UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AMIN NAIM SALIM ADRIANZA, individually and as next friend to Leimariana del Valle Petit Romero; LEIMARIANA DEL VALLE PETIT ROMERO; BLANCA DANELIA FUNES CASTELLANO, individually and as next friend to Emma Obando Funes, A.Y.B.O., and J.L.B.O.; EMMA OBANDO FUNES; TEODILA SAMBULA RAMOS, individually and as next friend to Cinthya Vanessa Castillo Sambula and A.E.C.S.; CINTHYA VANESSA CASTILLO SAMBULA; and JANE DOE, Plaintiffs, v. DONALD J. TRUMP, President of the United States; CHAD F. WOLF, Acting Secretary of Homeland Security; and the U.S. DEPARTMENT OF HOMELAND SECURITY. Defendants.	Civ. No. 20-cv-3919

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

DATED: September 5, 2020

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** motion for pro hac vice pending*

Table of Contents

Table of Authorities

Cases.....Page(s)

Statutes, Regulations, and Other Authorities

INTRODUCTION

Fourteen years ago, Congress legislated a system for expeditiously removing individuals who cross land borders and are found present in the United States. In recognition of the United States' humanitarian obligations to those seeking protection at our borders, Congress included a mechanism within that system to screen for valid asylum claims. The current administration now seeks to undermine this system via executive fiat and press release rather than lawful means. The recent "Migrant Protection Protocols" allow immigration officers to apprehend asylum-seekers who have entered the United States and summarily return them to dangerous border regions in Mexico, where they spend months waiting for hearings in U.S. immigration courts.

This case concerns the unlawful application of the Protocols to seven asylum-seekers apprehended inside the United States and forced back into Mexico and the harm to their families who reside in New York. This forcible return violates long-standing protections Congress conferred on asylum seekers in the Immigration and Nationality Act, as well as its implementing regulations, the Rehabilitation Act, the Administrative Procedure Act, and the Constitution. Nor did it comply with the defendants' own legally enforceable protocols, which exclude vulnerable individuals. Trapped in Mexico, the plaintiffs have suffered violence, threats, homelessness, and the deterioration of their medical and mental health, while their families in New York fear the worst. Because returning these plaintiffs to Mexico was unlawful and the plaintiffs risk further irreparable harm, the Court should grant preliminary injunctive relief.

BACKGROUND AND FACTS

I. THE PROTOCOLS DRAMATICALLY DEPART FROM THE LEGAL REGIME GOVERNING ASYLUM-SEEKERS APPREHENDED IN THE UNITED STATES.

On December 20, 2018, the Department of Homeland Security ("DHS") announced in a press release that it had created the euphemistically named "Migrant Protection Protocols"

("MPP"). *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, DHS ("Press Release") attached as Exhibit A to the Declaration of Megan Sallomi ("Sallomi Decl."). The United States no longer would permit asylum-seekers entering the United States without inspection to pursue those claims in the safety of the United States; instead, they would be returned to Mexico and forced to wait there while the government processed their claims. *Id*. To do this, DHS would be "invoking [8 U.S.C. § 1225(b)(2)(C)]" to return individuals who already entered the U.S. without inspection to Mexico pending removal proceedings. *Id.* That provision states:

> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not 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 [removal] proceeding under section 1229a of this title.

8 U.S.C. § 1225(b)(2)(C).

This "return provision" was codified in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). *See* IIRIRA, Pub. L. 104–208, § 302, 110 Stat 3009 (1996). It applies to certain noncitizens seeking admission, who Congress directed to be detained or, if "arriving on land," may be returned to the contiguous territory pending standard removal proceedings. *See* § 1225(b)(2). IIRIRA separately created an expedited removal system for those found present in the United States after having entered without inspection. *See* 8 U.S.C. § 1225(b)(1). The statute requires immigration officers to screen apprehended individuals for asylum claims (known as "credible fear interviews"). Those with credible fears are entitled to a standard removal proceeding; those who do not are expeditiously removed. *See id*.

IIRIRA directed the Immigration and Naturalization Service (whose functions were later transferred to DHS) to promulgate regulations implementing the law, which the Service did in 1997. *See* IIRIRA § 309(b); Interim Rule: Inspection and Expedited Removal of Aliens, 62 Fed.

Reg. 10312 (Mar. 6, 1997). After notice and comment, the Service chose to define "arriving aliens," a term that appears repeatedly in IIRIRA, including in the return provision, as noncitizens seeking admission at a port of entry. *See* Interim Rule, 62 Fed. Reg. at 10312-10313; 8 C.F.R. § 1001.1(q); *see also* Proposed Rule: Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 445 (Jan. 3, 1997). Consistent with its definition of arriving, the Service simultaneously "implement[ed]" the return provision by limiting its authority to those "who arrive at a land border port-of-entry." Proposed Rule, 62 Fed. Reg. at 445; 8 C.F.R. § 235.3(d).

Days after entering office, President Trump issued an executive order directing DHS to change this regime and bar asylum-seekers from pursuing their claims from the safety of the United States. *See* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (directing DHS to "ensure that aliens described in [8 U.S.C. 1225(b)(2)(C)] are returned to the territory from which they came pending a formal removal proceeding"). DHS recognized that it would first need to amend its regulation "so that it is consistent with the [Executive Order's] requirement." DHS/CBP Proposed Return to Territory Rule (RIN-1651-AB13), Office of Information and Regulatory Affairs, Spring 2017 ("Proposed Return Rule") (Sallomi Decl., Ex. G). It listed the proposed change on its regulatory agenda from spring of 2017 through the fall of 2018. *See* Unified Agenda and Regulatory Plan Search Results for RIN-1651-AB13 (Sallomi Decl., Ex. H).

