mother again. Lafaille Decl. Ex. 6 at ¶¶ 13-25, 33-47 ("Ex. 6"); Lafaille Decl. Ex. 5 at ¶¶ 7-9 ("Ex. 5"); *see also* Ex. 11A at ¶¶ 11-13; Lafaille Decl. Ex. 10A at ¶¶ 2-11 ("Ex. 10A").

In 2019, Ms. Reyes, the López Abarca family, and Ms. Zuniga fled Central America and crossed into the United States. The Department of Homeland Security apprehended them on U.S. soil and placed them in removal proceedings. But under the MPP, the United States expelled them to Tamaulipas, Mexico—one of the most dangerous places on earth. With MPP hearings indefinitely suspended during the pandemic, each faces increasingly dire conditions with no end in sight.

Plaintiffs are likely to succeed on the merits of their claim. As this Court held on May 14, 2020, the MPP violates the INA by applying 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). ECF No. 45 at 18-22; *see also Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1084-87 (9th Cir. 2020), *cert. granted*, No. 19-1212 (Oct. 19, 2020). Moreover, as this Court also held, noncitizens apprehended on U.S. soil after crossing the border—like the plaintiffs at issue here—are not "arriving" within the meaning of 8 U.S.C. § 1225(b)(2)(C). ECF No. 45 at 14-18; *see also* 8 C.F.R. §§ 235.3(d), 1001.1(q).

Plaintiffs' return to Mexico is also unlawful for reasons not reached by the Court. The MPP violates the Administrative Procedure Act ("APA") as it is a substantive rule issued without notice and comment; it is arbitrary and capricious because, *inter alia*, it is not designed to serve its stated goal of discouraging fraudulent claims and protecting legitimate asylum seekers; it is motivated by animus in violation of the Equal Protection Clause; and it exposes Plaintiffs to persecution in violation of this country's duty of non-refoulement, *see Innovation Law Lab*, 951 F.3d at 1093.

These fatal defects with the MPP, as well as the other equitable factors, warrant a preliminary injunction ordering Defendants to permit Ms. Reyes, the López Abarca family, and Ms. Zuniga to remain in the United States while their removal proceedings are litigated.

BACKGROUND[1]

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

This country's core commitment to refugees is non-refoulement. 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 a protected ground. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b). Even where the law does not provide the immediate opportunity for a noncitizen to apply for withholding of removal in a full immigration removal proceeding, noncitizens who fear persecution in a country to which the United States wishes to send them are entitled to a fear screening. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b); 8 C.F.R. § 208.31.[4] At

---

[1] The arguments in this brief largely reiterate those in Plaintiffs' original preliminary injunctive papers. *See* ECF No. 28. They have been updated to address subsequent authority, further factual developments, and the circumstances of the new plaintiffs.

[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, 436-37 (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.").

[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).

that screening, if an asylum officer finds a "reasonable fear" of persecution, the noncitizen proceeds to a full withholding of removal proceeding before an immigration judge. 8 C.F.R. § 208.31(e). If not, the noncitizen is entitled to review of the negative determination by an immigration judge. 8 C.F.R. § 208.31(g). DHS may not summarily send individuals to a place where they fear persecution without these safeguards. 8 C.F.R. §§ 208.16(a), 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 U.S. without entry papers, or commit fraud, are summarily removed through "expedited removal." 8 U.S.C. § 1225(b)(1)(A)(i). Individuals apprehended 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 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 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 under an expedited procedure; they are instead referred for proceedings in which 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

[5] *See also* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004); *cf. Make The Rd. New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020) (upholding expansion of expedited removal to those in United States for less than two years).

the MPP, "individuals arriving in or entering the United States 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 determine whether noncitizens expressing 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] As this Court noted, these MPP

---

[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].

[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

non-refoulement interviews "differ substantially" from "'reasonable fear'" screenings and provide no opportunity for review by an immigration judge. ECF No. 45 at 25 n.27.

The MPP is a result of President Trump's January 2017 Executive Order directing that noncitizens "described in" 8 U.S.C. § 1225(b)(2)(C) be "returned to the territory from which they came" pending their removal proceedings.[10] It also implements the President's specific directive that DHS simply stop allowing migrants to ender the U.S. at the Southern border to seek asylum.[11] Former DHS Secretary Nielsen acknowledged that the MPP is an "unprecedented action" taken in response to court decisions the government deems "misguided" and to laws that it deems "outdated."[12] These decisions and laws, the government claims, permit the "exploit[ation]" of "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 remaining in the U.S. before a "final decision" on their immigration cases, the "MPP will reduce the number

---

"reasonable possibility" that a noncitizen would be persecuted, 8 C.F.R. § 208.31(c), a standard that is interpreted to be satisfied by a ten percent chance of persecution. *See* USCIS, *Questions and Answers: Reasonable Fear Screenings*, uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-reasonable-fear-screenings (reasonable fear applies same standard as "well-founded fear" in asylum context); *see also 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].

