UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAUDY ROMELI CONSTANZA LEMUS, et al. Plaintiffs, v. CHAD F. WOLF, et al. Defendants.	Civ. No. 20-10009 **ORAL ARGUMENT REQUESTED** **LEAVE TO FILE GRANTED ON JANUARY 23, 2020**

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

American laws and regulations codify the principle that our government cannot blind itself to the likely fate of the noncitizens it removes. Yet this case arises from a government program that expels noncitizens into foreign territory not only despite, but because of, the dangers that await them. Under this program, which it calls "Migrant Protection Protocols" ("MPP"), the United States government forced Plaintiffs Hanz Morales and his son H.E.M.C. to walk over a bridge and into one of the most dangerous places on earth. They – and refugees like them – have no choice but to put their lives at risk for months in Mexico if they want any chance at asylum in the United States. This is by design; MPP fatally undermines core American legal protections for asylum seekers. The government's actions are illegal, and Plaintiffs seek preliminary injunctive relief to stop MPP's application to Mr. Morales and H.E.M.C. and bring them to safety.

Under MPP, the United States expels asylum seekers like Mr. Morales and his son into Mexico while their immigration cases are pending, and instructs them to the return to border to attend court. Disregarding legal protections for those who fear persecution, the government

implements MPP knowing migrants are persecuted in Mexico. This persecution is especially severe in the city of Nuevo Laredo, where migrants cannot safely be outside in broad daylight. Rather than walk into such danger, Mr. Morales begged U.S. officials not to make him cross the bridge, but an official responded by threatening to permanently separate him from his son. Mr. Morales and H.E.M.C. are now in hiding in Mexico, where they were nearly kidnapped twice and live in fear.

The government pretends its policy "protect[s]" migrants. But it does no such thing. Plaintiffs are likely to show that, as applied to Mr. Morales and H.E.M.C., MPP is unlawful in at least five ways:

1. It exceeds, in multiple respects, the government's legal authority to return noncitizens to contiguous foreign territory; most obviously, it violates 8 C.F.R. § 235.3(d), which limits applications of that authority to noncitizens who, unlike Mr. Morales and H.E.M.C., arrived in the U.S. at ports of entry.

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

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

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

5. It impermissibly exposes Mr. Morales and H.E.MC. to persecution in Mexico, in violation of the U.S. government's duty of non-refoulement.

As shown below, these fatal defects with MPP, as well as the other preliminary injunction factors, warrant a preliminary injunction ordering the Defendants to permit Mr. Morales and H.E.M.C. to enter the United States while their removal proceedings are litigated.

BACKGROUND

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

This country's core commitment to refugees is the duty of non-refoulement, under which the U.S. may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."[1] 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.[2]

U.S. law implements its non-refoulement duty in part through a protection called "withholding of removal," which protects noncitizens from being sent to a country where they faced past persecution or are "more likely than not" to face future persecution on account of one of the protected grounds. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b). Even in contexts in which the law does not provide 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. *Id.*

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[1] 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 (1987); *Devitri v. Cronen*, 289 F. Supp. 3d 287, 295 n.11 (D. Mass. 2018) (recognizing Convention "imposed a mandatory non-refoulement duty").

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

§ 208.31.[3] At that screening, if an asylum officer finds a "reasonable fear" of persecution, the noncitizen proceeds to a full withholding of removal proceeding in front of an immigration judge. *Id.* § 208.31(e). If not, the noncitizens is entitled to review of the negative fear determination by an immigration judge. *Id.* § 208.31(g). The Department of Homeland Security ("DHS") may not summarily send individuals to a place where they fear persecution without these safeguards. *See id.* §§ 208.16(a), 208.31(a).

A similar process is designed to achieve both expediency and protection for asylum seekers at the border. Since 1996, noncitizens who arrive in the United States without entry papers, or with papers obtained through fraud, are summarily removed through the "expedited removal" process. 8 U.S.C. § 1225(b)(1)(A)(i). Individuals who are caught shortly after crossing the border between ports of entry may also be subject to this process. *Id.* § 1225(b)(1)(A)(iii).[4] But recognizing that many *bona fide* asylum seekers might 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. *Id.* §§ 1225(b)(1)(A)–(B). Where the asylum officer does not find a credible fear, noncitizens are entitled to review by an immigration judge. *Id.* § 1225(b)(1)(B)(iii)(III). Individuals found to have a credible fear of persecution are not expeditedly removed and are instead referred for removal proceedings in which they may apply for asylum, withholding of removal, and other relief in front of an immigration judge. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30, 235.6.