At the end of 2018, however, the defendants abandoned this approach and instead announced the creation of the MPP in a December 20, 2018 press release from DHS. *See id.*; Press Release. On January 25, 2019, DHS Secretary Nielsen directed Immigration and Customs Enforcement ("ICE"), Customs and Border Patrol ("CBP") and U.S. Citizenship and Immigration Services ("USCIS") to "issue appropriate internal procedural guidance to carry out the [MPP] policy." Sec. Kirstjen M. Nielsen, *Policy Guidance for Implementation of the Migrant*

Protection Protocols (Jan. 25, 2019) (Sallomi Decl., Ex. B). On January 28, CBP issued that guidance. Todd Hoffman, CBP, *Guidance on Migrant Protection Protocols* (Jan. 28, 2019) ("Hoffman Memo") (Sallomi Decl., Ex. C); CBP, *MPP Guiding Principles* (Jan. 28, 2019) ("MPP Guiding Principles") (Sallomi Decl., Ex. D). At some point after that, CBP created a memorandum that redefined the term "arriving" to include any person encountered within four days of crossing the border. *See* Muster MPP Guiding Principles, *Bollat Vasquez v. Wolf*, No. 20-CV-10566 (D. Mass., May 7, 2020), ECF 43-1 ("Muster Memo") (Sallomi Decl., Ex. E).

Through a document titled the "MPP Guiding Principles," CBP created new categorical exclusions from the return provision. The Guiding Principles ensure that "vulnerable aliens . . . will not be placed into MPP." *See* Hoffman Memo. For example, individuals with "known physical or mental health issues" are to be excluded. *See* MPP Guiding Principles. In practice, however, the defendants routinely return vulnerable persons to Mexico. *See* Declaration of Sergio Martin ("Martin Decl.") ¶ 70; Letter from Amnesty Int'l to Chad Wolf at 2-3 (Feb. 21, 2020) ("Amnesty Int'l Letter") (Exhibit A to Declaration of Charlene D'Cruz ("D'Cruz Decl.")). The experiences of vulnerable plaintiffs in this case admit the same. *See* Declaration of Cinthya Castillo Sambula ("Sambula Decl.") ¶¶ 4-8, 14-17; Declaration of Jane Doe ("Doe Decl."), ECF 9-2, ¶¶ 6-9; Declaration of Emma Obando Funes ("Funes Decl.") ¶¶ 5-9.

II. ASYLUM-SEEKERS FACE DAILY PERIL AND DESTITUTION IN MEXICO.

Pursuant to the MPP, CBP detains asylum-seekers for processing, schedules them for a hearing at an immigration court near the U.S.-Mexico border, and returns them to a Mexican border town; sometimes towns or regions they have never been to before. *See, e.g.*, Declaration of Leimariana Petit Romero ("Romero Decl.") ¶¶ 4, 9. They then must wait in Mexico for months until their hearing date. *See, e.g.*, Doe Decl. ¶ 18; Sambula Decl. ¶¶ 3, 8, 24.

In these border zones, especially the towns of Matamoros and Nuevo Laredo in the Mexican state of Tamaulipas (where all the plaintiffs were returned), Central American asylum-seekers are readily identified and targeted for violence. *See* Martin Decl. ¶¶ 9-10, 30-31; Declaration of Kennji Kizuka ("Kizuka Decl.") ¶¶ 9-13; Letter from the Center for Gender and Refugee Studies to Chad Wolf at 4-10 (Dec. 9, 2019) ("CGRS Letter") (Sallomi Decl., Ex. I). In Matamoros and Nuevo Laredo, cartels employ "hawks" near the ports of entry to wait for individuals returned under the MPP to kidnap them. Martin Decl. ¶ 28-36. As of February 28, 2020, Human Rights First had identified over 1,000 public reports of murder, torture, rape, kidnapping, and other violent assaults against asylum seekers returned to Mexico under the MPP—a gross underreporting. *See* Human Rights First, *Publicly reported cases of violent attacks on individuals returned to Mexico under the 'Migrant Protection Protocols'* (Feb. 28, 2020) (Sallomi Decl., Ex. F); Kizuka Decl. ¶¶ 8, 44; Martin Decl. ¶¶ 45-46.

Asylum-seekers often have no plan, contacts, or resources to survive after being returned to Mexico. *See* Kizuka Decl. ¶¶ 44-52 (describing dangerous and unsanitary living conditions for MPP returnees). The plaintiffs had to sleep on the ground, bathe in the river, and even beg for change to make a phone call for help. *See* Funes Decl. ¶ 10; Doe Decl. ¶ 10; Sambula Decl. ¶ 10. Asylum-seekers with disabilities are especially vulnerable to these harms and struggle to access necessary health care in Mexico. *See* Martin Decl. ¶¶ 54-57; *see also* Kevin Sief, *She told the U.S. immigration agent she was HIV-positive*, WASHINGTON POST, (March 24, 2020) (Sallomi Decl., Ex. S) ("Sief Article").

Those who are able travel on to relatively safer towns outside of Tamaulipas. *See* Romero Decl. ¶ 14; Sambula Decl. ¶ 11. However, this choice requires them to make dangerous trips through Mexico to report for their hearings. *See* U.S. Dep't of State, Mexico Travel Advisory at

16 (Aug. 6, 2020) ("Mexico Travel Advisory") (stating U.S. government employees may not travel on Mexican interior highways in Tamaulipas) (Sallomi Decl., Ex. J); CGRS Letter at 9 (describing report of 19 refugees traveling by bus in Tamaulipas who were kidnapped). While asylum-seekers often must report for their hearings at 4:30 a.m. at the port of entry in Matamoros or Nuevo Laredo, *see* Romero Decl. ¶ 8; Funes Decl. ¶ 18, the U.S. government imposes a curfew on its employees in those cities between midnight and 6:00 a.m. due to crime. Mexico Travel Advisory at 16.

The U.S. government knows these dangers exist. By its own assessment, there is a serious risk of crime in Tamaulipas: gun battles, murder, kidnapping and sexual assault are "common" and "[h]eavily armed members of criminal groups often patrol areas of the state . . . and operate with impunity." *See* Mexico Travel Advisory at 16-17. The U.S. Department of State designated Matamoros and Nuevo Laredo as "Level 4: Do Not Travel," its highest risk level, the same used for active conflict zones like Syria and Afghanistan. *See* Overseas Security Advisory Council, Mexico 2020 Crime and Safety Report: Matamoros (June 24, 2020) (Sallomi Decl., Ex. K); Overseas Security Advisory Council, Mexico 2020 Crime and Safety Report: Nuevo Laredo (June 24, 2020) (Sallomi Decl., Ex. L); Martin Decl. ¶ 19. The defendants have received numerous reports about the violence asylum-seekers face in Tamaulipas. *See* CGRS Letter (enclosing 67 U.S. governmental and non-governmental reports and articles describing the dangers to migrants in Tamaulipas). Far from being unaware of these risks, the harms inherent in the MPP are a feature of the defendants' deterrence strategy, and not the first time the defendants have proposed harming asylum-seekers to deter future claimants.[1]

