UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANDRES OSWALDO BOLLAT VASQUEZ, et al.	)	
Plaintiffs,	)	
v.	)	C.A. No. 20-10566-IT
CHAD F. WOLF, Acting Secretary of Homeland Security, et al.	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Pursuant to the Court's April 30, 2020 Order, Dkt. 38, Defendants hereby submit the following supplemental brief to respond to this Court's questions regarding the statutory authority outlined in 8 U.S.C. § 1225(b)(2)(C).

ARGUMENT

I. Aliens Who Enter Between Ports of Entry And Are Immediately Apprehended, Like Plaintiffs, Are "[A]rriving" As That Term Is Used in 8 U.S.C. § 1225(b)(2)(C).

Defendants respectfully submit that aliens like Plaintiffs are "arriving" as that term is defined by 8 U.S.C. § 1225(b)(2)(C) because any other interpretation of the term "arriving" would render statutory language in section 1225(b)(2)(C) null and void.

As Defendants noted in their opposition to Plaintiffs' preliminary injunction motion, the contiguous return authority elucidated in 8 U.S.C. § 1225(b)(2)(C) may be exercised with respect to any alien placed in full removal proceedings "who is arriving on land ... from a foreign territory contiguous to the United States" "*whether or not* at a designated port of arrival." *Id.* (emphasis added); Dkt. 35 at 11. The plain import of section 1225(b)(2)(C) is that DHS possesses discretion to apply the contiguous return authority both to amenable aliens who seek admission at ports of entry, as well as to aliens who illegally cross the border between ports of entry. If it were correct that an alien who illegally crossed the border between ports of entry was no longer "arriving" simply by virtue of his or her physical presence in the United States, however brief, then, as a practical matter, 8 U.S.C. § 1225(b)(2)(C) could never be applied to aliens who enter between ports of entry. That was clearly not Congress's intent, and a holding that aliens who illegally cross the border are no longer "arriving" within the meaning of 8 U.S.C. § 1225(b)(2)(C) would impermissibly render the phrase "whether or not at a designated port of arrival" in 8 U.S.C. § 1225(b)(2)(C) completely meaningless. *See Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir.

1999) ("It is a time-honored tenet that all words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous.") (citation and internal quotation marks omitted); *see also United States v. Ahlers*, 305 F.3d 54, 58 (1st Cir. 2002) ("We presume that Congress intended all words and provisions contained within a statute to have meaning and effect, and we will not readily adopt any construction that renders any such words or phrases meaningless, redundant, or superfluous.").

The facts of this case plainly illustrate that Plaintiffs were "arriving" as that term is used by 8 U.S.C. § 1225(b)(2)(C). After illegally crossing the border between ports of entry, Plaintiffs were immediately apprehended "at or near Hidalgo, TX," a city that sits on the U.S.-Mexico border. *See* Dkt. 29-7 at 2, 6, 8. If it were correct that Plaintiffs' status instantaneously changed from "arriving" to "arrived" the moment they crossed the border, then, as a practical matter, no aliens who cross the border between ports of entry could be returned under section 1225(b)(2)(C). As Defendants have demonstrated, the statutory text decisively rejects such an interpretation, which would render a key component of 1225(b)(2)(C) superfluous.

In addition, DHS, after surveying relevant statistics, has found that the vast majority of aliens apprehended by the U.S. Border Patrol along the Southwest Border are apprehended within 96 hours of crossing the land border. *See* Ex. 1 at 1 n.2. Accordingly, DHS issued guidance reasonably advising that aliens who enter between ports of entry may only be processed for MPP if they have been in the country for less than 96 hours and that agents "also should consider unique circumstances in which an alien apprehended in that period has not credibly demonstrated that he or she has reached his or her intended destination in the United States." *Id.* Thus, individuals, like Plaintiffs, who illegally crossed the border between ports of entry and were apprehended within

96 hours of crossing the border may be processed under MPP because they are "arriving on land" between ports of entry "from a foreign territory contiguous to the United States," and are thus properly subject to section 1225(b)(2)(C). This case simply does not present the stark hypothetical of an individual who illegally crossed the border from Mexico, traveled thousands of miles within the United States to Massachusetts, and then resided in the United States for "seven years" and was then "returned to Mexico." Tr. at 7:12-17. Indeed, as the accompanying MPP Guiding Principles reflect, such an alien could not be returned to Mexico under MPP, as that alien would have been in the United States far longer than 96 hours. *See* Ex. 1. at 1.