[13] Dec. 2018 Press Release, *supra* note 6.

[14] Jan. 2019 Press Release, *supra* note 12.

of aliens taking advantage of U.S. law" and "more effectively assist legitimate asylum-seekers."[15]

In March 2020, DHS used the coronavirus pandemic to intensify its exclusion of Central American and other asylum seekers. Citing a public health law that has been held not to provide such authority, *see P.J.E.S. v. Wolf*, --- F. Supp. ---, 2020 WL 6770508 (D.D.C. Nov. 18, 2020), *appeal pending*, D.C. Cir. No. 20-5357, the government began to expel Central American migrants at the southern border back into Mexico without placing them in removal proceedings and without any screening or consideration of their asylum claims.[16]

The administration has also postponed MPP video court proceedings indefinitely, even as U.S. immigration courts have reopened. In March, April, May, and June 2020, the government issued notices cancelling MPP hearings for weeks at a time.[17] And in July 2020, under what it called a "Plan to Restart MPP Hearings," the government postponed MPP proceedings indefinitely.[18] DHS has also made it difficult for migrants in MPP to obtain non-refoulement

---

[15] *Id.*

[16] *See* Nick Miroff, *Under coronavirus immigration measures, U.S. is expelling border-crossers to Mexico in an average of 96 minutes*, Washington Post (Mar. 30, 2020), washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3_story.html. White House officials reportedly forced the Centers for Disease Control and Prevention to adopt these measures on threat of firing. *See* Jason Dearen & Garance Burke, *Pence ordered borders closed after CDC experts refused*, Associated Press (Oct. 3, 2020), apnews.com/article/virus-outbreak-pandemics-public-health-new-york-health-4ef0c6c5263815a26f8aa17f6ea490ae. While DHS has all but ceased placing Central Americans in MPP as a result of this expulsion practice, it still uses MPP to expel people who cannot be sent into Mexico under the CDC expulsion order. *See generally* Ex. 11A at ¶5 n.4.

[17] See, *e.g.*, DHS, *Joint DHS/EOIR Statement on MPP Rescheduling* (June 16, 2020), dhs.gov/news/2020/06/16/joint-dhseoir-statement-mpp-rescheduling.

[18] DHS, *Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings* (July 17, 2020), justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings (reopening can occur only after "California, Arizona and Texas progress to Stage 3 of their reopening plans"; the Department of State and CDC "lower their global health advisories to Level 2, and/or a comparable change in health advisories, regarding Mexico in particular"; and the Mexican Government characterizes all of the Mexican border states as a "yellow" risk in its "'stoplight'" system).

interviews. *See* Ex. 11A at ¶ 8. These measures have stranded migrants subject to MPP.

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

Approximately 68,000 migrants, including at least 16,000 children, have been sent to Mexico under the MPP.[19] In July 2019, DHS expanded the MPP to the northeastern Mexican state of Tamaulipas, one of the most dangerous places in the world.[20] 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 and Nuevo Laredo.[21]

Central American and other migrants bear the brunt of these dangers and face persecution throughout Mexico and especially in Tamaulipas. Lafaille Decl. Ex. 12B at ¶¶ 6, 8, 28-36 ("Ex. 12B"); Lafaille Decl. Ex. 11B at ¶¶ 9-15, 19-27 ("Ex. 11B"). Central American migrants are readily identified and targeted for violence in Tamaulipas. Ex. 12B at ¶¶ 9-10, 30-31; Ex. 11B at ¶¶ 9-13; Lafaille Decl. Ex. 10B at ¶¶ 14-18 ("Ex. 10B").

As of December 15, 2020, Human Rights First identified over 1,300 public reports of murder, torture, rape, kidnapping, and other violent assaults against asylum seekers returned to

---

[19] TRACImmigration, *MPP Cases Highest Since Start of Pandemic* (Oct. 20, 2020), trac.syr.edu/immigration/reports/628/; *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.

[20] 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.

[21] 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 Dec. 24, 2020) [hereinafter Mexico Travel Advisory].