[1] *See, e.g.*, Michael Shear, *Border Officials Weighed Deploying Migrant 'Heat Ray' Ahead of Midterms*, THE NEW YORK TIMES, Aug. 26, 2020 (Sallomi Decl., Ex. M) (describing President Trump and top DHS officials' proposal to physically harm migrants by electrifying the border wall, deploying a "heat ray" weapon, and having soldiers shoot migrants in the legs to slow them down). The defendants also enacted a policy of separating young children from

III. THE PLAINTIFFS IN MEXICO FACE VIOLENCE, HOMELESSNESS, AND DETERIORATING HEALTH CONDITIONS.

Plaintiffs Cinthya Castillo Sambula, Emma Obando Funes and her children A.Y.B.O. and J.L.B.O., Leimariana del Valle Petit Romero, and Jane Doe (the "MPP Plaintiffs") all fled persecution and threats against their lives in Central America. They each crossed the U.S.-Mexico border to seek safety in the United States. CBP found each of them well after they had entered the United States and took them into custody. *See* Romero Decl. ¶¶ 2-4; Funes Decl. ¶¶ 2-5; Sambula Decl. ¶¶ 2-4; Doe Decl., ECF 9-2, ¶¶ 2, 5. While the MPP Plaintiffs were in custody, CBP became aware that some of them were vulnerable and had serious mental and physical conditions. *See* Funes Decl. ¶¶ 6-9; Sambula Decl. ¶¶ 4-6; Doe Decl., ECF 9-2, ¶¶ 6-9. Nonetheless, CBP returned each to Mexico. *See id*.

A.Y.B.O. is a ten-year-old child with autism and a severe sensory disorder. When CBP officials apprehended him with his mother, they confiscated his medication. His mother explained he had autism; A.Y.B.O. was visibly distressed and physically ill. The CBP officer replied that autism was not a medical condition and returned the family to Mexico, where A.Y.B.O. has struggled to obtain medication and treatment. *See* Funes Decl. ¶¶ 6-9.

Ms. Doe identifies and presents as a transgender woman. Because of her gender identity, she faces a substantial risk of harm in Mexico and, before coming to the United States, already had been victimized there. While in CBP custody, officers moved her from a shared all-male cell to an individual cell based on her vulnerabilities. Ms. Doe also explained her fear of returning to Mexico. Nonetheless, CBP returned her to Mexico. *See* Doe Decl., ECF 9-2, ¶¶ 6-9.

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their parents at the border, without a plan for tracking the children or reunifying them with their parents. *See Ms. L. v. U.S. Imm. & Customs Enf't*, 310 F. Supp. 3d 1133, 1144-46 (S.D. Cal. 2018) (finding family separation policy shocked the conscience and likely violated substantive due process), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019), and *enforcement granted in part, denied in part,* 415 F. Supp. 3d 980 (S.D. Cal. 2020).

Ms. Castillo Sambula was six months pregnant and bleeding when CBP apprehended her. CBP sent her to a hospital by ambulance and initially told her that she would be united with her mother in Brooklyn. Instead, days after the hospital discharged her, Ms. Castillo Sambula was returned to Mexico. CBP told her to report back for a hearing three months later—the same time she was expected to deliver her child. Nine months pregnant, Ms. Castillo Sambula was forced to travel cross-country for her hearing, going into labor the day of her hearing in a notoriously dangerous border town. When she left the hospital two days later, she went directly to the port of entry with her newborn. While she was in CBP custody, an immigration judge ordered her removed for failing to attend her hearing. She was then returned to Mexico, where her daughter became seriously ill. *See* Sambula Decl. ¶¶ 4-9, 12-17, 20.

In Mexico, the MPP Plaintiffs have suffered threats, assaults, and kidnappings. Ms. Obando Funes and her children were kidnapped and held for days without food while they witnessed their kidnappers assault and "disappear" other victims. *See* Funes Decl. ¶ 4. Later, they were robbed and threatened several times. *See id.* ¶¶ 13-16. Ms. Castillo Sambula and Ms. Petit Romero were nearly kidnapped shortly after CBP returned them to Mexico. *See* Sambula Decl. ¶ 18; Romero Decl. ¶ 13; *see also* Martin Decl. ¶ 31 (describing how MPP returnees are "easy targets" for cartels). Ms. Doe faces regular humiliation, harassment, and violence as a transgender woman. *See* Doe Decl. ¶¶ 3-4, 11-12, 14-15. Ms. Doe has Post-Traumatic Stress Disorder ("PTSD") but is unable to obtain treatment in Mexico. *See id*. ¶ 20; Supp. Psych. Eval. at 3. Their relatives living in New York agonize about the safety of their respective spouses, children, and siblings. *See* Funes Decl. ¶ 21; Romero Decl. ¶ 20; Sambula Decl. ¶ 26.

ARGUMENT

Preliminary injunctive relief is warranted where (1) the plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief, (2) the plaintiffs are likely to succeed on the

merits,[2] (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Each factor weighs in favor of preliminary relief in this case. The plaintiffs risk irreparable harm as they face a constant risk of violent attack and suffer psychological and medical harms. They are likely to succeed on the merits for seven reasons. First, the defendants violate the Immigration and Nationality Act ("INA") by invoking a provision that authorizes return only for "arriving" aliens, not those who already entered the United States. Second, the defendants violate their regulations, which limit their return authority to those arriving at a land border port-of-entry, not those entering between ports. Third, the defendants' departure from their regulations without a reasoned explanation is arbitrary and capricious in violation of the APA. Fourth, expanding their return authority to those *not* arriving at a land border port-of-entry required notice and comment under the APA. Fifth, returning vulnerable plaintiffs violated the defendants' own guidance, which exempt such individuals from the MPP. Sixth, the defendants failed to provide A.Y.B.O. and Jane Doe reasonable accommodations in violation of the Rehabilitation Act. Seventh, the defendants violated the substantive due process rights of Jane Doe by returning her to Mexico.[3]

