No. 19-15716

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

KISRTJEN NIELSEN,
Secretary of Homeland Security, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency

As set forth more fully in the motion, the district court has entered a nationwide injunction barring enforcement of an important Executive Branch initiative that is designed to address the dramatically escalating burdens of unauthorized migration, which is causing irreparable harm to the defendants and the public. The injunction rests on serious errors of law and harms the public by thwarting enforcement of a policy initiative implementing the Secretary of Homeland Security's express statutory authority to return certain aliens to Mexico while their removal proceedings are pending.

(3) When and how counsel notified

The undersigned counsel notified counsel for Plaintiffs by email on April 10, 2019, of Defendants' intent to file this motion and its substance. Service will be effected by electronic service through the CM/ECF system and via email.

(4) Submissions to the district court

The defendants requested a stay from the district court, which the district court

denied in an order on April 8, 2019.

(5) Decision requested by

The district court's nationwide injunction goes into effect at 5:00 P.M. PST, April 12, 2019. A decision on the motion for an administrative stay is requested by that time, and a request on the motion for a stay is requested as soon as is possible.

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INTRODUCTION

The United States and Mexico face a humanitarian and security crisis on their shared border. In recent months, hundreds of thousands of migrants have left their home countries in Central America to journey through Mexico and then across the southern border of the United States, where they often make meritless claims for asylum and yet—because of strains on our resources—frequently secure release into our country. The Department of Homeland Security (DHS) reports that, just last month, it apprehended more than 92,000 illegal border-crossers—a pace of more than one million per year and nearly double what it was just months ago. In the same month, DHS reports encountering 53,000 migrants as part of family units (many with children), a number never before seen. The extraordinary volume of crossings has severely burdened DHS's ability to control the southern border.

In the face of this crisis, and amid ongoing diplomatic discussions with the government of Mexico, the Secretary of Homeland Security has exercised the authority expressly conferred on her by the Immigration and Nationality Act (INA) to return migrants to Mexico while their U.S.-asylum claims are processed. The INA provides that, for an alien "described in subparagraph (A)"—that is, an alien who is "seeking admission" but "is not clearly and beyond a doubt entitled to be admitted"—and who "is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States," the Secretary, as

an alternative to the mandatory detention that would otherwise be statutorily required, "may return the alien to that territory [of arrival] pending a [removal] proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A), (C). Pursuant to that authority, the Secretary recently implemented the Migrant Protection Protocols (MPP), which guides personnel on the southern border on how and when to return select aliens to Mexico while their immigration proceedings are ongoing. MPP does not apply to any Mexican national (among others) seeking to enter the United States, and it provides a procedure, consistent with international obligations, for DHS to consider a claim by any alien that she will face persecution or torture if returned to Mexico.

Despite the crisis on the southern border, the fact that MPP is part of the Executive Branch's foreign-policy and national-security strategy, and the INA's express authorization for the Secretary's actions, the district court entered a nationwide injunction of MPP, to take effect at 5:00 pm PST on Friday, April 12, 2019. The district court's order is deeply flawed, and a stay from this Court is urgently needed until the Court can resolve the government's appeal.

The district court concluded that MPP is not authorized by misreading 8 U.S.C. § 1225(b)(2)(B)(ii). That provision states that the key requirement of 8 U.S.C. § 1225(b)(2)(A)—a full removal proceeding under section 1229a—"shall not apply to an alien" "to whom [8 U.S.C. § 1225(b)(1)] applies." That clarification

is needed because section 1225(b)(1) is a procedure for *expedited* removal of certain aliens, and it provides that a covered alien shall be "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution." *Id.* § 1225(b)(1)(A)(i).

The district court reasoned that, because the aliens to whom MPP applies were *eligible* for expedited removal under section 1225(b)(1), those aliens were not "described in [8 U.S.C. § 1225(b)(2)(A)]." *Id.* § 1225(b)(2)(C). But that is plainly incorrect, because it is undisputed that the Secretary possesses, and has exercised, prosecutorial discretion *not* to seek expedited removal of aliens covered by MPP, and has instead elected to apply section 1225(b)(2)(A) and afford to those aliens full, "regular" removal proceedings under section 1229a. Op. 15 (noting "well-established law, conceded by plaintiffs, that DHS has prosecutorial discretion to place aliens in regular removal proceedings under section 1229a notwithstanding the fact that they would qualify for expedited removal under [8 U.S.C. § 1225(b)(1)]"). In light of that uncontested discretion, the exception in section 1225(b)(2)(B)(ii) is inapposite to aliens covered by MPP, because the expedited removal procedures in section 1225(b)(1) are not being "applie[d]" to them, even though those procedures *could* have been applied. The court's contrary interpretation is atextual and internally inconsistent, because the court recognized that the Secretary has discretion

to apply to these aliens the regular removal procedures, which are called for under section 1225(b)(2)(A), rather than the expedited removal procedures under section 1225(b)(1), and yet the court *prohibited* the Secretary from invoking the contiguous-territory-return authority in section 1225(b)(2)(C) that, by its terms, applies to aliens described in section 1225(b)(2)(A). The court's interpretation also produces implausible results: Given the broad scope of the expedited removal provision, the court's view would mean that the contiguous-territory-return provision applies only to those few aliens who *do* possess valid documents and *do not* engage in fraud. It makes little sense that Congress would authorize return only for aliens who follow our laws but would preclude return for those lacking documents or engaging in fraud at the border.

The district court separately found MPP's procedures for review of individual migrants' cases before return to Mexico to be deficient, citing the United States' international obligations regarding protection for refugees and the Administrative Procedure Act (APA). It is unclear whether the court concluded that MPP's procedures were substantively deficient or were faulty because they were not promulgated through notice-and-comment rulemaking, but either conclusion would be incorrect. To the extent the court meant that MPP provides less than what is required under treaty obligations, MPP satisfies any applicable international obligations by providing that any alien who is "more likely than not" to "face

persecution or torture in Mexico" will not be returned to Mexico. AR1. To the extent the district court believed MPP's procedures were problematic for lack of notice-and-comment rulemaking, MPP governs agency procedures and is a "statement of policy" concerning the exercise of DHS's prosecutorial discretion that preserves significant flexibility in individual cases, so the APA does not require notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b)(A).

The district court's injunction will impose immediate, substantial harm on the United States, including by diminishing the Executive Branch's ability to work effectively with Mexico to manage the crisis on our shared border. That harm is exacerbated by the court's decision to exceed limitations on its equitable authority and issue a universal injunction. This Court should grant an immediate administrative stay while it receives stay briefing and considers this stay request; it should expedite stay briefing and appellate briefing; and it should stay the district court's injunction pending appeal.

BACKGROUND

Legal Background. The Executive Branch has broad constitutional and statutory power to exclude aliens and secure the border, *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), and has for decades exercised that authority through its prosecutorial discretion to prioritize which aliens to remove and through what type

of proceedings. *See Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011).

In 8 U.S.C. § 1225, Congress has delegated to the Executive Branch the authority to manage the flow of aliens arriving in the United States, and conferred discretion to address that flow.[1] First, Congress has authorized DHS to initiate expedited (summary) removal proceedings in 8 U.S.C. § 1225(b)(1). Under that provision, an "applicant for admission" to the United States who lacks valid entry documentation or misrepresents his identity shall be "removed from the United States without further hearing or review unless" he "indicates either an intention to apply for asylum ... or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i). Alternatively, Congress has provided that the Secretary shall place an applicant who is seeking admission into full, regular removal proceedings (proceedings held before an immigration judge that involve more extensive procedures than expedited removal proceedings, *see id.* § 1229a), and shall detain that alien pending such proceedings, if he is not "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A). When DHS places an alien seeking admission into a regular removal proceeding under section 1229a, Congress has provided that, if the alien is "arriving on land (whether or not at a designated port of arrival) from a foreign

[1] Section 1225(b) refers to the Attorney General, but those functions have been transferred to the Secretary. *See* 6 U.S.C. §§ 251, 552(d); *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

territory contiguous to the United States," the Secretary "may return the alien to that territory pending a proceeding under section 1229a." *Id.* § 1225(b)(2)(C). The statute leaves to DHS's discretion whether to seek expedited or regular removal as to aliens who are eligible for expected removal under section 1225(b)(1). *See* Op. 15-16 (citing authorities). And if the alien is placed in regular proceedings, the statute also authorizes DHS to choose between detaining the alien or returning him to contiguous territory pending removal proceedings. *Id.* § 1225(b)(2)(A), (C).

Migrant Protection Protocols. On December 20, 2018, Secretary Nielsen announced that DHS would exercise its authority under section 1225(b)(2)(C) through MPP—guidance aimed at shaping efforts "to address the migration crisis along our southern border." AR7. MPP is to be implemented "consistent with applicable domestic and international legal obligations," AR8, and it accounts for the Mexican government's representations during diplomatic negotiations that aliens returned to Mexico under MPP would be afforded "all legal and procedural protection[s] provided for under applicable domestic and international law," including "applicable international human rights law and obligations" under the "1951 Convention relating to the Status of Refugees (and its 1967 Protocol) and the Convention Against Torture [(CAT)]." *Id.*

On January 25, 2019, the Secretary further instructed that, "in exercising [DHS's] prosecutorial discretion regarding whether" to "return the alien to the

contiguous country from which he or she is arriving," officers should act consistent with the non-refoulement principles contained in the 1951 Convention, 1967 Protocol, and CAT. AR9. Thus, if an alien expresses a fear of return to Mexico, she will be referred to U.S. Citizenship and Immigration Services to "assess whether it is more likely than not that" she will "be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion," or will "be tortured" if "returned pending removal proceedings," AR9-10, 2273, in which case the alien "may not be processed for MPP," AR2. MPP does not apply at all to arriving Mexican nationals, among others. AR1.

This Lawsuit. On February 14, 2019, eleven aliens subject to MPP and six organizations that provide services to immigrants filed this suit in the Northern District of California and sought immediate injunctive relief. On April 8, the district court issued a decision granting a nationwide injunction that bars implementation of MPP. *See* Op., Dkt. 73 (Exhibit A). The court concluded that this case is justiciable (Op. 7-12); that the contiguous-territory-return provision, 8 U.S.C. § 1225(b)(2)(C), likely does not authorize return to Mexico of aliens who could be placed in expedited removal proceedings (Op. 15-19); that, even if the INA authorizes such returns, MPP is likely inconsistent with non-refoulement principles (Op. 19-22, 23); and that the other injunctive factors supported Plaintiffs (Op. 24-25). The court denied the

government's request for a stay pending appeal, but delayed the effective date of its ruling to April 12, 2019, at 5:00 pm PST. Op. 26.

ARGUMENT

An immediate stay pending appeal is warranted. The government is likely to prevail on appeal, the government will be irreparably harmed without a stay, a stay will not substantially harm Plaintiffs, and the public interest supports a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This case also warrants expedited appellate consideration—including expedited consideration of this stay request—and the Court should grant an administrative stay while it receives briefing and considers this stay request.

I. Defendants Are Likely to Succeed on Appeal

A. MPP Is Authorized by Statute

MPP is authorized by section 1225(b) and is a lawful implementation of DHS's discretion over what (if any) removal proceedings to initiate against aliens arriving at the border. Section 1225(b)(2)(C) provides that the Secretary "may return" certain aliens "who [are] arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States" "to that territory pending a [full removal] proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(C). The Secretary may exercise that contiguous-territory-return authority against any "alien described in subparagraph (A)"—that is, section

1225(b)(2)(A). *Id.* Section 1225(b)(2)(A) provides: "Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [regular removal] proceeding under section 1229a." *Id.* Taking the two sections together, if an alien who is inadmissible arrives by land from a contiguous territory and is placed in regular removal proceedings, he can be returned to that contiguous territory pending those proceedings. That indisputably describes the aliens here. *See* Compl. ¶¶ 12-22. Thus, section 1225(b)(2)(C) authorizes MPP.

Section 1225(b)(2)(B) contains exceptions to section 1225(b)(2)(A), but contrary to the district court's reasoning, none changes the straightforward textual analysis. Section 1225(b)(2)(B) provides that "Subparagraph (A) [*i.e.*, section 1225(b)(2)(A)] shall not apply to an alien—(i) who is a crewman, (ii) to whom paragraph (1) [*i.e.*, section 1225(b)(1)] applies, or (iii) who is a stowaway." 8 U.S.C. § 1225(b)(2)(B). Subsections (i) and (iii) are irrelevant here. As to subsection (ii), section 1225(b)(1) provides that an "applicant for admission" who lacks valid entry documentation or misrepresents his identity shall be placed in expedited removal proceedings, meaning that he shall be "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum ... or a fear of persecution." *Id.* § 1225(b)(1)(A)(i).

Congress included the exceptions in section 1225(b)(2)(B) to make clear that the core requirement of section 1225(b)(2)(A)—that an alien is entitled to a regular removal proceeding under section 1229a—"shall not apply" to the classes of aliens covered by the exceptions. Section 1225(b)(2)(A) is intentionally broad and applies to *any* alien who "is not clearly and beyond a doubt entitled to be admitted." Without the section 1225(b)(2)(B)(ii) exception, the text of section 1225(b)(2)(A) would mandate that an alien who is subject to expedited removal proceedings under section 1225(b)(1) would *also* be entitled to a regular removal proceeding under section 1229a. The section 1225(b)(2)(B)(ii) exception eliminates that potential conflict and clarifies that, when section 1225(b)(1) "applies," that alien is "not entitled" to a regular removal proceeding under section 1229a: he can be removed more swiftly using a less extensive procedure. *Matter of E-R-M-*, 25 I. & N. Dec. at 523.

Section 1225(b)(2)(B)(ii) does not, however, strip DHS of its discretion to use regular section 1229a removal proceedings as provided for in section 1225(b)(2)(A) even when expedited removal proceedings under 1225(b)(1) are available. *See id.* It simply means that the "classes of aliens" referenced "are not *entitled* to a [section 1229a] proceeding." *Id.* (emphasis added). Nor is DHS's discretion eliminated by the uses of the word "shall" in both sections 1225(b)(1) and 1225(b)(2). The law is clear—and Plaintiffs have conceded (Compl. ¶ 73)—that "DHS has discretion to put aliens in section [1229a] removal proceedings even though" DHS could have placed

them in "expedited removal [proceedings]" under section 1225(b)(1). *Id.* This Court has similarly held that DHS's discretion encompasses "institut[ing] [normal] immigration removal proceedings." *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013). That is what MPP does: it implements DHS's authority place aliens in full removal proceedings (even if they could be placed in expedited removal proceedings), and to return such aliens to Mexico while their proceedings are pending. MPP is thus lawful under the INA.

The district court held (Op. 15-19) that section 1225(b)(2)(C) does not authorize MPP, reasoning that, under section 1225(b)(2)(B)(ii), "the contiguous territory return provision [*i.e.*, section 1225(b)(2)(C)] does *not* apply to persons to whom [section 1225(b)(1)] *does* apply." Op. 16 (emphasis in original). Although the court recognized that "DHS may choose" whether to use "expedited removal" or "regular removal," it concluded that because expedited removal *could have been* used, section 1225(b)(1) "applies" exclusively, and thus section 1225(b)(2)(C)'s contiguous territory-provision does not apply. Op. 16-17.

The district court was wrong. The court recognized that DHS has authority to choose whether to place such an alien in expedited removal proceedings or regular removal proceedings as called for by section 1225(b)(2)(A). *Id.* But the court nevertheless concluded that section 1225(b)(2)(A) cannot "apply," and so DHS cannot take the corresponding step of invoking section 1225(b)(2)(C). That makes

no sense. The only logical reading of the statute is that, once DHS elects to place an alien in section 1229a proceedings, DHS has proceeded in the manner provided by section 1225(b)(2)(A) rather than section 1225(b)(1). And when DHS has made its choice, the "shall not apply" provision in 1225(b)(2)(B) is simply no longer relevant; it has already served its purpose of making clear that DHS was not *required* to afford that alien a regular removal proceeding under section 1225(b)(2)(A), even though DHS has elected to do so.

It would be especially wrong to read section 1225(b)(2) as the court did given that section 1225(b)(2)(C) refers to those "alien[s] *described in* subparagraph (A)." (Emphasis added.) By using the phrase "described in" to define who is subject to the provision, Congress encompassed *all* aliens substantively described by that paragraph—*i.e.*, any "applicant for admission" who the "examining officer determines ... is not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. § 1225(b)(2)(A)—rather than only those aliens to whom one type of proceeding or another is applied. *See Nielsen v. Preap*, 139 S. Ct. 954, 964-65 (2019) (explaining that the phrase "described in" as used in 8 U.S.C. § 1226(c) is used "to communicate … an account of the salient identifying features" of individuals who could be subject to that provision, not to provide what DHS must do to the "described" alien).

The district court's reading largely nullifies section 1225(b)(2)(C) by imputing to Congress the implausible intent to confine contiguous-territory return to

only a small subset of land-arriving aliens in full removal proceedings: those who possess documents necessary for admission and who did not engage in misrepresentation. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (describing the various categories of aliens subject to expedited removal). The court's reasoning would also have the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud—and who are for that reason subject to section 1225(b)(1) through 8 U.S.C. § 1182(a)(6)(C)—over aliens who follow our laws.

The court's nullification of section 1225(b)(2) also ignores that *detention* pending removal proceedings is the process Congress expected for most aliens arriving at our Nation's borders who are not clearly and beyond a doubt entitled to be admitted. *See* 8 U.S.C. § 1225(b)(1), (b)(2)(A); *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). The availability of return under section 1225(b)(2)(C) is a consequence that may accompany a "pending ... proceeding under section 1229a," as an alternative to mandatory detention for aliens in such proceedings. *See Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 450 (BIA 1996) (explaining that if choosing between "custodial detention or parole[] is the only lawful course of conduct, the ability of this nation to deal with mass migrations" would be severely undermined). For aliens whose removal is *expedited*, Congress had no need to authorize returning them to Mexico pending proceedings as an alternative to detention.

In sum, Congress's clarification in section 1225(b)(2)(B)(ii) that the

requirement of normal removal proceedings would not apply to aliens potentially subject to expedited removal did not eliminate DHS's *discretion* to institute normal removal proceedings against those aliens under section 1229a, to detain them pending those proceedings, or to return them to contiguous territory as an alternative to mandatory detention during those proceedings, as provided under section 1225(b)(2)(C).

B. MPP is Consistent with Non-Refoulement Obligations and the APA

The district court (Op. 20) described international-law principles of non-refoulement, including Article 33 of the United Nations 1951 Convention relating to the Status of Refugees, which provides that a "Contracting State" shall not "expel or return" a "refugee" to "the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." But MPP is consistent with any non-refoulement obligations that may apply domestically to a decision to invoke section 1225(b)(2)(C), and it is also consistent with the APA.

To the extent that the court concluded that MPP's procedural provisions for evaluating non-refoulement concerns are insufficient in light of the United States' international obligations, that conclusion was flawed. First, it is well-settled that the Convention (as well as its 1967 Protocol and the CAT) are non-self-executing, and do not confer judicially enforceable rights beyond those implemented by Congress.

See Yuen Jin v. Mukasey, 538 F.3d 143, 159 (2d Cir. 2008). Second, MPP satisfies the United States' obligations. MPP applies only to non-Mexicans, not Mexicans fleeing persecution or torture in Mexico. AR1. And MPP provides a procedure whereby any non-Mexican who is "more likely than not" to "face persecution or torture in Mexico" will not be subject to MPP. AR1-2, 9-10. Aliens can raise such a claim at any time, including "before or after they are processed for MPP or other disposition," AR1, after "return[ing] to the [port of entry] for their scheduled hearing," AR2, or in transit to or at his immigration proceedings. AR2278. Upon referral, asylum officers conduct an "MPP assessment interview in a non-adversarial manner, separate and apart from the general public." AR2273. All assessments must "be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." AR2274. Those procedures satisfy the government's non-refoulement obligations, as this Court has held in other contexts. *See Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956-57 (9th Cir. 2012) (en banc) (concluding, in challenge to extradition on non-refoulement grounds, that if the agency declared it "more likely than not" that non-refoulement would not occur, "the court's inquiry shall have reached its end").

The district court noted (Op. 21-22) that MPP's procedures differ in some respects from the procedures that apply before an alien is *removed* to his home country. That is unsurprising, because the logic of the contiguous-territory-return

statute is that aliens generally do not face persecution on account of a protected status in the country from which they happen to arrive by land, as opposed to the home country from which they may have fled. That is why Plaintiffs are incorrect in their assertion that MPP's non-refoulement provisions are inconsistent with 8 U.S.C. § 1231(b)(3), the INA provision for withholding of removal. Section 1231(b)(3) codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable. *See id.*; 8 C.F.R. § 1208.16(a). Aliens subject to MPP do not receive a final order of removal to their home country when they are returned (temporarily) to Mexico, and so there is no reason why the same procedures would apply, as even the district court appeared to recognize. *See* Op. 21-22.