Mexico under the MPP, likely a significant underreporting. Ex. 11A at ¶ 4; *see* Ex. 12B at ¶¶ 45-46.[22] In Tamaulipas, criminal cartels hunt and kidnap migrants who are awaiting MPP hearings. Ex. 12B ¶¶ 28-33. In Nuevo Laredo, migrants are kidnapped at such alarming rates that they have been referred to as "fish in a barrel"[23] or "sitting ducks."[24] *See* Ex. 10A at ¶¶ 4-11; Ex. 10B at ¶¶ 11-18; Ex. 12B at ¶ 41. Meanwhile, at the Matamoros encampment—where hundreds live in substandard conditions—migrants have been threatened by members of organized crime, disappearances have become common, and bodies have been pulled from the river. Ex. 12A at ¶¶ 8-9; Ex. 11A at ¶ 14; Ex. 12B at ¶¶ 59-64.[25]

Mexican authorities offer little protection, and often work with cartels. Ex. 11B at ¶¶ 14, 21, 26-27, 35; Ex. 10A at ¶¶ 8-9; Ex. 10B at ¶¶ 20, 26. Central American migrants are seen as second-class citizens against whom crime can be committed without consequence. Ex. 12B at ¶¶ 9-10, 30-31; Ex. 10B at ¶¶ 19-20. Migrants avoid going out on the street due to the imminent risk of kidnapping, extortion, and violence. Ex. 12B at ¶¶ 33, 43; Ex. 11B at ¶ 22.

Desperation in Tamaulipas is rising. Ex. 11A at ¶¶ 11-20; Ex. 12A at ¶¶ 2-3, 8-9, 12Ex. 10A at ¶¶ 4-13. Faced with suspended MPP hearings and deteriorating conditions, many parents

---

[22] *See also* Human Rights First, *Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger* (Dec. 2020), humanrightsfirst.org/sites/default/files/HumanitarianDisgrace.12.16.2020.pdf.

[23] Human Rights First, *US Move Puts More Asylum Seekers at Risk* (Sept. 25, 2019), hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk.

[24] Robbie Whelan, *Violence Plagues Migrants Under U.S. 'Remain in Mexico' Program*, Wall Street Journal (Dec. 28, 2019), wsj.com/articles/violence-plagues-migrants-under-u-s-remain-in-mexico-program-11577529000.

[25] *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.

have made the excruciating decision to allow their children to cross the border alone in order to be processed out of the MPP. Ex. 11A at ¶ 19.[26]

FACTS

I. The May 14, 2020 preliminary injunction

Plaintiffs filed this case on March 20, 2020, seeking to remove from the MPP Luisa Marisol Vasquez Perez de Bollat and A.B., Rosa Maria Martinez de Urias, and Evila Floridalma Colaj Olmos and J.C. On May 14, 2020, this Court determined that Plaintiffs were likely to succeed at least on count 1 of their Complaint and granted preliminary injunctive relief requiring Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to be removed from the MPP. ECF No. 45. In making that decision, this Court concluded that applying contiguous return to these Plaintiffs was not authorized by 8 U.S.C. § 1225(b)(2)(C)—on which DHS relied—for two reasons.

First, this Court recognized that § 1225 consistently distinguishes between "arriving" noncitizens and those already "present" within the U.S., and only authorizes contiguous return for the "arriving" class. ECF No. 45 at 15. Accordingly, it concluded that § 1225(b)(2)(C) could not be applied to the Plaintiffs before the Court, who had finished "arriving" and were "present" in the United States when apprehended. *Id.* at 14-18.

Second, the Court held that the statute authorizes contiguous return only for § 1225(b)(2) noncitizens, whereas Plaintiffs—who lacked entry documents—fell within § 1225(b)(1), which provides expedited removal proceedings for certain noncitizens without entry documents. *Id.* at 18-22. This Court rejected the government's argument that DHS could transmute § 1225(b)(1) noncitizens into § 1225(b)(2) noncitizens simply by placing them in full rather than expedited proceedings. *Id.* at 20.

[26] Yami Virgin, *Exclusive video on* Coyotes, Fox 29 (Dec. 9, 2020), foxsanantonio.com/news/yami-investigates/exclusive-video-on-coyotes.

Finally, this Court held that Plaintiffs satisfied the remaining preliminary injunction factors, and ordered Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. to be removed from the MPP. *Id.* at 22-24. They now live safely in Massachusetts.