I. THE PLAINTIFFS ARE SUFFERING IRREPARABLE HARM.

A likelihood of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d

[2] The plaintiffs seek a prohibitory injunction ordering a return to the status quo before the defendants unlawfully subjected them to the MPP, which requires only a showing of likelihood of success on the merits. The Second Circuit defines the status quo as "the last actual, peaceable uncontested status which preceded the pending controversy." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc*. ("*NASL*"), 883 F.3d 32, 37 (2d Cir. 2018). Under this definition, "[p]reserving the status quo is not confined to ordering the parties to do nothing: it may require parties to take action." *Mastrio v. Sebelius*, 768 F.3d 116, 120–21 (2d Cir. 2014); *see also NASL*, 883 F.3d 32, 37–38 (finding orders reinstating benefits were prohibitory). Nonetheless, the plaintiffs can also meet the higher mandatory injunction standard of showing a "clear or substantial likelihood of success on merits." *Chunn v. Edge*, No. 20-CV-1590, 2020 WL 3055669, at *23 (E.D.N.Y. June 9, 2020) (quoting *NASL*, 883 F.3d at 37).

[3] The plaintiffs elect to press only these claims in their request for preliminary injunctive relief, reserving all rights on their other challenges listed in the complaint, including their equal protection claim, the Rehabilitation Act claim on behalf of Ms. Castillo Sambula, and due process claims for the other plaintiffs. *See* Compl. ¶¶ 116-125.

Cir. 2009) (internal quotations omitted). The plaintiffs are not only "likely" to suffer irreparable harm—they have suffered and continue to suffer it. The MPP Plaintiffs already have been kidnapped, assaulted, extorted, and threatened in Mexico causing incalculable anguish and stress for their relatives in New York. *See* Funes Decl. ¶¶ 4, 12-15, 21; Romero Decl. ¶¶ 11-14, 20; Sambula Decl. ¶¶ 18, 26; Doe Decl. ¶¶ 3-4, 11-12, 14-15.

Human rights organizations have identified hundreds of cases of "torture, rape, kidnapping, and other violent assaults" among asylum seekers returned to Tamaulipas under the MPP. Kizuka Decl. ¶ 11; *see also* CGRS Letter. Indeed, the plaintiffs living in Tamaulipas do not go outside out of fear of kidnapping or other violence. *See* Doe Decl. ¶ 20; Funes Decl. ¶ 16. Ms. Petit Romero and Ms. Castillo Sambula live outside of Tamaulipas, but still "must take dangerous journeys to return for court hearings" and are under threat of attack in other cities in Mexico. Kizuka Decl. ¶ 11; *see generally* Mexico Travel Advisory.

Living in constant precarity also causes the plaintiffs psychological harm. *See* Doe Decl. ¶ 19; Supplemental Psychological Evaluation of Jane Doe at 3 (concurrently filed under seal) ("Supp. Eval."); Funes Decl. ¶ 17; *see also* Martin Decl. ¶¶ 54-58. The relatives living in New York also suffer emotional anguish from seeing their spouses, siblings, and children in Mexico suffer and be exposed to life-threatening situations. *See* Funes Decl. ¶ 21; Romero Decl. ¶ 20; Sambula Decl. ¶ 26; *Hawaii v. Trump*, 878 F.3d 662, 699 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018) (finding that prolonged family separation was irreparable harm).

II. THE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The INA Does Not Permit Returning Noncitizens Who Are Not "Arriving."

Returning the plaintiffs to Mexico violates the INA because the statute entitles asylum-seekers with credible fears to pursue their claims while in the United States. *See* 8 U.S.C. §

1225(b)(1)(B)(ii).[4] The defendants incorrectly invoke the INA's sole provision authorizing temporary return to a contiguous territory, as that provision only permits the return of certain noncitizens "arriving on land." § 1225(b)(2)(C). It does not apply to those who are apprehended *after* they had entered the United States as they are not "arriving."

The INA distinguishes noncitizens who are "arriving" and those "physically present" in the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law"). Section 1225(b) makes the same distinction. *See, e.g.*, § 1225(b)(1) (encompassing "aliens arriving in the United States" *and* "certain other aliens who have not been admitted or paroled"); § 1225(b)(1)(A)(iii) (defining "certain other aliens who have not been admitted or paroled" as those "physically present" in the United States for less than two years). While Section 1225(b)(1)(A)(iii) authorizes expedited removal for individuals physically present in the United States, there is no language authorizing their return to a contiguous territory.

Instead, Section 1225(b)(2)(C) only permits return to a contiguous territory pending removal proceedings for those "arriving on land." Congress established this temporal limitation through the use of the present participle. "Congress' use of a verb tense is significant in construing statutes." *U.S. v. Wilson*, 503 U.S. 329, 333 (1992). Here, "arriving" describes an act in the process of occurring, not an act that occurred in the past. *See Barscz v. Dir., Office of Workers' Comp. Programs & Elec. Boat Corp.*, 486 F.3d 744, 749-50 (2d Cir. 2007) (holding

[4] Though they do not seek preliminary relief on this claim, the MPP Plaintiffs also are not subject to the return provision because they are individuals described in Section 1225(b)(1), but the return provision only applies to individuals described in subparagraph (b)(2)(A). *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1082-86 (9th Cir. 2020), *stay granted*, 140 S.Ct. 1564 (Mar. 11, 2020). This motion presents a narrower question than the one considered in *Innovation Law Lab*: whether the MPP can be applied to these plaintiffs, who were not apprehended while "arriving" in the United States, but after they had entered.

that statute's use of the present tense unambiguously referred only to presently occurring actions, not past ones); *In re AroChem Corp.*, 176 F.3d 610, 623 (2d Cir. 1999) (same).

If Congress had meant the term "is arriving" to encompass not only those individuals who are "arriving" but also those who "arrived," it would have used the past tense "arrived," as it did elsewhere in the statute.[5] Indeed, until President Trump directed DHS to expand its authority, the agency consistently interpreted the term "arriving" to refer *only* to those seeking admission at a port of entry. *See* 8 C.F.R. §§ 1001.1(q), 235.3(d); 62 Fed. Reg. at 10312-13; *see infra* § II(B). This interpretation is correct based on the statute's plain language, but also because it respects the longstanding distinction in immigration law between those who entered the country and those presenting at a port of entry; it accounts for the practical difference between turning back noncitizens at a port of entry and seizing, detaining, and expelling them into foreign cities; and it recognizes that border crossers without valid asylum claims already are subject to the harsh consequence of expedited removal.