The district court provided no indication of what procedures it thought should apply before DHS can exercise its authority under section 1225(b)(2)(C); instead, the court explicitly declined "to determine what the minimal anti-refoulement procedures might be." Op. 21. That is not an appropriate basis for enjoining a major foreign-policy and border-security initiative of the Executive Branch. The court thought it problematic that an alien must "affirmatively" claim fear before an asylum officer will consider whether he may be returned to Mexico, Op. 22, but aliens in expedited removal proceedings likewise must take the initiative to claim asylum or assert fear before they receive a credible-fear screening. *See* 8 U.S.C. § 1225(b)(1)(A)(ii). The court also noted that counsel is not available during the

initial MPP review, Op. 22, but the process is non-adversarial and no statute or international obligation requires counsel to be present (or any other specific procedure) before DHS makes a determination to temporarily return an alien to the non-home country from which he has arrived. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (BIA 2014) (what procedure to use to assess refoulement "is left to each contracting State"). Last, the court noted that DHS's determinations regarding whether an alien is more likely than not to face persecution in Mexico are not subject to review by an immigration judge. Op. 22. Once again, however, the statute and international obligations do not require that particular form of process. And the court failed to acknowledge that the MPP non-refoulement assessment is built in part on assurances that the Mexican government remains committed to fulfilling its own domestic and international obligations. *See* AR7-18, 318, 2273-74.

At other points, the district court suggested that it viewed MPP's non-refoulement procedures as deficient because they differ from procedures implemented under 8 U.S.C. § 1231(b)(3) and were not adopted through notice-and-comment rulemaking under the APA. *See* Op. 23. But that reasoning, too, is deeply flawed. As discussed above, contiguous-territory return under section 1225(b)(2)(C) and withholding-of-removal under section 1231(b)(3) differ in fundamental ways that make them incomparable, and even the district court agreed that DHS need not use the same procedures described in section 1231(b)(3) to implement section

1225(b)(2)(C). Op. 21. Regardless, MPP affords DHS officers significant flexibility and discretion, and thus constitutes a "general statement of policy," *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987), or otherwise a rule of agency "procedure," both exempt from notice-and-comment rulemaking. 5 U.S.C. § 553(b)(A).

II. The Balance of Harms Weighs Strongly in Favor of a Stay

The injunction undermines the Executive Branch's constitutional and statutory authority to secure the Nation's borders. The injunction also constitutes a major and "unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). As the record reflects, the "United States has been engaged in sustained diplomatic negotiations with Mexico ... regarding the situation on the southern border," AR38, and during the course of those negotiations obtained an understanding from the Mexican government that, "[f]or humanitarian reasons ... [it] will authorize the temporary entrance of" aliens subject to MPP. AR8. The injunction thus harms efforts to address a national-security and humanitarian crisis that is the subject of ongoing diplomatic engagement.

The magnitude of the crisis at the heart of these negotiations is enormous. Last fall, United States officials "each day encountered an average of approximately 2,000 inadmissible aliens at the southern border," AR38, with "a significant increase

in the arrival of … family units," AR430. Last month alone, 53,077 members of family units and 92,607 total individuals were apprehended at the southwest border.[2] MPP responds to the fact that more than "60%" of illegal aliens who cross the southern border are now "family units and unaccompanied children," AR12, and that DHS lacks detention capacity to house these aliens, thus forcing their release. AR7-18, 418, 575, 620. MPP also re-calibrates incentives for aliens to make the "dangerous journey north" to the United States border, and for "[s]mugglers and traffickers" to exploit "outdated laws" and "migrants" in order "to turn human misery into profit." AR12-13. In sum, MPP "provide[s] a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum." AR13. The district court's injunction thwarts this important effort to ameliorate the crisis on the southern border.

The district court, despite noting that the "precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable," Op. 24, found the "possibility of irreparable injury" sufficient to weigh the balance of harms in their favor because they assertedly "live in fear of future violence, in Mexico." *Id.* But

[2] "Southwest Border Migration FY2019," *available at* https://www.cbp.gov/newsroom/stats/sw-border-migration.

the Mexican government has provided assurances that it will afford returned aliens all "protection[s] provided for under applicable domestic and international law." AR8. The district court accordingly erred in finding that Plaintiffs are likely to suffer irreparable harm without an injunction. Nor is the organizational Plaintiffs' asserted harm remotely sufficient here, even assuming they have a cognizable claim. The district court found that those organizations have "shown a likelihood of harm in terms of impairment of their ability to carry out their core mission[s]." Op. 24. But asserted injuries based on "money, time and energy ... are not enough," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980), especially when balanced against halting an important national policy to secure our border.

In any event, this appeal could be expedited to minimize any prejudice. Given the harms posed by the injunction, the government respectfully requests that this Court enter an immediate administrative stay pending consideration of the merits of this motion and expedite consideration of this stay request and of this appeal.

III. The District Court Improperly Issued a Nationwide Injunction

The district court's nationwide injunction imposes particularly sweeping harm because it defies the rules that, under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and that injunctions must "be no more burdensome to the defendant

than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Here, any relief must be tailored to remedying the individual Plaintiffs' putative harms stemming from their return to Mexico. *See L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). Plaintiffs cannot invoke the rights of individual aliens not part of this lawsuit, and so an injunction premised on such injuries would be inappropriate. *See Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). An injunction limited to the individual Plaintiffs and any bona fide clients identified by the Plaintiff organizations who were processed under MPP (if the organizations have a cognizable claim at all), would "provide complete relief to them." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1244-45 (9th Cir. 2018).[3] The injunction is overbroad and should be rejected on that ground alone. At a minimum, it should be stayed as to everyone other than the named Plaintiffs and identified clients. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993).

CONCLUSION

The Court should stay the district court's order and expedite this appeal.

[3] The government maintains that the organizational Plaintiffs lack a "judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), or in the manner of enforcement of the INA generally, and otherwise lack organizational standing. Dkt. 42 at 10 n.5. They accordingly lack standing. *But see East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1241-45 (9th Cir. 2018).

Respectfully submitted,

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Dated: April 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2018, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Erez Reuveni*
EREZ REUVENI
Assistant Director
United States Department of Justice
Civil Division

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,186 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

Ex. A

Order Granting Motion for Preliminary Injunction, *Innovation Law Lab v. Nielsen*, 19-807 (N.D. Cal. April 8. 2019)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INNOVATION LAW LAB, et al.,

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.,

Defendants.

Case No. 19-cv-00807-RS

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

In January of this year, the Department of Homeland Security ("DHS") began implementing a new policy regarding non-Mexican asylum seekers arriving in the United States from Mexico.[1] Denominated the "Migrant Protection Protocols" ("MPP"), the policy calls for such persons, with certain exceptions, to be "returned to Mexico for the duration of their immigration proceedings," rather than either being detained for expedited or regular removal proceedings, or issued notices to appear for regular removal proceedings. This case presents two basic questions: (1) does the Immigration and Nationalization Act authorize DHS to carry out the return policy of

[1] The policy is administered by DHS sub-agencies Citizenship and Immigration Services ("CIS"), Customs and Border Protection ("CBP"), and Immigration and Customs Enforcement ("ICE")). The defendants named in this action are those agencies, and certain of their officials (collectively "DHS" or "the Government").

the MPP, and; (2) even assuming Congress has authorized such returns in general, does the MPP include sufficient safeguards to comply with DHS's admitted legal obligation not to return any alien to a territory where his or her "life or freedom would be threatened"? In support of their motion for a preliminary injunction, the plaintiffs have sufficiently shown the answer to both questions is "no."

First, the statute that vests DHS with authority in some circumstances to return certain aliens to a "contiguous territory" cannot be read to apply to the individual plaintiffs or others similarly situated. Second, even assuming the statute could or should be applied to the individual plaintiffs, they have met their burden to enjoin the MPP on grounds that it lacks sufficient protections against aliens being returned to places where they face undue risk to their lives or freedom. Accordingly, plaintiffs' motion for a preliminary injunction will be granted.[2]

To be clear, the issue in this case is *not* whether it would be permissible for Congress to authorize DHS to return aliens to Mexico pending final determinations as to their admissibility. Nor does anything in this decision imply that DHS would be unable to exercise any such authority in a legal manner should it provide adequate safeguards. Likewise, the legal question is not whether the MPP is a wise, intelligent, or humane policy, or whether it is the best approach for addressing the circumstances the executive branch contends constitute a crisis. Policy decisions remain for the political branches of government to make, implement, and enforce.

Rather, this injunction turns on the narrow issue of whether the MPP complies with the Administrative Procedures Act ("APA"). The conclusion of this order is only that plaintiffs are likely to show it does not, because the statute DHS contends the MPP is designed to enforce does not apply to these circumstances, and even if it did, further procedural protections would be required to conform to the government's acknowledged obligation to ensure aliens are not returned to unduly dangerous circumstances.

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[2] Plaintiffs' motion was filed as an application for a temporary restraining order. In response to a court scheduling order, the parties stipulated to deem plaintiffs' motion as one for a preliminary injunction, which now has been fully briefed and heard.

Furthermore, nothing in this order obligates the government to release into the United States any alien who has not been legally admitted, pursuant to a fully-adjudicated asylum application or on some other basis. DHS retains full statutory authority to detain all aliens pending completion of either expedited or regular removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

II. BACKGROUND

In December of 2018, the Secretary of the DHS, Kirstjen Nielsen, announced adoption of the MPP, which she described as a "historic action to confront illegal immigration." *See* December 20, 2018 press release, "Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration," Administrative Record ("AR") 16-18. DHS explained that pursuant to the MPP, "the United States will begin the process of invoking Section 235(b)(2)(C) of the Immigration and Nationality Act." *Id.* DHS asserted that under the claimed statutory authority, "individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings." *Id.*

In January of 2019, DHS issued a further press release regarding the implementation of the MPP. *See* "Migrant Protection Protocols," AR 11-15. In a paragraph entitled "What Gives DHS the Authority to Implement MPP?" the press release asserts:

> Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted into the U.S. and provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. Section 235(b)(2)(C) provides that "in the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the Secretary of Homeland Security "may return the alien to that territory pending a [removal] proceeding under § 240" of the INA.

The positions taken in press releases reflect contemporaneous policy memoranda. On January 25, 2018, Secretary Nielsen issued a memorandum stating:

> [T]he United States will begin the process of implementing Section 235(b)(2)(C) . . . with respect to non-Mexican nationals who may be arriving on land (whether or not at a designated port of entry) seeking to enter the United States from Mexico illegally or without proper documentation.

DHS Memorandum, AR 7-10; *see also* CIS Policy Memorandum, January 28, 2019, "Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols. AR 2271-2275.

Thus, it is undisputed that the MPP represents a legal exercise of defendants' authority regarding treatment of alien applicants for admission if and only if section 235(b)(2)(C) of the Immigration and Nationality Act applies to the individual plaintiffs and those similarly situated. Section 235(b)(2)(C) is codified at 8 U.S.C. §1225(b)(2)(C) and will hereafter be referred to as the "contiguous territory return provision."

It is similarly undisputed that prior to adoption of the MPP, aliens applying for asylum at a port of entry on the U.S.-Mexico border were either placed in expedited removal proceedings pursuant subparagraph (1) of 8 U.S.C. §1225(b), or in defendants' discretion were placed in regular removal proceedings described in 8 U.S.C. §1229a. There also is no apparent dispute that aliens placed directly into regular removal proceedings frequently were permitted to remain in the United States during the pendency of those proceedings, and were not detained in custody. In announcing the MPP, Secretary Nielsen asserted the new policy is intended to address a purported problem of aliens "trying to game the system" by making groundless asylum claims and then "disappear[ing] into the United States, where many skip their court dates." *See* December 20, 2018 press release, AR 16.

Although the contiguous territory return provision has existed in the statute for many years, the extent to which it has previously been utilized is unclear in the present record. While the provision theoretically could be applied with respect to aliens arriving from either Mexico or Canada, the focus of the MPP is aliens transiting through Mexico, who originated from other countries. When this suit was filed, the MPP had been implemented only at the San Ysidro port of

entry on the California-Mexico border. Defendants have since advised that it has now been extended to the Calexico port of entry, also on the California-Mexico border, and to El Paso, Texas. Indications are that it will be further extended unless enjoined.

The CIS Policy Memorandum providing guidance for implementing the MPP specifically addresses the issue of aliens who might face persecution if returned to Mexico. Under that guidance, aliens who, unprompted, express a fear of return to Mexico during processing will be referred to an asylum officer for interview. CIS Policy Memorandum, AR 2273. The asylum officer's determination, however, is not reviewable by an immigration judge. *Id* at 2274. Although DHS insists this policy satisfies all obligations the United States has under domestic and international law to avoid "refoulement"— the forcible return of prospective asylum seekers to places where they may be persecuted—there is no dispute that the procedural protections are less robust than those available in expedited removal proceedings, or those that apply when a decision is made that an alien is subject to removal at the conclusion of regular removal proceedings.

Plaintiffs in this action are eleven individuals who were "returned" to Mexico under the MPP, and six non-profit organizations that provide legal services and advocacy related to immigration issues.[3] Plaintiffs' claims in this action are brought under the Administrative Procedures Act and international law, although the preliminary injunction is sought only under the former.

III. LEGAL STANDARD

A. Injunctions

An application for preliminary injunctive relief requires the plaintiff to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

[3] The unopposed motion of the individual plaintiffs to proceed in this litigation under pseudonyms (Dkt. No. 4) is granted.

public interest." *Winter v. N.R.D.C., Inc.*, 555 U.S. 7, 21-22 (2008). The Ninth Circuit has clarified, however, that courts in this Circuit should still evaluate the likelihood of success on a "sliding scale." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) ("[T]he 'serious questions' version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter*."). As quoted in *Cottrell*, that test provides that, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," provided, of course, that "plaintiffs must also satisfy the other [*Winter*] factors" including the likelihood of irreparable harm. *Id*. at 1135.

B. The APA

Under section 706 of the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D). Accordingly, the decision-making process that ultimately leads to the agency action must be "logical and rational." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Courts should be careful, however, not to substitute their own judgment for that of the agency. *Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977). Ultimately, a reviewing court may uphold agency action "only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). Post hoc rationalizations may not be considered. *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981). In evaluating APA claims, courts typically limit their review to the Administrative Record existing at the time of the decision. *Sw. Ctr. for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996); *accord Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499

F.3d 1108, 1117 (9th Cir. 2007).[4]

IV. DISCUSSION

A. Justiciability

At the threshold, defendants oppose plaintiffs' motion for preliminary relief by arguing their claims simply are not justiciable. Defendants advance several interrelated points. First, defendants contend the central issue is fundamentally one of prosecutorial discretion, and therefore immune from judicial review. Were plaintiffs in fact challenging a policy decision to place them in regular removal proceedings as opposed to expedited removal proceedings, that argument might be viable.

As discussed below, however, plaintiffs concede DHS has such discretion, and none of their claims in this action rest on a contrary position. Rather, the complaint here alleges the statute on which defendants rely simply does not confer on DHS the powers it claims to be exercising under the MPP. While defendants are free to argue they have discretion under the statute to adopt and enforce the MPP, whether or not they actually do is a justiciable question.

Next, defendants contend several different sections of the INA preclude judicial review. Defendants first cite 8 U.S.C. § 1252(g), which provides that "[e]xcept as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary] to commence proceedings." Defendants argue that provision is "designed to give some measure of protection to . . . discretionary determinations"

[4] Here, plaintiffs submit substantial evidence outside the administrative record, which defendants move to strike and which plaintiffs move separately to deem admitted. The parties agree extra-record evidence is admissible for limited purposes, including to support standing or a showing of irreparable harm. Plaintiffs stipulate to having the present motion adjudicated based on the administrative record presented by defendants, without waiving their right to challenge the completeness of that record at a later junction. This order relies only on matters in the administrative record or which the parties otherwise agree may be considered. Further rulings on specific aspects of the motions to strike and to admit accordingly need not be addressed at this juncture.

like "the initiation or prosecution of various stages in the deportation process," and so bars claims "attempt[ing] to impose judicial constraints upon prosecutorial discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 n.9 (1999). This argument, however, turns on the conclusion that *if* DHS has discretion to apply the contiguous return provision to persons in the circumstances of the individual plaintiffs, its decisions to return or not return any particular alien under any such authority, might not be subject to review.

Defendants next invoke 8 U.S.C. § 1252(a), which provides, in part, "[n]otwithstanding any other provision of law," "no court shall have jurisdiction to review . . . any other decision or action of the . . . Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the . . . Secretary." As defendants admit, however, this provision applies when the relevant decision is "specified by statute to be in the discretion of the" the Secretary. *Kucana v. Holder*, 558 U.S. 233, 248 (2010). The very point of dispute in this action is whether section 1225(b)(2)(C) applies such that DHS has such discretion, or not. That threshold question is justiciable.

Defendants further argue 8 U.S.C. § 1252(a) and (e) jointly preclude review. As noted, §1252(a) does not foreclose examination of whether application of the contiguous territory return provision to the named plaintiffs is legally correct. Defendants also assert section 1252(a)(2)(A) provides that no court shall have jurisdiction, except as permitted in section 1252(e), to review "procedures and policies adopted by the [Secretary] to implement the provisions of section 1225(b)(1)." To the extent that is a new argument, it fails because plaintiffs in this action are *not* challenging the discretionary decision to refrain from placing them in expedited removal under 1225(b)(1), and are instead litigating what the consequences of placing them in section 1229a proceedings should or should not be.

The final issue is the potential applicability of section 1252(e)(3). That subparagraph provides no court, other than the United States District Court for the District of Columbia, has jurisdiction to review "determinations under section 1225(b) of this title and its implementation," including "whether such a . . . written policy directive, written policy guideline, or written

procedure issued by or under the authority of the [Secretary] to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A). On its face, this provision arguably requires plaintiffs' claims to proceed exclusively in the District of Columbia. In light of that concern, the parties were invited to provide further briefing after the hearing on the motion for preliminary relief. *See* Dkt. No. 68.

Plaintiffs argue section 1252(e)(3) is intended only to invest jurisdiction in the district court of the District of Columbia to hear systemic challenges specifically addressing the expedited removal scheme. Thus, plaintiffs argue, the provision's reference to "determinations under section 1225(b) of this title and its implementation," rather than "determinations under section 1225(b)(1)" should be seen as nothing more than a "scrivener's error."

The question is close, because section 1252(e)(3) otherwise would appear to describe the issues presented in this case quite well. As noted, it expressly refers to review of issues such as, "whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." That lines up neatly with the main thrust of plaintiffs' argument here—that contrary to defendants' claim the MPP merely addresses when discretion should be exercised to apply the contiguous territory return provision, by definition the provision in fact does *not* apply to plaintiffs.

Nevertheless, plaintiffs have the better argument that section 1252(e)(3) should not be read to require them to bring these claims in the District of Columbia. Although statutory titles and headings are not dispositive, they are instructive. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47, 128 S. Ct. 2326 (2008) ("To be sure, a subchapter heading cannot substitute for the operative text of the statute . . . [T]he title of a statute . . . cannot limit the plain meaning of the text. Nonetheless, statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute.")(internal quotations and citations omitted).

Here, section 1252 as a whole is entitled, "Judicial review of orders of removal," and most

of its provisions are focused on issues relating to review of individual decisions to remove an alien. More to the point in question here, subparagraph (e) is entitled "Judicial review of orders under section 1225(b)(1)" (emphasis added). Other sub-subparagraphs of (e) explicitly indicate that they are applicable to challenges to determinations made under 1225(b)(1). *See* §1252(e)(1)(A) (" . . . in accordance with section 1225(b)(1) . . .); §1252(e)(2) ("any determination made under section 1225(b)(1) . . . ."); §1252(e)(4)(A) (". . . an alien who was not ordered removed under section 1225(b)(1) of this title"); §1252(e)(5) (". . . an alien has been ordered removed under section 1225(b)(1) of this title").

Given that sub-subparagraphs (1), (2), (4), and (5) of 8 U.S.C §1252(e) all expressly invoke section 1225(b)(1), the mere fact that §1252(e)(3) fails to state "1225(b)(1)" instead of only "1225(b)" is too thin a reed on which to conclude that jurisdiction of this action lies exclusively in the federal court of the District of Columbia. The omission of "(1)" may or may not constitute a "scrivener's error," in the traditional sense of that phrase, but it is not a basis to disregard the clear import of the structure of section 1252 and subparagraph (e).

Challenges to "validity of the system" undeniably are subject to section 1252(e)(3), and therefore arguably subject to exclusive jurisdiction in the District of Columbia.[5] In context, however, "the system" should be understood as a reference to the expedited removal procedure authorized under section 1225(b)(1). There can be no dispute that this action is *not* a challenge to that "system." Rather, plaintiffs acknowledge both that they are subject to expedited removal and that DHS has discretion to place them instead into regular removal proceedings under 8 U.S.C. §1229a. Indeed, in essence, plaintiffs are arguing that because they *are* subject to expedited removal, they should at a minimum have the protections they would enjoy under that regime, either by being exempt from contiguous territorial return, and/or by having additional procedural and substantive protections against being sent to places in which they would not be safe from

[5] Plaintiffs contend that even where section 1252(e)(3) applies and permits jurisdiction in the District of Columbia, it does not preclude jurisdiction elsewhere. While that proposition appears dubious at best, the question need not be decided here.

persecution.