The conclusion that physical presence is not dispositive of an alien's rights is not unique to the statutory context presented here. The First Circuit has held that in the context of assessing procedural due process claims, which are not at issue here, an alien "present in the United States" has "limited" due process rights because the alien is "still in theory of law at the boundary line and ha[s] gained no foothold in the United States." *Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003). That conclusion is consistent with the broader principle that "aliens receive constitutional protections when they have come within the territory of the United States *and* developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (emphasis added); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

II. The Statement in 69 Fed. Reg. 48,877 Concerning Return Does Not Refer to Returns Under 8 U.S.C. § 1225(b)(2)(C).

The Federal Register Notice titled "Designating Aliens for Expedited Removal," 69 Fed. Reg. 48,877 (Aug. 11, 2004), does not limit DHS's ability to use the contiguous return authority in section 1225(b)(2)(C) in any way.

The aforementioned Federal Register Notice concerns DHS's designation that aliens "encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border" are amenable to expedited removal, codified at 8 U.S.C. § 1225(b)(1). 69 Fed. Reg. at 48,879. As this Court is aware, expedited removal, which concerns *removing* certain inadmissible aliens without a hearing or further review, unless the alien expresses a fear of persecution or an intent to seek protection, is fundamentally different from the temporary *return* of aliens to Mexico pending their removal proceedings under 8 U.S.C. § 1229a. The Immigration and Nationality Act ("INA") specifically distinguishes between these two different concepts in section 1225. *Compare* 8 U.S.C. § 1225(b)(1)(A)(i) (outlining procedures for expedited "remov[al]" of aliens "without further hearing or review unless the alien indicates either an intention to apply for asylum ... or a fear of persecution"), *with* 8 U.S.C. § 1225(b)(2)(C) ("[T]he [Secretary] may return the alien to that territory pending a proceeding under section 1229a of this title."); *see also* Dkt. 35 at 21 ("An order of removal and temporary return are not synonymous, and the considerations entailed by each course of action are fundamentally different and distinct.").

The Federal Register Notice does contain the following statement in outlining the need to apply expedited removal procedures to aliens encountered within 14 days of illegally crossing the border and within 100 miles of the U.S. international land border:

> Presently, DHS officers cannot apply expedited removal procedures to the nearly 1 million aliens who are apprehended each year in close proximity to the borders after illegal entry. It is not logistically possible for DHS to initiate formal removal proceedings against all such aliens. This is primarily a problem along the southern border, and thus the majority of such aliens are Mexican nationals, who are "voluntarily" returned to Mexico without any formal removal order. Based upon anecdotal evidence, many of those who are returned to Mexico seek to reenter the U.S. illegally, often within 24 hours of being voluntarily returned ... . On the southern land border with Mexico, those aliens who are apprehended who are not Mexican nationals cannot be returned to Mexico. Currently, non-Mexican nationals who are inadmissible may be voluntarily returned to their country of citizenship or nationality via aircraft, or placed in formal removal proceedings … .

69 Fed. Reg. at 48,878. The aliens described in this paragraph who are "voluntarily returned," *id.*, are not aliens who are "arriving from a foreign territory contiguous to the United States" and who are subsequently "return[ed] ... to that territory pending a proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(C). Instead, this paragraph is describing inadmissible aliens who are apprehended, and who elect to voluntarily depart the country in lieu of being placed in removal proceedings. *See* 8 U.S.C. § 1229c(a)(1) ("The [Secretary] may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title."); *Rosario-Mijangos v. Holder*, 717 F.3d 269, 273 (2d Cir. 2013) ("[T]he Form I-826 [is] the 'voluntary return form.' [The agent] testified that it was his standard practice ... to ask any alien completing a Form I-826 if he wanted 'to take a voluntary return back to his country so that he could leave immediately, or if he would want a hearing before an Immigration Judge."); *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003) ("An administrative 'voluntary departure' under the statute is something that occurs with the permission of the Attorney General in lieu of removal proceedings."). These voluntary returns to an alien's home country have nothing to do with temporarily returning an alien to the contiguous territory from which he or she arrived for the pendency of removal proceedings. And the Federal Register Notice makes the unremarkable observation that non-Mexicans cannot voluntarily agree to be removed to Mexico because they did not come from Mexico.