For these reasons, the only district court to have considered the issue reached the same conclusion sought here: the return provision does not permit return of individuals who entered and are present in the United States. *Bollat Vasquez v. Wolf*, No. 20-CV-10566, 2020 WL 2490040 at *8 (D. Mass. May 14, 2020), *appeal docketed*, No. 20-1554 (1st Cir. May 29, 2020). Applying Section 1225(b)(2)(C) to the MPP Plaintiffs, who were apprehended after entering the United States, violates the INA and, therefore, the APA. *See* 5 U.S.C. § 706(2)(A), (C).

[5] *See, e.g.*, § 1225a(a)(3)(A) (specifying data collection on "the foreign airports which served as last points of departure for aliens who arrived by air at United States ports of entry without valid documentation"); § 1231(b)(1)(B) ("If [an] alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States . . . removal shall be to the country in which the alien boarded the vessel"); *see also* IIRIRA § 301 (providing that, for battered spouses or children, certain provisions "shall not apply to an alien who . . . first arrived in the United States before the title III–A effective date").

B. Regulations Foreclose Applying the INA's Return Provision to Noncitizens Who Arrive Between Ports of Entry.

Section 1225(b)(2)(C) also cannot be applied to the plaintiffs because two implementing regulations further limit its scope to those arriving "at a land border port-of-entry," which none of the plaintiffs did. 8 C.F.R. § 1001.1(q) defines "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry." And 8 C.F.R. § 235.3(d) limits contiguous return to those "who arrive[] at a land border port-of-entry." Per regulation, an "arriving" noncitizen under 8 U.SC. § 1225(b)(2)(C) is one who presents at a port-of-entry.

This limitation reflected the agency's judgment about the best way to implement IIRIRA. *See generally* 62 Fed. Reg. 444. The Service proposed limiting the definition of "arriving aliens" to only those "arriving at a port-of-entry," even though the term "could also include other classes of aliens, e.g., those apprehended crossing a land border between ports-of-entry." *Id.* at 445. Following comment, the Service adopted its proposed definition, expressly rejecting a suggestion to "include aliens who have been present for less than 24 hours in the United States without inspection and admission," 62 Fed. Reg. at 10312-10313, and limiting its contiguous return authority to the same group:

> 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.

8 C.F.R. § 235.3(d) (emphasis added). Standing alone, and certainly in combination with the definition of "arriving alien," section 235.3(d) makes clear that DHS may return only noncitizens who present at a land border port of entry. *Accord* 62 Fed. Reg. at 445 (affirming proposed 8 C.F.R. § 235.3(d) "implements" 8 U.S.C. § 1225(b)(2)(C) by "stat[ing] that an applicant for admission arriving at a land border port-of-entry and subject to a removal hearing . . . may be required to await the hearing in Canada or Mexico").

The defendants' regulations thus prevent them from applying the INA's return provision to individuals who were not arriving at a land border port-of-entry. Having published these rules for itself, the agency is bound to follow them. *See Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020) (finding an agency's violation of its regulations is challengeable under the APA as a violation of the *Accardi* doctrine).

C. The Defendants' Departure From Their Own Regulations Without a Reasoned Explanation is Arbitrary and Capricious.

In addition to the regulatory violation, the defendants' blatant disregard of their regulations "still on the books" in expanding their return authority is arbitrary and capricious. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). An agency that is changing course must, at a minimum, "display awareness that it is changing position." *Id*. Even assuming notice and comment was not required to abandon the port-of-entry limitation of 8 C.F.R. §§ 235.3(d) and 1001.1(q), or to create "guidance" permitting a vast return program sweeping in anyone detained within four days of crossing the border (though it was, *see infra* § II(C)), DHS still had to acknowledge and provide a reasoned explanation for this change. *Fox*, 556 U.S. at 515. Its failure to do so was arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A).

D. Implementing the Protocols Without Notice and Comment Violates the APA.

Another independent basis for invalidating the application of the MPP to the plaintiffs arises from the fact the defendants failed to comply with the APA's notice-and-comment requirements. That those requirements apply here is evident from the fact DHS *did* notice its intent to change its regulations in 2017 and 2018 before abandoning that effort and instead proceeding by press release and internal memoranda. *See* Proposed Return Rule.

Before making "substantive" rules, agencies must first provide the public notice and an opportunity to comment. *Sweet v. Sheahan*, 235 F.3d 80, 90-91 (2d Cir. 2000); *see also* 5 U.S.C.

§ 553. By contrast, the APA does not require notice and comment for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b). To distinguish substantive and interpretive rules, "the 'central question is essentially whether an agency is exercising its rule-making power to clarify an existing statute or regulation, or to create new law, rights, or duties'" in what amounts to a legislative act. *Zhang v. Slattery*, 55 F.3d 732, 745 (2d Cir. 1995). Substantive rules "'change the substantive standards by which the [agency] evaluates' applications which seek a benefit that the agency has the power to provide." *L.M. v. Johnson*, 150 F. Supp. 3d 202, 215 (E.D.N.Y. 2015); *see also Zhang*, 55 F.3d at 746 (holding new asylum rule was substantive because it created "a new basis on which aliens may be granted refugee status; it change[d] an existing policy").

Here, the MPP represents a sea change in immigration policy along the southern border. It creates a new "intricate set of rules" regarding who may be returned to Mexico, none of which appear in the statute. *See Make the Rd. New York v. Pompeo*, No. 19-CV-11633, 2020 WL 4350731, at *18 (S.D.N.Y. July 29, 2020) (holding changes to agency manual were substantive because they "transform[ed] [the INA's] basic directive into an intricate set of rules" concerning benefit applications). For years, DHS limited its return authority to noncitizens arriving at a land border port-of-entry. *See* 8 C.F.R. § 235.3(d). Without changing this regulation, the MPP extended the return authority to any person encountered within four days of crossing the border. Muster Memo at 1. This four-day rule "change[d] existing policy" and created a "new basis" for return that appears nowhere in the statute. *See Zhang*, 55 F.3d at 745. The MPP also created a list of categorical exceptions to return, including individuals "with known physical or mental health issues" and those with "Government of Mexico or U.S. Government interest." Muster Memo at 1. Plainly, the MPP changes the "substantive standards" by which DHS officers determine

whether to return apprehended noncitizens. *See L.M.*, 150 F. Supp. 3d at 215. Because none of these standards exist in the statute, *see* 8 U.S.C. § 1225(b)(2)(C), the MPP goes beyond mere interpretation. Instead, these extra-statutory standards are the hallmark of a substantive rule.