II. The Plaintiffs who remain in Mexico

On December 22, 2020, three additional families joined this case as Plaintiffs via the Amended Complaint. These newly-joined families comprise seven noncitizens currently in Mexico under the MPP. Plaintiffs Nora Idalia Alvarado Reyes, Hermes Arnulfo López Merino, María de la Cruz Abarca de López, T.L., D.L., A.L, and Miriam Yanett Zuniga Posadas all crossed the border and were apprehended by U.S. Customs and Border Protection. They were issued Notices to Appear in immigration court for removal proceedings. Lafaille Decl. Ex. 7 ("Ex. 7").[27] But CBP officials also issued them notices stating that they had been "identified for processing under the Migrant Protection Protocols." *See* Lafaille Decl. Ex. 8 ("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 first hearings. *Id.* The notices provided that they could consult with counsel "through any available mechanism," including at the hearing facility on the days of their 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 they would have to appear for their court dates by presenting themselves at a bridge and crossing into Brownsville, Texas—or, in the case of Ms. Zuniga, into Laredo, Texas—for their hearings. *Id.*

Officials did not tell Ms. Reyes, the López Abarca family, or Ms. Zuniga that they were

[27] These Notices to Appear follow the practice, specific to MPP, of failing to check any box that would specify the type of proceeding each of the Plaintiffs is in. *See* Ex. 7; *see generally* 8 C.F.R. § 1003.15(b) (requirements for Notices to Appear); *Matter of Herrera-Vasquez*, 27 I&N Dec. 825 (BIA 2020).

being returned to Mexico in advance, and they did not have an opportunity to express a fear of being returned to Mexico. Nor did they know that they could request non-refoulement interviews. *See* Ex. 2 at ¶¶ 6-7; Ex. 4 at ¶¶ 7-8; Ex. 6 at ¶¶ 6-9.

Ms. Reyes was sent back to Matamoros with her two young children, then six and three years old, in early September 2019. For most of the time since then, she has lived at the migrant encampment at the foot of the bridge—living with inadequate access to food and water, poor sanitation, flooding, and temperatures that reach above 100 degrees in summer and dip below 40 degrees in winter. Ex. 2 at ¶¶ 20, 27-29.[28] Increasingly, members of organized crime are a presence at the camp. Ex. 12A at ¶¶ 8-9; Ex. 11A at ¶ 14. Ms. Reyes has known migrants who were raped or killed and seen dead bodies floating in the river. She and her children have also seen migrants being beaten with wooden planks. For their safety, Ms. Reyes avoided using the bathrooms at night, putting diapers on her children instead. Ex. 2 at ¶¶ 24-26.

In November, Ms. Reyes' children crossed the border alone and were reunited with their father and another sibling in Massachusetts. Ms. Reyes's husband and children—Jorge Alberto Guevara Diaz, J.G., S.G., and M.G.—struggle without her. Her four-year-old daughter uses a toy and pretends she is talking to her mother, telling her she misses her. At night, she refuses to go to the bathroom alone; her father still cannot convince her that it's safe. Ex. 1 at ¶¶ 3, 8-10.

Mr. López and Ms. Abarca have been living in Matamoros with their daughters, T.L, D.L, and A.L. since the family was sent there under MPP around the beginning of October 2019. After facing threats at the migrant encampment, they eventually rented a small crumbling house with a

[28] AccuWeather, Matamoros, Tamaulipas reports for Nov. 2019, April. 2020, Dec. 2020, accuweather.com/en/mx/matamoros/235982/november-weather/235982?year=2019; accuweather.com/en/mx/matamoros/235982/april-weather/235982?year=2020; accuweather.com/en/mx/matamoros/235982/december-weather/235982?year=2020.

hole in the roof. Ex. 4 at ¶¶ 13-16. Afraid to go outside except when necessary, they are completely isolated. *Id.* at ¶ 22. Even though Mr. López was working, and Mr. López's siblings in Massachusetts help out, the family still does not have enough to eat. *Id.* at ¶¶ 21, 27-29. When Mr. López lost his job in December 2020, the family had to begin trying to go to bed earlier and get up later in order to eat fewer meals. *Id.* at ¶¶ 27-28. Temperatures have become frigid. *Id.* at ¶ 17. Ms. Abarca hears her daughters praying and asking God why he is punishing them. *Id.* at ¶ 24. In Massachusetts, Mr. López's brother—Mateo López—suffers knowing that the family is not well, and tries to send help. Lafaille Decl. Ex. 3 at ¶ 9 ("Ex. 3").

Ms. Zuniga was sent back to Nuevo Laredo under the MPP around the beginning of October 2019. Ex. 6 at ¶¶ 4-8. Cartels in Nuevo Laredo aggressively target migrants returned under MPP for kidnapping and other violent crime. Ex. 10A at ¶¶ 4-11; Ex. 10B at ¶¶ 11-18; Ex. 12B at ¶ 41. Ms. Zuniga and her children were threatened by cartels the moment they arrived in the city, on the way to and from court, and inside the shelter where they lived. Ex. 6 at ¶¶ 11-25, 36-38, 43. They witnessed the kidnapping of other migrants as well as the trauma those migrants had suffered when, months later, they were finally released. *Id.* at ¶¶ 33, 40-42. In September, after a cartel member menacingly stroked 17-year-old G.Z.'s cheek and told her she was beautiful, Ms. Zuniga's children crossed the border into the United States. *Id.* at ¶¶ 44-47. Now G.Z., D.Z., and K.Z. must live with the agony of knowing that their mother is still in danger, while their aunt Rosi Lisbeth Zuniga Posada struggles to care for them. Ex. 5 at ¶¶ 7-11; *see also* Ex. 10A at ¶¶ 2-11.