Accordingly, this action is not a challenge to the "system" of expedited removal. Given the overall structure of section 1252(e), the most reasonable construction of subparagraph (3) is that it applies only to such challenges. *See Porter v. Nussle*, 534 U.S. 516, 528, 122 S.Ct. 983 (2002). ("The placement of §1146(a) within a subchapter expressly limited to postconfirmation matters undermines Piccadilly's view that §1146(a) covers preconfirmation transfers."). As a result, whether presented as a jurisdictional issue or one of venue, 8 U.S.C. §1252(e)(3) is not a bar to the particular claims plaintiffs present in this forum.[6]

B. Standing

In a footnote, defendants assert "[t]he organizational Plaintiffs lack standing because they lack a 'judicially cognizable interest in the prosecution or nonprosecution of another.'" Opposition at 10, n. 5. (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)). Defendants concede, however, that their standing arguments are foreclosed by the holding in *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1240 (9th Cir. 2018), where the Ninth Circuit held that similarly situated organizational plaintiffs have organizational standing premised on a diversion of resources caused by the challenged government actions. *See id*. at 1242.

Defendants state they "respectfully disagree with that ruling" and question standing only to preserve their rights on appeal. Nevertheless, to the extent defendants argue *East Bay Sanctuary* is factually distinguishable, their position is not persuasive. It is true, as defendants point out, that *East Bay* involved a different statutory provision, and that standing may turn on whether a plaintiff

[6] Defendants also seek a discretionary transfer under 28 U.S.C. §1404 to the Southern District of California. Although the MPP was first implemented at a border crossing point in that district, defendants have not shown that the balance of factors applicable under §1404 warrant a transfer. Plaintiffs' choice of forum is supported by the institutional plaintiffs' presence in this district and is therefore entitled to deference. The issues in the litigation largely involve legal questions not tied to any district and/or federal policy decisions not made in or limited to the Southern District of California. The motion to transfer is therefore denied.

is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 396 (1987). Nevertheless, the organizational plaintiffs have made a showing that is stronger, if anything, than that in *East Bay Sanctuary*. Plaintiffs' organizational standing in that case was premised on various broad "diversion of resources" arguments and the potential loss of funding. *See, e.g.*, 909 F.3d at 1242 ("The Organizations have also offered uncontradicted evidence that enforcement of the Rule has required, and will continue to require, a diversion of resources, independent of expenses for this litigation, from their other initiatives.") Here, the organizational plaintiffs have made a showing that the challenged policy directly impedes their mission, in that it is manifestly more difficult to represent clients who are returned to Mexico, as opposed to being held or released into the United States. Additionally, there is no suggestion by defendants that the individual plaintiffs lack standing. Accordingly, to whatever extent defendants may have challenged standing, there is no basis to preclude preliminary relief on such grounds.[7]

C. Showing on the merits

1. Structure of 8 U.S.C. §1225

The statute at the center of this action is 8 U.S.C. §1225, which is entitled, "Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing." Paragraph (a) of the statute provides generally that aliens who are arriving in the United States, or who have not already been admitted, are deemed to be applicants for admission and that they "shall be inspected by immigration officers."[8] Paragraph (b) then divides such applicants for admission into two categories.

Subparagraph (b)(1) is entitled, "[i]nspection of aliens arriving in the United States and

[7] Furthermore, defendants have not challenged the standing of the individual plaintiffs to bring these claims or to seek preliminary relief.

[8] For clarity, all statutory exceptions that are not applicable to plaintiffs and that are not relevant to the statutory construction analysis will be omitted from quotations and the discussion in this order.

certain other aliens who have not been admitted or paroled." It provides, in short, that aliens who arrive in the United States without specified identity and travel documents, or who have committed fraud in connection with admission, are to be "removed from the United States without further hearing or review" unless they apply for asylum or assert a fear of persecution. 8 U.S.C. §1225(b)(1)(A)(i). This procedure is known as "expedited removal."[9]

Subparagraph (b)(1) provides that aliens who indicate either an intention to apply for asylum or a fear of persecution are to be referred to an asylum officer for an interview. §1225(b)(1)(A)(ii). The officer is to make a written record of any determination that the alien has not shown a credible fear. §1225(b)(1)(B)(iii)(II). The record is to include a summary of the material facts presented by the alien, any additional facts relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. *Id.*

The alien in that scenario is entitled to review by an immigration judge of any adverse decision, including an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. §1225(b)(1)(B)(iii)(II). Additionally, aliens are expressly entitled to receive information concerning the asylum interview and to consult with a person or persons of the alien's choosing prior to the interview and any review by an immigration judge. §1225(b)(1)(B)(iv). Thus, an alien processed for "expedited" removal under subparagraph (b)(1) still has substantial procedural safeguards against being removed to a place where he or she may face persecution.

Subparagraph (b)(2) is entitled, "[i]nspection of *other* aliens" (emphasis added). It provides that aliens seeking admission are "to be detained for a proceeding under section 1229a of [Title 8]" unless they are "clearly and beyond a doubt entitled to be admitted." §1225(b)(2)(A). Section

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[9] Subparagraph (b)(1) also expressly gives defendants discretion to apply expedited removal to aliens already present in the United States who have not been legally admitted or paroled, if they are unable to prove continuous presence in the country for more than two years. §1225(b)(1)(A)(iii).

1229a, in turn, is entitled "Removal proceedings" and sets out the procedures under which immigration judges generally "conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a (a)(1).

Section 1225 subparagraph (b)(2)(B) *expressly* provides that (b)(2)(A) "*shall not apply* to an alien . . . to whom paragraph (1) applies." Thus, on its face, section 1225 divides applicants for admission into two mutually exclusive categories. Subparagraph (b)(1) addresses aliens who are subject to expedited removal. Subparagraph (b)(2) addresses those who are either clearly and beyond a doubt entitled to admission, or whose application for admission will be evaluated by an administrative law judge in section 1229a proceedings if they are not.

Although not expressly addressing mutual exclusivity of the two categories, the Supreme Court has described the operation of section 1225 similarly:

> [A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. See § 1225(b)(1)(A)(i) (citing §§ 1182(a)(6)(C), (a)(7)) . . . . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).

Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018).

As set out above, there is no dispute that the MPP purports to be an implementation of the contiguous territory return provision, which appears in the statute as a sub-subparagraph under subparagraph (b)(2). The provision states, in full:

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

8 U.S.C. §1225(b)(2)(C).[10]

[10] Plaintiffs' complaint includes an assertion that the contiguous territory return provision may

On its face, therefore, the contiguous territory return provision may be applied to aliens described in subparagraph (b)(2)(A). Pursuant to subparagraph (b)(2)(B), however, that *expressly* excludes any alien "to whom paragraph (1) applies."

2. Application of the contiguous territory return provision to the individual plaintiffs

At least for purposes of this motion, there is no dispute that the individual plaintiffs are asylum seekers who lack valid admission documents, and who therefore ordinarily would be subject to expedited removal proceedings under subparagraph (1) of section 1225. Applying the plain language of the statute, they simply are not subject to the contiguous territory return provision.

Defendants advance three basic arguments to contend the plain language should not apply and that therefore the MPP represents a legal exercise of DHS's authority under the contiguous return provision. First, defendants rely on well-established law, conceded by plaintiffs, that DHS has prosecutorial discretion to place aliens in regular removal proceedings under section 1229a notwithstanding the fact that they would qualify for expedited removal under subparagraph (b)(1). Indeed, defendants are correct that the apparently mandatory language of subparagraph (b)(1)—"the officer *shall* order the alien removed from the United States without further hearing or review . . . ."—does not constrain DHS's discretion.

In *Matter of E-R-M- & L-R-M*, 25 I. & N. Dec. 520 (BIA 2011) the Board of Immigration Appeals rejected a contention that aliens subject to expedited removal could not be placed directly into 1229a proceedings instead.

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lawfully be applied only to aliens who are "from" the contiguous territory. Complaint, para. 149. It may be the individual plaintiffs contend they are not subject to the provision because they are "from" countries other than Mexico. Plaintiffs did not advance this point in briefing, and it is not compelling. The statute refers to aliens "arriving on land . . . from a foreign territory contiguous to the United States." This language plainly describes the alien's entry point, not his or her country of origin.

> [W]e observe that the issue arises in the context of a purported restraint on the DHS's exercise of its prosecutorial discretion. In that context, we find that Congress' use of the term "shall" in section 235(b) (1) (A) (i) of the Act does not carry its ordinary meaning, namely, that an act is mandatory. It is common for the term "shall" to mean "may" when it relates to decisions made by the Executive Branch of the Government on whether to charge an individual and on what charge or charges to bring.

25 I. & N. Dec. at 522; *see also, Matter of J-A-B*, 27 I. & N. Dec. 168 (BIA 2017) ("The DHS's decision to commence removal proceedings involves the exercise of prosecutorial discretion, and neither the Immigration Judges nor the Board may review a decision by the DHS to forgo expedited removal proceedings or initiate removal proceedings in a particular case."). Plaintiffs do not dispute that DHS holds such discretion and even expressly acknowledge it in the complaint. *See* Complaint, para. 73 ("Although most asylum seekers at the southern border lack valid entry documents and are therefore eligible to be placed in expedited removal, it is well established that the government has discretion to decline to initiate removal proceedings against any individual; to determine which charges to bring in removal proceedings; and to place individuals amenable to expedited removal in full removal proceedings instead.")

Thus, defendants are correct that DHS undoubtedly has discretion to institute regular removal proceedings even where subparagraph (b)(1) suggests it "*shall* order the alien removed." The flaw in defendants' argument, however, is that DHS cannot, merely by placing an individual otherwise subject to expedited removal into section 1229a regular removal proceedings instead, somehow write out of existence the provision in subparagraph (b)(2) of section 1225 that the contiguous territory return provision does *not* apply to persons to whom subparagraph (b)(1) *does* apply. Exercising discretion to process an alien under section 1229a instead of expedited removal under section 1225(b)(1) does not mean the alien is somehow *also* being processed under section 1225(b)(2).

DHS may choose which *enforcement* route it wishes to take—1125(b)(1) expedited removal, or 1229a regular removal—but it is not thereby making a choice as to whether

1125(b)(1) or 1125(b)(2) applies. The language of those provisions, not DHS, determines into which of the two categories an alien falls.

The *E-R-M- & L-R-M* decision further illustrates this distinction. There, as discussed above, the Board of Immigration Appeals held DHS has discretion to place aliens subject to expedited removal under subparagraph (b)(1) into regular removal proceedings. Observing that other aliens are *entitled* to regular removal under (b)(2), the Board found the express exclusion from (b)(2) of aliens to whom (b)(1) applies means only that they are not *entitled* to regular removal, not that the DHS lacks discretion to place them in it. 25 I. & N. Dec. at 523. Thus, the decision recognizes that such persons remain among those to whom (b)(1) applies and who are thereby excluded from treatment under (b)(2).

Defendants' second argument overlaps with their first. In light of the discretion DHS has to place aliens eligible for expedited removal into section 1229a proceedings, defendants contend subparagraph (b)(1) only "applies"—thereby triggering the exclusion from subparagraph (b)(2)—when DHS elects actually to apply it to a particular alien. This argument is not supportable under the statutory language. Subparagraph (b)(2) provides that it "shall not apply to an alien . . . to whom paragraph (1) *applies*." The relevant inquiry therefore is whether the *language* of subparagraph (b)(1) encompasses the alien, not whether *DHS* has decided to apply the provisions of the subparagraph to him or her. Because there is no dispute the language of subparagraph (b)(1) describes persons in the position of the individual plaintiffs, the exclusion from subparagraph (b)(2) reaches them.

Finally, defendants make a statutory intent argument based on the circumstances under which the contiguous return provision was originally enacted. Defendants assert the provision was adopted by Congress as a direct response to the Board of Immigration Appeals decision in *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). In *Sanchez-Avila*, the government argued it had a long-standing and legal practice of, in some instances, "[r]equiring aliens to remain in Mexico or Canada pending their exclusion proceedings." *Id.* at 450. The government noted that it has "plenary power . . . . to preserve its dominion" and a "legal right to preserve the integrity of its

borders and ultimately its sovereignty." *Id.* Accordingly, the government argued, "its exclusion policy of requiring certain aliens to await their exclusion hearings in either Mexico or Canada" was "a practical exercise of plenary power." *Id.*

The *Sanchez-Avila* decision concluded that whatever "plenary power" the government might otherwise have, it had not shown the alleged practice of returning aliens to Mexico (or Canada) pending removal proceedings was "longstanding" with an "unchallenged history." *Id.* at 465. Nor could the plaintiffs show there was "explicit statutory or regulatory authority for a practice of returning applicants for admission at land border ports to Mexico or Canada to await their hearings." *Id.* As a result, the Board declined to treat the practice as valid. *Id.*

Defendants contend that because the contiguous territory return provision purportedly was a direct Congressional response to *Sanchez-Avila,* it should be seen as authorizing the return of aliens such as the named plaintiffs. The first and most fundamental problem with defendants' argument, however, is that the plaintiff alien "returned" to Mexico in *Sanchez-Avila* was a resident alien commuter whose application for entry was not granted given apparent grounds to exclude him for "involvement with controlled substances." *Id.* at 445. Thus, there is no indication he was an undocumented applicant for admission subject to expedited removal under subparagraph (b)(1). To the extent Congressional intent to supersede the result of *Sanchez-Avila* can be inferred, doing so would not show Congress intended the contiguous territory return provision to apply to aliens subject to subparagraph (b)(1).

Plaintiffs insist that, to the contrary, it is reasonable to assume Congress affirmatively wished to exclude aliens subject to expedited removal from the contiguous territory return provision. Plaintiffs suggest because refugees and asylum seekers are among those most likely to lack proper admission documents and therefore be subject to expedited removal, it is perfectly sensible that Congress would expressly exclude them from the contiguous territory return provision.

The record supports no clear conclusion of any Congressional intent beyond that implemented in the plain language of the statute. It is certainly possible that if squarely presented

with the question, Congress could and would choose to authorize DHS to impose contiguous territory return on aliens subject to expedited removal, and that the appearance of the provision in subparagraph (b)(2) was essentially a matter of poor drafting. It is also possible, however, that Congress authorized contiguous return only for aliens not subject to expedited removal because that was the particular issue presented by *Sanchez-Avila* and/or because there was no indication of any pressing need to "return" persons during the presumably faster process of expedited removal.[11] Given the unambiguous language and structure of the statute, speculation about unexpressed Congressional intent does not advance the analysis.

Finally, the conclusion that plaintiffs and others similarly situated are not subject to the contiguous territory return provision is neither irrational nor unfair. While at first blush it might appear they thereby are in a better position than those who are not encompassed by section 1225(b)(1), any such perceived "advantage" flows only from the exercise of DHS's prosecutorial discretion. If persons in plaintiffs' position should not be admitted to this country, DHS retains full statutory authority to process them for expedited removal, and to detain them pending such proceedings. Accordingly, plaintiffs have made a strong showing that they are likely to succeed on the merits with respect to their claim that the MPP lacks a legal basis for applying the contiguous territory return provision in this context.

3. Refoulement safeguards

Even if, contrary to the preceding discussion, the contiguous territory return provision

[11] Even assuming plaintiffs are correct that persons subject to expedited removal are more likely to be asylum seekers with credible fear of persecution if not admitted, that alone would not be a basis to exclude them from contiguous territory return. If the statute were amended, or if the statutory construction of this order were rejected on appeal, that concern would more appropriately be addressed by adopting appropriate statutory and/or regulatory safeguards against "refoulement," rather than simply concluding contiguous territory return should never be applied to such persons. It is also worth noting that an asylum seeker from some country other than Mexico will not automatically be at undue risk of persecution in Mexico, even if he or she can present an extremely compelling case of persecution in his or her country of origin.

could be lawfully applied to the individual plaintiffs and others like them, that does not end the inquiry. Defendants openly acknowledge they must comply with the government's legal obligations to avoid refoulement when removing aliens to a contiguous or any other territory pending conclusion of section 1229a proceedings. The United States is bound by the United Nations 1951 Convention relating to the Status of Refugees.[12] Article 33 of the Convention provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The United States has codified at least some of its obligations under the Convention at 8 U.S.C. §1231(b)(3). That section is entitled "Restriction on removal to a country where alien's life or freedom would be threatened," and its provisions and the regulations thereunder provide for hearings and reviews far beyond what is required by the MPP and implementing guidance. DHS insists section 1231(b)(3) and its regulations do not apply here because it refers only to circumstances where an alien is *removed*, as opposed to "returned."

Defendants' argument ignores that the section is admittedly intended to implement the United States' obligations under the Convention, which expressly refer to "expel or return." Additionally, while the record is not completely clear, there is a suggestion the prior statutory language of "deport or return" was amended to substitute the term "remove" only as a result of the consolidation of deportation and exclusion proceedings into unitary "removal" proceedings in 1996. If so, there would be no reason to infer the change was intended to make a substantive alteration to the government's obligations to avoid refoulement.

That said, it is not clear that defendants would be obligated to provide the full panoply of

[12] The United States is not a direct party to the Convention, but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the Convention.

procedural and substantive protections prescribed under §1231(b)(3) and its implementing regulations, even assuming the individual plaintiffs are subject to "return" under the contiguous territory return provision. First, as noted above and as reflected generally in subdivision (b) of §1231, the potential issues relating to sending an alien to a contiguous territory as opposed to his or her "home" country may not be identical. Moreover, in this action plaintiffs are *not* contending the protections against refoulement provided under subparagraph (b)(1) of section 1225 for those placed in expedited return are insufficient. Those restrictions are quite clearly less restrictive than are required under §1231(b)(3).

Second, even though plaintiffs are not contending that DHS *must* place them in expedited removal, all their arguments depend on the fact that the expedited removal statute applies to them, absent prosecutorial discretion. Thus, it would be anomalous to conclude that they necessarily are entitled to *greater* procedural and substantive protections against refoulement—i.e., those prescribed by §1231(b)(3)—upon temporary "return" to Mexico than they would receive if the government instead elected simply to remove them permanently on an expedited basis.

Accordingly, to the extent plaintiffs contend section §1231(b)(3) applies to persons being "returned" under the contiguous territory return provision, they have not shown they are more likely than not to succeed on the merits of such an argument. That, however, does not answer the question of whether the MPP includes sufficient safeguards against refoulement.

At the preliminary injunction stage, it is neither possible nor necessary to determine what the minimal anti-refoulement procedures might be. Plaintiffs have established that persons placed in expedited removal proceedings, and persons who ultimately are found removable under section 1229a, all benefit from protections not extended to the individual plaintiffs here. The issue in this case is only whether the MPP's protections for persons like the individual plaintiffs comply with the law. Even assuming neither §1231(b)(3) nor the more limited procedures under expedited removal apply, plaintiffs have shown they are more likely than not to prevail on the merits of their contention that defendants adopted the MPP without sufficient regard to refoulement issues. Notably, the CIS Policy Memorandum, AR 2273 n.5, expressly acknowledges the government's

obligations "vis-à-vis the 1951 Convention and 1967 Protocol are reflected in Section 241(b)(3)(B)." The subsequent conclusion of that memo that "the reference to Section 241(b)(3)(B) should not be construed to suggest that Section 241(b)(3)(B) applies to MPP," may ultimately be supportable. It leaves open, however, the question of what the government's obligations are.

As noted above, the MPP provides only for review of potential refoulement concerns when an alien "affirmatively" raises the point. Access to counsel is "currently" not available. AR 2273. While an CIS officer's determination is subject to review by a supervisory asylum officer, no administrative review proceedings are available. AR 2274. These procedures undeniably provide less protection than prior legislative and administrative rulemaking procedures have concluded is appropriate upon removal, either expedited or regular. While it might be rational to treat "return" differently, the rules must be adopted in conformance with administrative law and with governments anti-refoulement obligations. Without opining as to what minimal process might be required, plaintiffs' showing on this point suffices.

4. Plaintiffs' specific claims for relief

The first claim for relief set out in the complaint asserts the MPP is "contrary to law" because the contiguous return provision does not apply to persons in the position of the individual plaintiffs. As set out above, plaintiffs have the better argument on this point.

Plaintiffs' second claim for relief asserts that under 5 U.S.C. § 553(b) and (c), defendants may not adopt a "rule" without providing notice and an opportunity for comment. If it were the case that the MPP represents a lawful exercise of DHS's discretion to implement the contiguous territory return provision, plaintiffs would have no tenable "notice and comment" claim regarding that exercise of prosecutorial discretion.

Additionally, even given the conclusion above that the contiguous return provision does *not* provide a legal basis for the MPP, the issue does not rise to a violation of the notice and comment provisions under the APA. Rather, plaintiffs' claim for relief with respect to notice and

comment is implicated if, and only if, they are subject to the contiguous territory return provision, notwithstanding the discussion above. In that instance, the question would be whether the defendants were obligated to comply with APA notice and comment rules with respect to adopting procedures to address refoulement concerns. Plaintiffs' complaint appears to recognize this point, and focuses on the allegation that the MPP procedures for addressing an alien's risk of persecution upon return to Mexico were not adopted after notice and comment.