The existing regulations, which *were* promulgated after notice-and-comment, amplify this distinction. *See Gonnella v. U.S. Sec. & Exch. Comm'n*, 954 F.3d 536, 547 (2d Cir. 2020) (stating when "the rule effectively amends a prior legislative rule," it too is a legislative rule subject to notice and comment (quoting *Sweet*, 235 F.3d at 91)). The contiguous return and arriving alien regulations were issued following Congress's delegation of "the power to promulgate rules" in IIRIRA, which directed the Immigration and Naturalization Service to issue rules to implement the new law. *See Sweet,* 235 F.3d at 91; IIRIRA § 309. The Service then "published the rule in the Code of Federal Regulations" and "explicitly invoked its general legislative authority" to implement IIRIRA, both which indicate the rules were substantive. *See Sweet*, 235 F.3d at 91 (quoting *Am. Mining Cong. v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1110–12 (D.C. Cir. 1993)). The Service promulgated these regulations after notice and comment with an intent to "implement," not interpret, IIRIRA. *See* 62 Fed. Reg. at 445 (describing proposed 8 C.F.R. § 235.3(d) as "implement[ing]" 8 U.S.C. § 1225(b)(2)(C)). And, DHS previously published its intent to amend the return regulation through formal rule-making. *See* Proposed Return Rule. DHS may not now charge ahead with new rules without first providing the public notice and comment.

E. Subjecting Vulnerable Plaintiffs to the MPP Violates the *Accardi* Doctrine.

Another independent basis for granting relief to the plaintiffs arises from the fact the defendants failed to comply with legally enforceable policies they issued in conjunction with the creation of the MPP. In particular, the MPP Guiding Principles exempt from the MPP those asylum-seekers with specified vulnerabilities, including "known physical and mental health

conditions," and require all asylum-seekers to be assessed on a "case-by-case basis" to see if they qualify for this exemption. *See* MPP Guiding Principles. None of the plaintiffs received this assessment, and several of them plainly are vulnerable so as to be exempt under this policy: Ms. Doe, a transgender woman; A.Y.B.O., a child with autism and a severe sensory disorder; and Ms. Castillo Sambula, a pregnant woman who experienced complications with her pregnancy.

Under the *Accardi* doctrine, an agency is bound by the rules it has announced for itself. *See U.S. ex rel. Accardi,* 347 U.S. 260, 265 (1954) (holding "regulations with the force and effect of law supplement the bare bones" of federal statutes). The Second Circuit interpreted *Accardi* in the immigration context in *Montilla v. I.N.S.*, concluding that "[i]t's ambit is not limited to rules attaining the status of formal regulations." 926 F.2d 162, 167 (2d Cir. 1991). The court explained that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required, and even though the procedural requirement has not yet been published in the federal register." *Id*. (internal quotations omitted); *see also Aracely v. Nielsen*, 319 F. Supp. 3d 110, 150 (D.D.C. 2018) (extending *Accardi* to unpublished measures intended to be binding). District courts in this Circuit have similarly required DHS to follow its internal directives and memoranda. *See Zhang v. Slattery,* 840 F. Supp. 292, 294–96 (S.D.N.Y. 1994) (finding INS was required to adhere to internal directives in its Parole Project Memorandum); *Abdi v. Duke*, 280 F. Supp. 3d 373, 389 (W.D.N.Y. 2017) (finding ICE bound by Asylum Parole Directive), *partially vacated on other grounds sub nom Abdi v. McAleenan*, 405 F. Supp. 3d 467 (W.D.N.Y. 2019); *see also Damus v. Nielsen*, 313 F. Supp. 3d 317, 337-38 (D.D.C. 2018) (same).

A district court recently found that DHS was bound under *Accardi* by the same internal memorandum at issue here. In *Nora v. Wolf*, the District Court for the District of Columbia held that DHS's failure to provide a non-refoulement interview, as required by the MPP Guiding Principles, violated *Accardi*. No. 20-CV-0993, 2020 WL 3469670 at *14, (D.D.C. June 25, 2020). As *Nora* held, the Guiding Principles, which instruct CBP officers how to implement the MPP, is binding on DHS and actionable under the *Accardi* doctrine. This memorandum states that certain populations, including those with "known physical or mental health issues," are "not amenable to MPP." Other guidance issued by DHS confirms that, per the Guiding Principles, "vulnerable aliens . . . will not be placed into MPP." *See id*., Hoffman Memo.

Nonetheless, the defendants routinely disregard this guidance and place vulnerable people, including those with known physical or mental health issues, into the program. *See* Martin Decl. ¶¶ 7, 47-58 (describing high levels of mental health disorders among people placed in the MPP); Amnesty Int'l Letter. The defendants' treatment of the plaintiffs here also demonstrates their failure to follow this policy. For example, CBP decided to return Ms. Castillo Sambula to Mexico although she was six months pregnant and had pregnancy complications so severe that CBP sent her to the hospital. Sambula Decl. ¶¶ 4-9. These "known medical issues" rendered Ms. Castillo Sambula vulnerable under any plausible definition of that term.[6] Similarly, CBP officers consciously disregarded A.Y.B.O.'s severe mental health issues when they confiscated his medication, ignored his mother's requests for medical assistance, and summarily returned the family to Mexico. Funes Decl. ¶¶ 5-10; *see also* D'Cruz Decl. ¶¶ 7-11. In yet another example, CBP chose to return Ms. Doe, a trans woman with PTSD, to Mexico, though

[6] Notably, DHS also has stated that "absent extraordinary circumstances, ICE will not detain a pregnant [woman] during the third trimester of pregnancy." Immigration and Customs Enforcement, FAQs and Monitoring of Pregnant Detainees (Sallomi Decl., Ex. N).

defendants also have stated that transgender people were not amenable to MPP because of their unique vulnerabilities. Doe Decl. ¶¶ 6-9, 20; D'Cruz Decl. ¶¶ 6, 14-15. Pursuant to *Accardi*, the Court should require the defendants to comply with their own rules.