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

[4] *See also* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004).

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

Notwithstanding Congress's commitment to fulfill this country's duty of non-refoulement and protect asylum seekers, DHS announced what it called "Migrant Protection Protocols" ("MPP") in a December 2018 press release. Under MPP, individuals "arriving in or entering the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings."[5] 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.[6]

DHS did not promulgate any regulations for MPP. And although the agency seemingly agrees 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 "non-refoulement" 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.[7] Under these new mandatory procedures, asylum officers must determine whether noncitizens who express a fear of return to Mexico will "more likely than not" experience persecution there on account of a protected ground—a standard five-times higher than

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

[6] *Id.*

[7] *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), www.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].

reasonable fear and identical to the showing required to prevail on the *merits* of a withholding of removal claim after a full hearing in front of an immigration judge.[8] These MPP non-refoulement interviews bear little resemblance to "reasonable fear" screenings, and provide no opportunity for review by an immigration judge.

MPP carries out President Trump's directive that DHS simply stop allowing migrants at the Southern border to enter the U.S. to seek asylum.[9] Former DHS Secretary Kirstjen Nielsen acknowledged that MPP is an "unprecedented action" taken in response to court decisions the government deems "misguided" and to laws that are "outdated."[10] These decisions and laws, the government claims, permit the "exploit[ation]" of "asylum loopholes" by "[i]llegal aliens" and "fraudsters."[11] 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.[12] DHS asserted that, by prohibiting asylum seekers from entering and remaining in the U.S. prior to a "final decision" on the merits of their immigration cases, the "MPP will reduce the number of

[8] *Compare id. with* 8 C.F.R. § 208.16(b) ("more likely than not" standard in withholding of removal) *with* 8 C.F.R. § 208.31 (reasonable fear interviews). A "reasonable fear" is a "reasonable possibility" that a noncitizen would be persecuted, 8 C.F.R. § 208.31(c), a standard that is interpreted to be satisfied when a noncitizen demonstrates a ten percent chance of persecution. *See* USCIS, Reasonable Fear FAQ, www.uscis.gov/faq-page/reasonable-fear-faq#t12808n40174 (reasonable fear applies same standard as "well-founded fear" in asylum context); *Cardoza-Fonseca*, 480 U.S. at 440 ("well-founded fear" satisfied with ten percent chance of persecution).

[9] Julie H. Davis and 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").

[10] DHS Press Release, Kirstjen M. Nielsen, Secretary, Homeland Security, Migrant Protection Protocols (Jan. 24, 2019), www.dhs.gov/news/2019/01/24/migrant-protection-protocols [hereinafter Jan. 2019 Press Release].

[11] Dec. 2018 Press Release, *supra* n.5.

[12] Jan 2019 Press Release, *supra* n.10.

aliens taking advantage of U.S. law."[13] And by limiting the number who avail themselves of U.S. laws, the government claimed it would "more effectively assist legitimate asylum-seekers."[14]

III. Central American migrants are persecuted in Tamaulipas and Mexico.

Approximately 60,000 asylum seekers and migrants, including 16,000 children, have been sent to Mexico under MPP.[15] In July 2019, DHS expanded MPP to Tamaulipas, one of the most dangerous places in the world.[16]

The U.S. State Department has assigned Tamaulipas a "Level 4: Do Not Travel" warning—the same as Syria 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 6:00 a.m. in Nuevo Laredo.[17] In December 2019, the U.S. consulate in Nuevo Laredo advised U.S. personnel to shelter in place because of multiple gunfights in the city, in which three civilians died.[18] The U.S. government has also taken steps to designate the wreak havoc on Nuevo Laredo

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[13] *Id.*
[14] *Id.*
[15] Human Rights First, *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger* (Jan. 20, 2019), www.humanrightsfirst.org/campaign/remain-mexico [hereinafter HRF Delivered to Danger]; *see also* Reuters and Joseph Zeballos-Roig, *Trump's Immigration Crackdown Forced 16,000 Children, Including 500 Babies, to Wait for Weeks or Months in Mexico*, Business Insider (Oct. 11, 2019), www.businessinsider.com/exclusive-us-migrant-policy-sends-thousands-of-babies-and-toddlers-back-to-mexico-2019-10.
[16] Lizbeth Diaz, *Two More Border Cities Added to U.S.-Mexico Asylum Program*, Reuters (June 23, 2019), www.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 (Jul. 2, 2019), www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico.
[17] 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 Jan. 20, 2020) [hereinafter Mexico Travel Advisory].
[18] Reuters, *U.S. Consulate Warns Employees as Gun Battles Rock Mexican Border City* (Jan. 2, 2020), www.reuters.com/article/us-mexico-violence-nuevolaredo-idUSKBN1Z10AA; *see also* U.S. Embassy & Consulates in Mexico, Security Alert Update-U.S. Consulate General Nuevo

and other parts of Northern Mexico as foreign terrorist organizations.[19] Just this month, a South Texas sheriff warned against travel to Nuevo Laredo due to "intensive shootings" involving "high-caliber machine guns and explosives."[20]

