UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANDRÉS OSWALDO BOLLAT VASQUEZ, et al., Plaintiffs, v. CHAD F. WOLF, et al., Defendants.	No. 20-cv-10566-IT

SUPPLEMENTAL BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

I. BECAUSE THE PLAINTIFFS HAD ENTERED THE UNITED STATES BETWEEN PORTS OF ENTRY, SUBJECTING THEM TO THE MPP VIOLATED 8 U.S.C. § 1225(B)(2)(C) AND ITS REGULATIONS....1

A. Section 1225(b)(2)(C) applies only to noncitizens who are "arriving." 1

B. The INS limited "arriving" to the port of entry. 3

C. Section 235.3(d) limited contiguous return to noncitizens arriving at a port of entry. 6

D. Section 235.3 is a binding legislative rule. 9

II. PLAINTIFFS ARE ALSO ENTITLED TO RELIEF ON THEIR OTHER CLAIMS. 11

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Min. Cong. v. Mine Safety & Health Admin.,
995 F.2d 1106 (D.C. Cir. 1993) 9

Centro Presente v. DHS,
332 F. Supp. 3d 393 (D. Mass 2018) 13

Citizens to Save Spencer Cty. v. U.S. Envtl. Prot. Agency,
600 F.2d 844 (D.C. Cir. 1979) 10

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 10, 11

Guerrero-Lasprilla v. Barr,
140 S. Ct. 1062 (2020) 13

Innovation Law Lab v. Nielsen,
366 F. Supp. 3d 1110 (N.D. Cal. 2019) 13

Innovation Law Lab v. Wolf,
951 F.3d 1073 (9th Cir. 2020) 11, 13

INS v. Chadha,
462 U.S. 919 (1983) 9

La Casa Del Convaleciente v. Sullivan,
965 F.2d 1175 (1st Cir. 1992) 10

Make the Rd. New York v. McAleenan,
405 F. Supp. 3d 1 (D.D.C. 2019) 2

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007) 7

Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan,
979 F.2d 227 (D.C. Cir. 1992) 10

New Hampshire Hosp. Ass'n v. Azar,
887 F.3d 62 (1st Cir. 2018) 10

Perez v. Mortg. Bankers Ass'n,
575 U.S. 92 (2015) 5, 11

Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 2

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 7, 12

Zadvydas v. Davis,
533 U.S. 678 (2001) 2

Statutes

8 U.S.C. § 1225(b)(2) 6, 7, 11

8 U.S.C. § 1225(b)(2)(B)(ii) 11

8 U.S.C. § 1225(b)(2)(C) ..... *passim*

8 U.S.C. § 1226 11

8 U.S.C. § 1229 11

8 U.S.C. § 1229a 6, 11, 12

8 U.S.C. § 1229c 5

Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 302, 110 Stat. 3009 (1996) 2

Other Authorities

8 C.F.R. § 1.1 5

8 C.F.R. § 1.1(q) 5

8 C.F.R. § 1.2 5

8 C.F.R. § 235.3(d) ..... *passim*

8 C.F.R. § 239.1 11

8 C.F.R. § 1001.1 5

82 Fed. Reg. 8793 (Jan. 25, 2017) 9

62 Fed. Reg. 444 (Jan. 3, 1997) 3

62 Fed. Reg. 10312 (Mar. 6, 1997) 5

63 Fed. Reg. 19382 (Apr. 20, 1998) 5

68 Fed. Reg. 9824 (Feb. 28, 2003) 5

69 Fed. Reg. 48877 (Aug. 11, 2004).....2

71 Fed. Reg. 27585 (May 12, 2006).....5

76 Fed. Reg. 53764 (Aug. 29, 2011).....5

21 I&N Dec. 444 (BIA 1996).....8

At the hearing on April 30, 2020, the Court invited supplemental briefing on the application of 8 U.S.C. § 1225(b)(2)(C) to Plaintiffs Luisa Marisol Vasquez Perez de Bollat, A.B., Rosa Maria Martinez de Urias, Evila Floridalma Colaj Olmos, and J.C., all of whom had entered the United States between ports of entry when they were returned to Mexico under the so-called "Migrant Protection Protocols" (MPP). Tr. at 33:22-34:10. Plaintiffs respectfully submit this brief to expand upon their position and respond to the government's arguments.

