FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB; CENTRAL [illegible] UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER,

Plaintiffs-Appellees,

v.

CHAD WOLF, Acting Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; KENNETH T. CUCCINELLI, Acting Director, U.S. Citizenship and Immigration Services, in his official capacity; ANDREW DAVIDSON, Acting Chief of Asylum Division, U.S. Citizenship and Immigration Services, in his official capacity; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, Executive Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, in his official

D.C. No.
3:19-cv-00807-
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OPINION

capacity; U.S. CUSTOMS AND BORDER PROTECTION; MATTHEW T. ALBENCE, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION

SUMMARY*

Immigration /Preliminary Injunctions

The panel affirmed the district court's grant of a preliminary injunction setting aside the Migrant Protection Protocols ("MPP"), under which non-Mexican asylum seekers who present themselves at the southern border of the United States are required to wait in Mexico while their asylum applications are adjudicated.

After the MPP went into effect in January 2019, individual and organizational plaintiffs sought an injunction, arguing, *inter alia*, that the MPP is inconsistent with the Immigration and Nationality Act ("INA"), and that they have a right to a remedy under the Administrative Procedure Act ("APA"). The district court issued a preliminary injunction setting aside the MPP.

The Government appealed and requested an emergency stay in this court pending appeal. In three written opinions, a motions panel unanimously granted the emergency stay. In a per curiam opinion, the motions p

concurred only in the result, arguing that the MPP was inconsistent with 8 U.S.C. § 1225(b).

The current panel first noted that the individual plaintiffs, all of whom have been returned to Mexico under the MPP, obviously have standing. The panel also concluded that the organizational plaintiffs have standing, noting their

The panel next concluded that plaintiffs had shown a likelihood of success on their claim that the MPP does not comply with the United States' treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b). The panel explained that refoulement occurs when a government returns aliens to a country where their lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. Further, the United States is obliged by treaty—namely, the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees—and implementing statute—namely, § 1231(b)—to protect against refoulement of aliens arriving at the country's borders.

Plaintiffs argued that the MPP provides insufficient protection against refoulement. First, under the MPP, to stay in the United States during proceedings, an asylum seeker must show that it is "more likely than not" that he or she will be persecuted in Mexico, but that standard is higher than the ordinary standing in screening interviews, in which aliens need only establish a "credible fear," which requires only a "significant possibility" of persecution. Second, an asylum seeker under the MPP is not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; to the assistance of a lawyer during the hearing; or to any review of the asylum officer's determination. Third, an asylum officer acting under the MPP does not ask an asylum seeker whether he or she fears returning to Mexico; instead, asylum seekers must volunteer, without any prompting, that they fear returning. The Government disagreed with plaintiffs on the grounds that: 1) § 1231(b) does not encompass a general non-

refoulement obligation; and 2) the MPP satisfies non-refoulement obligations by providing sufficient procedures.

The panel rejected both arguments. With respect to the second argument, the panel noted that the Government pointed to no evidence supporting its speculations either that aliens will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico. The panel also noted that the Government

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Georgia; Michelle P. Gonzalez, Southern Poverty Law Center, Miami, Florida; Sean Riordan and Christine P. Sun, American Civil Liberties Union Foundation of Northern California Inc., San Francisco, California; Blaine Bookey, Karen Musalo, Eunice Lee, Kathryn Jastram, and Sayoni Maitra, Center for Gender and Refugee Studies, San Francisco, California; Steven Watt, ACLU Foundation Human Rights Program, New York, New York; for Plaintiffs-Appellees.

Adeel A. Mangi, Muhammad U. Faridi, Elizabeth Riordan Hurley, W. Robert Fair, and A. Robert Quirk, Patterson Belknap Webb & Tyler LLP, New York, New York, for Amicus Curiae Local 1924.

Alan E. Schoenfeld and Olga Musayev, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York; Julia Prochazka, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts; Harold Hongju Koh, Rule of Law Clinic, Yale Law School, New Haven, Connecticut; for Amici Curiae Former U.S. Government Officials.