Confirmation that the "return[s]" being discussed in the Federal Register Notice, 69 Fed. Reg. at 48878, are a separate concept from the contiguous return authority here is that the notice is replete with references to the fact that returns in the context being discussed are "voluntar[y]," and once the voluntary returns are completed, no further proceedings are pending. *Id.* By contrast, returns of aliens under MPP are pending section 1229a removal proceedings, which is why aliens

returned under MPP are temporarily returned, and then subsequently return to the United States for their immigration proceedings. This cements the conclusion that the discussion in the Federal Register Notice does not place any constraints on how the government may use the statutory authority in section 1225(b)(2)(C). And the fact that DHS sought to address a crisis on the southern border with one tool (expansion of expedited removal) does not foreclose or limit its ability to simultaneously also use different tools (such as the authority in section 1225(b)(2)(C)) to address a subsequent crisis, especially given its scale and magnitude.

III. The Phrases "Arriving on Land" and "From a Foreign Territory Contiguous to the United States" in 8 U.S.C. § 1225(b)(2)(C) Perform Different Functions And Do Not Limit 8 U.S.C. § 1225(b)(2)(C)'s Application to Mexican or Canadian Nationals.

The phrases "arriving on land" and "from a foreign territory contiguous to the United States" perform discrete functions in 8 U.S.C. § 1225(b)(2)(C), such that neither phrase is surplusage.

"[A]rriving on land" refers to an alien's method of arrival. Aliens can attempt to enter the United States not just by land, but also by "aircraft," 8 U.S.C. § 1225(b)(1)(F), or by sea, which is why immigration officials have the authority to "board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States." 8 U.S.C. § 1225(d)(1); *id.* § 1225(d)(2)(A) ("Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States-- (A) to detain the alien on the vessel or at the airport of arrival."); NBC News, "Migrants Turn to Sea To Enter U.S. Illegally," *available at* www.nbcnews.com/id/38868544/ns/us_news-immigration_a_nation_divided/t/migrants-turn-sea-enter-us-illegally/ ("This is a new frontier for illegal immigrations entering the United States—a roughly 400 square-mile ocean expanse that

stretches from the bullring on the shores of Tijuana, Mexico, to suburban Los Angeles."); Ex. 1 at 1 n.2 ("Section [1225](b)(2)(C) applies to applicants for admission who are 'arriving on land.' This term thus clearly constitutes a reference both to the alien's location (in the act of 'arriving') and manner of entry (on land, rather than by sea or air.)"). Thus, "arriving on land" in 8 U.S.C. § 1225(b)(2)(C) distinguishes the method of arrival that the statute covers from other methods of arrival, such as by aircraft or by sea.

"[F]rom a foreign territory contiguous to the United States," on the other hand, refers to the location from which aliens amenable to being returned under section 1225(b)(2)(C) arrive. This is confirmed when examining the statute in its entirety. If an alien is "arriving on land" "from a foreign territory contiguous to the United States," the Secretary "may return the alien to *that* territory." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Without the phrase "from a foreign territory contiguous to the United States," the return authority in section 1225(b)(2)(C) would be underspecified: the statute would not specify to where aliens returned under section 1225(b)(2)(C) could be returned. This reinforces the conclusion that "from a foreign territory contiguous to the United States" refers to the location from where the alien attempted to enter the United States not the alien's nationality. *See Cruz v. DHS*, No. 19-cv-2727, 2019 WL 8139805, at *4 (D.D.C. Nov. 21, 2019) ("Cruz's own sworn statement makes clear that immediately upon crossing the U.S./Mexican border on May 10th, he sought out immigration agents. Moreover, the government's notice to appear clarifies the location where Cruz entered the United States. On this factual record, I conclude that Cruz was an alien arriving on land from Mexico."); *see also Little People's School, Inc v. United States*, 842 F.2d 570, 573 (1st Cir. 1999) ("[A] court's interpretation of a single provision necessitates consideration of the statute in its entirety.").

Taking the two phrases together, section 1225(b)(2)(C) may be applied to aliens that arrive by land (as opposed to by aircraft or by sea) from a territory contiguous to the United States—Canada or Mexico. The fact that these two phrases perform different functions accords with the presumption that "Congress intended all words and provisions contained within a statute to have meaning and effect." *Ahlers*, 305 F.3d at 58. Interpreting "from a foreign territory contiguous to the United States" as referring to Mexican or Canadian nationals is therefore inconsistent with the role that this statutory phrase plays. This is especially true because in other parts of the INA, Congress specifically refers to an "alien's nationality," but that phrase does not appear in section 1225(b)(2)(C). *See, e.g.*, 8 U.S.C. § 1231(a)(3)(C), (b)(3)(A); *DHS v. MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). Furthermore, this conclusion is consistent with a memorandum addressing the treatment of Cuban Asylum Seekers At Land Border Ports of Entry, which provided that "a native or citizen of Cuba may also be returned to contiguous territory pending [full] removal proceedings" and thus approved the exercise of the return authority in section 1225(b)(2)(C) as to Cuban nationals who are neither Mexican nor Canadian nationals. Dkt. 39, Memorandum from Jason Ahern, Assistant Comm'r, Office of Field Operations, *CBP Treatment of Cuban Asylum Seekers at Land Border Ports of Entry*, IPP 05 1562 (June 10, 2005).