After each court hearing in the United States, Ms. Reyes, the López Abarca family, and Ms. Zuniga have been escorted back to Tamaulipas. After being sent to Mexico, all of them had non-refoulement interviews where they discussed their fear of remaining there. Ex. 6 at ¶¶ 27-30; Ex. 2 at ¶ 37; Ex. 4 at ¶ 25. But they were found not to satisfy the standard for being removed from

the MPP. Lafaille Decl. Ex. 9 ("Ex. 9"). Each is now waiting in limbo under increasingly difficult and threatening conditions. *See* Ex. 12A at ¶¶ 8-9; Ex. 11A at ¶ 14; Ex. 10A at ¶¶ 2-11; Ex. 4 at ¶¶ 17-18, 27-30.

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. Reyes, Ms. Zuniga, and the López Abarca family to remain Mexico is unlawful.

Plaintiffs are likely to succeed on the merits of their claims that subjecting Ms. Reyes, Ms. Zuniga, and the López Abarca family to continued exile in Mexico is unlawful because they are similarly situated to the plaintiffs that this Court ordered to be removed from the MPP in May 2020. *See* ECF No. 45. As this Court already held, noncitizens apprehended after crossing the U.S.-Mexico border without valid entry documents—like the plaintiffs at issue here—are not subject to the statutory and regulatory authority governing return to contiguous territory. That holding controls here.[29] *See, e.g., AcBel Polytech Inc. v. Fairchild Semiconductor Int'l, Inc.*, No. 1:13-cv-13046-IT, 2019 WL 7169470, at *1 (D. Mass. Dec. 24, 2019) (Talwani, J.) ("Unless corrected by an appellate tribunal, a legal decision made at one stage of a civil or criminal case constitutes the law of the case throughout the pendency of the litigation.") (*citing Latin Am. Music Co. Inc. v. Media Power Grp., Inc.*, 705 F.3d 34, 40 (1st Cir. 2013)). Moreover, Plaintiffs' return

[29] Although Defendants have appealed this Court's preliminary injunction, the First Circuit has not yet ruled on Defendants' appeal. Instead, that court has held the appeal in abeyance pending Supreme Court proceedings in *Innovation Law Lab v. Wolf* (No. 19-1212). Accordingly, this Court's original injunction, including the legal decisions therein, remain binding on all parties.

to Mexico violates 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" noncitizens to a contiguous territory from which they arrived by land. That statute provides:

> © Treatment of aliens arriving from contiguous territory
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

Consistent with this Court's May 14, 2020 ruling, § 1225(b)(2)(C) does not apply to Ms. Reyes, Ms. Zuniga, and the López Abarca family for two independent reasons. First, the noncitizens "described in subparagraph (A)"—to whom the contiguous return authority may be applied—exclude migrants like Ms. Reyes, Ms. Zuniga, and the López Abarca family, who came to the U.S. without entry documents and are consequently subject to the procedures of § 1225(b)(1). Second, § 1225(b)(2)(C) permits the contiguous return *only* of noncitizens who are "arriving," not those who have already "arrived" in the United States, and regulations further limit contiguous return to those who presented themselves at ports of entry. Ms. Reyes, Ms. Zuniga, and the López Abarca family did not.

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

Ms. Reyes, Ms. Zuniga, and the López Abarca family 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. As this Court explained in its May 14 order, "Section (b)(1) applicants are not defined by the proceedings to which they are ultimately subject but, rather, by their status as noncitizens arriving or present in the United States for less than two years whom 'an immigration officer determines…is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) . . .'" ECF No. 45 at 20. Because Ms. Reyes, Ms. Zuniga, and the López Abarca family "were determined to be inadmissible under 8 U.S.C. § 1182(a)(7) because they lacked valid entry documents," they "are § (b)(1) applicants" and cannot be subject to § 1225(b)(2)(C). *See id.*; Ex. 7.

The only appellate court to examine the question has agreed that the MPP does not comply with § 1225(b). As the Ninth Circuit explained:

> 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.

Innovation Law Lab, 951 F.3d at 1083. 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) only applies to noncitizens who are "arriving," and does not apply to noncitizens who entered the United States between ports of entry.

Ms. Reyes, Ms. Zuniga, and the López Abarca family 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" noncitizens within the meaning of § 1225(b)(2)(C). *See* Ex. 7.

a. Section 1225(b)(2)(C) applies to those who are "arriving," not those who are already "present" in the United States.