I. Because the Plaintiffs had entered the United States between ports of entry, subjecting them to the MPP violated 8 U.S.C. § 1225(b)(2)(C) and its regulations.

Under the MPP, the Department of Homeland Security (DHS) arrests individuals who are already present in the United States and expels them into foreign territory without any removal proceeding—or, indeed, legal proceeding of any kind. This is unlawful. As explained in Plaintiffs' opening brief and further described below, Section 1225(b)(2)(C)'s contiguous return authority applies only to those who are "arriving," and has been expressly limited by binding regulation to those arriving at a port of entry.

The Plaintiffs in this case were apprehended after they were already present the United States. Indeed, on the Notices to Appear issued to Ms. Vasquez and A.B., the government indicated that each was an "alien present in the United States who has not been admitted or paroled," not an "arriving alien." ECF No. 29-7; Ex. 1 (attached). The government did not designate Ms. Martinez, Ms. Colaj, or J.C. as either "arriving" or "present" on their Notices to Appear, *id.*, and now concedes that, like Ms. Vasquez and A.B., they were apprehended after they had entered the United States, Tr. at 36:12-16.

A. Section 1225(b)(2)(C) applies only to noncitizens who are "arriving."

The plain language of § 1225(b)(2)(C) does not apply to Plaintiffs here, who were apprehended after they had already entered the United States, not while they were arriving. The

Immigration and Nationality Act, including § 1225, distinguishes between noncititizens who are "arriving" and those who are already "present" in the United States. For example, § 1225(a)(1) treats as an "applicant for admission" both a noncitizen who "arrives in the United States (whether or not at a designated port of arrival . . .)" and one who is "present in the United States who has not been admitted." Both the title and text of § 1225(b)(1), which provides for expedited removal of certain individuals who lack valid admission documents, track these two categories. Section 1225(b)(1) applies both to "aliens arriving in the United States" and, if designated by the Attorney General, to "certain other aliens" who have "not been admitted or paroled into the United States" and cannot show that they have been "physically present in the United States" for the past two years.[1] This language, adopted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), tracks the longstanding distinction in immigration law between those deemed to be knocking at the door of the United States and those who have already entered, even if illegally. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 302, 110 Stat. 3009 (1996).[2]

Only those who are "arriving" are even potentially subject to being returned to contiguous territory under 8 U.S.C. § 1225(b)(2)(C). Unlike the expedited removal procedures of § 1225(b)(1), the text of § 1225(b)(2)(C) contains no language providing for contiguous return of

[1] This designation has been extended only to noncitizens who are apprehended within 100 miles of the border and cannot demonstrate 14 days' presence in the United States. 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004); *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019) (enjoining further expansion of expedited removal), *appeal docketed*, No. 19-5298 (D.C. Cir. Sept. 27, 2019).

[2] *See also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (distinguishing "aliens who have once passed through our gates, even illegally" from "alien on the threshold of initial entry").

individuals who are *already present* in the United States. Instead, § 1225(b)(2)(C) further limits the set of noncitizens described in § 1225(b)(2)(A)[3] to those who are "arriving." Similarly, the title of § 1225(b)(2)(C) explicitly refers to "aliens arriving from contiguous territory." Thus, even if IIRIRA had not required (and the Immigration and Naturalization Service (INS) had not undertaken) *any* rulemaking, the Plaintiffs here could not be subject to contiguous return under § 1225(b)(2)(C) because they were already "present," not "arriving," when they were apprehended.

B. The INS limited "arriving" to the port of entry.

Although the statutory text ends the inquiry, Plaintiffs are not subject to § 1225(b)(2)(C) for the further reason that the statute's implementing regulations have limited contiguous return to noncitizens who arrive at the port of entry. IIRIRA required rulemaking to implement § 1225. Under § 309(a) of IIRIRA, § 1225 and seven other provisions comprising Subtitle III-A of IIRIRA would go into effect on April 1, 1997. But § 309(b) specified that the Attorney General "shall first promulgate regulations to carry out this subtitle by not later than 30 days before the title III-A effective date."