If defendants simply were to proceed by applying the existing procedures and regulations of §1231(b)(3) to temporary "returns" under the contiguous territory return provision, they might have a good argument that no "notice and comment" procedure would be required. If, however, defendants take the position—which may be completely reasonable—that a different set of procedures should apply to contiguous territory "returns," compliance with APA notice and comment procedures more likely than not would be required. Accordingly, plaintiffs have shown they have a likelihood of success on the merits of their notice and comment claim.

The third claim for relief set out in the complaint alleges, in essence, that the adoption of the MPP was arbitrary and capricious as a whole, and that it effectively "deprives asylum seekers of a meaningful right to apply for asylum." The sixth claim for relief, which may be duplicative, also asserts impairment of the right to seek asylum. At this juncture, it is not necessary to determine whether plaintiffs might be able to prove such broader and/or "catch-all" claims.

Finally, the fourth claim for relief[13] avers the MPP is contrary to law because it has inadequate provisions to protect against refoulement. The claim invokes the UN Convention, the Protocols, section 1231(b)(3), and its implementing regulations. As discussed above, plaintiffs have not shown they are likely to prove section 1231(b)(3) applies directly. Their claims about refoulement nevertheless likely merge with their "notice and comment" and/or catch-all claims under the second and third claims for relief. Thus, in the event DHS has statutory authority to

[13] As noted above, the present motion does not address the fifth claim for relief, which is not grounded in the APA.

apply the contiguous return provision to plaintiffs and others in their position, plaintiffs have shown a likelihood of success on the refoulement issue, whether that is best characterized as a claim under their second, third, or fourth claims for relief, or some combination thereof.

C. Other injunction factors

Under the familiar standards, plaintiffs who demonstrate a likelihood of success on the merits, as plaintiffs have done here, must also show they are "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 21-22. While the precise degree of risk and specific harms that plaintiffs might suffer in this case may be debatable, there is no real question that it includes the possibility of irreparable injury, sufficient to support interim relief in light of the showing on the merits.

The individual plaintiffs present uncontested evidence that they fled their homes in El Salvador, Guatemala, and Honduras to escape extreme violence, including rape and death threats. One plaintiff alleges she was forced to flee Honduras after her life was threatened for being a lesbian. Another contends he suffered beatings and death threats by a "death squad" in Guatemala that targeted him for his indigenous identity. Plaintiffs contend they have continued to experience physical and verbal assaults, and live in fear of future violence, in Mexico.

Defendants attempt to rebut the plaintiffs' showing of harm by arguing the merits—contending the individual plaintiffs were all "processed consistent[ly] with applicable law" and had sufficient opportunity to assert any legitimate fears of return to Mexico. As reflected in the discussion above, however, plaintiffs have made a strong showing that defendants' view of the law on those points is not correct. The organizational plaintiffs have also shown a likelihood of harm in terms of impairment of their ability to carry out their core mission of providing representation to aliens seeking admission, including asylum seekers. *Cf. East Bay Sanctuary*, 909 F.3d at 1242 (describing cognizable harms to organizational plaintiffs for standing purposes.)

Finally, the balance of equities and the public interest support issuance of preliminary

relief. As observed in *East Bay Sanctuary*:

> the public has a "weighty" interest "in efficient administration of the immigration laws at the border." *Landon v. Plasencia*, 459 U.S. 21, 34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982). But the public also has an interest in ensuring that "statutes enacted by [their] representatives" are not imperiled by executive fiat. *Maryland v. King*, 567 U.S. 1301, 1301, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012) (Roberts, C.J., in chambers).

909 F.3d at 1255. Additionally, similar to the situation in *East Bay Sanctuary*, while this injunction will bring a halt to a current and expanding policy, and in that sense technically does not preserve the "status quo," it will only "temporarily restore[] the law to what it had been for many years prior." *Id.*

D. Scope of injunction

Defendants urge that any injunction be limited in geographical scope. As the *East Bay Sanctuary* court recently observed, there is "a growing uncertainty about the propriety of universal injunctions." 909 F.3d at 1255.

Nevertheless, as *East Bay Sanctuary* also noted:

> In immigration matters, we have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 511 (9th Cir. 2018) ("A final principle is also relevant: the need for uniformity in immigration policy."); *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), rev'd on other grounds, –— U.S. —, 138 S. Ct. 2392, 201 L.Ed.2d 775 (2018) ("Because this case implicates immigration policy, a nationwide injunction was necessary to give Plaintiffs a full expression of their rights."); *Washington [v. Trump]*, 847 F.3d [1151 (9th Cir. 2017) at 1166–67 ("[A] fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy." (citing *Texas v. U.S.*, 809 F.3d 134, 187–88 (5th Cir. 2015))). "Such relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *Univ. of Cal.*, 908 F.3d at 512.

Id. Although issues sometimes arise when a ruling in a single judicial district is applied nationwide, defendants have not shown the injunction in this case can be limited geographically. This is not a case implicating local concerns or values. There is no apparent reason that any of the places to which the MPP might ultimately be extended have interests that materially differ from those presented in San Ysidro. Accordingly, the injunction will not be geographically limited.[14]

E. Bond and stay issues

No party has suggested that it would be appropriate to condition issuance of a preliminary injunction upon the posting of a bond under the circumstances of this case. No bond will be required.[15] At argument, defendants moved orally for a stay pending appeal of any injunctive relief that might issue. Defendants contend the MPP was adopted to address certain aspects of a crisis. Even fully crediting defendants' characterization of the circumstances, they have not shown that a stay of this injunction is warranted. *See East Bay Sanctuary*, 909 F.3d at 1255. Accordingly, the request for a stay during the pendency of appeal will be denied. To permit defendants to exercise their right to seek a stay from the Court of Appeal, however, this order will not take effect until 5:00 p.m., PST, April 12, 2019.

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[14] While the injunction precludes the "return" under the MPP of any additional aliens who would otherwise be subject to expedited removal, nothing in the order determines if any individuals, other than those appearing as plaintiffs in this action, should be offered the opportunity to re-enter the United States pending conclusion of their section1229a proceedings. Nor does anything in the injunctive relief require that any person be *paroled* into the country during such proceedings. DHS will have discretion to detain the individual plaintiffs and others when they are allowed back across the border.

[15] On its face, Federal Rule of Civil Procedure 65(c) permits a court to grant preliminary injunctive relief "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Ninth Circuit has made clear, however, that "[d]espite the seemingly mandatory language, Rule 65(c) invests the district court with discretion as to the amount of security required, *if any*." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009)(citations and quotations omitted, emphasis in original). This is not a case where a bond would serve to protect against quantifiable harm in any event.

V. CONCLUSION

Plaintiffs' motion for a preliminary injunction is granted. Defendants are hereby enjoined and restrained from continuing to implement or expand the "Migrant Protection Protocols" as announced in the January 25, 2018 DHS policy memorandum and as explicated in further agency memoranda. Within 2 days of the effective date of this order, defendants shall permit the named individual plaintiffs to enter the United States. At defendants' option, any named plaintiff appearing at the border for admission pursuant to this order may be detained or paroled, pending adjudication of his or her admission application.

This order shall take effect at 5:00 p.m., PST, April 12, 2012.

IT IS SO ORDERED.

Dated: April 8, 2019

RICHARD SEEBORG
United States District Judge

Ex. B

Appendix of Administrative Record Citations

No. 19-15716

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

KISRTJEN NIELSEN,
Secretary of Homeland Security, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPENDIX OF ADMINISTRATIVE RECORD CITATIONS IN EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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INDEX TO APPENDIX

DOCUMENT

MPP Guiding Principles

Date: January 28, 2019

Topic: Guiding Principles for Migrant Protection Protocols

HQ POC/Office: Enforcement Programs Division

- Effective January 28, 2019, in accordance with the Commissioner's Memorandum of January 28, 2019, the Office of Field Operations, San Diego Field Office, will, consistent with its existing discretion and authorities, begin to implement Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) through the Migrant Protection Protocols (MPP).
    - To implement the MPP, aliens arriving from Mexico who are amenable to the process (see below), and who in an exercise of discretion the officer determines should be subject to the MPP process, will be issued an Notice to Appear (NTA) and placed into Section 240 removal proceedings. They will then be transferred to await proceedings in Mexico.

- Aliens in the following categories are not amenable to MPP:
    - Unaccompanied alien children,
    - Citizens or nationals of Mexico,
    - Aliens processed for expedited removal,
    - Aliens in special circumstances:
        - Returning LPRs seeking admission (subject to INA section 212)
        - Aliens with an advance parole document or in parole status
        - Known physical/mental health issues
        - Criminals/history of violence
        - Government of Mexico or USG interest,
    - Any alien who is more likely than not to face persecution or torture in Mexico, or
    - Other aliens at the discretion of the Port Director

- Nothing in this guidance changes existing policies and procedures for processing an alien under procedures other than MPP, except as specifically provided. Thus, for instance, the processing of aliens for expedited removal is unchanged. Once an alien has been processed for expedited removal, including the supervisor approval, the alien may not be processed for MPP.
- Officers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis. Adverse factors precluding placement in the MPP process include, but are not limited to, factors such as prior removal, criminal history, it is more likely than not that the alien will face persecution or torture in Mexico, and permanent bars to readmission.
- If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that alien will be referred to a USCIS asylum officer for screening following the affirmative statement of fear of persecution or

torture in, or return to, Mexico, so that the asylum officer can assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico.

- If USCIS assesses that an alien who affirmatively states a fear of return to Mexico is more likely than not to face persecution or torture in Mexico, the alien may not be processed for MPP. Officers retain all existing discretion to process (or re-process) the alien for any other available disposition, including expedited removal, NTA, waivers, or parole.
- Aliens at the POE who are processed for MPP will receive a specific immigration court hearing date and time. Every effort will be made to schedule similar MPP alien populations (e.g. single adult males, single adult females, family units) for the same hearing dates.
- OFO and USBP will be sharing court dates using only one existing Immigration Scheduling System (ISS) queue.
- Any alien who is subject to MPP will be documented in the appropriate system of records, SIGMA, and the proper code will be added.
- POEs will provide aliens subject to MPP a tear sheet containing information about the process, as well as a list of free or low-cost legal service providers.
- Aliens who return to the POE for their scheduled hearing and affirmatively state a fear of return to Mexico will be referred to USCIS for screening prior to any return to Mexico. If USCIS assesses that such an alien is more likely than not to face persecution or torture in Mexico, CBP Officers should coordinate with ICE Enforcement and Removal Operations (ERO) to determine whether the alien may be maintained in custody or paroled, or if another disposition is appropriate. Such an alien may not be subject to expedited removal, however, and may not be returned to Mexico to await further proceedings.

Hearing date and processing

- POEs will establish scheduling for the arrival of aliens returning for their hearing to permit efficient transportation, according to applicable policy.
- Returning aliens who arrive at the POEs for proceedings will be biometrically identified, screened to ensure they have requisite documents, and turned over to ICE ERO.
- POEs will coordinate with ICE ERO to establish transfer of custody and expeditious transportation from the POE to the hearing. ERO is responsible for the transportation of aliens between the POE and court location, as well as the handling of the alien during all court proceedings.
- If the alien receives a final order of removal from an immigration judge, the alien will be processed in accordance with ERO operations.
- If the alien's INA section 240 removal proceedings are ongoing ERO will transport the alien back to the POE and CBP officers will escort the alien to the United States/Mexico limit line.

U.S. Department of Homeland Security
Washington, DC 20229

U.S. Customs and Border Protection

Commissioner

January 28, 2019

MEMORANDUM FOR: Todd C. Owen
Executive Assistant Commissioner, Field Operations

Carla L. Provost
Chief, U.S. Border Patrol

FROM: Kevin K. McAleenan
Commissioner

SUBJECT: Implementation of the Migrant Protection Protocols

Effective January 28, 2019, and in furtherance of the provisions of the attached memorandum from the Secretary, U.S. Customs and Border Protection (CBP) will commence implementation of the Migrant Protection Protocols (MPP) under its existing discretion and the authority of Section 235(b)(2)(C) of the Immigration and Nationality Act (INA).

Section 235(b)(2)(C) of the INA provides that the Secretary of Homeland Security may return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry) pending removal proceedings under Section 240 of the INA.

MPP implementation will begin at the San Ysidro port of entry on January 28, 2019, and it is anticipated that it will be expanded in the near future. Please ensure that each stage of MPP expansion beyond OFO implementation at San Ysidro is coordinated closely with my office.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

January 28, 2019

MEMORANDUM FOR: Directors, Field Operations
Office of Field Operations

Director, Field Operations Academy
Office of Training and Development

FROM: Todd A. Hoffman
Executive Director
Admissibility and Passenger Programs
Office of Field Operations

SUBJECT: Guidance on Migrant Protection Protocols

Effective January 28, 2019, in accordance with the Commissioner's Memorandum of January 28, 2019, and subject to the terms of policy, the Office of Field Operations (OFO) San Diego Field Office will, consistent with its existing discretion and authorities, implement Section 235(b)(2)(C) of the Immigration and Nationality Act (INA).

Under this implementation of section 235(b)(2)(C), referenced as the Migrant Protection Protocols (MPP), DHS is authorized to return certain applicants for admission who arrive via land at the San Ysidro Port of Entry, and who are subject to removal proceedings under Section 240 of the INA, to Mexico pending removal proceedings. Certain aliens, including vulnerable aliens, criminal aliens, or aliens of interest to the Government of Mexico (GoM) or the United States, will not be placed into MPP, in accordance with the Guiding Principles for Migrant Protection Protocols issued today by the Enforcement Programs Division (HQ) (Guiding Principles).

The Guiding Principles outline which aliens may be amenable to MPP. As part of the determination of whether an alien is amenable to MPP, OFO will refer aliens who are potentially amenable, but who affirmatively state fear of return to Mexico, whether before or after they are processed for MPP or other disposition, to United States Citizenship and Immigration Services (USCIS) for screening following the affirmative statement of fear of return to Mexico. Please see the Guiding Principles for MPP.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Please ensure that this memorandum is disseminated to all ports of entry within your jurisdiction.

ICE

Migrant Protection Protocols (MPP)

FACT SHEET
February 13, 2019

ICE Policy 11088.1: Implementation of the Migrant Protection Protocols

On January 25, 2019, Secretary Nielsen issued a memorandum entitled *Policy Guidance for Implementation of the Migrant Protection Protocols*, in which she provided guidance for the implementation of the Migrant Protection Protocols (MPP) announced on December 20, 2018, an arrangement between the United States and Mexico to address the migration crisis along our southern border. Pursuant to the Secretary's direction, this memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE) about its role in the implementation of the MPP.

Migrant Protection Protocols Guidance for Enforcement and Removal Operations Field Office Directors

This memorandum provides operational guidance to impacted Enforcement and Removal Operations (ERO) field offices to ensure that the Migrant Protection Protocols (MPP) are implemented in accordance with applicale law, the Secretary's January 25, 2019, memorandum, *Policy Guidance for Implementation of the Migrant Protection Protocols*, Acting Director Vitiello's February 12, 2019, memorandum of the same title, and other applicable policies and procedures.

Last Reviewed/Updated: 02/13/2019

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

January 25, 2019

ACTION

MEMORANDUM FOR: L. Francis Cissna
Director
U.S. Citizenship and Immigration Services

Kevin K. McAleenan
Commissioner
U.S. Customs and Border Protection

Ronald D. Vitiello
Deputy Director and Senior Official Performing the Duties of Director
U.S. Immigration and Customs Enforcement

FROM: Kirstjen M. Nielsen
Secretary

SUBJECT: Policy Guidance for Implementation of the Migrant Protection Protocols

On December 20, 2018, I announced that the Department of Homeland Security (DHS), consistent with the Migrant Protection Protocols (MPP), will begin implementation of Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) on a large-scale basis to address the migration crisis along our southern border. In 1996, Congress added Section 235(b)(2)(C) to the INA. This statutory authority allows the Secretary of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry) pending removal proceedings under Section 240 of the INA. Consistent with the MPP, citizens and nationals of countries other than Mexico ("third-country nationals") arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico pursuant to Section 235(b)(2)(C) for the duration of their Section 240 removal proceedings.

Section 235(b)(2)(C) and the MPP

The United States issued the following statement on December 20, 2018, regarding implementation of the Migrant Protection Protocols:

> [T]he United States will begin the process of implementing Section 235(b)(2)(C) . . . with respect to non-Mexican nationals who may be arriving on land (whether or not at a designated port of entry) seeking to enter the United States from Mexico illegally or without proper documentation. Such implementation will be done consistent with applicable domestic and international legal obligations. Individuals subject to this action may return to the United States as necessary and appropriate to attend their immigration court proceedings.
>
> The United States understands that, according to the Mexican law of migration, the Government of Mexico will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law. That includes applicable international human rights law and obligations as a party to the 1951 Convention relating to the Status of Refugees (and its 1967 Protocol) and the Convention Against Torture.
>
> The United States further recognizes that Mexico is implementing its own, sovereign, migrant protection protocols providing humanitarian support for and humanitarian visas to migrants.
>
> The United States proposes a joint effort with the Government of Mexico to develop a comprehensive regional plan in consultation with foreign partners to address irregular migration, smuggling, and trafficking with the goal of promoting human rights, economic development, and security.[1]

The Government of Mexico, in response, issued a statement on December 20, 2018. That statement provides, in part, as follows:

> 1. For humanitarian reasons, [the Government of Mexico] will authorize the temporary entrance of certain foreign individuals coming from the United States who entered that country at a port of entry or who were detained between ports of entry, have been interviewed by U.S. immigration authorities, and have received a notice to appear before an immigration judge. This is based on current Mexican legislation and the international commitments Mexico has signed, such as the Convention Relating to the Status of Refugees, its Protocol, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.

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[1] Letter from Chargé d'Affaires John S. Creamer to Sr. Jesús Seade, Subsecretaría para América del Norte, Secretaría de Relaciones Exteriores (Dec. 20, 2018).

2. It will allow foreigners who have received a notice to appear to request admission into Mexican territory for humanitarian reasons at locations designated for the international transit of individuals and to remain in national territory. This would be a "stay for humanitarian reasons" and they would be able to enter and leave national territory multiple times.

3. It will ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law. They will be entitled to equal treatment with no discrimination whatsoever and due respect will be paid to their human rights. They will also have the opportunity to apply for a work permit for paid employment, which will allow them to meet their basic needs.

4. It will ensure that the measures taken by each government are coordinated at a technical and operational level in order to put mechanisms in place that allow migrants who have receive[d] a notice to appear before a U.S. immigration judge have access without interference to information and legal services, and to prevent fraud and abuse.[2]

Prosecutorial Discretion and *Non-Refoulement* in the Context of the MPP

In exercising their prosecutorial discretion regarding whether to place an alien arriving by land from Mexico in Section 240 removal proceedings (rather than another applicable proceeding pursuant to the INA), and, if doing so, whether to return the alien to the contiguous country from which he or she is arriving pursuant to Section 235(b)(2)(C), DHS officials should act consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees[3] (1951 Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[4] Specifically, a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the

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[2] Secretaría de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018).

[3] The United States is not a party to the 1951 Convention but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention. Article 33 of the 1951 Convention provides that: "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[4] Article 3 of the CAT states, "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a) (8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

INA), or would more likely than not be tortured, if so returned pending removal proceedings. The United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018.

U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and U.S. Immigration and Customs Enforcement will issue appropriate internal procedural guidance to carry out the policy set forth in this memorandum.[5]

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[5] A DHS immigration officer, when processing an alien for Section 235(b)(2)(C), should refer to USCIS any alien who has expressed a fear of return to Mexico for a *non-refoulement* assessment by an asylum officer.

MIGRANT PROTECTION PROTOCOLS

Release Date: January 24, 2019

"We have implemented an unprecedented action that will address the urgent humanitarian and security crisis at the Southern border. This humanitarian approach will help to end the exploitation of our generous immigration laws. The Migrant Protection Protocols represent a methodical commonsense approach, exercising long-standing statutory authority to help address the crisis at our Southern border." – Secretary of Homeland Security Kirstjen M. Nielsen

What Are the Migrant Protection Protocols?

The Migrant Protection Protocols (MPP) are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico – illegally or without proper documentation – may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.

Why is DHS Instituting MPP?

The U.S. is facing a security and humanitarian crisis on the Southern border. The Department of Homeland Security (DHS) is using all appropriate resources and authorities to address the crisis and execute our missions to secure the borders, enforce immigration and customs laws, facilitate legal trade and travel, counter

traffickers, smugglers and transnational criminal organizations, and interdict drugs and illegal contraband.

MPP will help restore a safe and orderly immigration process, decrease the number of those taking advantage of the immigration system, and the ability of smugglers and traffickers to prey on vulnerable populations, and reduce threats to life, national security, and public safety, while ensuring that vulnerable populations receive the protections they need.