Central American and other migrants bear the brunt of this violence, facing persecution throughout Mexico, but especially in Tamaulipas and Nuevo Laredo.[21] Criminal cartels hunt migrants who are awaiting their asylum hearings, running a "lucrative enterprise of abducting and extorting" them. Sealed Aff. ¶ 11.[22] Migrants who do not submit to this authority are violently punished. Sealed Aff. ¶¶ 10-11. Nuevo Laredo is so dangerous for migrants that if they so much as venture outside they are simply picked off the street by the cartels. *Id*. at ¶¶ 12, 17. And that

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Laredo (Jan. 2, 2020), mx.usembassy.gov/security-alert-update-u-s-consulate-general-nuevo-laredo-january-2-2020/.

[19] *See* Douglas Clark, *Bill Classifies Seven Mexican Drug Cartels as Terrorist Organizations*, Homeland Preparedness News (Dec. 27, 2019), homelandprepnews.com/stories/41838-bill-classifies-seven-mexican-drug-cartels-as-terrorist-organizations/; Mary Beth Sheridan, *At Least 19 Killed as Mexican Cartel Battles Police and Army South of U.S. Border*, Washington Post (Dec. 1, 2019), www.washingtonpost.com/world/the_americas/at-least-21-killed-in-gun-battle-as-mexican-cartel-battles-security-forces-south-of-us-border/2019/12/01/722ae348-1450-11ea-80d6-d0ca7007273f_story.html; Morgan Winsor and Julia Jacob, *Horrific Details Emerge in Killings of 9 US Citizens, Including 6 Children, in Ambush in Mexico*, ABC News (Nov. 5, 2019, 7:39 PM), abcnews.go.com/international/members-american-family-including-children-killed-ambush-mexico/story?id=66758676; *see also* Valarie Gonzalez, *Tamaulipas Requesting Federal Assistance Against Cartel Violence*, KRGV (Aug. 28, 2019), www.krgv.com/news/tamaulipas-requesting-federal-assistance-against-cartel-violence-surge/ (quoting former FBI agent who stated cartels have "monster vehicles heavily fortified with barracks and high-caliber guns even stronger than the military").

[20] Adrian Ortega, *South Texas Sheriff Warns About Traveling to Nuevo Laredo Amid 'Intensive Shootings'* KSTAT (Jan. 2, 2020), www.ksat.com/news/texas/2020/01/02/south-texas-sheriff-warns-about-traveling-to-nuevo-laredo-amid-intensive-shootings/.

[21] *See* Affidavit ¶11-23, 26, 28-30 (attached to Lafaille Decl. at Ex. 1) ("Sealed Aff."). Plaintiffs have concurrently moved to seal this Affidavit. *See* Pls.' Mt. for Leave to File Affidavit Under Seal and the affidavit attached thereto.

[22] Patrick J. McDonnell, *Mexico Sends Asylum Seekers South – With No Easy Way to Return for U.S. Court Dates*, L.A. Times (Oct. 15, 2019), www.latimes.com/world-nation/story/2019-10-15/buses-to-nowhere-mexico-transports-migrants-with-u-s-court-dates-to-its-far-south.

violence is only increasing. *Id.* ¶ 28-29. In October 2019, a full 75 percent of new patients seen by Doctors Without Borders in Nuevo Laredo after being subject to MPP reported that they had been kidnapped.[23]

Migrants in Nuevo Laredo risk their lives every time they go to court. *Id*. ¶ 24.[24] Cartels identify migrants as they walk across the bridge to Nuevo Laredo. Sealed Aff. ¶ 14. They target migrants at the Mexican immigration building, at bus stations, and outside of shelters. *Id.* at ¶ 16.[25] They even penetrate shelters and private homes. Sealed Aff. ¶16.[26] Public reports of rape, kidnapping, torture, and other violent attacks against asylum seekers returned to Mexico under MPP numbered 779 by January 20, 2019—a vast underreporting.[27]