Following the passage of IIRIRA, the INS undertook rulemaking that it recognized was "necessary to implement the provisions" of IIRIRA. 62 Fed. Reg. 444, 444 (Jan. 3, 1997). Consistent with longstanding practice and the text of the statute, the agency recognized that IIRIRA defined two types of applicants for admission, *i.e.*, (1) noncitizens who were "arriving" and (2) those who were "present" without being admitted. It gave particular attention to the statutory term "arriving." *Id.* In its January 1997 Notice of Proposed Rulemaking, the agency explained:

[3] As noted in Plaintiffs' opening brief, § 1225(b)(2) also excludes, on its face, noncitizens like Plaintiffs who are described in § 1225(b)(1). *See generally* ECF No. 28 at 14-16.

> The proposed definition of "arriving alien" in section 1.1(q) includes aliens arriving at a port-of-entry, aliens interdicted at sea, and aliens previously paroled upon arrival. The term "arriving alien" could also include other classes of aliens, e.g., those apprehended crossing a land border between ports-of-entry. The Department would value commentary on the proper scope of the regulatory definition.

Id. at 445.

The agency thus asserted that it had a choice about how to define "arriving," potentially including defining the term to include individuals apprehended while crossing the border between ports of entry. But it proposed a narrower definition. And in March 1997, the INS decided to keep its proposed definition of an "arriving alien":

> Several sections of the statute, such as sections 212(a)(9), 240B, and 241 of the Act, refer to arriving aliens, even though this term is not defined in statute. After carefully considering these references, the Department felt that the statute seemed to differentiate more clearly between aliens at ports-of-entry and those encountered elsewhere in the United States. For clarity, "arriving alien" was specifically defined in 8 CFR part 1, and the Department invited commentary on the proper scope of the regulatory definition.
>
> One commenter suggested that aliens interdicted in United States waters should not be included in the definition because persons arriving in United States waters have already legally arrived in the United States. . . . Aliens who have not yet established physical presence on land in the United States cannot be considered as anything other than arriving aliens. . . .
>
> Another commenter suggested that the definition be expanded to include aliens who have been present for less than 24 hours in the United States without inspection and admission. The Department extensively considered this and similar options, such as a distance-based distinction. For the reasons discussed below relating to the decision not to apply the expedited removal provisions at this time to certain aliens who entered without inspection, and considering the difficulty not only in establishing that the alien entered without inspection, but also in determining the exact time of the alien's arrival, the Department continues to believe the position taken in the proposed rule is correct and will not modify this definition in the interim rule. The definition of "arriving alien" will be given further consideration in the final rule, however, drawing upon the experience of the early implementation of the interim rule.

62 Fed. Reg. 10312, 10312-13 (Mar. 6, 1997).[4] The resulting definition of an "arriving alien" included only noncitizens at the port of entry and those interdicted at sea, not any individuals caught during or after crossing the border between ports of entry. *See* 8 C.F.R. §§ 1.2, 1001.1(q).

The INS never expanded this definition of an "arriving alien" beyond the port of entry.[5] Thus, even if it had not expressly limited the contiguous return authority in 8 C.F.R. § 235.3(d), its definition of an "arriving alien" would still foreclose contiguous return of the Plaintiffs here because they unquestionably did not "com[e] or attempt[] to come into the United States at a port-of-entry." 8 C.F.R. §§ 1.2, 1001.1(q).[6]

[4] The government contends that, in defining an "arriving alien," the INS was not intending to define the term "arriving" or "aliens arriving," which are used in the text and title, respectively, of § 1225(b)(2)(C). ECF No. 35 at 14. But the INS listed § 240B of IIRIRA (codified at 8 U.S.C. § 1229c) as an example of a provision that refers to an "arriving alien." *See* 62 Fed. Reg. at 10312 ("Several sections of the statute, such as sections 212(a)(9), 240B, and 241 of the Act, refer to arriving aliens . . . ."). The only part of § 240B to use the term "arriving" is § 240B(a)(4), a provision that uses the term "aliens arriving" in its title and "arriving" in its text in a manner nearly identical to § 1225(b)(2)(C).

[5] The initial definition of an arriving alien was codified at 8 C.F.R. § 1.1(q). It was amended in 1998 and 2006, primarily with regard to its treatment of parole. 63 Fed. Reg. 19382 (Apr. 20, 1998); 71 Fed. Reg. 27585 (May 12, 2006). Following the creation of DHS, 8 C.F.R. § 1.1 was duplicated at 8 C.F.R. § 1001.1, *see* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003), and in 2011, the definition was moved from 8 C.F.R. § 1.1 to § 1.2, *see* 76 Fed. Reg. 53764, 53778 (Aug. 29, 2011). These changes do not impact this case.