Historically, illegal aliens to the U.S. were predominantly single adult males from Mexico who were generally removed within 48 hours if they had no legal right to stay; now over 60% are family units and unaccompanied children and 60% are non-Mexican. In FY17, CBP apprehended 94,285 family units from Honduras, Guatemala, and El Salvador (Northern Triangle) at the Southern border. Of those, 99% remain in the country today.

Misguided court decisions and outdated laws have made it easier for illegal aliens to enter and remain in the U.S. if they are adults who arrive with children, unaccompanied alien children, or individuals who fraudulently claim asylum. As a result, DHS continues to see huge numbers of illegal migrants and a dramatic shift in the demographics of aliens traveling to the border, both in terms of nationality and type of aliens- from a demographic who could be quickly removed when they had no legal right to stay to one that cannot be detained and timely removed.

In October, November, and December of 2018, DHS encountered an average of 2,000 illegal and inadmissible aliens a day at the Southern border. While not an all-time high in terms of overall numbers, record increases in particular types of migrants, such as family units, travelling to the border who require significantly more resources to detain and remove (when our courts and laws even allow that), have overwhelmed the U.S. immigration system, leading to a "system" that enables smugglers and traffickers to flourish and often leaves aliens in limbo for years. This has been a prime cause of our near-800,000 case backlog in immigration courts and delivers no consequences to aliens who have entered illegally.

Smugglers and traffickers are also using outdated laws to entice migrants to undertake the dangerous journey north where on the route migrants report high rates of abuse, violence, and sexual assault. Human smugglers and traffickers exploit

migrants and seek to turn human misery into profit. Transnational criminal organizations and gangs are also deliberately exploiting the situation to bring drugs, violence, and illicit goods into American communities. The activities of these smugglers, traffickers, gangs and criminals endanger the security of the U.S., as well as partner nations in the region.

The situation has had severe impacts on U.S. border security and immigration operations. The dramatic increase in illegal migration, including unprecedented number of families and fraudulent asylum claims is making it harder for the U.S. to devote appropriate resources to individuals who are legitimately fleeing persecution. In fact, approximately 9 out of 10 asylum claims from Northern Triangle countries are ultimately found non-meritorious by federal immigration judges. Because of the court backlog and the impact of outdated laws and misguided court decisions, many of these individuals have disappeared into the country before a judge denies their claim and simply become fugitives.

The MPP will provide a safer and more orderly process that will discourage individuals from attempting illegal entry and making false claims to stay in the U.S., and allow more resources to be dedicated to individuals who legitimately qualify for asylum.

What Gives DHS the Authority to Implement MPP?

Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted into the U.S. and provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. Section 235(b)(2)(C) provides that "in the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the U.S.," the Secretary of Homeland Security "may return the alien to that territory pending a [removal] proceeding under § 240" of the INA." The U.S. has notified the Government of Mexico that it is implementing these procedures under U.S. law.

Who is Subject to MPP?

With certain exceptions, MPP applies to aliens arriving in the U.S. on land from Mexico (including those apprehended along the border) who are not clearly

admissible and who are placed in removal proceedings under INA § 240. This includes aliens who claim a fear of return to Mexico at any point during apprehension, processing, or such proceedings, but who have been assessed not to be more likely than not to face persecution or torture in Mexico. Unaccompanied alien children and aliens in expedited removal proceedings will not be subject to MPP. Other individuals from vulnerable populations may be excluded on a case-by-case basis.

How Will MPP Work Operationally?

Certain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the country, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim. Instead, these aliens will be given a "Notice to Appear" for their immigration court hearing and will be returned to Mexico until their hearing date.

While aliens await their hearings in Mexico, the Mexican government has made its own determination to provide such individuals the ability to stay in Mexico, under applicable protection based on the type of status given to them.

Aliens who need to return to the U.S. to attend their immigration court hearings will be allowed to enter and attend those hearings. Aliens whose claims are found meritorious by an immigration judge will be allowed to remain in the U.S. Those determined to be without valid claims will be removed from the U.S. to their country of nationality or citizenship.

DHS is working closely with the U.S. Department of Justice's Executive Office for Immigration Review to streamline the process and conclude removal proceedings as expeditiously as possible.

Will Migrants in MPP Have Access to Counsel?

Consistent with the law, aliens in removal proceedings can use counsel of their choosing at no expense to the U.S. Government. Aliens subject to MPP will be

afforded the same right and provided with a list of legal services providers in the area which offer services at little or no expense to the migrant.

What Are the Anticipated Benefits of MPP?

Every month, tens of thousands of individuals arrive unlawfully at the Southern Border. MPP will reduce the number of aliens taking advantage of U.S. law and discourage false asylum claims. Aliens will not be permitted to disappear into the U.S. before a court issues a final decision on whether they will be admitted and provided protection under U.S. law. Instead, they will await a determination in Mexico and receive appropriate humanitarian protections there. This will allow DHS to more effectively assist legitimate asylum-seekers and individuals fleeing persecution, as migrants with non-meritorious or even fraudulent claims will no longer have an incentive for making the journey. Moreover, MPP will reduce the extraordinary strain on our border security and immigration system, freeing up personnel and resources to better protect our sovereignty and the rule of law by restoring integrity to the American immigration system.

Keywords: CBP (/keywords/cbp)

Last Published Date: January 24, 2019

Homeland Security

Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration

U.S. Department of Homeland Security sent this bulletin at 12/20/2018 10:42 AM EST

U.S. DEPARTMENT OF HOMELAND SECURITY

Office of Public Affairs

FOR IMMEDIATE RELEASE
December 20, 2018

Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration

Announces Migration Protection Protocols

WASHINGTON – Today, Secretary of Homeland Security Kirstjen M. Nielsen announced historic action to confront the illegal immigration crisis facing the United States. Effective immediately, the United States will begin the process of invoking Section 235(b)(2)(C) of the Immigration and Nationality Act. Under the Migration Protection Protocols (MPP), individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.

"Today we are announcing historic measures to bring the illegal immigration crisis under control," said Secretary Nielsen. "We will confront this crisis head on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. 'Catch and release' will be replaced with 'catch and return.' In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution.

"Let me be clear: we will undertake these steps consistent with all domestic and international legal obligations, including our humanitarian commitments. We have notified the Mexican government of our intended actions. In response, Mexico has made an independent determination that they will commit to implement essential measures on their side of the border. We expect affected migrants will receive humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await a U.S. legal determination."

Background

Illegal aliens have exploited asylum loopholes at an alarming rate. Over the last five years, DHS has seen a 2000 percent increase in aliens claiming credible fear (the first step to asylum), as many know it will give them an opportunity to stay in our country, even if they do not actually have a valid claim to asylum. As a result, the United States has an overwhelming asylum backlog of more than 786,000 pending cases. Last year alone the number of asylum claims soared 67 percent compared to the previous year. Most of these claims are not meritorious—in fact *nine out of ten asylum claims are not granted by a federal immigration judge*. However, by the time a judge has ordered them removed from the United States, many have vanished.

Process

- Aliens trying to enter the U.S. to claim asylum will no longer be released into our country, where they often disappear before a court can determine their claim's merits.
- Instead, those aliens will be processed by DHS and given a "Notice to Appear" for their immigration court hearing.
- While they wait in Mexico, the Mexican government has made its own determination to provide such individuals humanitarian visas, work authorization, and other protections. Aliens will have access to immigration attorneys and to the U.S. for their court hearings.
- Aliens whose claims are upheld by U.S. judges will be allowed in. Those without valid claims will be deported to their home countries.

Anticipated Benefits

- As we implement, illegal immigration and false asylum claims are expected to decline.
- Aliens will not be able to disappear into U.S. before court decision.
- More attention can be focused on more quickly assisting legitimate asylum-seekers, as fraudsters are disincentivized from making the journey.

- Precious border security personnel and resources will be freed up to focus on protecting our territory and clearing the massive asylum backlog.
- Vulnerable populations will get the protection they need while they await a determination in Mexico.

# # #

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 208

RIN 1615–AC34

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003 and 1208

[EOIR Docket No. 18–0501; A.G. Order No. 4327–2018]

RIN 1125–AA89

Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security; Executive Office for Immigration Review, Department of Justice.

ACTION: Interim final rule; request for comment.

SUMMARY: The Department of Justice and the Department of Homeland Security (''DOJ,'' ''DHS,'' or, collectively, ''the Departments'') are adopting an interim final rule governing asylum claims in the context of aliens who are subject to, but contravene, a suspension or limitation on entry into the United States through the southern border with Mexico that is imposed by a presidential proclamation or other presidential order (''a proclamation'') under section 212(f) or 215(a)(1) of the Immigration and Nationality Act (''INA''). Pursuant to statutory authority, the Departments are amending their respective existing regulations to provide that aliens subject to such a proclamation concerning the southern border, but who contravene such a proclamation by entering the United States after the effective date of such a proclamation, are ineligible for asylum. The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where they would be processed in a controlled, orderly, and lawful manner. This rule would apply only prospectively to a proclamation issued after the effective date of this rule. It would not apply to a proclamation that specifically includes an exception for aliens applying for asylum, nor would it apply to aliens subject to a waiver or exception provided by the proclamation. DHS is amending its regulations to specify a screening process for aliens who are subject to this specific bar to asylum eligibility. DOJ is amending its regulations with respect to such aliens. The regulations would ensure that aliens in this category who establish a reasonable fear of persecution or torture could seek withholding of removal under the INA or protection from removal under regulations implementing U.S. obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (''CAT'').

DATES:

Effective date: This rule is effective November 9, 2018.

Submission of public comments: Written or electronic comments must be submitted on or before January 8, 2019. Written comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments prior to midnight eastern standard time at the end of that day.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 18–0501, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 18–0501 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, Contact Telephone Number (703) 305–0289 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2616, Falls Church, VA 22041, Contact Telephone Number (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Departments also invite comments that relate to the economic or federalism effects that might result from this rule. To provide the most assistance to the Departments, comments should reference a specific portion of the rule; explain the reason for any recommended change; and include data, information, or authority that supports the recommended change.

All comments submitted for this rulemaking should include the agency name and EOIR Docket No. 18–0501. Please note that all comments received are considered part of the public record and made available for public inspection at *www.regulations.gov.* Such information includes personally identifiable information (such as a person's name, address, or any other data that might personally identify that individual) that the commenter voluntarily submits.

If you want to submit personally identifiable information as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the information of which you seek redaction.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment and precisely and prominently identify the confidential business information of which you seek redaction. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.* Personally identifiable information and confidential business information provided as set forth above will be placed in the public docket file of DOJ's Executive Office of Immigration Review (''EOIR''), but not posted online. To inspect the public docket file in person, you must make an appointment with EOIR. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for the contact information specific to this rule.

II. Purpose of This Interim Final Rule

This interim final rule (''interim rule'' or ''rule'') governs eligibility for asylum and screening procedures for aliens subject to a presidential proclamation or order restricting entry issued pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), or section 215(a)(1) of the INA, 8 U.S.C. 1185(a)(1), that concerns entry to the United States along the southern border with Mexico and is issued on or after the effective date of this rule. Pursuant to statutory authority, the interim rule renders such aliens ineligible for asylum if they enter the United States after the effective date of

such a proclamation, become subject to the proclamation, and enter the United States in violation of the suspension or limitation of entry established by the proclamation. The interim rule, if applied to a proclamation suspending the entry of aliens who cross the southern border unlawfully, would bar such aliens from eligibility for asylum and thereby channel inadmissible aliens to ports of entry, where such aliens could seek to enter and would be processed in an orderly and controlled manner. Aliens who enter prior to the effective date of an applicable proclamation will not be subject to this asylum eligibility bar unless they depart and reenter while the proclamation remains in effect. Aliens also will not be subject to this eligibility bar if they fall within an exception or waiver within the proclamation that makes the suspension or limitation of entry in the proclamation inapplicable to them, or if the proclamation provides that it does not affect eligibility for asylum.

As discussed further below, asylum is a discretionary immigration benefit. In general, aliens may apply for asylum if they are physically present or arrive in the United States, irrespective of their status and irrespective of whether or not they arrive at a port of entry, as provided in section 208(a) of the INA, 8 U.S.C. 1158(a). Congress, however, provided that certain categories of aliens could not receive asylum and further delegated to the Attorney General and the Secretary of Homeland Security (''Secretary'') the authority to promulgate regulations establishing additional bars on eligibility that are consistent with the asylum statute and ''any other conditions or limitations on the consideration of an application for asylum'' that are consistent with the INA. *See* INA 208(b)(2)(C), (d)(5)(B), 8 U.S.C. 1158(b)(2)(C), (d)(5)(B).

In the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (''IIRIRA''), Public Law 104–208, Congress, concerned with rampant delays in proceedings to remove illegal aliens, created expedited procedures for removing inadmissible aliens, and authorized the extension of such procedures to aliens who entered illegally and were apprehended within two years of their entry. *See generally* INA 235(b), 8 U.S.C. 1225(b). Those procedures were aimed at facilitating the swift removal of inadmissible aliens, including those who had entered illegally, while also expeditiously resolving any asylum claims. For instance, Congress provided that any alien who asserted a fear of persecution would appear before an asylum officer, and that any alien who is determined to have established a ''credible fear''—meaning a ''significant possibility . . . that the alien could establish eligibility for asylum'' under the asylum statute—would be detained for further consideration of an asylum claim. *See* INA 235(b)(1), (b)(1)(B)(v), 8 U.S.C. 1225(b)(1), (b)(1)(B)(v).

When the expedited procedures were first implemented approximately two decades ago, relatively few aliens within those proceedings asserted an intent to apply for asylum or a fear of persecution. Rather, most aliens found inadmissible at the southern border were single adults who were immediately repatriated to Mexico. Thus, while the overall number of illegal aliens apprehended was far higher than it is today (around 1.6 million in 2000), aliens could be processed and removed more quickly, without requiring detention or lengthy court proceedings.

In recent years, the United States has seen a large increase in the number and proportion of inadmissible aliens subject to expedited removal who assert an intent to apply for asylum or a fear of persecution during that process and are subsequently placed into removal proceedings in immigration court. Most of those aliens unlawfully enter the country between ports of entry along the southern border. Over the past decade, the overall percentage of aliens subject to expedited removal and referred, as part of the initial screening process, for a credible-fear interview jumped from approximately 5% to above 40%, and the total number of credible-fear referrals for interviews increased from about 5,000 a year in Fiscal Year (''FY'') 2008 to about 97,000 in FY 2018. Furthermore, the percentage of cases in which asylum officers found that the alien had established a credible fear—leading to the alien's placement in full immigration proceedings under section 240 of the INA, 8 U.S.C. 1229a—has also increased in recent years. In FY 2008, when asylum officers resolved a referred case with a credible-fear determination, they made a positive finding about 77% of the time. That percentage rose to 80% by FY 2014. In FY 2018, that percentage of positive credible-fear determinations has climbed to about 89% of all cases. After this initial screening process, however, significant proportions of aliens who receive a positive credible-fear determination never file an application for asylum or are ordered removed in absentia. In FY 2018, a total of about 6,000 aliens who passed through credible-fear screening (17% of all completed cases, 27% of all completed cases in which an asylum application was filed, and about 36% of cases where the asylum claim was adjudicated on the merits) established that they should be granted asylum.

Apprehending and processing this growing number of aliens who cross illegally into the United States and invoke asylum procedures thus consumes an ever increasing amount of resources of DHS, which must surveil, apprehend, and process the aliens who enter the country. Congress has also required DHS to detain all aliens during the pendency of their credible-fear proceedings, which can take days or weeks. And DOJ must also dedicate substantial resources: Its immigration judges adjudicate aliens' claims, and its officials are responsible for prosecuting and maintaining custody over those who violate the criminal law. The strains on the Departments are particularly acute with respect to the rising numbers of family units, who generally cannot be detained if they are found to have a credible fear, due to a combination of resource constraints and the manner in which the terms of the Settlement Agreement in *Flores* v. *Reno* have been interpreted by courts. *See* Stipulated Settlement Agreement, *Flores* v. *Reno,* No. 85–cv–4544 (N.D. Cal. Jan. 17, 1997).

In recent weeks, United States officials have each day encountered an average of approximately 2,000 inadmissible aliens at the southern border. At the same time, large caravans of thousands of aliens, primarily from Central America, are attempting to make their way to the United States, with the apparent intent of seeking asylum after entering the United States unlawfully or without proper documentation. Central American nationals represent a majority of aliens who enter the United States unlawfully, and are also disproportionately likely to choose to enter illegally between ports of entry rather than presenting themselves at a port of entry. As discussed below, aliens who enter unlawfully between ports of entry along the southern border, as opposed to at a port of entry, pose a greater strain on DHS's already stretched detention and processing resources and also engage in conduct that seriously endangers themselves, any children traveling with them, and the U.S. Customs and Border Protection (''CBP'') agents who seek to apprehend them.

The United States has been engaged in sustained diplomatic negotiations with Mexico and the Northern Triangle countries (Honduras, El Salvador, and Guatemala) regarding the situation on the southern border, but those negotiations have, to date, proved

unable to meaningfully improve the situation.

The purpose of this rule is to limit aliens' eligibility for asylum if they enter in contravention of a proclamation suspending or restricting their entry along the southern border. Such aliens would contravene a measure that the President has determined to be in the national interest. For instance, a proclamation restricting the entry of inadmissible aliens who enter unlawfully between ports of entry would reflect a determination that this particular category of aliens necessitates a response that would supplement existing prohibitions on entry for all inadmissible aliens. Such a proclamation would encourage such aliens to seek admission and indicate an intention to apply for asylum at ports of entry. Aliens who enter in violation of that proclamation would not be eligible for asylum. They would, however, remain eligible for statutory withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or for protections under the regulations issued under the authority of the implementing legislation regarding Article 3 of the CAT.

The Departments anticipate that a large number of aliens who would be subject to a proclamation-based ineligibility bar would be subject to expedited-removal proceedings. Accordingly, this rule ensures that asylum officers and immigration judges account for such aliens' ineligibility for asylum within the expedited-removal process, so that aliens subject to such a bar will be processed swiftly. Furthermore, the rule continues to afford protection from removal for individuals who establish that they are more likely than not to be persecuted or tortured in the country of removal. Aliens rendered ineligible for asylum by this interim rule and who are referred for an interview in the expedited-removal process are still eligible to seek withholding of removal under section 241(b)(3) of the INA, 8 U.S.C. 1231(b)(3), or protections under the regulations issued under the authority of the implementing legislation regarding Article 3 of the CAT. Such aliens could pursue such claims in proceedings before an immigration judge under section 240 of the INA, 8 U.S.C. 1229a, if they establish a reasonable fear of persecution or torture.

III. Background

A. Joint Interim Rule

The Attorney General and the Secretary of Homeland Security publish this joint interim rule pursuant to their respective authorities concerning asylum determinations.

The Homeland Security Act of 2002, Public Law 107–296, as amended, transferred many functions related to the execution of federal immigration law to the newly created Department of Homeland Security. The Homeland Security Act of 2002 charges the Secretary ''with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens,'' 8 U.S.C. 1103(a)(1), and grants the Secretary the power to take all actions ''necessary for carrying out'' the provisions of the INA, *id.* 1103(a)(3). The Homeland Security Act of 2002 also transferred to DHS some responsibility for affirmative asylum applications, *i.e.,* applications for asylum made outside the removal context. *See* 6 U.S.C. 271(b)(3). Those authorities have been delegated to U.S. Citizenship and Immigration Services (''USCIS''). USCIS asylum officers determine in the first instance whether an alien's affirmative asylum application should be granted. *See* 8 CFR 208.9.

But the Homeland Security Act of 2002 retained authority over certain individual immigration adjudications (including those related to defensive asylum applications) in DOJ, under the Executive Office for Immigration Review (''EOIR'') and subject to the direction and regulation of the Attorney General. *See* 6 U.S.C. 521; 8 U.S.C. 1103(g). Thus, immigration judges within DOJ continue to adjudicate all asylum applications made by aliens during the removal process (defensive asylum applications), and they also review affirmative asylum applications referred by USCIS to the immigration court. *See* INA 101(b)(4), 8 U.S.C. 1101(b)(4); 8 CFR 1208.2; *Dhakal* v. *Sessions,* 895 F.3d 532, 536–37 (7th Cir. 2018) (describing affirmative and defensive asylum processes). The Board of Immigration Appeals (''BIA'' or ''Board''), also within DOJ, in turn hears appeals from immigration judges' decisions. 8 CFR 1003.1. In addition, the INA provides ''[t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling.'' INA 103(a)(1), 8 U.S.C. 1103(a)(1). This broad division of functions and authorities informs the background of this interim rule.