Mexican authorities do not protect migrants, who are simply left to fend for themselves.[28] Amnesty International has concluded that Mexican officials systematically violate their own non-refoulement duty.[29] And some Mexican officials are reported to help turn migrants over to the

[23] Affidavit of Sergio Martin ¶ 8 (attached to Lafaille Decl. at Ex. 8).
[24] *See also* Patrick McDonnell, *Pastor's Kidnapping Underscores Threat to Migrants Returned to Mexican Border Towns*, L.A. Times (Sept. 2, 2019), www.latimes.com/world-nation/story/2019-09-01/kidnapping-of-pastor-in-mexican-border-town-dramatizes-threats-to-migrants (documenting the plight of migrant trying to escape the gangs extorting her family's grocery store; she stated that the gangs in Nuevo Laredo are worse than those she fled); Emily Green, *Trump's Asylum Policies Sent Him Back to Mexico. He Was Kidnapped Five Hours Later By a Cartel*, Vice News (Sept. 16, 2019), www.vice.com/en_us/article/pa7kkg/trumps-asylum-policies-sent-him-back-to-mexico-he-was-kidnapped-five-hours-later-by-a-cartel.
[25] Human Rights First, Human Rights Fiasco: The Trump Administration's Dangerous Asylum Returns Continue 1-2, 10-13 (Dec. 2019), www.humanrightsfirst.org/sites/default/files/Human RightsFiascoDec19.pdf [hereafter HRF Human Rights Fiasco].
[26] *See also* HRF Human Rights Fiasco 7-9 (describing cartel members breaking into homes, placing rifles to migrants' heads, and beating and robbing them).
[27] HRF Delivered to Danger, *supra* n.15. Human Rights First has found at least 190 public reports cases of kidnapping of attempted kidnapping of children in the MPP Program.
[28] Patrick McDonnell, *Pastor's Kidnapping*, *supra* n.23.
[29] Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum*, www.amnestyusa.org/reports/overlooked-under-protected-mexicos-deadly-refoulement-of-central-americans-seeking-asylum/ (last visited Jan. 20, 2020).

cartels. Sealed Aff. ¶13. For example, in September 2019, cartel members entered a Mexican immigration building in Nuevo Laredo and openly kidnapped returned asylum seekers, with one cartel member bragging, "The man from migration gave you to us."[30] Cartels prey on Central Americans freely—knowing that Mexican society and authorities views them as an underclass that is unworthy of protection. Sealed Aff. ¶¶19-24.

FACTS

Hanz Morales fled Guatemala with Plaintiff Maudy Constanza and their three children in June 2019, to escape the people that shot Mr. Morales four times. Morales Aff. ¶¶ 6-7; Constanza Aff. ¶ 2.[31] Ms. Constanza and the couple's two young daughters crossed the U.S.-Mexico border between ports of entry. *Id.* at ¶ 3.They were apprehended by Customs and Border Patrol ("CBP"), given Notices to Appear in Immigration Court for removal proceedings, and paroled into the U.S. They live with relatives in Massachusetts. *Id.*

Mr. Morales and the couple's eight-year-old son, H.E.M.C., were also apprehended by CBP and issued Notices to Appear after crossing the border between ports of entry in July 2019. *See* Lafaille Decl. Ex. 4. But CBP informed Mr. Morales and H.E.M.C. that they would be sent back to Mexico under the "Migrant Protection Protocols." Morales Aff. ¶ 12; Lafaille Decl. Ex. 5. As explained in a government notice, Mr. Morales would have to appear for their next court date, approximately three months later, by presenting themselves at a bridge connecting Nuevo Laredo, in the Mexican state of Tamaulipas, and Laredo, in the U.S. state of Texas. H.E.M.C.'s attendance was required. Lafaille Decl. Ex. 5.

[30] HRF Delivered to Danger, *supra* n.15.
[31] Affidavit of Hanz Morales ¶¶ 6-7 (attached to Lafaille Decl. at Ex. 2) ("Morales Aff."); Affidavit of Maudy Constanza ¶ 2 (attached to Lafaille Decl. at Ex. 3) ("Constanza Aff.").

Mr. Morales told U.S. officials that it was too dangerous for them in Mexico. On the day that he and H.E.M.C. were taken to the Gateway to the Americas Bridge and told to walk to Nuevo Laredo, Mr. Morales was so afraid that he sat down on the bridge, in the hot sun, and begged officials to do anything with him, so long as they did not send him and H.E.M.C. to Mexico. Morales Aff. ¶¶ 12–14.