[6] Minutes ago, the government filed a document revealing that it has redefined "arriving" for purposes of MPP to include noncitizens apprehended within 96 hours of entry—precisely the type of line that the agency considered and opted against in 1997. ECF No. 43; *see* 62 Fed. Reg. at 10313. That definition is contrary to 8 C.F.R. § 1.2 and would require rulemaking. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) (APA requires agencies to "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

C. Section 235.3(d) limited contiguous return to noncitizens arriving at a port of entry.

At the same time that it defined "arriving," the INS also expressly limited its contiguous return authority to a noncitizen who "arrives at a land border port-of-entry." The resulting regulation provides:

> **(d) Service custody**. The Service will assume custody of any alien subject to detention under paragraph (b) or (c) of this section. In its discretion, the Service may require any alien who appears inadmissible and who arrives at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing. Such alien shall be considered detained for a proceeding within the meaning of section 235(b) of the Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.

8 C.F.R. § 235.3(d); 62 Fed. Reg. at 10357. The regulation limits contiguous return to noncitizens at the port of entry; it cannot be interpreted to be "silent" on the application of that authority to individuals who entered between ports of entry, *see* ECF No. 35 at 11.

First, the INS's limitation on the contiguous return authority is consistent with the agency's "careful" consideration of the term "arriving alien," and its intentional deliberation concerning how it would implement IIRIRA with regard to noncitizens who entered the United States between ports of entry. 62 Fed. Reg. at 10312-13. For example, the INS decided that it would not initially apply expedited removal to those who entered between ports of entry. *Id.* at 10313. And, with regard to contiguous return, the INS explained that "[t]he proposed regulation *implements* a new provision added to [8 U.S.C. § 1225(b)(2)] *to state* that an applicant for admission arriving at a land border port-of-entry and subject to a removal hearing under [8 U.S.C. § 1229a] may be required to await the hearing in Canada or Mexico." 62 Fed. Reg. at 445 (emphasis added).

Second, the plain text of § 235.3(d) confirms that it sets out the totality of the agency's contiguous return authority, not merely one specific application of it. The second and third

sentences of the regulation would be nonsensical or, at best, a surplussage if the INS intended to authorize contiguous return of noncitizens who entered between ports of entry—a construction this Court must consequently avoid. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). For example, the third sentence provides that "[s]uch alien"—*i.e.* a noncitizen who arrived at the port of entry and is sent back to Mexico or Canada pending removal proceedings—is deemed to be detained for purpose of § 1225(b)(2)(A), which requires noncitizens placed in removal proceedings under § 1225(b)(2) to be detained. The third sentence of § 235.3(d) further provides that "[s]uch alien" may be ordered removed *in absentia* upon a failure to appear. But if the INS intended to allow contiguous return of noncitizens who entered *between* ports of entry, it would be peculiar for the agency to want to ensure that contiguous return would not violate the detention mandate of § 1225(b)(2)(A) *only* in those cases in which a noncitizen had arrived at a port of entry. Similarly, there is no reason the INS would want to limit the ability to issue *in absentia* orders to noncitizens who had arrived at the port of entry.[7]

Third, contiguous return is both logically and historically limited to individuals who are at a port of entry and may be made to "remain" in a contiguous territory, *see* 8 C.F.R. § 235.3(d)—a process that does not require arresting someone on U.S. soil, determining how long they have been in the country, and expelling them into a city where they may have never been. The government's position provides no limiting principle that would permit application of contiguous return of the Plaintiffs but not to a noncitizen apprehended in Boston three years after entry—precisely the kind of line-drawing the agency considered doing when it decided instead to

[7] Indeed, *in absentia* orders are routinely issued when noncitizens do not appear for removal hearings under MPP. *See* TRAC Immigration, *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases* (Dec. 19, 2019), trac.syr.edu/immigration/reports/587/.

limit "arriving" to the port-of-entry. *See* 62 Fed. Reg. at 10313. The INS explained in its January 1997 proposed rulemaking that the contiguous return authority codifies "a long-standing practice of the Service." 62 Fed. Reg. at 445. But in *Matter of Sanchez-Avila*, the INS described that practice to the Board of Immigration Appeals as a "longstanding practice *at land border ports of entry*." 21 I&N Dec. 444, 453 (BIA 1996) (emphasis added); *id. at* 463 ("We note that the Service only asserts the right to employ the practice at issue here at land border ports . . . .").[8]

The text of § 235.3 and regulatory context thus make clear that the regulation is not "silent" on the application of contiguous return to noncitizens between ports of entry. It limits contiguous return to those (1) arriving (2) at the port of entry.