F. Subjecting Disabled Plaintiffs to the MPP Violates the Rehabilitation Act.

Plaintiffs Doe and A.Y.B.O.[7] also are separately entitled to relief because the defendants violated the Rehabilitation Act when they sent them to Mexico where Ms. Doe and A.Y.B.O. have faced enormous challenges in effectively accessing their removal proceedings due to their disabilities.

The federal government is required to make "reasonable accommodations" to ensure that everyone has "meaningful access" to benefits, programs, or services. *See Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189, 197 (2d Cir. 2014). To establish a violation of Section 504 of the Rehabilitation Act, a plaintiff need only show that "(1) [they are] a qualified individual with a disability; (2) the defendant is subject to [] the Act[]; and (3) [they were] denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or [were] otherwise discriminated against by the defendant because of [their] disability." *Id*. at 196-97 (internal quotation marks omitted).

First, Ms. Doe and A.Y.B.O. are qualified individuals with a disability under the Act. They plainly meet the "essential eligibility requirements" to participate in their removal proceedings. 42 U.S.C. § 12131(2). Disability is defined under the Act in part as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 28 C.F.R. § 35.108(a)(1)(i). The term is "construed broadly," to the maximum extent

[7] Plaintiff Castillo Sambula also had a pregnancy-related disability at the time she was returned to Mexico under the MPP and for several months thereafter. *See* Sambula Decl. ¶¶ 4-9. Ms. Castillo Sambula does not seek injunctive relief because she no longer has that disability.

permitted under the Americans with Disabilities Act. 28 C.F.R. § 35.108(d)(2)(i). Ms. Doe suffers from PTSD, Doe Decl., ¶¶ 19-20, and A.Y.B.O. has autism and a severe sensory disorder, Funes Decl., ¶ 6. The Act's implementing regulations specifically list both conditions as ones that will "virtually always" meet the definition of a disability because they "substantially limit[] brain function." *See* 28 C.F.R. §§ 35.108(d)(2)(ii); (d)(2)(iii)(E) & (K). In each plaintiff's case, their disabilities impact their ability to function daily. *See generally* Supp. Psych. Eval. (describing Ms. Doe's daily symptoms); Funes Decl. ¶ 6.

Second, the Act applies to "any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). The program or benefit at issue here is the plaintiffs' removal proceedings and their asylum applications. *See Noel v. New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 68 (2d Cir. 2012) ("services, programs, or activities" is "a catch-all phrase that prohibits all discrimination by a public entity"); *see also Fraihat v. U.S. Immigration & Customs Enf't*, 445 F. Supp. 3d 709, 748 (C.D. Cal. 2020) (finding "[t]he programmatic 'benefit' in this context . . . is best understood as participation in the removal process").

Third, an agency must "as a practical matter" provide individuals with disabilities "meaningful access to services, programs or activities to which he or she [is] legally entitled." *Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016) (internal quotation marks omitted). DHS's regulations require it to provide individuals with disabilities with "equally effective" access, meaning "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs." 6 C.F.R. § 15.30(b)(1)(ii) & (b)(2). Showing that "a disability makes it difficult for a plaintiff [with disabilities] to access benefits . . . is sufficient." *Henrietta D. v.*

Bloomberg, 331 F.3d 261, 277 (2d Cir. 2003). It matters not that non-disabled individuals may also face significant difficulties accessing the relevant government program. *Id.* at 279.

Returning Ms. Doe and A.Y.B.O. to Mexico denies them equally effective access to their immigration proceedings and asylum applications. The MPP forced them to cross into a violent area, where they have little to no access to health care, food, shelter, or safety; then required them to wait their for prolonged periods before traveling back to the border where they must defend themselves in complex legal proceedings. *See generally* Kizuka Decl.; CGRS Letter. Their disabilities have made navigating this already challenging and extremely dangerous process much more difficult.

Like many asylum seekers in the MPP, Plaintiffs Doe and A.Y.B.O.'s mental health has deteriorated while in Mexico. *See* Martin Decl. ¶¶ 7, 70-75. The harassment, sounds, smells, and chaos of the encampment have made A.Y.B.O. anxious and stressed to the point of physical illness. *See* Funes Decl. ¶ 12. His mother is even considering abandoning their asylum claims to try to prevent A.Y.B.O.'s mental health from deteriorating further. *Id*. at ¶ 17. Ms. Doe's PTSD has been constantly triggered by the repeated assaults and harassment she has experienced in Mexico and "likely [has] rendered her less able to collaborate in her legal representation." Supp. Eval. at 3.; *see also* Doe Decl. ¶¶ 4, 11-17. Nor can they access needed mental health care in Mexico. *See* Funes Decl. ¶¶ 10, 17; D'Cruz Decl. ¶ 7; Doe Decl. ¶ 20; *see also* Sief Article.

These harms have interfered with Ms. Doe and A.Y.B.O.'s ability to manage even daily life, much less the complex and time-intensive process of defending removal proceedings. Applying for asylum also often involves recalling past trauma, which is particularly difficult for individuals like the plaintiffs who are not receiving adequate care or support. *See Fernandez Aguirre v. Barr*, No. 19-CV-7048, 2019 WL 3889800, at *3 (S.D.N.Y. Aug. 19, 2019) (finding

immigration detention exacerbated asylum-seeker's PTSD and major depressive disorder, rendering it difficult for him to pursue his asylum case). A.Y.B.O.'s deteriorating condition now requires full time care, making it impossible for his mother to work to pay for an attorney to defend him. *See* Funes Decl. ¶ 17. It likely will also limit how much longer he can wait in Mexico for his case to progress. *See id*.

To remedy these violations, CBP must make the reasonable accommodation of exempting A.Y.B.O. and Ms. Doe from placement in the MPP. "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." *Hargrave v. Vermont*, 340 F.3d 27, 37–38 (2d Cir. 2003) (quoting 28 C.F.R. § 35.130(b)(7)). The proposed accommodation is plainly reasonable in light of the agency's claim that it already exempts such individuals from the MPP. *See supra* Part II(E). Nor would this accommodation constitute a "fundamental alteration" to the agency's process. *See Hargrave*, 340 F.3d at 37–38. To the contrary, based on the agency's own guidance, it should already be screening for vulnerable individuals, including those with a disability, and exempting them from the MPP. Nonetheless, it is clear based on the plaintiffs' experience that CBP is not even currently providing such screenings. *See, e.g.*, Funes Decl. ¶ 7; D'Cruz Decl. ¶ 13. The defendants' failure to accommodate their disabilities violates the Rehabilitation Act.