An officer told Mr. Morales that he would be sent to jail for a long time, that H.E.M.C. would be sent to a facility for minors, and that they would never see each other again. H.E.M.C. heard this conversation and was inconsolable. Mr. Morales was never told, and did not know, that they were entitled to raise their fear of persecution in Mexico and receive an interview. Instead, the next day, they were taken to the bridge again, and walked across, feeling they had no choice. *Id.* at ¶¶ 15–20.

With nowhere to go, the two slept for several days on the floor of a Mexican immigration building in Nuevo Laredo. After their first night, when they ventured outside, armed men wearing ski masks attempted to kidnap them. The next time they went out, Mr. Morales saw men following them and ran back inside with H.E.M.C. Mr. Morales and H.E.M.C. were often hungry because it was too dangerous to buy food. *Id.* at ¶¶ 20–26. They eventually found shelter outside of Tamaulipas with the help of a pastor, but are unable to go outside due to their fear of being attacked. *Id.* at ¶ 28; Sealed Aff. ¶ 1.

In October and November 2019, Mr. Morales and H.E.M.C. returned to Nuevo Laredo so they could cross to the U.S. and attend their court hearings, risking their lives each time in order to do so. At the conclusion of these hearings, they walked back across the bridge and made it back to their shelter only because the pastor picked them up in his van. Morales Aff. ¶¶ 30–32.

Through an attorney, Mr. Morales formally requested a non-refoulement interview, which occurred by telephone immediately after his November 2019 hearing. Mr. Morales was never told the result of it. Instead, he and H.E.M.C. were again taken to the bridge and forced into Nuevo Laredo, this time with instructions to appear at a final removal hearing. Morales Aff. ¶¶ 33–37.

To appear at that hearing, they will need to present themselves at the bridge at 4:30 am—a time when the U.S. government forbids its employees to be outside in Nuevo Laredo. *See* Lafaille Decl. Ex. 6. Hanz and H.E.M.C. have no safe way of appearing in court. *See* Sealed Aff. ¶¶ 28–32.

At the removal hearing, Mr. Morales's and H.E.M.C.'s applications for protection from removal to Guatemala will be decided. Because Mr. Morales and H.E.M.C. are subject not only to MPP but also to the government's asylum transit ban against asylum seekers who did not first apply in a third country (implemented in July 2019),[32] they will be permitted only to apply for withholding of removal or "Convention Against Torture" protection.[33] If the immigration judge's decision is appealed by either side, Mr. Morales and H.E.M.C. could spend at least four to eight more months in hiding in Mexico, awaiting the results of that appeal.

Mr. Morales and H.E.M.C. remain in danger and live in hiding. They cry almost daily. On many days, Mr. Morales can barely function. H.E.M.C. does not attend school and becomes inconsolable if he loses sight of his father, even briefly. Morales Aff. ¶¶ 40–43. Knowing this, Ms. Constanza lives in anguish. Constanza Aff. ¶¶ 5-13.

[32] Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829, 33830 (July 16, 2019)
[33] Withholding of removal requires demonstrating persecution is "more likely than not" to occur, a standard significantly higher than asylum. *See Cardoza-Fonseca*, 480 U.S. at 423-24.

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 forcibly returning Mr. Morales and H.E.M.C. to Mexico was unlawful.

A. Subjecting plaintiffs to 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 MPP derives from 8 U.S.C. § 1225(b)(2)(C), which permits the "return" of certain "arriving" aliens to a contiguous territory from which they arrived by land. Section 1225(b)(2)(C) applies to noncitizens who present valid entry documents but are not clearly entitled to be admitted for reasons such as visa violations, likelihood of becoming a "public charge," past crimes, or prior immigration violations. *See generally* 8 U.S.C. § 1182(a). It provides:

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

For two reasons, § 1225(b)(2)(C) does not apply to Mr. Morales and H.E.M.C. First, notwithstanding the statute's reference to arriving aliens "whether or not at a designated port of entry," the regulation implementing § 1225(b)(2)(C) permits the return *only* of noncitizens who presented themselves at ports of entry. Mr. Morales and H.E.M.C. did not. Second, the noncitizens "described in subparagraph (A)"—to whom the contiguous return authority may be applied—

exclude migrants like Mr. Morales and H.E.M.C. who came to the U.S. illegally or without entry documents and are consequently subject to expedited removal under § 1225(b)(1).