As the Court noted during the April 30 hearing, the agency's understanding of its authority since 1997 has recognized this limitation on its contiguous return authority. In 2004, for example, DHS expanded expedited removal to those apprehended within 100 miles of the border and unable to demonstrate 14 days of presence in the United States. 69 Fed. Reg. at 48880. DHS noted that the expansion was "necessary to remove quickly from the U.S. aliens who are encountered shortly after illegally entering the U.S. across the land borders." *Id.* "[E]xpanding expedited removal between ports of entry" was important, according to DHS, because, while it could quickly return apprehended Mexicans to Mexico, "[o]n the southern land

[8] The precise issue in *Matter of Sanchez-Avila* was the immigration judge's failure to enter an *in absentia* removal order in a case involving a noncitizen who had been forced to remain in Mexico pending removal proceedings after presenting himself to a port of entry. The BIA noted the lack of authority recognizing the INS's longstanding practice, upheld the immigration judge's decision to terminate removal proceedings, and urged the agency to enact regulations. The government's contention that, mere months later, the agency used regulatory silence to preserve its authority to return noncitizens who entered between ports to contiguous territory, all the while providing for the entry of *in absenta* removal orders *only* in the case of noncitizens who arrived at ports of entry, cannot be squared with this history.

border with Mexico, those aliens who are apprehended who are not Mexican nationals cannot be returned to Mexico." *Id.* at 48878.[9] It is not surprising that, thirteen years later, when President Trump ordered DHS to ensure that noncitizens subject to §1225(b)(2)(C) were returned to a contiguous territory, DHS recognized that employing contiguous return to the full extent permitted by the statute would require a regulatory amendment. *See* ECF No. 28 at 18-19.[10]

D. Section 235.3 is a binding legislative rule.

Faced with the plain text of § 235.3(d), the government argues the regulation is "interpretive" and nonbinding. ECF No. 35 at 12. That is incorrect.

Section 235.3(d) is a legislative rule. Legislative rules are "issued by an agency pursuant to statutory authority and . . . implement the statute" *INS v. Chadha*, 462 U.S. 919, 986 n.19 (1983) (quoting U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)). Section 235.3(d) fits this definition of a legislative rule because Congress required and the agency undertook rulemaking in order to implement it. *See* IIRIRA § 309(b); 62 Fed. Reg. 444; 62 Fed. Reg. 10312. The INS codified its rule in the Code of Federal Regulations, a strong indication of an intent to create rules with the force of law. *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).[11]

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[9] The Jayson Ahern memorandum referenced at the April 30 argument is another example of the agency referring to its contiguous return authority only in the context of the port of entry. *See* Memorandum from Jayson Ahern, Assistant Comm'r, Office of Field Operations, CBP, Treatment of Cuban Asylum Seekers at Land Border Ports of Entry IPP 05 1562 (June 10, 2005), ECF No. 39 at 3-4.

[10] *See also* Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017); Office of Information and Regulatory Affairs, Spring 2017 Unified Agenda, DHS/USCBP, RIN 1651-AB13, reginfo.gov/public/do/eAgenda ViewRule?pubId=201704&RIN=1651-AB13.