Xiao Wang, Rakesh Kilaru, Aleshadye Getachew, and Sophia Cooper, Wilkinson Walsh & Eskovitz LLP, Washington, D.C.; Chanakya A. Sethi, Wilkinson Walsh & Eskovitz LLP, New York, New York; for Amici Curiae Amnesty InternatioKilaru,

Ana C. Reyes, Williams & Connolly LLP, Washington, D.C.; Alice Farmer, United Nations High Commissioner for Refugees, Washington, D.C.; for Amicus Curiae United Nations High Commissioner.

Permanent Residents] seeking admission," and "aliens with an advance parole document or in parole status."

DHS issued guidance documents to implement the MPP. Under this guidance, asylum seekers who cross the border and are subject to the MPP are given a Notice to Appear in immigration court and returned to Mexico to await their court date. Asylum seekers may be

Live in Fear in Mexico, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/us/politics/asylum-united-states-migrants-mexico.html; Alicia A. Caldwell, *Trump's Return-to-Mexico Policy Overwhelms Immigration Courts*, WALL STREET J. (Sept. 5, 2019), https://www.wsj.com/articles/trumps-return-meutcu-

East Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 765–67 (9th Cir. 2018), given their decreased ability to carry out their core missions as well as the diversion of their resources, both caused by the MPP. *See Innovation Law Lab*, 366 F. Supp. at 1120–22. Because *East Bay Sanctuary Covenant* was a decision by a motions panel on an emergency stay motion, we are not obligated to follow it as binding precedent. *See* discussion, *infra*, Part III. However, we are persuaded by its reasoning and hold that the organizational plaintiffs have Article III standing.

II. Proceedings in the District Court

Plaintiffs filed suit in district court seeking an injunction, alleging, *inter alia*, that the MPP is inconsistent with the Immigration and Nationality Act ("INA"), specifically 8 U.S.C. §§ 1225(b) and 1231(b), and that they have a right to a remedy under 5 U.S.C. § 706(2)(A). Section 706(2)(A) provides, "The reviewing court shall . . . 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." (Internal numbering omitted.)

The district court held that plaintiffs had shown a likelihood of success on the merits of their claim that the MPP is inconsistent with § 1225(b). *Id.* at 1123. The Government contended that the MPP is authorized by § 1225(b)(2). Plaintiffs argued, however, that they are arriving aliens under § 1225(b)(1

> On its face, . . . the

unanimously granted the emergency stay on May 7. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

In a per curiam opinion, the motions panel p

Judge Fletcher emphasized the preliminary nature of the emergency stay proceedings before the motions panel, writing, "I

V. Likelihood of Success on the Merits

A. Effect of the Motions Panel's Decision

A preliminary question is whether a merits panel is bound by the analysis of a motions panel on a question of lapPsˆ€À

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aspect of the MPP should have been adopted through notice-and-comment rulemaking.

1. Return to Mexico

The essential feature of the MPP is that non-Mexican asylum seekers who arrive at a port of entry along the United States' southern border must be returned to Mexico to wait while their asylum applications are adjudicated. Plaintiffs contend that the requirement that they wait in Mexico is inconsistent with 8 U.S.C. § 1225(b). The government contends, to the contrary, that the MPP is consistent with

(A) Screening

(i) In general

> If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

> If an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an

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. . .

(ii) Referral of certain aliens

> If the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.

. . .

(2) Inspection of other aliens

(A) In general

> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration 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 proceeding under section 1229a of this title.

(B) Exception

> Subparagraph (A) FÆRà

> **(ii)** to whom paragraph (1) applies, or
>
> **(iii)** who is a stowaway.
>
> **(C) Treatment of aliens arriving from contiguous territory**
>
> In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

There are two categories of "applicants for admission" under § 1225. § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).

Applicants described in § 1225(b)(1) are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof. Applicants described in § 1225(b)(2) are in an entirely separate category. In the words of the statute, they are "other aliens." § 1225(b)(2) (heading). Put differently, again in the words of the statute, § (b)(2) applicants are applicants "to whom paragraph [(b)](1)" does not apply. § 1225(b)(2)(B)(ii). That is, § (b)(1) applicants are those who are inadmissible on either of the two grounds specified in that subsection. Section (b)(2) applicants are all other inadmissible applicants.