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

Mr. Morales and H.E.M.C. are not subject to § 1225(b)(2)(C) because they were detained after entering the country between ports of entry, and because they are not "arriving" aliens within the meaning of § 1225(b)(2)(C).

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

And limit its own discretion is what the executive did. On March 6, 1997, as part of regulations it recognized as "necessary" to implement IIRIRA,[34] the INS enacted a regulation implementing § 1225(b)(2)(C)'s contiguous-return authority by applying it *only* to noncitizens arriving at land border ports of entry. That regulation provides:

> In its discretion, the Service may require any alien who appears inadmissible and who arrives *at a land border port-of-entry* from Canada or Mexico, to remain in that country

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

> while awaiting a removal hearing. Such alien shall be considered detained for a proceeding within the meaning of section 235(b) of the Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.

8 C.F.R. § 235.3(d) (emphasis added).

This port-of-entry limitation was quite intentional. In promulgating the 1997 rule, the Immigration and Naturalization Service ("INS") made clear that 8 C.F.R. § 235.3(d) "implements" § 1225(b)(2)(C), and it described the contiguous-return authority as applying to "an applicant for admission arriving at a land border port-of-entry."[35] The INS also explained that it had "extensively considered" the application of other provisions of § 1225(b) to noncitizens arriving between land border ports of entry and noted that "the statute seemed to differentiate more clearly between aliens at ports-of-entry and those encountered elsewhere in the United States."[36] This limitation is logical. It respects the longstanding distinction in immigration law between those who have entered the country and those deemed to be knocking on its door at a port of entry;[37] it accounts for the practical difference between turning back noncitizens at a ports of entry and seizing, detaining, and expelling them into foreign cities; and it recognizes that illegal border crossers are already subject to the harsh possibility of expedited removal.

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

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[35] 62 Fed. Reg. at 445.
[36] Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10313 (March 6, 1997).
[37] Before 1996, for example, individuals who had entered the country, even illegally, were subject to "deportation" proceedings, whereas those who arrived at a port of entry were subject to "exclusion" proceedings. *See Kawashima v. Holder*, 565 U.S. 478, 481 n.2 (2012).

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

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

Mr. Morales and H.E.M.C. are also not subject to 8 U.S.C. § 1225(b)(2)(C) because that authority does not apply to migrants who are eligible for expedited removal procedures 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 MPP. Only those individuals subject to § 1225(b)(2) may be returned to foreign contiguous territory pending a removal proceeding. *See* § 1225(b)(2)(C).

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 Mr. Morales and H.E.M.C. to MPP 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 paragraph (1) *has been applied* to them, but whether it "applies." Plainly, it does, and consequently, the contiguous return authority of § 1225(b)(2)(C)

does not. *See Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1123 (N.D. Cal. 2019), *stay pending appeal granted*, 924 F.3d 503 (9th Cir. 2019).

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

The government's implementation of 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 MPP violated notice-and-comment for two reasons. *First*, DHS abandoned its longstanding regulations, *see, e.g.*, 8 C.F.R. § 235.3(d), by applying 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, MPP departs from "reasonable fear" regulations and implements an entirely new, mandatory fear screening process, one that is designed to return as many people to Mexico as possible in the shortest time possible. The fear screening procedures are mandatory.[38] By requiring immigration officers to apply the procedures to noncitizens who express a fear, and prohibiting the return of any noncitizens found to satisfy its 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.

[38] CBP, *MPP Guiding Principles: Guiding Principles for Migrant Protection Protocols* (Jan. 28, 2019), www.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").

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. *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)) (internal quotation marks and citations omitted).

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

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

First, 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 F3d 1259, 1267 (D.C. Cir. 1994) (agency approach was inconsistent with agency's own stated intentions, making it arbitrary and capricious). MPP does nothing to vet for or deter fraudulent claims specifically. Instead, the mechanism employed by MPP is to inflict so much suffering and danger on migrants that they will find it unbearable to pursue asylum, regardless of the merits of their claims. If anything, MPP is more likely to discourage meritorious asylum claims because the hardships

inflicted by MPP will exact the heaviest toll on asylum seekers who are most genuinely vulnerable and traumatized. This mechanism obviously contradicts MPP's stated goal of protecting migrants, and MPP cannot possibly claim to "protect" genuine asylum seekers like Mr. Morales and his son because it is nothing more than a choice to keep asylum seekers out and abandon the protections for them in U.S. law.