In its May 14 ruling, this Court held that because § 1225(b)(2)(C) applies only to noncitizens who are "arriving," it may not be applied to those who—like Ms. Reyes, Ms. Zuniga, and the López Abarca family—were apprehended after they had crossed the border between ports of entry. The Court explained that "if applicants are apprehended while crossing the border (whether or not at a check point), they are 'arriving' applicants under the statute, and if apprehended at some point thereafter, they are not 'arriving,' but rather 'alien[s] present in the United States who [have] not been admitted.' 8 U.S.C. § 1225(a)(1)." ECF No. 45 at 16. Thus, it concluded that because "the Returned Plaintiffs were apprehended after they had crossed the border, . . . Plaintiffs have demonstrated a likelihood of success on the merits as to their contention that the Returned Plaintiffs do not belong to the subgroup of applicants subject to the contiguous return provision in § 1225(b)(2)(C) because, at the time of their apprehension by CBP, they were not 'arriving on land.'" *Id.* at 17-18. That holding is law of the case, and, in any event, correct.

Simply put, interpreting "arriving" not to encompass those who have already crossed the border is consistent with Congress's use of the present participle—"arriving"—rather than the past

tense, with the statutory difference between "arriving" and "present" in § 1225(b)(1), and with immigration law's longstanding distinction between those who are "already physically in the United States" and those who are deemed to be "outside the United States seeking admission." *See Landon v. Plasencia*, 459 U.S. 21, 26 (1982); *see also Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958); ECF No. 45 at 14-16.

Contrary to the government's argument, ECF No. 59 at 2, the Court should not defer to *Matter of M-D-C-V-*, 28 I&N Dec. 18 (BIA 2020), which was issued after its May 14 ruling. Deference is not warranted because *M-D-C-V-* interprets § 1225(b)(2)(C) in a manner contrary to the statute's plain meaning. *See Succar v. Ashcroft*, 394 F.3d 8, 29 (1st Cir. 2005). Even if that were not the case, *M-D-C-V-* was decided *after* DHS sent the MPP Plaintiffs to Mexico and cannot retroactively justify a government action that was unlawful at the time it was made.[30]

Moreover, *M-D-C-V-* provides no reasoning to defer to on the questions here. At best, *M-D-C-V-* holds that the time that a noncitizen can be determined to be "arriving" for purposes of § 1225(b)(2)(C) can stretch modestly beyond the "exact moment" a noncitizen's feet first touch U.S. soil, *see* Lafaille Decl. Ex. 13 at 22-23 ("Ex. 13"). But deferring to that interpretation is of no help to the government. The BIA did not determine whether Plaintiffs in *this* case were "arriving." Moreover, CBP placed Ms. Reyes, Ms. Zuniga, and the López Abarca family in MPP not based on any individualized determination like the one made by the BIA in *M-D-C-V-*, but because it concluded—applying its "Muster MPP Guiding Principles," ECF No. 43-1—that they had been in the United States for fewer than 96 hours. But *M-D-C-V-* provides no support for that 96-hour rule, and neither does § 1225(b)(2)(C). Even if the Court deferred to *M-D-C-V-*, therefore, it would still

[30] *See Enamorado-Rodriguez v. Barr*, 941 F.3d 589, 597 n.2 (1st Cir. 2019); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency").

have to determine whether the 96-hour rule is consistent with the statute. It is not, and, because of that, the decision to place Plaintiffs in MPP cannot be upheld. *See Ananeh-Firempong v. INS*, 766 F.2d 621, 629 (1st Cir. 1985).[31]

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

Regulations implementing § 1225(b)(2)(C) confirm that it cannot be applied to noncitizens apprehended after crossing the border between ports of entry. Congress required the executive to "promulgate regulations to carry out" sections 301 to 309 of the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), which include the contiguous return provision. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 302, 309(b), 110 Stat. 3009, 583, 625 (1996). As the Court observed, the resulting March 1997 regulations "limit[] 'arriving aliens' to those crossing the border at a port of entry or interdicted at sea" and "limit[] the use of the contiguous return provision to individuals arriving in the United States at designated points of entry." ECF No. 45 at 16-17.

First, the Immigration and Naturalization Service ("INS") defined an "arriving alien" as a noncitizen who comes to a port of entry or is interdicted at sea. 8 C.F.R. §§ 1.2, 1001.1(q). That definition reflected considerable deliberation. Although the INS considered defining the term to include noncitizens apprehended within twenty-four hours after crossing the border or within a certain distance of it, the agency decided against such proposals. 62 Fed. Reg. 10312, 10313 (March 6, 1997); *see also* 62 Fed. Reg. 444, 444-45 (Jan. 3, 1997).