B. Legal Framework for Asylum

Asylum is a form of discretionary relief under section 208 of the INA, 8 U.S.C. 1158, that precludes an alien from being subject to removal, creates a path to lawful permanent resident status and citizenship, and affords a variety of other benefits, such as allowing certain alien family members to obtain lawful immigration status derivatively. *See R–S–C* v. *Sessions,* 869 F.3d 1176, 1180 (10th Cir. 2017); *see also, e.g.,* INA 208(c)(1)(A), (C), 8 U.S.C. 1158(c)(1)(A), (C) (asylees cannot be removed and can travel abroad with prior consent); INA 208(b)(3), 8 U.S.C. 1158(b)(3) (allowing derivative asylum for asylee's spouse and unmarried children); INA 209(b), 8 U.S.C. 1159(b) (allowing the Attorney General or Secretary to adjust the status of an asylee to that of a lawful permanent resident); INA 316(a), 8 U.S.C. 1427(a) (describing requirements for naturalization of lawful permanent residents). Aliens who are granted asylum are authorized to work in the United States and may receive certain financial assistance from the federal government. *See* INA 208(c)(1)(B), (d)(2), 8 U.S.C. 1158(c)(1)(B), (d)(2); 8 U.S.C. 1612(a)(2)(A), (b)(2)(A); 8 U.S.C. 1613(b)(1); 8 CFR 274a.12(a)(5); *see also* 8 CFR 274a.12(c)(8) (providing that asylum applicants may seek employment authorization 150 days after filing a complete application for asylum).

Aliens applying for asylum must establish that they meet the definition of a ''refugee,'' that they are not subject to a bar to the granting of asylum, and that they merit a favorable exercise of discretion. INA 208(b)(1), 240(c)(4)(A), 8 U.S.C. 1158(b)(1), 1229a(c)(4)(A); *see Moncrieffe* v. *Holder,* 569 U.S. 184, 187 (2013) (describing asylum as a form of ''discretionary relief from removal''); *Delgado* v. *Mukasey,* 508 F.3d 702, 705 (2d Cir. 2007) (''Asylum is a discretionary form of relief . . . . Once an applicant has established eligibility . . . it remains within the Attorney General's discretion to deny asylum.''). Because asylum is a discretionary form of relief from removal, the alien bears the burden of showing both eligibility for asylum and why the Attorney General or Secretary should exercise discretion to grant relief. *See* INA 208(b)(1), 240(c)(4)(A), 8 U.S.C. 1158(b)(1), 1229a(c)(4)(A); *Romilus* v. *Ashcroft,* 385 F.3d 1, 8 (1st Cir. 2004).

Section 208 of the INA provides that, in order to apply for asylum, an applicant must be ''physically present'' or ''arriv[e]'' in the United States, ''whether or not at a designated port of arrival'' and ''irrespective of such alien's status''—but the applicant must also ''apply for asylum in accordance with'' the rest of section 208 or with the expedited-removal process in section 235 of the INA. INA 208(a)(1), 8 U.S.C. 1158(a)(1). Furthermore, to be granted asylum, the alien must demonstrate that he or she meets the statutory definition

Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act

Press Release 14

Press Release

Autor
Secretaría de Relaciones Exteriores

Fecha de publicación
20 de diciembre de 2018

Categoría
Comunicado

At 8 a.m. this morning, the Government of the United States informed the Mexican Government that the U.S. Department of Homeland Security (DHS) intends to invoke a section of its immigration law that would enable it to return non-Mexican individuals to our country for the duration of their immigration proceedings in the United States.

Mexico reaffirms its sovereign right to implement its immigration policy and admit or deny entry into its territory to foreign citizens. Therefore, the Government of Mexico has decided to take the following steps on behalf of migrants, especially minors, whether accompanied or not, and to protect the right of those who wish to begin and continue the process of applying for asylum in United States territory:

1. For humanitarian reasons, it will authorize the temporary entrance of certain foreign individuals coming from the United States who entered that country at a port of entry or who were detained between ports of entry, have been interviewed by U.S. immigration authorities, and have received a notice to appear before an immigration judge. This is based on current Mexican legislation and the international commitments Mexico has signed, such as the

Convention Relating to the Status of Refugees, its Protocol, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.

2. It will allow foreigners who have received a notice to appear to request admission into Mexican territory for humanitarian reasons at locations designated for the international transit of individuals and to remain in national territory. This would be a "stay for humanitarian reasons" and they would be able to enter and leave national territory multiple times.

3. It will ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law. They will be entitled to equal treatment with no discrimination whatsoever and due respect will be paid to their human rights. They will also have the opportunity to apply for a work permit for paid employment, which will allow them to meet their basic needs.

4. It will ensure that the measures taken by each government are coordinated at a technical and operational level in order to put mechanisms in place that allow migrants who have receive a notice to appear before a U.S. immigration judge have access without interference to information and legal services, and to prevent fraud and abuse.

The actions taken by the governments of Mexico and the United States do not constitute a Safe Third Country arrangement, in which migrants in transit would be required to apply for asylum in Mexico. They are aimed at facilitating the follow-up to applications for asylum in the United States. This does not imply that foreign individuals face any obstacles to applying for asylum in Mexico.

The Government of Mexico reiterates that all foreign individuals must comply with the law while they are in national territory.

FY2016-2019 YTD ATD FAMU vs. Non-FAMU Absconder Rates

FY16 ATD Absconder Rates: FAMU vs. Non-FAMU			
Metric	**FAMU**	**Non-FAMU**	**Overall**
Absconders	2,626	1,567	4,193
Terminations	8,459	12,921	21,380
Absconder Rate	31.0%	12.1%	19.6%

FY17 ATD Absconder Rates: FAMU vs. Non-FAMU			
Metric	**FAMU**	**Non-FAMU**	**Overall**
Absconders	4,628	2,424	7,052
Terminations	20,131	16,053	36,184
Absconder Rate	23.0%	15.1%	19.5%

FY18 ATD Absconder Rates: FAMU vs. Non-FAMU			
Metric	**FAMU**	**Non-FAMU**	**Overall**
Absconders	8,299	3,182	11,481
Terminations	30,322	19,903	50,225
Absconder Rate	27.4%	16.0%	22.9%

FY19 through November Absconder Rates: FAMU vs. Non-FAMU			
Metric	**FAMU**	**Non-FAMU**	**Overall**
Absconders	2,281	539	2,820
Terminations	8,911	4,364	13,275
Absconder Rate	25.6%	12.4%	21.2%

USBP Arrest Data 10/1/2013 through 11/30/2018.
Data from BI Inc. Participants Reports, 9/30/2016, 9/30/2017, & 9/30/2018.
Family Unit (FAMU) subject apprehensions represent all OBP apprehensions of adults (18 years old and over) with a FAMU classification.

U.S. Immigration and Customs Enforcement

Fiscal Year 2018 ICE Enforcement and Removal Operations Report

Overview

This report summarizes U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) activities in Fiscal Year (FY) 2018. ERO identifies, arrests, and removes aliens who present a danger to national security or a threat to public safety, or who otherwise undermine border control and the integrity of the U.S. immigration system. ICE shares responsibility for administering and enforcing the nation's immigration laws with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services.

During FY2018, ICE ERO continued its focus on priorities laid out by two primary directives issued in 2017. On January 25, 2017, President Donald J. Trump issued Executive Order 13768, *Enhancing Public Safety in the Interior of the United States* (EO), which set forth the Administration's immigration enforcement and removal priorities. Subsequently, the Department of Homeland Security's (DHS) February 20, 2017 implementation memorandum, *Enforcement of the Immigration Laws to Serve the National Interest* provided further direction for the implementation of the policies set forth in the EO. Together, the EO and implementation memorandum expanded ICE's enforcement focus to include removable aliens who (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. The Department continued to operate under the directive that classes or categories of removable aliens are not exempt from potential enforcement.

ICE ERO continued efforts under the direction of the 2017 EO and implementation memorandum by placing a significant emphasis on interior enforcement by protecting national security and public safety and upholding the rule of law. This report represents an analysis of ICE ERO's FY2018 year-end statistics and illustrates how ICE ERO successfully fulfilled its mission while furthering the aforementioned policies.

FY2018 Enforcement and Removal Statistics

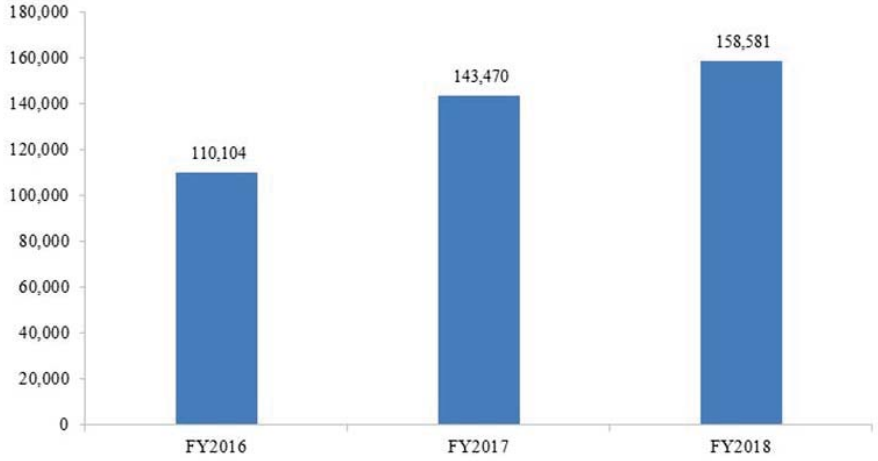
As directed in the EO and implementation memorandum, ICE does not exempt classes or categories of removable aliens from potential enforcement. This policy directive is reflected in ERO's FY2018 enforcement statistics, which show consistent increases from previous fiscal years in the following enforcement metrics: (1) ICE ERO overall administrative arrests; (2) an accompanying rise in overall ICE removals tied to interior enforcement efforts; (3) ICE removals of criminal aliens from interior enforcement; (4) ICE removals of suspected gang members and known or suspected terrorists; (5) positive

impact on ICE removals from policy initiatives including visa sanctions and diplomatic relations; (6) ICE ERO total book-ins and criminal alien book-ins; and (7) ICE ERO Detainers.

ICE ERO Administrative Arrests

An administrative arrest is the arrest of an alien for a civil violation of U.S. immigration laws, which is subsequently adjudicated by an immigration judge or through other administrative processes. With 158,581 administrative arrests in FY2018, ICE ERO recorded the greatest number of administrative arrests[1] as compared to the two previous fiscal years (depicted below in Figure 1), and the highest number since FY2014. ICE ERO made 15,111 more administrative arrests in FY2018 than in FY2017, representing an 11 percent increase, and a continued upward trend after FY2017's 30 percent increase over FY2016.

Figure 1. FY2016 – FY2018 ERO Administrative Arrests

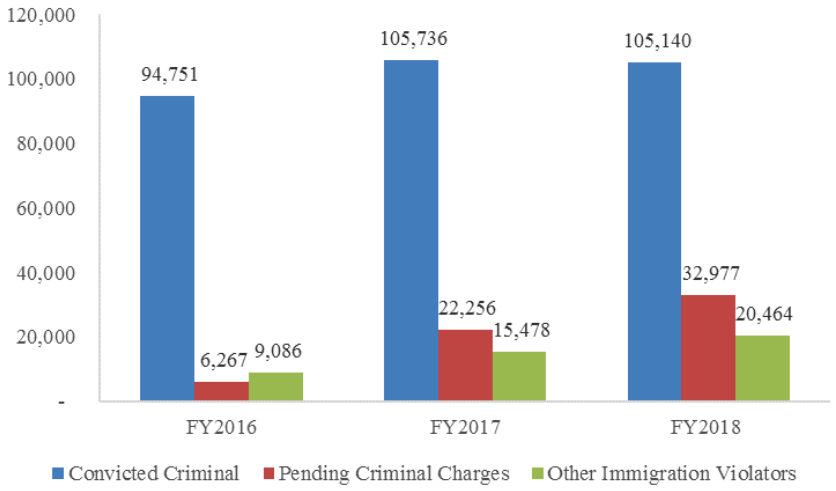


Administrative Arrests of Immigration Violators by Criminality

ICE remains committed to directing its enforcement resources to those aliens posing the greatest risk to the safety and security of the United States. By far, the largest percentage of aliens arrested by ICE are convicted criminals[2] (66 percent), followed by immigration violators with pending criminal charges[3] at the time of their arrest (21 percent). In FY2018, ERO arrested 138,117 aliens with criminal histories (convicted criminal and pending criminal charges) for an increase of 10,125 aliens over FY2017. This continued the growth seen in FY2017 when ERO arrested 26,974 more aliens with criminal histories than in FY2016 for a 27 percent gain. While the arrests of convicted criminals remained relatively level from FY 2017 to FY2018 at 105,736 and 105,140 respectively, administrative arrests with pending criminal charges increased by 48 percent. This continues the upward trend seen in FY2017, where arrests with pending charges increased by 255 percent over FY2016. Figure 2 provides a breakdown of FY2016, FY2017, and FY2018 administrative arrests by criminality.

[1] ERO administrative arrests include all ERO programs. All statistics are attributed to the current program of the processing officer of an enforcement action.
[2] Immigration violators with a criminal conviction entered into ICE systems of record at the time of the enforcement action.
[3] Immigration violators with pending criminal charges entered into ICE system of record at the time of the enforcement action.

Figure 2. FY2016 – FY2018 ERO Administrative Arrests by Criminality



Below, Table 1 tallies all pending criminal charges and convictions by category for those aliens administratively arrested in FY2018 and lists those categories with at least 1,000 combined charges and convictions present in this population. These figures are representative of the criminal history as it is entered in the ICE system of record for individuals administratively arrested. Each administrative arrest may represent multiple criminal charges and convictions, as many of the aliens arrested by ERO are recidivist criminals.

Table 1. FY2018 Criminal Charges and Convictions for ERO Administrative Arrests

Criminal Charge Category	Criminal Charges	Criminal Convictions	Total Offenses
Traffic Offenses - DUI	26,100	54,630	**80,730**
Dangerous Drugs	21,476	55,109	**76,585**
Traffic Offenses	30,594	45,610	**76,204**
Immigration	11,917	51,249	**63,166**
Assault	20,766	29,987	**50,753**
Obstructing Judiciary, Congress, Legislature, Etc.	11,189	11,863	**23,052**
Larceny	5,295	15,045	**20,340**
General Crimes	8,415	10,973	**19,388**
Obstructing the Police	5,754	10,155	**15,909**
Fraudulent Activities	4,201	8,661	**12,862**
Burglary	2,829	9,834	**12,663**
Weapon Offenses	3,672	8,094	**11,766**
Public Peace	4,029	7,236	**11,265**
Invasion of Privacy	2,255	5,090	**7,345**
Sex Offenses (Not Involving Assault or Commercialized Sex)	1,913	4,975	**6,888**
Stolen Vehicle	1,693	4,568	**6,261**
Family Offenses	2,465	3,526	**5,991**
Robbery	1,139	4,423	**5,562**
Sexual Assault	1,610	3,740	**5,350**
Forgery	1,632	3,526	**5,158**
Damage Property	1,872	2,597	**4,469**
Stolen Property	1,335	3,127	**4,462**
Liquor	1,995	2,290	**4,285**
Flight / Escape	1,090	2,264	**3,354**
Kidnapping	791	1,294	**2,085**
Homicide	387	1,641	**2,028**
Health / Safety	522	1,242	**1,764**
Commercialized Sexual Offenses	729	1,010	**1,739**
Threat	583	791	**1,374**

Notes: Immigration crimes include "illegal entry," "illegal reentry," "false claim to U.S. citizenship," and "alien smuggling." "Obstructing Judiciary& Congress& Legislature& Etc.," refers to several related offenses including, but not limited to: Perjury; Contempt; Obstructing Justice; Misconduct; Parole and Probation Violations; and Failure to Appear. "General Crimes" include the following National Crime Information Center (NCIC) charges: Conspiracy, Crimes Against Person, Licensing Violation, Money Laundering, Morals - Decency Crimes, Property Crimes, Public Order Crimes, Racketeer Influenced and Corrupt Organizations Act (RICO), and Structuring.

As a result of ERO's enhanced enforcement efforts directed at restoring the integrity of the immigration system, the percentage of administrative arrests of other immigration violators[4] increased from FY2017 (11 percent) to FY2018 (13 percent). Of this population of immigration violators arrested in FY2018, Table 2 shows that 57 percent were processed with a notice to appear[5] while 23 percent were ICE fugitives[6] or subjects who had been previously removed, illegally re-entered the country (a federal felony under 8 U.S.C § 1326) and served an order of reinstatement.[7] Both the number of fugitive and illegal re-entry arrests continued a three-year trend by increasing 19 percent and 9 percent, respectively, in FY2018.

Table 2. FY2016 – FY2018 ERO Administrative Arrests of Other Immigration Violators by Arrest Type[8]

ERO Administrative Arrest Type	FY2016		FY2017		FY2018	
	Arrests	Percentage	Arrests	Percentage	Arrests	Percentage
Other Immigration Violators	**9,086**	**100%**	**15,478**	**100%**	**20,464**	**100%**
Notice to Appear	3,390	37%	7,642	49%	11,570	57%
Fugitives	1,605	18%	2,350	15%	2,791	14%
Reinstatement	758	8%	1,695	11%	1,846	9%
Other	3,333	37%	3,791	24%	4,257	21%

At-Large Arrests

An ERO at-large arrest is conducted in the community, as opposed to a custodial setting such as a prison or jail.[9] While at-large arrests remained consistent, with a 1 percent overall increase from 40,066 in FY2017 to 40,536 in FY2018 (Figure 3), at-large arrests levels remain significantly higher compared to the 30,348 from FY2016. At-large arrests of convicted criminal aliens decreased by 13 percent in FY2018 as shown in Figure 4. However, this group still constitutes the largest proportion of at-large apprehensions (57 percent). Increases year-over-year in at-large arrests of aliens with pending criminal charges (35 percent) and other immigration violators (25 percent) offset the decrease in arrests of convicted criminals. The increased enforcement of these populations without criminal convictions add to the increases seen in FY2017 for pending criminal charges (213 percent) and other immigration violators (122 percent). Again, this demonstrates ERO's commitment to removing criminal aliens and public safety threats, while still faithfully enforcing the law against all immigration violators.

[4] "Other Immigration Violators" are immigration violators without any known criminal convictions or pending charges entered into ICE system of record at the time of the enforcement action.
[5] A Notice to Appear (Form I-862) is the charging document that initiates removal proceedings. Charging documents inform aliens of the charges and allegations being lodged against them by ICE.
[6] A fugitive is any alien who has failed to leave the United States following the issuance of a final order of removal, deportation, or exclusion.
[7] Section 241(a)(5) of the Immigration and Nationality Act (INA) provides that DHS may reinstate (without referral to an immigration court) a final order against an alien who illegally reenters the United States after being deported, excluded, or removed from the United States under a final order.
[8] "Other" types of arrests of Other Immigration Violators include, but are not limited to, arrests for Expedited Removal, Visa Waiver Program Removal, Administrative Removal, and Voluntary Departure/Removal.
[9] ERO administrative arrests reported as "at-large" include records from all ERO Programs with Arrest Methods of Located, Non-Custodial Arrest, or Probation and Parole.

Figure 3. FY2016 – FY2018 At-Large Administrative Arrests

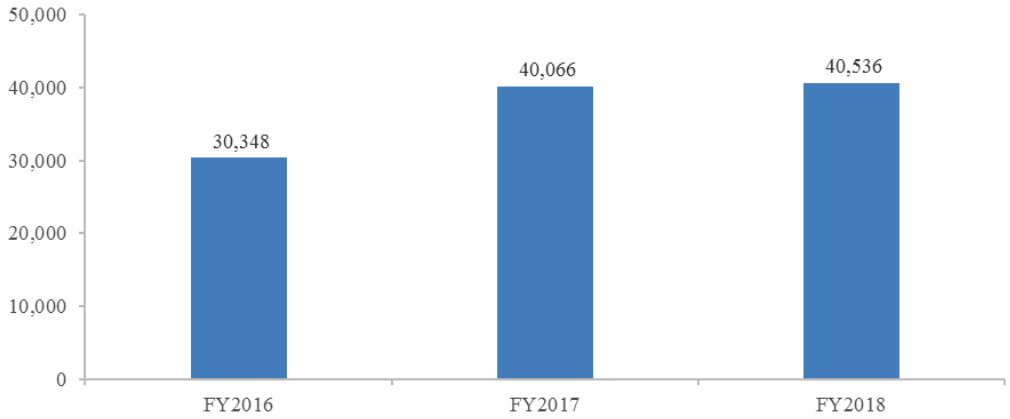
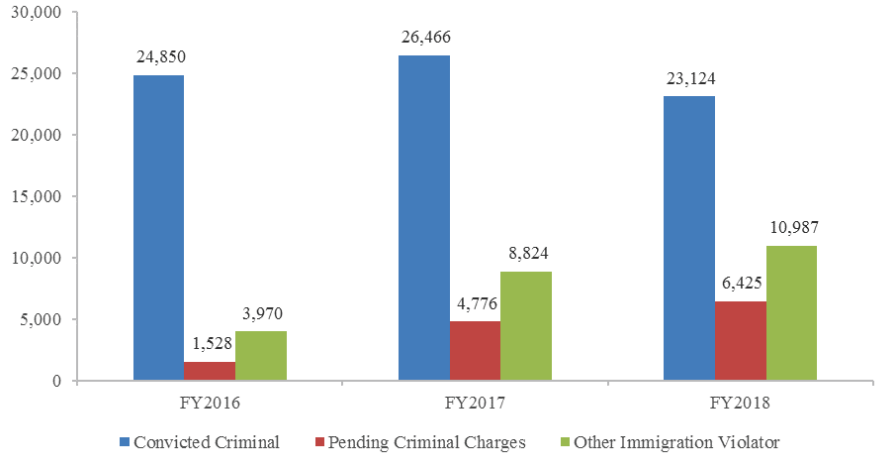


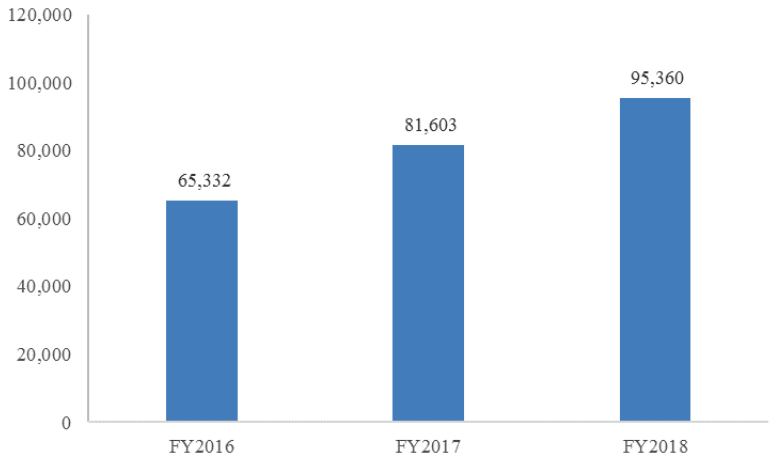
Figure 4. FY2016 – FY2018 At-Large Administrative Arrests by Criminality



Rise in ICE Removals through enhanced Interior Enforcement

The apprehension and removal of immigration violators is central to ICE's mission to enforce U.S. immigration laws. In addition to the 11 percent increase in ERO administrative arrests from FY2017 to FY2018, ERO also made significant strides in removing aliens arrested in the interior of the country (Figure 5). Such removals stem from an ICE arrest and is the ultimate goal of the agency's interior immigration enforcement efforts. Interior ICE removals continued to increase in FY2018, as ICE removed 13,757 more aliens in this category than it did in FY2017, a 17 percent increase (Figure 5). The increases in both ERO administrative arrests and removals based on these interior arrests demonstrate the significant successes ICE achieved during FY2018, as well as the increased efficacy with which the agency carried out its mission.