Second, MPP hastily departs from the carefully calibrated scheme adopted by Congress *for this very same population*. Congress already addressed the need to distinguish legitimate asylum seekers and remove fraudulent ones through the expeditd removal and credible fear screening process of 8 U.S.C. § 1225(b)(1). Calling Congress's scheme for distinguishing legitimate from fraudulent asylum claims "outdated,"[39] DHS has simply decided to run an experiment with the lives of tens of thousands of vulnerable people using procedures made up on the go.[40]

Third, the reasons for DHS's need to depart from this longstanding system for handling asylum seekers at the border are disingenuous. A central reason provided for DHS's dissatisfaction with the credible fear process is the slow pace of removal proceedings for those who pass credible fear screenings.[41] But the calendaring of removal proceedings is entirely within the executive's control. That DHS has *chosen* to schedule MPP hearings on a faster calendar has everything to do with the agency's own choice to prioritize these cases and nothing at all to do with asylum seekers needing to be in Mexico between court dates.

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[39] Jan 2019 Press Release.

[40] Mr. Morales' puzzling immigration documents reflect MPP's slap-dash implementation. His Notice to Appear is facially invalid because it fails to indicate the type of removal proceeding he is in. *See* Lafaille Decl. Ex. 4; 8 C.F.R. § 1003.15(b). And a "Notice of Custody Determination" oddly informs him that DHS has decided to release him from its custody (apparently, into Mexico), and misleadingly suggests that he could obtain review of that decision by an immigration judge. *See* Lafaille Decl. Ex. 7.

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

Fourth, MPP is an unreasoned and wholesale departure from the reasonable fear procedures that the government 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."[42] Unlike reasonable fear interviews, 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. MPP's non-refoulement procedures are also entirely devoid of the procedural protections of the reasonable fear process, including the opportunity to have counsel present and to present evidence, the creation of a written summary of facts reviewed by the noncitizen and of a written decision, and the right to review by an immigration judge.[43] Asylum officers conducting MPP interviews must further put their thumbs on the scale by "tak[ing] into account" the United States' "expectation" that the Mexican government will uphold its own humanitarian commitments to migrants subject to MPP.[44]

Fifth, beyond dispensing with screening procedures the agency previously thought necessary whenever *any* noncitizen claimed a fear of removal to *any* country, 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. In October 2019, amid news reports of killings and violence against migrants affected by its policies, DHS doubled down on its decision

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

to limit the number of non-refoulement interviews by declining to ask migrants whether they had a fear of return.[45]

Sixth, in July 2019, DHS recklessly expanded 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 Afghanistan and Syria. DHS persists in returning migrants to Nuevo Laredo and other parts of Tamaulipas even among reports of rampant violence against migrants and frequent mentions of kidnappings in its own immigration court proceedings. DHS also fails to take basic precautions that might marginally increase migrants' safety. It forces those appearing in court to be at the Gateway to the Americas Bridge in Nuevo Laredo at 4:30 a.m., a requirement U.S. officials would be prohibited from complying with because of its danger.[46] And U.S. officers expel asylum seekers in a manner that marks them as migrants expelled by the United States—including shoes without laces and belongings in government-issued plastic bags. Sealed Aff. ¶ 15; Morales Aff. 32.

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 regard to application of the contiguous return provision, which barred the provision's application unless "the alien's claim of fear of persecution or torture does not relate to Canada or Mexico."[47]

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

[46] *See* Lafaille Decl. Ex. 6; Mexico Travel Advisory.

[47] *See* Memorandum from Jayson Ahern, Assistant Commissioner, Office of Field Operations, United States Customs and Border Patrol, Treatment of Cuban Asylum Seekers at Land Border Ports of Entry IPP 05 1562 (June 10, 2005).

D. MPP is motivated by animus, in violation of equal protection. [Count 7]

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

MPP is a product of that animus. It implements President Trump's specific demand that that DHS keep out Central American asylum seekers,[50] and it does so by intentionally harming asylum seekers. It has also been accompanied by a slew of measures designed to discredit and dismantle the asylum system[51] and restrict every kind of legal immigration.[52] Because MPP is the product of invidious animus, the Equal Protection Clause prohibits it from continuing. *See, e.g.*,

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

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

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

[51] *See, e.g.*, *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (enjoining ban on asylum for border crossers), appeal pending, No. 18-17274 (9th Cir.); Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019); *see also* Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 11:02 AM), twitter.com/realdonaldtrump/status/1010900865602019329; *see also* Donald J. Trump (@realDonaldTrump), Twitter (June 21, 2018, 8:12 AM), twitter.com/realdonaldtrump/status/1009770941694298753/.