Second, at the same time that it defined an "arriving alien," the INS also enacted 8 C.F.R.

[31] *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020), on which the government also relies, *see* ECF No. 56 at 5, involves the scope of due process and *habeas corpus* protections, and does not purport to interpret § 1225(b)(2)(C) and thus is inapplicable.

§ 235.3(d), limiting its contiguous return authority to 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.

Id. (emphasis added). This provision removes any doubt that the INS intended its definition of an "arriving alien" to extend to § 1225(b)(2)(C).[32] The limitation it imposes is logical. It respects the longstanding legal distinction 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 ports of entry and seizing, detaining, and expelling them into foreign cities; and it recognizes that migrants who cross the border do not receive any windfall because they are still subject to the harsh possibility of expedited removal.

In *M-D-C-V-*, the BIA held that § 235.3(d) permits contiguous return at ports of entry but is "silent" on returning noncitizens who entered between ports of entry. 28 I&N Dec. at 23-27. But that interpretation defies logic. Construing language stating that the government "may do X" as if it were authorizing the very thing not described, instead of ruling it out, contradicts common English usage. It also invites chaos. For example, surely § 1225(b)(2)(C) could not be read to

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

[33] Before 1996, for example, individuals who had entered the country, even illegally, were generally 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).

permit DHS to return a noncitizen who is not "described in subparagraph (A)" or is not "arriving on land." That reading would render superfluous the words that Congress actually wrote to describe precisely when the authority could be used. By saying what the government "may" do, the statute is necessarily saying what the government "may not" do. And by reading § 235.3(d) to permit the contiguous return of an "alien who . . . arrives at a land border port-of-entry and also one who does not," the government ignores the considered choice made by the INS and inserts into the regulation the very authority that the INS left out.

Regulations have the force of law. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Although 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, it chose not to do so. Having limited itself in 8 C.F.R. §§ 235.3(d) and 1001.1(q) to applying its contiguous-return authority only to noncitizens at ports of entry, the executive is bound by that limitation.

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.[34] 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 through formal rulemaking.[35] *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.*

---

[34] 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").

[35] Although the district court in *Innovation Law Lab* 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.

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 even attempt to seek 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 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. Reyes, Ms. Zuniga, and the López Abarca family 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,"[36] in favor of a reckless experiment with the lives of tens of thousands of vulnerable people.

[36] Jan. 2019 Press Release, *supra* note 12.

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.[37] But the calendaring of removal proceedings is entirely within the executive branch's control. DHS initially chose 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).

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."[38] *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; ECF No. 45 at 25 n.27. The MPP's non-refoulement procedures are also entirely devoid of the procedural protections of the reasonable fear process, including the opportunity to appear with counsel and to present evidence, the creation

[37] Dec. 2018 Press Release, *supra* note 6.
[38] Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8493 (Feb. 19, 1999) (enacting 8 C.F.R. § 208.31).

of a written summary of facts reviewed by the noncitizen and of a written decision, and the right to review by an immigration judge.[39] Asylum officers conducting MPP interviews must further put their thumbs on the scale by "tak[ing] into account" the United States' thoroughly debunked "expectation" that the Mexican government would uphold its own humanitarian commitments to migrants subject to the MPP.[40] 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* Ex. 11B at ¶¶ 9-12; Ex. 12B at ¶¶ 9-10; 30-34; Ex. 10A at ¶¶ 4-11; Ex. 10B at ¶¶ 11-18. In October 2019, amid news reports of killings and violence against migrants affected 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.[41]

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.*, Ex. 11B at ¶¶ 27, 34; Ex. 10A at ¶¶ 4-11. DHS also fails to take basic precautions that

[39] USCIS Policy Memorandum, *supra* note 8.
[40] *Id.*
[41] 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].

might marginally increase migrants' safety.

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 barred the provision's application unless "the aliens [*sic*] claim of fear of persecution or torture does not relate to Canada or Mexico."[42]

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.[43] 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.[44]

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,[45] and it does so by intentionally harming asylum seekers. It has also been accompanied by a slew of

---

[42] *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), filed as ECF No. 39.

[43] 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.