Figure 5. FY2016 – FY2018 Interior ICE Removals



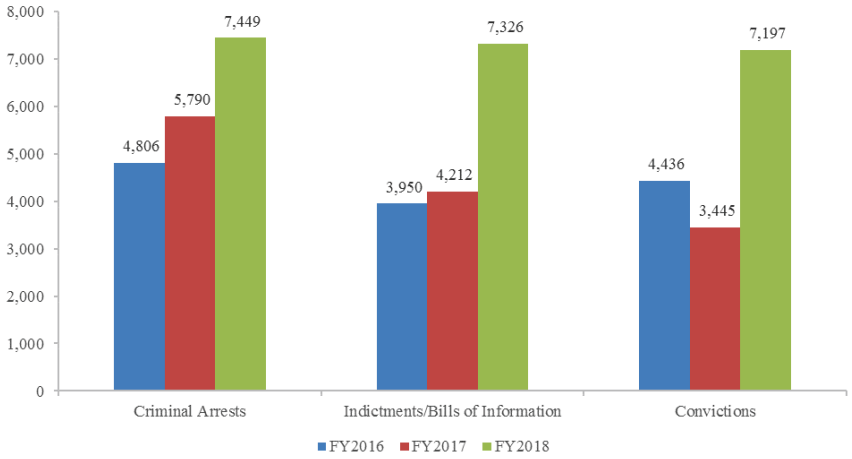
Criminal Arrests and Prosecutions

While ICE ERO showed significant gains in all meaningful enforcement metrics, perhaps none are more impressive nor have made more of an impact on public safety than its prosecutorial efforts. In conjunction with the United States Attorney's Office, ERO enforces violations of criminal immigration law through the effective prosecution of criminal offenders.

In FY2018, ERO's efforts resulted in the prosecutions of offenses which include, but are not limited to: 8 U.S.C § 1325, Illegal Entry into the United States; 8 U.S.C § 1326, Illegal Re-Entry of Removed Alien; 18 U.S.C § 1546, Fraud and Misuse of Visas, Permits and Other Documents; 18 U.S.C § 111, Assaulting and/or Resisting an Officer; and 18 U.S.C § 922(g)(5), Felon in Possession of a Firearm.

In FY2017, ERO made 5,790 criminal arrests resulting in 4,212 indictments or Bills of Information and 3,445 convictions. While these FY2017 numbers showed moderate increases over FY2016 in criminal arrests and indictments or Bills of Information, in FY2018 ERO made 7,449 criminal arrests resulting in 7,326 indictments or Bills of Information and 7,197 convictions. This surge in enforcement efforts directed at criminal aliens and repeat offenders reflects a 29 percent increase in criminal arrests, a 74 percent increase in indictments or Bills of Information, and a 109 percent increase in criminal convictions to reverse a downturn from FY2017 (Figure 6).

Figure 6. FY2016 – FY2018 Prosecution Statistics

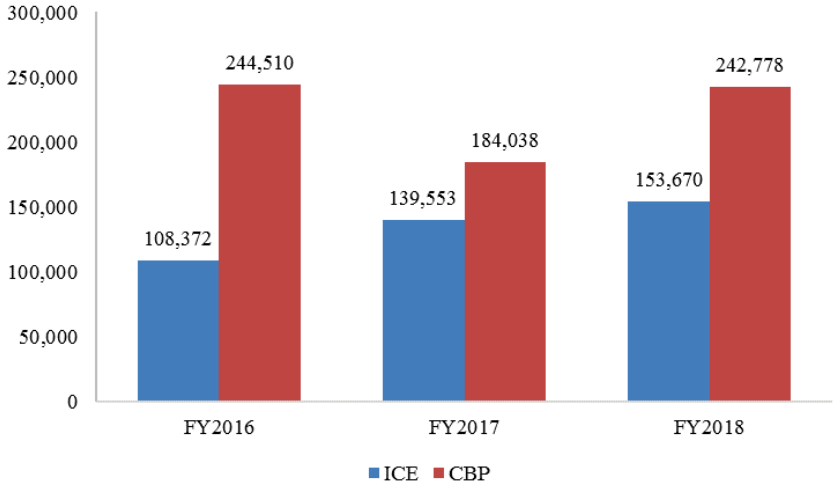


Initial Book-ins to ICE Custody

An initial book-in is the first book-in to an ICE detention facility to begin a new detention stay. This population includes aliens initially apprehended by CBP who are transferred to ICE for detention and removal. As seen in Figure 7, while overall ICE initial book-ins went down in FY2017 (323,591) compared to FY2016 (352,882), total book-ins increased in FY2018 to 396,448, illustrating the ongoing surge in illegal border crossings.

Figure 7 shows the number of book-ins resulting from ICE and CBP enforcement efforts for FY2016, FY2017, and FY2018.[10] Notably, book-ins from CBP increased 32 percent in FY2018 to 242,778, while book-ins from ICE arrests continued an upward trend from FY2017's 29 percent increase with an additional increase of 10 percent in FY2018.

Figure 7. FY2016 – FY2018 Initial Book-ins to ICE Detention by Arresting Agency



[10] CBP enforcement efforts represent records that were processed by Border Patrol, Inspections, Inspections-Air, Inspections-Land, and Inspections-Sea.

Detainers

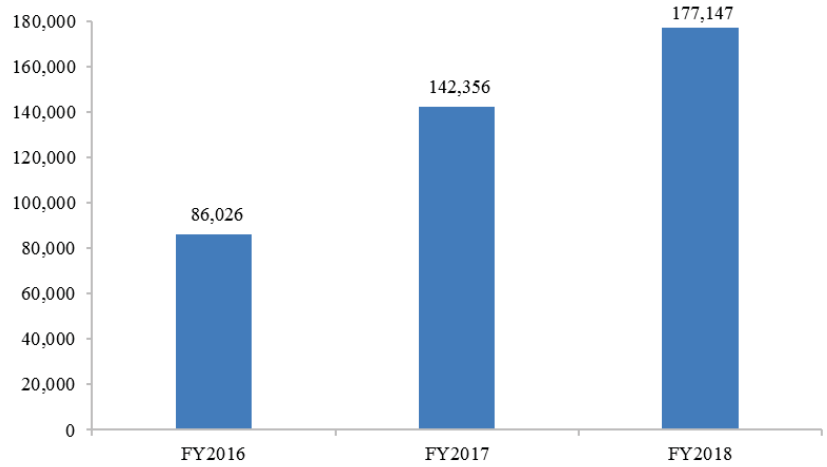
A detainer is a request to the receiving law enforcement agency to both notify DHS as early as practicable before a removable alien is released from criminal custody, and to maintain custody of the alien for a period not to exceed 48 hours beyond the time the alien would otherwise have been released to allow DHS to assume custody for removal purposes. ICE issues detainers to federal, state, and local law enforcement agencies only after establishing probable cause that the subject is an alien who is removable from the United States and to provide notice of ICE's intent to assume custody of a subject detained in that law enforcement agency's custody. The detainer facilitates the custodial transfer of an alien to ICE from another law enforcement agency. This process may reduce potential risks to ICE officers and to the general public by allowing arrests to be made in a controlled, custodial setting as opposed to at-large arrests in the community.

The cooperation ICE receives from other law enforcement agencies is critical to its ability to identify and arrest aliens who pose a risk to public safety or national security. Some jurisdictions do not cooperate with ICE as a matter of state or local law, executive order, judicial rulings, or policy. All detainers issued by ICE are accompanied by either: (1) a properly completed Form I-200 (Warrant for Arrest of Alien) signed by a legally authorized immigration officer; or (2) a properly completed Form I-205 (Warrant of Removal/Deportation) signed by a legally authorized immigration officer, both of which include a determination of probable cause of removability.

Issued Detainers

In FY2018, ERO issued 177,147 detainers – an increase of 24 percent from the 142,356 detainers issued in FY2017 (Figure 8). This number demonstrates the large volume of illegal aliens involved in criminal activity and the public safety risk posed by these aliens, as well as ERO's commitment to taking enforcement action against all illegal aliens it encounters. The rise in detainers issued continues the trend from FY2017's 65 percent growth over FY2016 and shows a consistent focus on interior enforcement, particularly for those aliens involved in criminal activity, despite continued opposition and lack of cooperation from uncooperative jurisdictions.

Figure 8. FY2016 – FY2018 ERO Detainers Issued



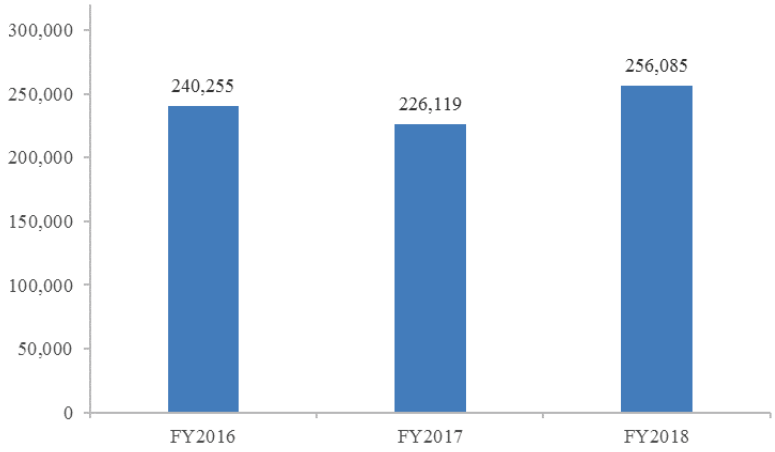
ICE Removals

Integral to the integrity of the nation's lawful immigration system is the removal of immigration violators who are illegally present in the country and have received a final order of removal.[11] A removal is defined as the compulsory and confirmed movement of an inadmissible or deportable alien out of the United States based on such an order.[12] ICE removals include both aliens arrested by ICE and aliens who were apprehended by CBP and turned over to ICE for repatriation efforts. In FY2018, ICE saw a significant increase in both overall removals as well as removals where ICE was the initial arresting agency.

Figure 9 displays total ICE removals for FY2016, FY2017, and FY2018 and highlights the 13 percent increase from 226,119 to 256,085 in FY2018. After a drop in FY2017 overall removals stemming from historic lows in border crossings, ICE removals rebounded in FY2018, with the previously identified 17 percent increase stemming from both strengthened ICE interior enforcement efforts as well as an 11 percent increase in removals of border apprehensions.

Figure 10 breaks down ICE removals by arresting agency, which demonstrates a 46 percent increase from FY2016 to FY2018 (from 65,332 to 95,360) in removals tied to ICE arrests.

Figure 9. FY2016 – FY2018 ICE Removals



[11] ICE removals include removals and returns where aliens were turned over to ICE for removal efforts. This includes aliens processed for Expedited Removal (ER) or Voluntary Return (VR) that are turned over to ICE for detention. Aliens processed for ER and not detained by ERO or VRs after June 1st, 2013 and not detained by ICE are primarily processed by the U.S. Border Patrol. CBP should be contacted for those statistics.
[12] Ibid.

Figure 10. FY2016 – FY2018 ICE Removals by Arresting Agency

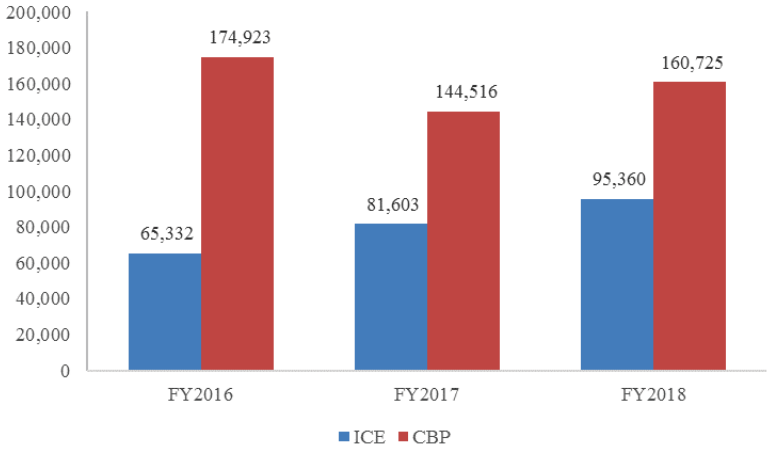
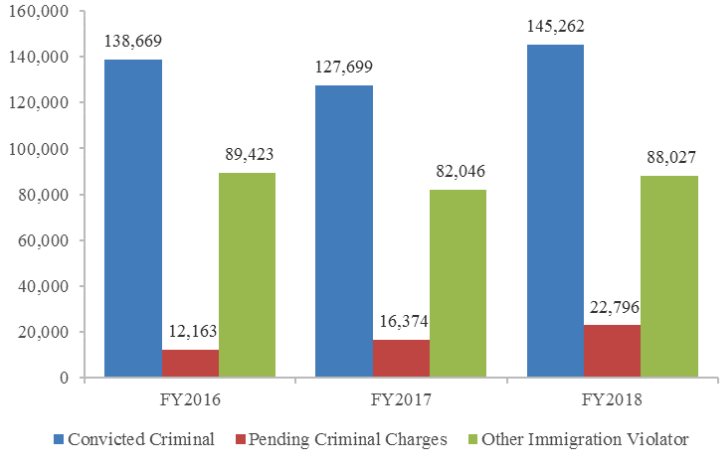


Figure 11 shows the breakdown of ICE removals based on criminal history. ICE removals of convicted criminals followed overall removal trends with a small decrease from 138,669 in FY2016 to 127,699 in FY2017, while rising to 145,262 in FY2018, a 14 percent increase. Over this same period, ICE removals of aliens with pending criminal charges has steadily increased from 12,163 in FY2016 to 16,374 in FY2017 for a 35 percent increase and to 22,796 in FY2018 for another 39 percent increase over the previous year.

Figure 11. FY2016 – FY2018 ICE Removals by Criminality



ICE Removals to Ensure National Security and Public Safety

ICE removals of known or suspected gang members and known or suspected terrorists (KST) are instrumental to ICE's national security and public safety missions, and the agency directs significant resources to identify, locate, arrest, and remove these aliens.

ICE identifies gang members and KSTs by checking an alien's background in federal law enforcement databases, interviews with the aliens, and information received from law enforcement partners. This information is flagged accordingly in ICE's enforcement systems. These populations are not mutually exclusive, as an alien may be flagged as both a known or suspected gang member, and a KST. As seen in Figure 12, ICE removals of known and suspected gang members increased by 162 percent in FY2017,

more than doubling from the previous year. These critical removals increased again in FY2018, rising by 9 percent from FY2017. ICE's KST removals also rose significantly between FY2016 and FY2017 (Figure 13), increasing by 67 percent, while removals of aliens in this group were relatively level in FY2018, with ICE conducting 42 removals compared to 45 in FY2017.

Figure 12. FY2016 – FY2018 ICE Removals of Known or Suspected Gang Members

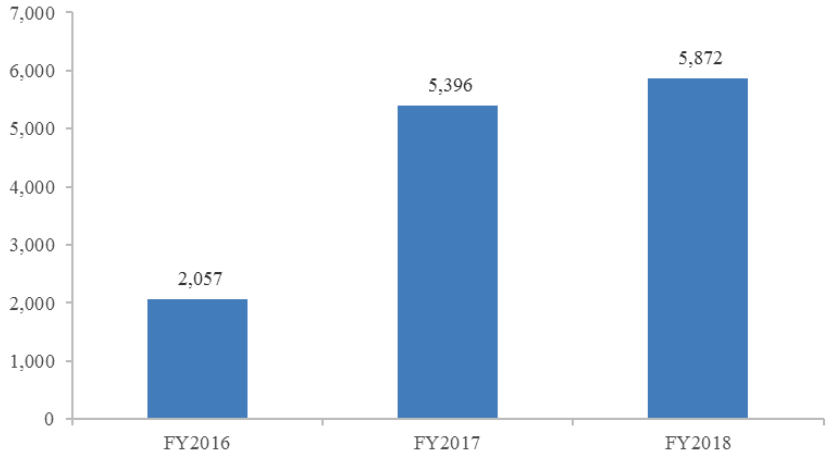
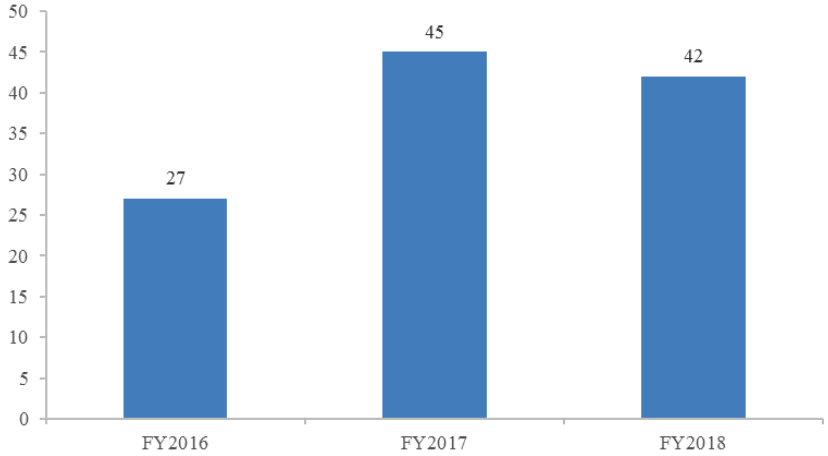


Figure 13. FY2016 – FY2018 ICE Removals of Known or Suspected Terrorists



Removals of USBP Family Unit and Unaccompanied Alien Children Apprehensions

Since the initial surge at the Southwest border SWB) in FY2014, there has been a significant increase in the arrival of both family units (FMUAs) and unaccompanied alien children (UACs). In FY2018, approximately 50,000 UACs and 107,000 aliens processed as FMUAs were apprehended at the SWB by the U.S. Border Patrol (USBP). These numbers represent a marked increase from FY2017, when approximately 41,000 UACs and 75,000 FMUA were apprehended by USBP. While USBP routinely turns FMUA apprehensions over to ICE for removal proceedings, ICE is severely limited by various laws and judicial actions from detaining family units through the completion of removal proceedings. For UAC apprehensions, DHS is responsible for the transfer of custody to the Department of Health and Human Services (HHS) within 72 hours, absent exceptional circumstances. HHS is similarly limited in their ability to detain UACs through the pendency of their removal proceedings. When these UACs are released by

Enforcement and Removal Operations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR THE RECORD

FROM: David A. Marin
Acting Deputy Executive Associate Director

SUBJECT: U.S. Immigration and Customs Enforcement Data Regarding Detention, Alternatives to Detention Enrollment, and Removals as of December 23, 2018, Related to Rulemaking Entitled, Procedures to Implement Section 235(b)(2)(C) of the Immigration and Nationality Act, RIN 1651-AB13

Purpose:

This memorandum includes detention, alternatives to detention enrollment, and removal data as of December 23, 2018. The data in the tables below were compiled by U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations as part of periodic internal U.S. Department of Homeland Security reporting a snapshot in time. This data is derived from various manual and systematic data sources to report ongoing operations. This memorandum is intended for inclusion in the administrative record for the above-referenced rulemaking.