[11] Indeed, in its November 1994 Basic Law Manual, the INS acknowledged that rules it codified into the Code of Federal Regulations have the force of law. It explained, "The primary immigration law is called the Immigration and Nationality Act (Act) and is found in Title 8 of the United States Code (USC). The implementation of this law is codified into Title 8 of the

Moreover, the rule on its face purports to "implement," not interpret, immigration law. 62 Fed. Reg. at 444-45; 62 Fed. Reg. at 10312; *see La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992) (noting importance of agency's intent as expressed at the time of rulemaking). In limiting contiguous return authority, the INS could not merely have *interpreted* "arriving on land (whether or not at a designated port of arrival)" to mean "arrives at a land border port-of-entry." *See Citizens to Save Spencer Cty. v. U.S. Envtl. Prot. Agency*, 600 F.2d 844, 879 (D.C. Cir. 1979) (finding rules legislative where "by no stretch of the imagination could [the rules] have been derived by mere 'interpretation' of the instructions of Congress"); *New Hampshire Hosp. Ass'n v. Azar*, 887 F.3d 62, 72 (1st Cir. 2018) (finding rule legislative where agency "does not meaningfully contend that the agency's rule is the result of a strictly interpretive exercise"). The agency instead recognized that the statute left a gap, acknowledged that it had choices about how that gap might be filled, and exercised its judgment about how to implement the statute—the basic hallmark of a legislative rule. *See* 62 Fed. Reg. at 444-45; 62 Fed. Reg. at 10312-13; *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992).

Finally, even if § 235.3(d) were somehow "interpretive," the existence of a longstanding regulation "interpreting" § 1225(b)(2)(C) to be limited to ports of entry would hardly help the government's argument. Agencies are not free to abandon longstanding policies and interpretations without a reasoned explanation or even so much as an acknowledgement of the change. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must "display

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Code of Federal Regulations (CFR). The Code of Federal Regulations has the force of law." INS, Asylum Division, *Basic Law Manual: U.S. Law and INS Refugee/Asylum Adjudications* 2 (Nov. 1994), 1995 WL 1789054, play.google.com/books/reader?id=G0fpQ8mnNS8C&pg=GBS.PA11-IA11.

awareness that it *is* changing position" and "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books) (emphasis original); *Perez*, 575 U.S. at 101. If DHS's application of contiguous return authority to the Plaintiffs did not violate 8 U.S.C. § 1225(b)(2)(C) and its implementing regulations because those regulations are merely "interpretive," that application would still be arbitrary and capricious. *Fox*, 556 U.S. at 515.

II. Plaintiffs are also entitled to relief on their other claims.

Plaintiffs have also demonstrated that they are entitled to relief because § 1225(b)(2)(C) does not apply to noncitizens subject to § 1225(b)(1)—as the Ninth Circuit found in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *stay granted*, No. 19A960, 2020 WL 1161432 (Mar. 11, 2020), *certiorari docketed*, No. 19-1212 (Apr. 14, 2020)—and because the government has violated the Administrative Procedure Act (APA), its non-refoulement obligations, and the Equal Protection Clause. ECF No. 28 at 14-16, 20-28. Plaintiffs herein respond briefly to the government's arguments regarding § 1225(b)(2) and the APA.

Section 1225(b)(2): Plaintiffs have demonstrated that, because they are noncitizens to whom § 1225(b)(1) "applies," they are not subject to § 1225(b)(2), including the contiguous return provision. *See* 8 U.S.C. § 1225(b)(2)(B)(ii). The government contends that it is "uncontroverted that Plaintiffs were placed in § 1229a removal proceedings under § 1225(b)(2)." ECF No. 35 at 7. Not so. While Plaintiffs were not placed into expedited removal proceedings, they were also not placed into removal proceedings "under § 1225(b)(2)." DHS has authority to place any removable noncitizens in the United States into removal proceedings under 8 U.S.C. § 1229a, serve them with Notices to Appear under 8 U.S.C. § 1229, and determine their custody under 8 U.S.C. § 1226. *See* ECF No. 29-9 (making § 1226 custody determining for Ms. Martinez); *see also* 8 C.F.R. § 239.1 (listing officials who may initiate removal proceedings); *id.* § 287.3(b). Section 1225(b)(2)(A) is not the authority under which removal proceedings are initiated for *all* noncitizens who are not

placed in expedited removal proceedings, but simply a requirement that particular noncitizens—those satisfying the criteria set out in § 1225(b)(2)(A) and (B)—be placed in removal proceedings under § 1229a.