Section (b)(1) applicants are more numerous than § (b)(2) applicants, but § (b)(2) is a broader category in the sense that § (b)(2) applicants are inadmissible on more grounds than § (b)(1) applicants. Inadmissable applicants under § (b)(1) are aliens traveling with fraudulent documents (§ 1182(a)(6)(C)) or no documents (§ 1182(a)(7)). By contrast, inadmissable applicants under § (b)(2) include, *inter alia*, aliens with "a communicable disease of public health significance" or who are "drug abuser[s] or addict[s]" (§ 1182(a)(1)(A)(i), (iv)); aliens who have "committed . . . a crime involving moral turpitude" or who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance" (§ 1182(a)(2)(A)(i)); aliens who "seek to enter the United States" (§ 1182(a)(3)(A)(i)); aliens

Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018) (emphasis added) (citations omitted).

Even more recently, the Attorney General of the United States, through the Board of Immigration Appeals, drew the same distinction and briefly described the procedures applicable to the two categories:

> Under section 235 of the proced • "ô¦V6Æ–6&ÆRFòF†RGvò6FVv÷&–W3

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§ (b)(2) applicant is "clearly and beyond a doubt entitled to be admitted," she or he "shall be detained" for a removal proceeding under § 1229a. § 1225(b)(2)(A). Subparagraph (A) is "[s]ubject to subparagraphs (B) and (C)." *Id.* Subparagraph (B) tells us that subparagraph (A) does not apply to three categories of aliens—"crewm[e]n," § (b)(1) applicants, and "stowaway[s]." § 1225(b)(2)(B). Finally, subparagraph (C) tells us that a § (b)(2) applicant who arrives "on land . . . from a foreign territory contiguous to the United States," instead of being "detained" under subparagraph (A) pending his or her removal proceeding under § 1229a, may be "returned" to that contiguous territory pending that proceeding. § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in § 1225(b)(2), in subparagraph (B)(ii). That subparagraph specifies that subparagraph (A)—which automatically entitles § (b)(2) applicants to regular removal proceedings under § 1229a—does not apply to § (b)(1) applicants.

The "return-to-a-contiguous-territory" provision of § 1225(b)(2)(C) is thus available only for § (b)(2) applicants. There is no plausible way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government's longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.

The Government nonetheless contends that § (b)(2)(C) authorizes the return to Mexico not only of § (b)(2) applicants, but also of § (b)(1) applicants. The Government makes essentially three arguments in support of this contention. None is persuasive.

needs some way to avoid giving regular removal proceedings to all § (b)(1)

same manner both times to refer to the application of subparagraph (A). The word is not used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS.

The Government's third argument is based on the supposed culpability of § (b)(1) applicants.

describe applicants who are inadmissible because they lack required documents rather than because they have a criminal history or otherwise pose a danger to

Blue Brief at 37–38 (emphasis in original).

We need not look far to discern Congress's motivation in authorizing return of § (b)(2) applicants but not § (

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1967 Protocol. "If one thing is clear from the legislative history of the . . . entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). The 1980 Act included, among other things, a provision designed to implement Article 33 of the 1951 Convention. After recounting the history behind 8 U.S.C. § 1253(h)(1), part of the 1980 Act, the Supreme Court characterized that section as "parallel[ing] Article 33," the anti-refoulement provision of the 1951 Convention. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

Section 1253(h)(1) provided, in relevant part, "The Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion." *Id.* at 419 (emphasis added). The current version is § 1231(b)(3)(A): "[T]he Attorney General *may not remove* an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." (Emphasis added.) The words "deport or return" in the 1980 version of the section were replaced in 1996 by "remove" as part of a general statutory revision under IIRIRA. Throughout IIRIRA, "removal" became the new all-purpose word, encompassing "deportation," "exclusion," and "return" in the earlier statute. *See, e.g.*, *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) ("IIRIRA eliminated the distinction between deportation and exclusion proceedings, replacing them with a new, consolidated category—'removal.'").