IV. 8 C.F.R. § 287.3 Does Not Limit The Exercise of the Statutory Authority in 8 U.S.C. § 1225(b)(2)(C).

The procedures outlined in 8 C.F.R. § 287.3 do not limit the exercise of the statutory authority in section 1225(b)(2)(C).

8 C.F.R. § 287.3 concerns the unique situation where an alien is "arrested without a warrant of arrest" under the authority "contained" in 8 U.S.C. § 1357, which enumerates certain powers that officers or employees of DHS possess without a warrant, such as interrogating aliens suspected

of impermissibly being in the United States, arresting aliens who are suspected of violating the law, and boarding and searching vessels and other vehicles to prevent the illegal entry of aliens into the United States. 8 U.S.C. § 1357(a); 8 C.F.R. § 287.3(a). 8 C.F.R. § 287.3, then, is not an alternative method of disposition to 8 C.F.R. § 235.3. Instead, as its title suggests, 8 C.F.R. § 287.3 exclusively describes the powers that immigration officers possess in the cases of "aliens arrested without [a] warrant."

8 C.F.R. § 287.3(b) confirms that it does not limit or narrow the authority in 8 U.S.C. § 1225(b)(2)(C) in any way. 8 C.F.R. § 287.3(b) states that "[i]f the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry in accordance with 8 CFR parts 235, 239, or 240, order the alien removed as provided for in [8 U.S.C. § 1225(b)(1)] ... or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case." That subsection makes clear that 8 C.F.R. § 287.3 simply outlines the different powers (interrogation, arrest, etc.) that immigration officers have, while different regulatory and statutory provisions, including 8 U.S.C. § 1225(b)(1), (b)(2), and 8 C.F.R. § 235.3 (including the regulatory provision at issue, 8 C.F.R. § 235.3(d)) provide for the appropriate disposition of aliens. This is why the concluding phrase in 8 C.F.R. § 287.3(b) makes clear that immigration officers may "take whatever other action may be appropriate or required." 8 C.F.R. § 287.3(b).

Nor is 8 C.F.R. § 287.3(d) inconsistent with 8 C.F.R. § 235.3(d). 8 C.F.R. § 287.3(d) states that a "determination will be made within 48 hours of the arrest" as to "whether the alien will be continued in custody or released on bond or recognizance." Returning an alien under 8 C.F.R. § 235.3(d) is fully consistent with § 287.3(d) because § 235.3(d), titled "Service custody," states

that the "Service will assume *custody* of any alien subject to detention," and then "[i]n 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." *Id.* (emphasis added). In other words, prior to returning an alien under section 1225(b)(2)(C), that alien is first taken into custody instead of being released on bond, consistent with 8 C.F.R. § 287.3(d). The fact that § 287.3(d) does not list return to a contiguous territory as a potential option is insignificant because this subsection exclusively concerns "[c]ustody procedures"—whether an alien will be taken into custody or not when that alien is first encountered—not how that alien is processed after the initial custody determination is made, a process governed by different subsections like 8 C.F.R. § 235.3(d).

As Defendants have already demonstrated to this Court, 8 U.S.C. § 1225(b)(2)(C) clearly applies to aliens that arrive between ports of entry, like Plaintiffs, and 8 C.F.R. § 235.3(d) does not narrow that statutory authority in any way. *See* Dkt. 35 at 10-14. So the return of Plaintiffs to Mexico is "appropriate" and authorized by section 1225(b)(2)(C), and 8 C.F.R. § 287.3 provides no basis to reach a different conclusion.

CONCLUSION

In sum, Defendants respectfully submit that because none of these issues form the basis for Plaintiffs' preliminary injunction motion, resolution of these questions, by themselves, cannot allow Plaintiffs to discharge the exacting burden necessary to demonstrate an entitlement to a preliminary injunction. *See Esso Standard Oil Co. (Puerto Rico) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006) ("The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor. The sine qua non of this four-factor inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his

quest, the remaining factors become matters of idle curiosity."); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.") (emphasis retained). For the reasons articulated in this brief, and in Defendants' opposition to Plaintiffs' preliminary injunction motion, this Court should deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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