G. Returning Plaintiff Doe to Mexico Violated Substantive Due Process.

Plaintiff Jane Doe specifically asserts a substantive due process claim given her unique vulnerabilities as a transgender woman in Mexico. In general, the Due Process Clause does not require the government to protect individuals against private violence. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). A duty to protect will arise, however, when the government imposes limitations on an individual's "freedom to act on his own behalf." *Id*. at

200. Thus, when a "special relationship" exists, substantive due process imposes an affirmative duty to provide for the individual's "safety and general well-being." *Id*.

When the government's failure to do so is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," it violates substantive due process. *Charles v. Orange Cty.*, 925 F.3d 73, 85-86 (2d Cir. 2019). "Intentional infliction of injury would shock even the least sensitive of contemporary consciences." *Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005). Lower standards of culpability, such as deliberate indifference, also may shock the conscience when time for reflection was possible. *Id*. at 113-14. For example, in *Pena*, police officers who were silent when confronted with an off-duty officer's drunk driving shocked the conscience because they "had ample opportunity . . . over an extended period of time and in the face of action that presented obvious risk of severe consequences and extreme danger" to intervene and failed to do so. *Id*.; *see also Charles,* 925 F.3d at 87 (stating that failure to act when officer "knew, *or should have known*, that the condition posed an excessive risk to the plaintiff's health or safety" is deliberate indifference) (emphasis in original).

By virtue of taking Ms. Doe into custody, returning her to Mexico, and ordering her to remain there pending her removal proceedings, the defendants established a "special relationship" and an affirmative duty to reasonably avoid releasing her into unsafe conditions. The relationship began when the defendants apprehended Ms. Doe and held her in custody for days. *See* Doe Decl. ¶¶ 5-9. Imprisonment is the paramount example of when a special relationship arises. *See Charles*, 925 F.3d at 81 (noting the duties the state owes to protect individuals differ "depending on whether the complainant was in the state's custody"). The defendants, fully aware of her vulnerability as a transgender woman, chose to return her to Mexico, where she would likely face serious harm. Though she is in Mexico, the defendants still

impose limitations on her freedom to act because she must remain there until her removal case concludes and report for her immigration hearings from Mexico. *See also* Doe Decl. ¶¶ 9-10, 18.

Courts have recognized that releasing an individual in unsafe conditions will violate substantive due process under the "special relationship" doctrine. *See Charles,* 925 F.3d at 82-83 (holding that failure to provide discharge planning to avoid post-release harm for mentally ill immigration detainees stated a claim for violation of substantive due process); *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (holding that police act of "strand[ing] [plaintiff] in a high-crime area at 2:30 a.m. distinguishe[d] [plaintiff] from the general public and trigger[ed] a duty of the police to afford her some measure of peace and safety"). In other words, "[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

And "throw [her] into a snake pit" is what the defendants did. The defendants were aware that Ms. Doe faced potential abuse as a transgender woman, a fact made clear when they moved her from a group male cell to a single cell for her own protection while in CBP custody and when she spoke to them about her fears of returning to Mexico. *See* Doe Decl. ¶¶ 6-8. The risk of abuse, even death, for transgender people in Mexico is well-documented.[8] Ms. Doe's experience in Mexico has not been exceptional – like many transgender people, she repeatedly has been harassed, humiliated, threatened, and assaulted. *See* Doe Decl. ¶¶ 3-4, 10-17, 19. Nor have the

[8] *See* U.S. Dep't of State, Mexico 2019 Human Rights Report at 1, 27 (Sallomi Decl., Ex. P) (noting violence against LGBT people is a "significant human rights issue" in Mexico and referencing a Mexican governmental study finding that more than half of LGTBQ individuals in Mexico suffered hate speech and physical aggression); Los Angeles Times, Mexico trans women fight for justice as killings go unpunished (Aug. 9, 2019) at 2 (Sallomi Decl., Ex. Q) (stating Mexico has become the second-deadliest country for transgender people, and less than 3% of killings of LGBTQ people members resulted in convictions since 2013); UNHCR, Women on the Run at 27-30, 44 (Sallomi Decl., Ex. R) (describing transgender asylum-seekers accounts of daily discrimination, harassment, and the threat of violence while in Mexico and other Central American countries).

defendants attempted to minimize the risks by timely processing her asylum claim; she now has been in Mexico for almost a year without a single hearing in immigration court. *See id*. ¶18. Under the circumstances, the defendants' deliberate indifference to the grave risks to Ms. Doe's safety and life in Mexico shocks the conscience and violates substantive due process.[9]

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION.

When the government is the opposing party, the balance of equities and public interest factors "merge." *Planned Parenthood of New York City, Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018). The plaintiffs' lives are in peril and they are separated from their families. *See supra* Part I. Conversely, an injunction that "simply require[s] [the government] to comply with their legal obligations" does not harm the government. *Abdi*, 280 F. Supp. 3d at 410; *see also L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 620 (S.D.N.Y. 2018). Moreover, "the public also has an interest in ensuring that 'statutes enacted by [their] representatives' are not imperiled by executive fiat." *Innovation Law Lab*, 951 F.3d at 1094 (citations omitted). On balance, therefore, the "constant danger [the MPP Plaintiffs] face outweighs the government's or the public's interest in the continued application of the MPP" to them. *Bollat Vasquez*, 2020 WL 2490040 at *12.

CONCLUSION

For the foregoing reasons, the Court should order the defendants to permit the MPP plaintiffs to re-enter the United States pending their removal proceedings. Alternatively, the Court should order the defendants to individually assess whether the plaintiffs should be excluded from MPP under the MPP Guiding Principles or the Rehabilitation Act.

[9] President Trump and top DHS officials have previously suggested measures that would physically harm asylum-seekers at the border to deter them. *See supra* n. 1. While these suggestions were not implemented, they indicate the defendants' indifference to harm that may befall asylum-seekers they return to Mexico.

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New York, N.Y.

Respectfully Submitted,

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