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

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. Mr. Morales and H.E.M.C. have faced, and will likely to continue to face, persecution in Mexico. [Counts 3, Count 6 ¶ 152]

Forcing Mr. Morales and H.E.M.C. to remain in Mexico violates the duty of non-refoulement, under which the United States "shall not expel or return ("refouler") a refugee" subject to persecution in the country to which he is returned.[53]

First, Plaintiffs are likely to demonstrate that keeping them in Mexico violates the duty of non-refoulement because they have faced past persecution and are likely to suffer future persecution there on account of a protected ground, *i.e.*, their national origin, Central American ethnicity, and status as migrants. Like other migrants, Mr. Morales and H.E.M.C. were hunted from the moment they stepped foot in Nuevo Laredo. On their very first full day after being returned to Mexico, Mr. Morales and H.E.M.C. were nearly kidnapped by armed men in ski masks. When Plaintiffs next ventured out, men followed them, and they were forced to race back to shelter. Mr. Morales has been unable to find housing or employment due to widespread discrimination. He and his son are condemned to live in hiding because of the pervasive targeting of Central American migrants, and the complicity of Mexican government officials. Morales Aff. ¶¶ 22-26, 38-39; Sealed Aff. ¶¶ 11-23.

Having established past persecution in Mexico, "it shall be presumed that [Mr. Morales's and H.E.M.C.'s] life or freedom would be threatened in the future in the country of removal on the basis of the original claim." 8 C.F.R. § 208.16(b)(1)(i). Moreover, Mr. Morales and H.E.M.C. need not provide individual evidence of future persecution because they have demonstrated that

[53] 1951 Convention, *supra* n.1, Art. 33.

"there is a pattern or practice of persecution" of Central American asylum seekers in Mexico. 8 C.F.R. § 208.16(b)(2); *cf. Zubeda v. Ashcroft*, 333 F.3d 463, 478 (3d Cir. 2003) (noting that mass violations of human rights in country of removal corroborate alien's claim that he will be subjected to torture and constitute proof required by Convention Against Torture). Because Mr. Morales and H.E.M.C. have been, and will continue to be, persecuted in Mexico due to their national origin, ethnicity, and status as migrants, Plaintiffs are likely to prevail on their claim that forcing them to remain in Mexico violates U.S. and international law.

Second, at a minimum, Plaintiffs are likely to demonstrate that they are entitled to adequate non-refoulement procedures. Mr. Morales and H.E.M.C. were constitutionally entitled to fair procedures before being expelled from the United States to face potential persecution and death. *See Arevalo v. Ashcroft*, 344 F.3d 1, 11, 14 (1st Cir. 2003); *Jimenez v. Nielsen*, 334 F. Supp. 3d 370, 386 (D. Mass. 2018). Instead, U.S. authorities sent Mr. Morales and H.E.M.C. to Mexico without *any* evaluation of their fear of persecution there, and—four full months later—provided an interview under standards and procedures designed to keep them in Mexico. Plaintiffs are likely to demonstrate that, at the very least, they are entitled to adequate non-refoulement procedures, which must employ a standard no higher than "reasonable fear" and provide for review by an immigration judge. *See* 8 C.F.R. §§ 208.16(a), 208.31; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

II. Plaintiffs prevail on the remaining preliminary injunction factors.

Plaintiffs have not only overcome "the main bearing wall of the four-factor framework" by showing a likelihood of success on the merits, *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996), but they also meet the burden of demonstrating the remaining preliminary injunction factors: "(2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted

with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." *Bl(a)ck Tea Society v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004) (quoting *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004)) (additional citations and internal quotation marks omitted).

Plaintiffs have demonstrated that they will suffer irreparable harm because their lives and well-being are at risk every day that Mr. Morales and H.E.M.C. remain in Mexico. While a preliminary injunction may well save Mr. Morales and H.E.M.C. from significant harm or even death, its impact on the government will be minimal. If anything, the government will benefit from permitting Mr. Morales to enter the United States and take steps to have his asylum claim heard together with that of Ms. Constanza, whose asylum case is based on the same set of facts. Permitting Mr. Morales and H.E.M.C. to remain in the U.S. is also in the public interest. It will reunite a family 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 MPP to Mr. Morales and H.E.M.C., and consequently, be required to parole them into the United States. Alternatively, Plaintiffs request an adequate fear screening following the reasonable fear standards and procedures of 8 C.F.R. § 208.31, including review by an immigration judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document will be served on all registered parties through court's CM/ECF system.

/s/ Jessica S. Dormitzer

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