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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
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INNOVATION LAW LAB, et al., Plaintiffs, v. KIRSTJEN NIELSEN, et al., Defendants.	Case No. 19

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the MPP, and; (2) even assuming Congress has authorized such returns in general, does the MPP include sufficient safegua any alien to a territory where life or freedom would be threatened In support of their motion for a preliminary injunction, the plaintiffs have sufficiently shown the answer to both

First, the statute that vests DHS with authority in some circumstances to return certain 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 protection

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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

See December

-18. DHS explained that pursuant to the

tates will begin the process of invoking Section 235(b)(2)(C) of the

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* AR 11-15.

> 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

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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 per2s42s4-7(f a)7(li)-13(e)4(ns 4Dico)122f rs42s4-turnq04(s

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

IV. DISCUSSION

A. Justiciability

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 leW*nBT/F1 12 Tf1 0 0 1 79.704 316.49 Tm0 g0 G[( )] TJETQ57.84 46.224 28

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persecution.

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certain other aliens who have not been admitted or paroled
arrive in the United States without specified identity and travel documents, or who have
removed from the United States without
further hearing or review a fear of persecution. 8 U.S.C.
§1225 [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

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
osing prior to the interview and any review by an
immigration judge. §1225 removal under
subparagraph (b)(1) still has substantial procedural safeguards against being removed to a place where he or she may face persecution.

nspection of *other* aliens
that aliens
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).

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*

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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).

Defenda

place aliens eligible for expedited removal into section 1229a proceedings, defendants contend

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) shall not apply to an alien . . . to whom paragraph (1) *applies* nt 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 pract

Id. at 450. The government noted that it

its

Id.

Id.

The *Sanchez-Avila*

might otherwise have, it had not shown the alleged practice of returning aliens to Mexico (or

Id. at

practice of returning applicants for admission at land border ports to Mexico or Canada

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 plainti

Sanchez-Avila was a resident alien commuter whose application for entry was not granted given apparent grounds to exclude hi 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 g02ancongress a19

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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.

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 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
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 showing of harm by arguing the merits contending the individual plaintiffs were all processed consistent[ly] with applicable law had sufficient opportunity to assert any legitimate fears of return to Mexico. As reflected in 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

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