Plaintiffs point out several features of the MPP that, in their view, provide insufficie

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> have a substantial and well-grounded basis for claiming that he is likely to be persecuted in Mexico, that alien will have every incentive to raise that fear at the moment he is told that he will be returned.

Blue Brief at 45. However, the Government points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico.

The Government further asserts, again without supporting evidence, that any violence that returned aliens face in Mexico is unlikely to be violence on account of a protected ground—that is, violence that constitutes persecution. The Government writes:

> [T]he basic logic of the contiguous-territory-return statute is that aliens generally do not face *persecution* on account of a protected status, or torture, in the country from which they happen to arrive by land, as opposed to the home country from which they may have fled. (International law guards against torture and persecution on account of a protected ground, not random acts of crime or generalized violence.)

Blue Brief at 40–41 (emphasis in original).

Plaintiffs, who are aliens returned to Mexico under the MPP, presented sworn declarations to the district court

directly contradicting the unsupported speculations of the Government.

Several declarants described violence and threats of violence in Mexico. Much of the violence was directed at the declarants because they were non-Mexican—that is, because of their nationality, a protected ground under asylum law. Gregory Doe wrote in his declaration:

> I did not feel safe at Benito Juarez [a migrant shelter] because the neighbors kept trying to attack the migrant community. The people who lived near the shelter tried to hurt us because they did not want us in their country. . . .
>
> At El Barretal [another migrant shelter], I felt a little more secure because we had a high wall surrounding us. Even so, one night someone threw a tear gas bomb into the shelter. When I tried tPhen

> neighborhood in Tijuana] in the middle of the night because a group of Mexicans threw stones at us and more people were gathering with sticks and other weapons to try to hurt us.

Christopher Doe wrote:

> The Mexican police and many Mexican citizens believe that Central Americans are all criminals. They see my dark skin and hear my Honduran accent, and they automatically look down on me and label me as a criminal. I have been stopped and questioned by the Mexican police around

. . .

> On Wednesday, January 30, 2019, I was attacked and robbed by two young Mexican men. They pulled a gun on me from behind and told me not to turn around. They took my phone and told me that they knew I was Honduran and that if they saw me again, they would kill me. Migrants in Tijuana are always in danger[.]

Some of the violence in Mexico was threatened by persecutors from the aliens' home countries, and much of that violence was on account of protected grounds—political opinion, religion, and social group. Gregory Doe wrote:

> I am also afraid the Honduran government will find me in Mexico and harm me. Even outside the country, the Honduran government often works with gangs and criminal networks to punish those who oppose their policies. I am afraid that they might track me down.

Dennis Doe, who had fled the gang "MS-13" in Honduras, wrote:

> In Tijuana, I have seen people who I believe are MS-13 gang members on the street and on the beach. They have tattoos that look like MS-13 tattoos . . . and they dress like MS-13 members with short sleeved button up shirts. I know that MS-13 were searching for people who tried to escape them with at least one of the caravans. This makes me afraid that the

people who wh

Two declarants wrote that asylum

said that

for implementing [the MPP]," also submitted an amicus brief. Local 1924 Amicus Brief at 1. Local 1924 writes in its brief:

> Asylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the

suffer irreparable harm, the balance of the equities, and the public interest in determining whether a preliminary injunction is justified. *Winter*, 555 U.S. at 20. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

There is a significant likelihood that the individual plaintiffs will suffer irreparable harm if the MPP is not enjoined. Uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum.

The balance of equities favors plaintiffs. On one side is the interest of the Government in continuing to follow the directives of the MPP. However, the strength of that interest is diminished by the likelihood, established above, that the MPP is inconsistent with 8 U.S.C. §§ 1225(b) and 1231(b). On the other side is the interest of the plaintiffs. The individual plaintiffs risk substantial harm, even death, so long as the directives of the MPP are followed, and the organizational plaintiffs are hindered in their ability to carry out their missions.