Although the government contends that the Ninth Circuit's decision gives "individuals who attempt to defraud the immigration system . . . a stronger entitlement to remain in the United States for their removal proceedings than individuals who do not," ECF No. 35 at 10, it does not. Congress provided expedited removal for § 1225(b)(1) individuals. Congress had no reason to imagine or to provide for a circumstance in which the executive would give noncitizens the *benefit* of foregoing expedited removal proceedings, place them into *full* removal proceedings, and then use exile to a migrant camp in Mexico as the means to deter them and others from continuing to pursue their legal claims in immigration court.

Moreover, § 1225(b)(2)(C) is properly read not to apply to individuals who merely transit through Canada or Mexico. The statute provides for contiguous return of noncitizens "arriving by land . . . *from* a foreign territory contiguous to the United States" (emphasis added). As the Court noted, Tr. at 17:12-16, the "from" clause is superfluous unless it limits contiguous return to those who are "from" the contiguous territory. *See TRW Inc.*, 534 U.S. at 31 (statutes must be construed to avoid rendering any word superfluous).

Judicial Review Bar. During the hearing, the Government conceded that its arguments regarding the bar on judicial review under § 1252(a)(2)(B)(ii) do *not* apply to Plaintiffs' arguments that the MPP violates the INA and its implementing regulation (Count 1) or to Plaintiffs' constitutional argument that the MPP is motivated by animus in violation of the Equal Protection Clause (Count 6). Tr. at 31:1-6. Thus, if the Court resolves the instant motion in Plaintiffs' favor on any of those grounds, it need not reach this issue.

In any event, Section 1252(a)(2)(B)(ii) does not bar Plaintiffs' challenge of the MPP under the APA (Counts 4 and 5) or as inconsistent with non-refoulement obligations (Counts 3 and 7), for several reasons. First, the Supreme Court recently emphasized that there is a "well-settled and strong" "presumption favoring judicial review of administrative action," which "ha[s] consistently applied . . . to immigration statutes." *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069-70 (2020). Second, Plaintiffs do not challenge any discretionary decision made with respect to them individually, but rather challenge the MPP itself.[12] *See* ECF No. 28 at 20-28. Plaintiffs note that the stated purpose of the MPP, to "reduce the incentive for aliens to assert claims for relief or protection," ECF No. 36-4 ("Assessment of the Migrant Protection Protocols") at 6, can only succeed when applied on a massive scale, belying the Government's claim that the MPP is merely high-level policy guidance leaving immigration officers with substantial individualized discretion.

Indeed, facing a similar challenge under the APA to the MPP, the District Court in *Innovation Law Lab* found several statutory bars (including § 1252(a)) inapplicable. *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1118 (N.D. Cal. 2019). To the extent the Court reaches Plaintiffs' APA and non-refoulement claims, it should follow that court's reasoning here. *Id;*[13] *see also Centro Presente v. DHS*, 332 F. Supp. 3d 393 (D. Mass 2018) (finding similar judicial review bar inapplicable in challenge to change in policy relating to temporary protected status designations).

[12] Plaintiffs' non-refoulement claim does challenge, in part, the government's decision to send them to a country where they face persecution, but the government does not contend that it has discretion to violate the duty of non-refoulement.

[13] The Ninth Circuit merits panel in *Innovation Law Lab* did not reach § 1252(a) as it affirmed the lower court's injunction on statutory grounds. *Innovation Law Lab*, 951 F.3d at 1082.

CONCLUSION

For the reasons stated above, the Court should **GRANT** Plaintiffs' motion and order the government to parole Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. into the United States forthwith.

Dated: May 7, 2020

Respectfully submitted,

/s/ Adam J. Kessel
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EXHIBIT 1

MPP

DEPARTMENT OF HOMELAND SECURITY
NOTICE TO APPEAR

In **removal proceedings under section 240 of the Immigration and Nationality Act:**
Subject ID: [redacted]

In the Matter of:
Respondent: [redacted] currently residing at:

DOB: [redacted]
File No: [redacted]
Event No: [redacted]
A [redacted] B [redacted]

CALLE GOLFO DE MEXICO NO. 49 COL. AMPLIACION SOLIDARIDAD MATAMOROS, MEXICO CP87453

(Number, street, city and ZIP code) (Area code and phone number)

☐ You are an arriving alien.

☒ You are an alien present in the United States who has not been admitted or paroled.