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

[45] Davis & Shear, *Border Wars* 334-37; Executive Order 13767, *supra* note 10.

measures designed to discredit and dismantle the asylum system[46] and restrict every kind of legal immigration.[47] 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); *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. Reyes, Ms. Zuniga, and the López Abarca family 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]

Forcing Ms. Reyes, Ms. Zuniga, and the López Abarca family 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.[48] *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.[49]

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; ECF No. 45 at 25 n.27. 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

[46] *See, e.g.*, 85 Fed. Reg. 80396 (Dec. 11, 2020) (regulation dramatically limiting asylum eligibility); American Immigration Lawyers Association, *Featured Issue: Border Processing and Asylum*, AILA Doc. No. 19032731 (Oct. 12, 2020), aila.org/advo-media/issues/all/featured-issue-border-processing-and-asylum; *see also* Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 11:02 AM), twitter.com/realdonaldtrump/status/1010900865602019329.
[47] *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.
[48] 1951 Convention, *supra* note 2, at Art. 33.
[49] *See supra* note 3.

immigration judge. *Id.* at 1088-89. Not surprisingly, few migrants are processed out of the MPP after these non-refoulement assessments. *See* Ex. 11B at ¶¶ 37-43.[50] These inadequacies are an intended feature, not an accidental byproduct, of the MPP, which is manifestly *designed* to give migrants no meaningful path to protection in the United States.

Plaintiffs were all sent to Tamaulipas without any non-refoulement inquiry. Ex. 2 at ¶¶ 6-7; Ex. 4 at ¶¶ 7-8; Ex. 6 at ¶¶ 6-9. As a result of that failure, they were immediately thrust into an environment where they are hunted, where authorities do not protect them, and where the only way to survive is to shelter-in-place. *See*, *e.g.*, Ex. 12B at ¶¶ 8-10, 28-41; Ex. 11B at ¶¶ 9-15, 19-27; Ex. 10B at ¶¶ 11-18; Ex. 2 at ¶¶ 24-26; Ex. 4 at ¶ 22. Ms. Zuniga, for example, was repeatedly targeted by people who understood that Central American migrants in Mexico can be harmed without consequences, and U.S. officials sent her and her children back to Mexico even *after* learning of these experiences. Ex. 6 at ¶¶ 13-30.

Plaintiffs Ms. Reyes, Ms. Zuniga, and the López Abarca family 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* Ex. 11B at ¶¶ 9-12; Ex. 12B at ¶¶ 9-10; 30-34; Ex. 10A at ¶¶ 4-11; Ex. 10B at ¶¶ 11-18. Moreover, Plaintiffs have suffered past persecution and are entitled to a presumption that their life or freedom would be threatened in Mexico on account of a

[50] *Cf.* DHS Assessment of MPP, *supra* note 42 (reporting positive fear finding in 13% of MPP non-refoulement screenings).

protected ground. *See* 8 C.F.R. § 208.16(b)(1)(i). They have been repeatedly targeted, threatened, and warned that they should not be out on the street, and they have avoided further violence only by following that advice to the extent possible. *See, e.g.*, Ex. 6 at ¶¶ 13-25, 33-47; Ex. 2 at ¶¶ 15, 22, 24-25; Ex. 4 at ¶¶ 14, 22. Because Ms. Reyes, Ms. Zuniga, and the López Abarca family have demonstrated that their "life or freedom would be threatened" on account of their Central American nationality and status as migrants, they are likely to prevail on their claim that forcing them to remain in Mexico violates U.S. and international law. Alternatively, Ms. Reyes, Ms. Zuniga, and the López Abarca family must be permitted to be in the United States until they can be provided with an adequate non-refoulement procedure—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.

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 the lives and well-being of Ms. Reyes, Ms. Zuniga, and the López Abarca family are at risk every day that they remain in Mexico. While a preliminary injunction may well save these plaintiffs from significant

harm or even death, its impact on the government will be minimal. Permitting Ms. Reyes, Ms. Zuniga, and the López Abarca family 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. Reyes, Mr. López, Ms. Abarca, T.L., D.L., A.L, and Ms. Zuniga, 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.

Dated: December 25, 2020

Respectfully submitted,

/s/ Adam J. Kessel
Adam J. Kessel (BBO # 661311)
Proshanto Mukherji (BBO #675801)
Eda Stark (BBO # 703974)
Fish & Richardson P.C.
ONE Marina Park Drive
Boston, MA 02210
(617) 368-2180
kessel@fr.com
mukherji@fr.com
stark@fr.com

Kenton W. Freeman, Jr. (BBO #690911)
Bobby Hampton (BBO #703472)
Fish & Richardson P.C.
1000 Main Avenue SW
Washington, DC 20024
kfreeman@fr.com
hampton@fr.com

Ricardo J. Bonilla
Texas Bar No. 24082704
Fish & Richardson P.C.
1717 Main Street, Suite 5000
Dallas, Texas 75201
(214) 747-5070
rbonilla@fr.com

/s/ Adriana Lafaille
Matthew R. Segal (BBO # 654489)
Adriana Lafaille (BBO # 680210)
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
alafaille@aclum.org