The public interest similarly favors the plaintiffs. We agree with *East Bay Sanctuary Covenant*:

> On the one hand, the public has
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> interest m *h* an of the *do* *That*
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First, plaintiffs have

constitutional and statutory requirement for uniform immigration law and policy." *Id.* at 1166–67.

Conclusion

We conclude that the MPP is inconsistent with 8 U.S.C. § 1225(b), and that it is inconsistent in part with 8 U.S.C. § 1231(b). Because the MPP is invalid in its entirety due to its inconsistency with § 1225(b), it should be enjoined in its entirety. Because plaintiffs have successfully challenged the MPP under § 706(2)(A) of the APA, and because the MPP directly affects immigration into this country along our southern border, the issuance of a temporary injunction setting aside the MPP was not an abuse of discretion.

We lift the emergency stay imposed by the motions panel, and we affirm the decision of the district court.

AFFIRMED.

FERNANDEZ, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion because I believe that we are bound by the published decision in *Innovation Law Lab v. McAleenan* (*Innovation I*), 924 F.3d 503 (9th Cir. 2019) (per curiam).

More specifically, we are bound by both the law of the circuit and the law of the case. Of course, the rules that animate the former doctrine are not the same as those that animate the latter. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

between motions panel opinions and other opinions; all are entitled to be considered with the same principles of deference by ensuing panels. Thus, any hesitation about whether they should be precedential must necessarily come before the panel decides to publish, not after. As we held in *Lair v. Bullock*, 798 F.3d 736 (9th Cir. 2015):

> Lair contended at oral argument that a motions panel's decision cannot bind a merits panel, and as a result we are not bound by the motions panel's analysis in this case. Not so. We have held that motions panels can issue published decisions. . . . [W]e are bound by a prior three-judge panel's published opinions, and a motions panel's published opinion binds future panels the same as does a merits panel's published opinion.

Id. at 747 (citations omitted). Therefore, the legal determinations in *Innovation I* are the law of the circuit.

We have explained the law of the case doctrine as "a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Jeffries v. Wood*, 114 F.3d 1484, 1488–89 (9th Cir. 1997) (en banc), *overruled on other grounds by Gonzalez*, 677 F.3d at 389 n.4. While we do have discretion to decline application of the doctrine, "[t]he prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling

footnote omitted).[5] We have also indicated that, in general, "our decisions at the preliminary injunction phase do not constitute the law of the case,"[6] but that is principally because the matter is at the preliminary injunction stage and a further development of the factual record as the case progresses to its conclusion may well require a change in the result.[7] Even so, decisions "on pure issues of law . . . are binding." *Ranchers Cattlemen*, 499 F.3d at 1114. Of course, the case at hand has not progressed beyond the preliminary injunction stage. It is still at that stage, and the factual record has not significantly changed between the record at the time of the decision regarding the stay motion and the current record. Therefore, as I see it, absent one of the listed exceptions, which I do not perceive to be involved here, the law of the case doctrine would also direct that we are bound by much of the motions panel's decision in *Innovation I*.

Applying those doctrines:

(1) The individuals and the organizational plaintiffs are not likely to succeed on the substantive claim that the Migrant Protection Protocols directive (the MPP) was not

[5] The majority seems to add a fourth exception, that is, motions panel decisions never constitute the law of the case. That would be strange if they can constitute the law of the circuit, which they can.

[6] *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1074, 1076 n.5 (9th Cir. 2015); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013).

[7] *See Ctr. for Biological Diversity*, 706 F.3d at 1090.

authorized by 8 U.S.C. § 1225(b)(2)(C). *Innovation I*, 924 F.3d at 506–09.