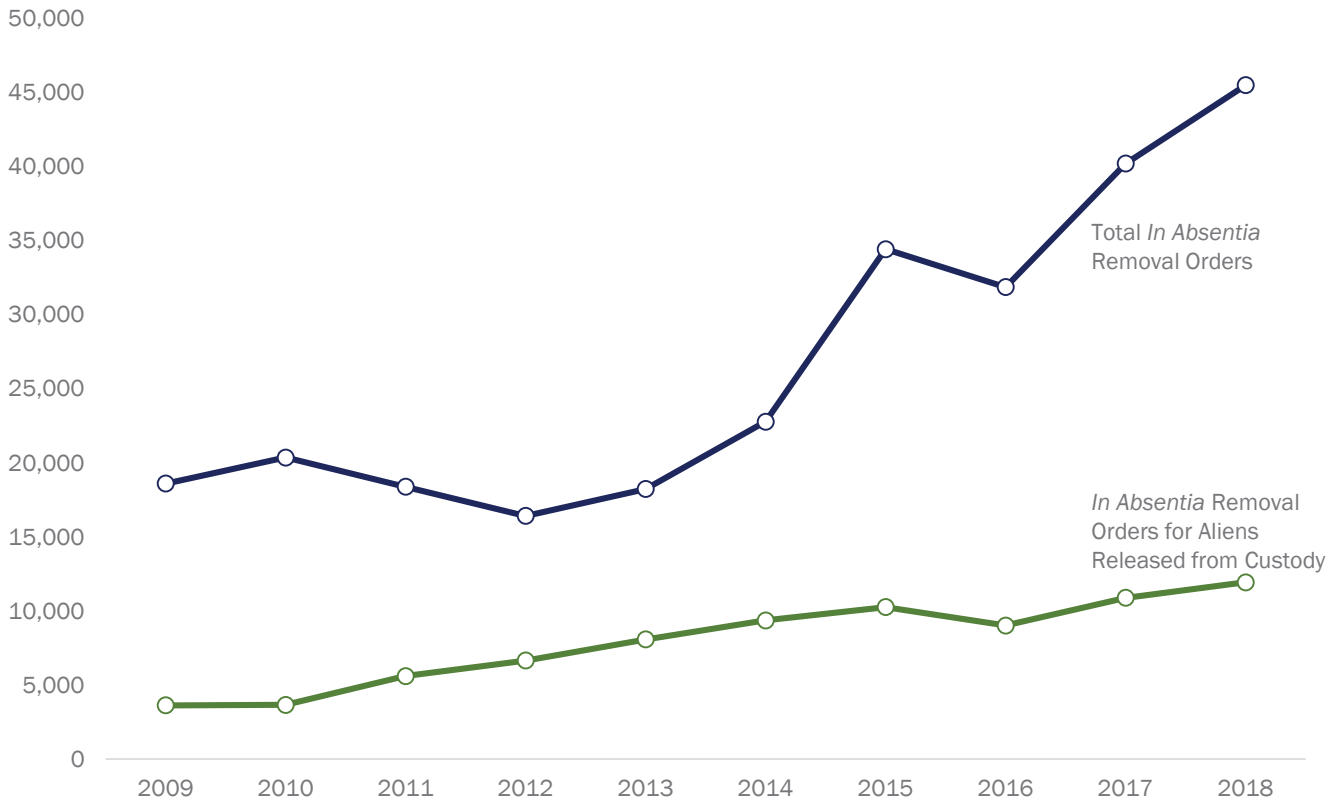
ICE ERO	Adult Removals	Adults Transferred	UAC Transferred
Number of Individuals	824	438	300
Completion Date	12/20/2018	12/20/2018	12/23/2018
Flights	8	4	N/A

UAC Pending Transport	FMUA Pending Transport
210	6

ICE ERO	Daily Adult Population	FMUA Population (FRC)	ATD Enrollment
Number of Individuals	45,150	1,711	93,635
Capacity	43,324	~2,500	81,024
Percent Capacity	104%	68%	116%

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS

In Absentia Removal Orders[1]



FY	Total	Average Per Month	*In Absentia* Removal Orders for Aliens Released from Custody[2]	Average Number of *In Absentia* Removal Orders for Aliens Released from Custody
2009	18,593	1,549	3,626	302
2010	20,354	1,696	3,665	305
2011	18,377	1,531	5,603	467
2012	16,413	1,368	6,656	555
2013	18,222	1,519	8,079	673
2014	22,769	1,897	9,366	781
2015	34,414	2,868	10,256	855
2016	31,847	2,654	9,012	751
2017	40,183	3,349	10,884	907
2018	45,479	3,790	11,928	994

Data Generated: October 24, 2018

[1] *In Absentia* removal orders issued in removal, deportation, and exclusion cases.

[2] Aliens released from custody does not include aliens released from custody prior to the initiation of removal, deportation, or exclusion proceedings.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director
Washington, DC 20529

U.S. Citizenship and Immigration Services

January 28, 2019 **PM-602-0169**

Policy Memorandum

SUBJECT: **Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols**

Purpose

This memorandum provides guidance to immigration officers in U.S. Citizenship and Immigration Services (USCIS) regarding the implementation of the Migrant Protection Protocols (MPP), including supporting the exercise of prosecutorial discretion by U.S. Customs and Border Protection (CBP). This memorandum follows the Secretary of Homeland Security's January 25, 2019, memorandum, *Policy Guidance for Implementation of the Migrant Protection Protocols*.

Background

Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) provides that aliens arriving by land from a foreign contiguous territory (i.e., Mexico or Canada)—whether or not at a designated port of entry—generally may be returned, as a matter of enforcement discretion, to the territory from which they are arriving pending a removal proceeding under Section 240 of the INA.

On December 20, 2018, Secretary of Homeland Security Kirstjen M. Nielsen announced that the Department of Homeland Security (DHS) will begin the process of implementing Section 235(b)(2)(C) of the INA on a large scale. That statutory provision allows for the return of certain aliens to a contiguous territory pending Section 240 removal proceedings before an immigration judge. Under the MPP, aliens who are nationals and citizens of countries other than Mexico (third-country nationals) arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings as a matter of prosecutorial discretion. *Accord* 8 C.F.R. § 235.3(d).

In her January 25, 2019, memorandum, Secretary Nielsen issued general policy guidance concerning DHS's implementation of Section 235(b)(2)(C) at the southern border consistent with the MPP. Memorandum from Kirstjen M. Nielsen, Secretary of Homeland Security, *Policy*

Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019) (Jan. 25, 2019, Memorandum). The Secretary advised that such authority should be implemented consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention)—as incorporated in the 1967 Protocol Relating to the Status of Refugees[1]—and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[2]

The Secretary specifically advised that, consistent with those principles, "a third-country national should not be involuntarily returned to Mexico pursuant to Section 235(b)(2)(C) of the INA if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA), or would more likely than not be tortured, if so returned pending removal proceedings." Jan. 25, 2019, Memorandum at 3-4. Article 33 of the 1951 Convention and Article 3 of the CAT require that the individual demonstrate that he or she is "more likely than not" to face persecution on account of a protected ground or torture, respectively.[3] That is the same standard used for withholding of removal and CAT protection determinations. *See* 8 C.F.R. § 208.16(b)(2), (c)(2); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999).

At the same time, under the MPP, the United States "understands that, according to the Mexican law of migration, the Government of Mexico will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law," including the 1951 Convention and the CAT. Letter from Chargé d'Affaires John S. Creamer to Sr. Jesús Seade, Subsecretaría para América del Norte, Secretaría de Relaciones Exteriores (Dec. 20, 2018). Further, "[t]he United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018."[4]

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[1] The United States is not a party to the 1951 Convention Relating to the Status of Refugees but is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention. Article 33 of the 1951 Convention provides that: "[n]o Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[2] Article 3 of the CAT states, "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *See also* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242(a) (8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

[3] *See INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Auguste v. Ridge*, 395 F.3d 123, 132-33 (3d Cir. 2005); *Pierre v. Gonzales*, 502 F.3d 109, 115 (2d Cir. 2007); *see also* Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, II(2), *available at* https://www.congress.gov/treaty-document/100th-congress/20/resolution-text; Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999).

[4] Jan. 25, 2019, Memorandum at 4.

The Secretary also advised that, where an alien affirmatively states a concern that he or she may face a risk of persecution on account of a protected ground or torture upon return to Mexico, CBP should refer the alien to USCIS, which will conduct an assessment to determine whether it is more likely than not that the alien will be subject to persecution or torture if returned to Mexico. The Secretary directed USCIS to issue appropriate internal procedural guidance to carry out this policy. That guidance is explained below.

Guidance

Upon a referral by a DHS immigration officer of an alien who could potentially be amenable to the MPP, the USCIS asylum officer should interview the alien to assess whether it is more likely than not that the alien would be persecuted in Mexico on account of his or her race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA),[5] or that the alien would be tortured in Mexico. The process or procedures described in INA Sections 208, 235(b)(1), (3), and 241(b)(3) and their implementing regulations, as well as those in the CAT regulations, do not apply to the MPP assessments.

A. Interview

Upon receipt of such a referral, the USCIS officer should conduct the MPP assessment interview in a non-adversarial manner, separate and apart from the general public. The purpose of the interview is to elicit all relevant and useful information bearing on whether the alien would more likely than not face persecution on account of a protected ground, or torture, if the alien is returned to Mexico pending the conclusion of the alien's Section 240 immigration proceedings.

The officer should conduct the assessment in person, via video teleconference, or telephonically. At the time of the interview, the USCIS officer should verify that the alien understands that he or she may be subject to return to Mexico under Section 235(b)(2)(C) pending his or her immigration proceedings. The officer should also confirm that the alien has an understanding of the interview process. In addition, provided the MPP assessments are part of either primary or secondary inspection, DHS is currently unable to provide access to counsel during the assessments given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals.[6]

In conducting the interview, the USCIS officer should take into account the following and other such relevant factors as:

[5] The disqualifying grounds for *non-refoulement* vis-à-vis the 1951 Convention and 1967 Protocol are reflected in Section 241(b)(3)(B) of the INA. However, the reference to Section 241(b)(3)(B) should not be construed to suggest that Section 241(b)(3)(B) applies to MPP.
[6] *See* 8 C.F.R. § 292.5(b).

1. The credibility of any statements made by the alien in support of the alien's claim(s) and such other facts as are known to the officer. That includes whether any alleged harm (i.e., the alleged persecution or torture) could occur in the region in which the alien would reside in Mexico, pending their removal proceedings, or whether residing in another region of Mexico to which the alien would have reasonable access could mitigate against the alleged harm;

2. Commitments from the Government of Mexico regarding the treatment and protection of aliens returned under Section 235(b)(2)(C) (including those set forth in the Government of Mexico's statement of December 20, 2018),[7] the expectation of the United States Government that the Government of Mexico will comply with such commitments,[8] and reliable assessments of current country conditions in Mexico (especially those provided by DHS and the U.S. Department of State); and

3. Whether the alien has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA.

B. Assessment

Once a USCIS officer assesses whether the alien, if returned to Mexico, would be more likely than not persecuted in Mexico on account of a protected ground (or has engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA), or would be more likely than not tortured in Mexico, the assessment shall be reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion. DHS staff should inform the alien of the outcome of the final assessment. USCIS should then provide its assessment to CBP for purposes of exercising prosecutorial discretion in connection with one or more of the decisions as to whether to place the alien in expedited removal or to issue a Notice to Appear for the purpose of placement directly into Section 240 removal proceedings, and if the latter, whether to return the alien to Mexico pending the conclusion of Section 240 proceedings under Section 235(b)(2)(C) pursuant to the MPP, and, when appropriate, to U.S. Immigration and Customs Enforcement for purposes of making discretionary custody determinations for aliens who are subject to detention and may be taken into custody pending removal proceedings.

If an officer makes a positive MPP assessment (i.e., that an alien is more likely than not either to be persecuted in Mexico on account of a protected ground and has not engaged in criminal, persecutory, or terrorist activity described in Section 241(b)(3)(B) of the INA, or to be tortured in Mexico), USCIS is *not* granting withholding of removal or protection from removal under the CAT regulations. Nor shall there be further administrative review, reopening, or reconsideration of the assessment by USCIS. The purpose of the assessment is simply to assess whether the alien meets one of the eligibility criteria under the MPP, pursuant to Section 235(b)(2)(C).

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[7] Secretaría de Relaciones Exteriores, *Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act* (Dec. 20, 2018); *see* Jan. 25, 2019, Memorandum at 2-3.

[8] *See* Jan. 25, 2019, Memorandum at 4.

Disclaimer

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

Contact Information

Questions relating to this memorandum must be directed through the appropriate channels to the Asylum Division Headquarters point of contact.

Enforcement and Removal Operations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

February 12, 2019

MEMORANDUM FOR: Field Office Directors
Enforcement and Removal Operations

FROM: Nathalie R. Asher
Acting Executive Associate Director

SUBJECT: Migrant Protection Protocols Guidance

Purpose

This memorandum provides operational guidance to impacted Enforcement and Removal Operations (ERO) field offices to ensure that the Migrant Protection Protocols (MPP) are implemented in accordance with applicable law, the Secretary's January 25, 2019, memorandum, *Policy Guidance for Implementation of the Migrant Protection Protocols*, Acting Director Vitiello's February 12, 2019, memorandum of the same title, and other applicable policies and procedures.

Background

On January 25, 2019, Secretary Nielsen issued a memorandum entitled *Policy Guidance for Implementation of the Migrant Protection Protocols*, in which she provided guidance for the implementation of the MPP, an arrangement between the United States and Mexico to address the migration crisis along our southern border announced on December 20, 2018. Thereafter, on February 12, 2019, Deputy Director and Senior Official Performing the Duties of the Director Vitiello issued U.S. Immigration and Customs Enforcement (ICE) Policy Memorandum 11088.1, *Implementation of the Migrant Protection Protocols*, announcing that operational implementation of MPP began at the San Ysidro port of entry on or about January 28, 2019, and directing that ICE program offices issue further guidance to ensure that the MPP is implemented in accordance with the Secretary's memorandum, applicable law, and policy guidance and procedures.

Discussion

Under section 235(b)(2)(C) of the Immigration and Nationality Act (INA), the U.S. Department of Homeland Security (DHS) may, in its discretion, with regard to certain applicants for admission who are "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, . . . return the alien[s] to that territory pending a proceeding under [INA section] 240."

return the alien to Mexico pending removal proceedings pursuant to section 235(b)(2)(C) of the INA, as detailed in ICE Policy Memorandum 11088.1. Aliens processed under the MPP will be issued a Notice to Appear (NTA) by CBP and returned by CBP to Mexico to await their removal proceedings.

Aliens returned to Mexico under the MPP pursuant to section 235(b)(2)(C) of the INA will be required to report to a designated POE on their scheduled hearing dates and will be paroled into the United States by CBP for purposes of their hearings. As further explained in the next section, CBP will then transfer the aliens to ERO custody for transportation to designated Executive Office for Immigration Review (EOIR) court locations for their hearings.

If the alien is granted relief or protection from removal by the immigration judge or is ordered removed from the United States, and appeal is not reserved by either party, the alien will be processed in accordance with standard procedures applicable to final order cases. If the immigration judge continues proceedings or enters an order upon which either party reserves appeal, ERO will transport the alien back to the POE, whereupon CBP officers will take custody of the alien to return the alien to Mexico to await further proceedings.

MPP implementation began at the San Ysidro port of entry (POE) on or about January 28, 2019, and it is intended that MPP implementation will expand to additional locations along the southern border. This memorandum provides general procedural guidance applicable to ERO personnel in the implementation of the MPP. Field Office Directors should each assign a lead POC for MPP issues arising within their AORs and issue local operational guidance applicable to their individual areas of responsibility as the MPP is phased in.

Hearing Transportation and Custody

Before returning an alien to Mexico under the MPP to await his or her removal proceedings, CBP will provide the alien instructions explaining when and to which POE to report to attend his or her hearing. On the day of the hearing, an alien returned to Mexico under the MPP will arrive at the POE at the time designated—generally, a time sufficient to allow for CBP processing, pre-hearing consultation with counsel (if applicable), and timely appearance at hearings. Once CBP conducts POE processing (including verification of identity and a brief medical screening), for hearings set at immigration courts located in the interior of the United States, CBP will parole the alien into ICE's custody under INA section 212(d)(5)(A), and ERO will maintain physical custody of the alien during transportation of the alien from the POE to the designated immigration court location, making appropriate use of contract support and complying with applicable requirements concerning the transportation of aliens.

In cases in which ICE performs that transportation function between the POE and an inland immigration court, the alien is detained in ICE custody as an arriving alien.[1] ERO should coordinate locally with CBP officials at POEs where the MPP has been implemented, so that the

[1] Aliens participating in the MPP who CBP initially encounters at a POE are "arriving aliens" within the meaning of 8 C.F.R. §§ 1.2 and 1001.1(q) (defining "arriving alien" to include "an applicant for admission coming … into the United States at a port-of-entry"). Moreover, on their hearing dates before an immigration judge, aliens who CBP initially encountered *between* the POEs will come *to* a POE to attend their hearings, placing them within the "arriving alien" definition, as well.

daily volume of MPP cases can be monitored and any transportation needs may be properly met. ERO should also coordinate locally with EOIR concerning security arrangements at the immigration court location. While EOIR is responsible for security inside the courtroom, and ERO should generally defer to immigration judges' wishes concerning their presence in the courtroom, DHS is ultimately responsible for maintaining custody of the alien. If an alien is ordered released by an immigration judge, ERO should coordinate closely with the ICE Office of the Principal Legal Advisor (OPLA) regarding how to proceed with the case. After an alien's removal hearing is over, ERO will transport him or her back to the POE for return to Mexico or to retrieve property, as applicable. If the alien has received a final grant of relief or an administratively final order of removal, ERO will coordinate with CBP and make appropriate custody determinations.

Access to Counsel

Section 240(b)(4)(A) of the INA provides that an alien in removal proceedings before an immigration judge "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." Similarly, section 292 provides that "[i]n any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose." Accordingly, in order to facilitate access to counsel for aliens subject to return to Mexico under the MPP who will be transported to their immigration court hearings by ERO, ERO will depart from the POE with the alien at a time sufficient to ensure arrival at the immigration court not later than one hour before his or her scheduled hearing time in order to afford the alien the opportunity to meet in-person with his or her legal representative.

Non-Refoulement Considerations

In accordance with Secretary Nielsen's January 25, 2019, memorandum, DHS should implement the MPP consistent with the *non-refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Specifically, an alien should not be involuntarily returned to Mexico under the MPP if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion (unless such alien has engaged in criminal, persecutory, or terrorist activity described in section 241(b)(3)(B) of the INA), or would more likely than not be tortured, if so returned pending removal proceedings.

If an alien subject to the MPP affirmatively states to an ERO officer that he or she has a fear of persecution or torture *in Mexico*, or a fear of return *to Mexico*, at any point while in ERO custody, ERO will notify CBP of the alien's affirmative statement so that CBP officials at the POE may refer the alien to a U.S. Citizenship and Immigration Services (USCIS) asylum officer for screening before any return to Mexico to assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico in accordance with guidance issued by the Director of USCIS.

If USCIS assesses that such an alien is more likely than not to face persecution or torture in Mexico, ERO will determine whether the alien may be maintained in custody or paroled, or if another disposition is appropriate. Such an alien may not be subject to expedited removal; however, and may not be returned to Mexico to await further proceedings.[2]

Recordkeeping and Reporting

MPP aliens booked in and out of ICE custody must be appropriately documented in the Enforce Alien Detention Module (EADM) and monitored per a final Form I-216, *Record of Person and Property Transfer*. For MPP aliens booked into ICE custody, the comment "out to court pursuant to MPP," must be added to the comments section of EADM.

EADM records for MPP aliens booked out of ICE custody will need to reflect the appropriate court dispositions. Comments in EADM should reflect "MPP, Returned to the POE for Future Hearing;" "MPP, Granted Relief, Released from Custody;" "MPP, Claimed Fear of Mexico, returned to the POE;" or "MPP, Ordered Removed," or similar comments indicating an MPP disposition as appropriate.

Disclaimers

Except as specifically provided in relation to the MPP, existing policies and procedures for processing and removing aliens remain unchanged. That applies to record-keeping responsibilities as well as removal authority and responsibility. The MPP does not change ERO's removal operations, and removable aliens will be processed in accordance with standard practices and procedures.

This document is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Likewise, this guidance places no limitations on the otherwise lawful enforcement or litigative prerogatives of DHS.

[2] In MPP cases where an immigration judge grants withholding or deferral of removal *to Mexico* and appeal is reserved, ERO should confer with OPLA about appropriate next steps prior to any return under INA section 235(b)(2)(C).