☐ You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of GUATEMALA and a citizen of GUATEMALA ;
3. You arrived in the United States at or near HIDALGO, TX , on or about September 18, 2019 ;
4. You were not then admitted or paroled after inspection by an Immigration Officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

2009 West Jefferson Avenue, Suite 300 Harlingen TX US 78550

(Complete Address of Immigration Court, including Room Number, if any)

on October 29, 2019 *(Date)* at 08:00 AM *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

for KEITH LUNDY ACTING PATROL AGENT IN CHARGE

(Signature and Title of Issuing Officer) (Sign in ink)

Date: September 20, 2019

MCALLEN, TEXAS

(City and State)

DHS Form I-862 (6/19)

Notice to Respondent

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are in removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 1003.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents that you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing. At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

One-Year Asylum Application Deadline: If you believe you may be eligible for asylum, you must file a Form I-589, Application for Asylum and for Withholding of Removal. The Form I-589, instructions, and information on where to file the Form can be found at www.uscis.gov/I-589. Failure to file the Form I-589 within one year of arrival may bar you from eligibility to apply for asylum pursuant to section 208(a)(2)(B) of the Immigration and Nationality Act.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of voluntary departure. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the Department of Homeland Security (DHS), in writing, with your full mailing address and telephone number. You must notify the Immigration Court and the DHS immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to your local DHS office, listed on the internet at http://www.ice.gov/contact/ero, as directed by the DHS and required by statute and regulation. Immigration regulations at 8 CFR 1241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United States and for ten years after your departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Immigration and Nationality Act.

U.S. Citizenship Claims: If you believe you are a United States citizen, please advise the DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.

Request for Prompt Hearing

To expedite a determination in my case, I request this Notice to Appear be filed with the Executive Office of Immigration Review as soon as possible. I waive my right to a 10-day period prior to appearing before an immigration judge and request my hearing be scheduled.

Before: _____

(Signature of Respondent) (Sign in ink)

_____ Date: _____

(Signature and Title of Immigration Officer) (Sign in ink)

Certificate of Service

This Notice To Appear was served on the respondent by me on September 20, 2019, in the following manner and in compliance with section 239(a)(1) of the Act.

[X] in person [ ] by certified mail, returned receipt # _____ requested [ ] by regular mail

[ ] Attached is a credible fear worksheet.

[X] Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the SPANISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

Parent/Conservator Refused to sign. Witnessed by:

_____

(Signature of Respondent if Personally Served) (Sign in ink)

JUSTIN THERIAULT BORDER PATROL AGENT

(Signature and Title of officer) (Sign in ink)

U.S. Department of Homeland Security
Bureau of Immigration and Customs Enforcement

Additional Charges of Inadmissibility/Deportability

In: ☒ **Removal proceedings under section 240 of the Immigration and Nationality Act**

☐ **Deportation proceedings commenced prior to April 1, 1997 under former section 242 of the Immigration and Nationality Act**

In the matter of:

Alien/Respondent: A[redacted] B[redacted]

File No: [redacted] Address: c/o Calle Golfo De Mexico No. 49 Col Ampliacion Solidaridad Matamoros, Mexcio CP87453

There is/are hereby lodged against you the additional charge(s) that you are subject to being taken into custody and deported or removed from the United States pursuant to the following provision(s) of law:

The section 212(a)(6)(A)(i) charge on the notice to appear, is hereby withdrawn.

ADDED: Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, in that you are an alien who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General.

In support of the additional charge(s) there is submitted the following factual allegation(s) in addition to or in lieu of those set forth in the original charging document:

No additional allegations.

Dated: **October 29, 2019**

Lily Dideban

Lily Dideban, Assistant Chief Counsel

Notice of Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office of the Immigration Review. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with you case. If any document is a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all the allegations in the charging document and that you are inadmissible or deportable on the charges contained in the charging document. You will have an opportunity to present evidence on you own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with you full mailing address and telephone number. You must notify the Immigration Court immediately by using form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide and address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Certificate of Service

This charging document was served on the respondent by me on 10/29/19 (Date) in the following manner and in compliance with section 239(a)(1)(F) of the Act:

X in person and by mail to attorney by fax (to atty.)

Via POE officer

to: A [redacted] B [redacted]
MPP Court – BRO POE
(Alien's Address)

☐ The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

_____ (Signature of alien)

_____ (Signature and title of officer)

Form I-261(Rev. 4/1/97)N