(2) The individuals and organizational plaintiffs are

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Waiting for Asylum in the United States, Migrants Live in Fear in Mexico

cited in Innovation Law Lab v. Wolf
No. 19-15716 archived on February 25, 2020

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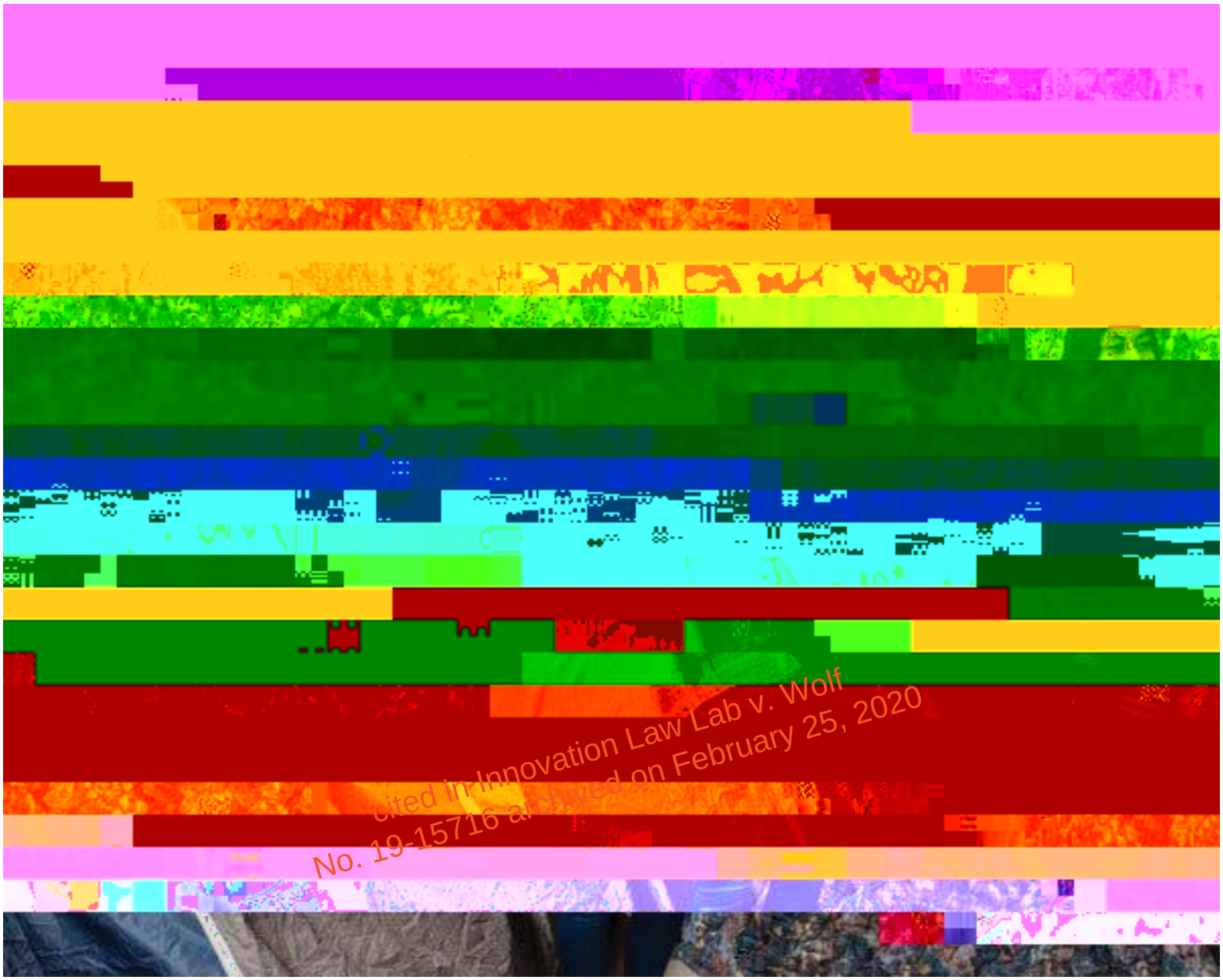
cited in Innovation Law Lab v. Wolf
No. 19-15716 archived on February 25, 2020

Daniela Diaz, 19, who said she was threatened with rape and death by a gang in El Salvador, is living in a shelter in Tijuana as American courts consider her asylum application. John Francis Peters for The New York Times

By Zolan Kanno-Youngs and Maya Averbuch

April 5, 2019

TIJUANA, Mexico — Hoping to convince American immigration officials that his life is in danger, Selvin Alvarado sorted through photographs of men who he said have threatened to kill him.

Mr. Alvarado said he fled Honduras last fall after exposing corruption in

his hometown and was followed into Mexico by an armed group. Once he reached the United States, he believed he would be safe — even if that meant being detained while waiting for asylum.

“I prefer 1,000 times being jailed,” he said last week at a shelter south of the United States border, “than being dead.”

Instead, as part of a newly expanded Trump administration policy, Mr. Alvarado, 29, a father of two, was sent back to Mexico. He has been waiting for weeks to be summoned for an asylum hearing in California.

Hundreds of asylum seekers are expected to be blocked from waiting in the

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convinced the authorities that they had a credible fear of returning to their home nations to remain in the United States while their asylum cases were being considered.

Stories of fleeing violence, extortion and corruption in their home countries do not meet the new standard for entry. Many migrants are also unable to obtain lawyers to represent them in court without first meeting them in the United States.

Mr. Alvarado said he was considering sneaking into the United States if his asylum claim was further delayed.

“I’ll have to do it illegally,” Mr. Alvarado said, holding photographs of the men who he said pursued him from Honduras, through Guatemala and into Tapachula, Mexico. “I’ll have to give up everything.”

For the most part, the policy has been rolled out slowly and quietly.

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When it began at the San Ysidro port of entry in California in late January, only men traveling by themselves from Central America were told to wait in Mexico as their asylum cases wound through the American legal system. The policy has since expanded to stop entire families from waiting in the United States, although unaccompanied children and Mexican citizens will be allowed to enter.

It is now being enforced at border ports at Calexico, Calif., where President Trump traveled on Friday to tour the border, and El Paso. Ms. Nielsen has directed her department to expand the policy to other legal crossing points from Mexico.

The number of border crossings are nowhere as high as in the early 2000s, when as many as 220,000 migrants crossed the border in a month. Ms. Nielsen estimated last month that border officials had stopped as many as 100,000 migrants in March, up from 76,000 in February.

A State Department report released last month acknowledged the

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possibility that the migrants were no safer in Mexico from the same gangs that threatened them in Central America than they had been at home.

That is constantly on the mind of Daniel Nuñez, who was working as a security guard in Honduras when gang members opened fire in October, severely injuring several of his colleagues.

Mr. Nuñez fled to the United States border, where he asked for asylum in Calexico, but he was recently sent back to the Mexican city of Mexicali to wait for his immigration hearing.

The closest American immigration court is 30 minutes away. But Mr. Nuñez was told he had to report for his hearing at the San Ysidro port, a nearly three-hour drive.

He has no car, is sleeping in a shelter with about 370 other people and is trying to figure out how to get to San Ysidro. “I was thinking about that,” he said last week, scratching his head. “How I was going to manage.”

cited in Innovation Law Lab v. Wolf
No. 19-15716 archived on February 25, 2020

In a lawsuit filed in February in federal court in San Francisco, the American Civil Liberties Union accused the government of violating immigration law by returning asylum seekers to Mexico. The Trump administration has maintained it has broad discretion over removal proceedings.

Jacqueline Brown Scott, a lawyer, represents one of the plaintiffs in the case, who is identified in court papers only as Howard Doe for protection. He claims to have fled a drug cartel in Honduras, only to be kidnapped by another cartel in Mexico. He escaped after 15 days and he went to the United States border to seek asylum.

Immigration authorities diverted him to Tijuana. Last week, he appeared in immigration court in San Diego, where Ms. Scott argued that he had a fear of persecution in Mexico. He was sent back again.

“I told them everything, but they didn’t seem to care,” the migrant said in a

text message that was viewed by The New York Times, which is withholding his name for security concerns.

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United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To File Petition for Panel Rehearing (F
  Petition for Rehearing En Banc

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of

- ☐ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ☐ The proceeding involves a question of exceptional importance; or
- ☐ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are
actually and necessarily produced, and that the requested costs wer
expended.

Signature _____ **Date** _____

(use "s/[typed name]" *to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*