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13 UNITED STATES DISTRICT COURT
14
15 SOUTHERN DISTRICT OF CALIFORNIA

16
17 CRISTIAN DOE, et al.,
18 Petitioners,
19 v.
20 CHAD F. WOLF, Acting Secretary of
21 Homeland Security; et. al.,
22 Respondents.

Case No. 19cv2119 DMS AGS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN RESPONSE TO
PETITIONERS' MOTION FOR A
PRELIMINARY INJUNCTION**

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INTRODUCTION

This Court should deny Petitioners’ extraordinary request for a preliminary injunction affording a sweeping class of aliens unfettered access to counsel in the course of the Government’s discretionary assessment of whether those aliens are amenable to being temporarily returned to Mexico for the duration of their removal proceedings.

To start, Petitioners’ claims are not justiciable. Under 8 U.S.C. § 1252(a)(2)(B)(ii), “no court shall have jurisdiction to review” “any action of the Attorney General or the Secretary of Homeland Security the authority for which is specified ... to be in the discretion of the Attorney General or the Secretary of Homeland Security.” The return decisions at issue are squarely “in the discretion of the ... Secretary of Homeland Security”: the statute authorizing return decisions provides that the agency head “*may* return the alien” pending removal proceedings. 8 U.S.C. § 1225(b)(2)(C). Because return decisions are discretionary and not subject to judicial review, the same must be true for the procedures used to arrive at return decisions. And since Congress precluded judicial review of return decisions, the rule of non-inquiry also forecloses judicial review of Petitioners’ claims.

Even if this Court had jurisdiction over Petitioners’ claims, this Court would need to reject those claims. Petitioners rely exclusively on the right-to-counsel provision in the Administrative Procedure Act (APA), which provides that any “person compelled to appear in person before an agency or representative thereof is entitled to be ... represented” and that a “party is entitled to appear in person or by or with counsel ... in an agency proceeding.” 5 U.S.C. § 555(b). But the Supreme Court has held that in immigration proceedings, the APA is supplanted by the comprehensive framework adduced in the Immigration and Nationality Act (INA). *See Ardestani v. I.N.S.*, 502 U.S. 129, 133 (1991). And even if the APA applied here, its right-to-counsel provision would still plainly not apply. By its terms, that provision applies only when a person is “compelled to appear in person before an agency or representative thereof.” Petitioners were not “compelled” to appear in the relevant sense, and the fear-assessment interviews that they challenge are not “agency proceeding[s]” under the APA. Finally, Petitioners have not carried the exacting

1 burden of showing that the Government's actions are arbitrary and capricious. Petitioners'
2 arbitrary-and-capricious claim faults the Migrant Protection Protocols (MPP) for using
3 procedures that differ from "credible and reasonable [fear] interviews conducted for
4 purposes of seeking asylum or withholding of removal." Mot. 16. But those latter two
5 contexts are materially different and nothing in the law requires the Government to import
6 wholesale the procedures that apply in those contexts to the different MPP context.

7 Petitioners' due-process claims also fail. As unadmitted aliens "temporar[ily]
8 parole[d]" into the United States, Petitioners' "legal status" is identical to aliens at the
9 border of the United States, and Petitioners have only those procedural rights conferred by
10 statute. *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). And even if Petitioners could
11 claim any rights beyond those conferred by statute, they would be minimal and, under the
12 relevant due-process balancing test, would not support the sweeping, burdensome, system-
13 clogging right to counsel that they claim.

14 Finally, Petitioners have not shown that class members will suffer irreparable harm
15 absent preliminary injunctive relief. Because Petitioners have been found to have a fear of
16 returning to Mexico, they can no longer be subject to MPP, and thus, injunctive relief can
17 only be granted upon a showing that "the class" Petitioners propose to certify will suffer
18 irreparable harm. *Meyer v. Portfolio Recovery Assocs., LLC*, No. 11cv1008 AJB (RBB),
19 2011 WL 11712610, at *2 (S.D. Cal. Sept. 14, 2011). Petitioners have failed to make the
20 requisite evidentiary showing. Instead, Petitioners simply suggest that without an
21 injunction, class members "risk[] an erroneous decision" that "could result" in irreparable
22 harm. Mot. 22. Such an unsubstantiated assertion, without more, does not absolve
23 Petitioners of providing clear evidence of irreparable harm that links the injury they
24 complain of to the harm being asserted.

25 Accordingly, the preliminary-injunction motion should be denied.
26
27
28

BACKGROUND

A. MIGRANT PROTECTION PROTOCOLS (MPP)

Congress has enacted comprehensive procedures governing the admission of aliens into the United States, which are enshrined in the INA. At issue here is one such procedure under 8 U.S.C. § 1225, which establishes the rules governing aliens who are “applicants for admission,” *i.e.*, aliens that attempt to enter the United States either at a port of entry, as well as those aliens who are apprehended in the United States after illegally crossing the border. All “applicants for admission ... shall be inspected by immigration officers,” 8 U.S.C. § 1225(a)(3), “during which immigration officers review the individual’s documents.” *AILA v. Reno*, 199 F.3d 1352, 1354 (D.C. Cir. 2000). This process is known as primary inspection or secondary inspection depending upon the amount of “time” the inspection takes. *United States v. Alatorre-Verdugo*, No. CR-170770-TUC-RCC (LAB), 2018 WL 6729664, at *4 (D. Ariz. June 11, 2018).

If an immigration officer finds that an alien is inadmissible, the alien is generally placed “into one of two categories”: an alien subject to expedited removal procedures under section 1225(b)(1), *see* 8 U.S.C. § 1225(b)(1), or an alien subject to full removal proceedings under section 1225(b)(2), *see* 8 U.S.C. § 1225(b)(2). With respect to aliens in the latter category, “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 full removal proceeding. 8 U.S.C. § 1225(b)(2)(A). For those aliens placed in full removal proceedings and who arrive “from a foreign territory contiguous to the United States,” the Executive retains discretion to return those aliens “to that territory pending” their removal proceedings. 8 U.S.C. § 1225(b)(2)(C).

Against this statutory backdrop, the “Department of Homeland Security (DHS) issued the Migrant Protection Protocols (MPP).” *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019). “Under the MPP,” applicants for admission who “are processed for [full] removal proceedings” “wait in Mexico until an immigration judge resolves their” claims. *Id.* The “statutory basis for the MPP” is the “contiguous-territory provision in” 8 U.S.C. § 1225(b)(2)(C). *Id.* at 507.

1 In announcing MPP, the former Secretary made “clear” that she was undertaking
 2 MPP “consistent with all domestic and international legal obligations,” and emphasized
 3 that, for aliens returned to Mexico, the Mexican government has “commit[ted] to
 4 implement essential measures on their side of the border.” MPP Announcement, Dkt. 14-
 5 1 at 2. Under MPP, “if an alien who is potentially amenable to MPP affirmatively states
 6 that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico,
 7 whether before or after they are processed for MPP or other disposition, that alien will be
 8 referred to a USCIS asylum officer for screening ... so that the asylum officer can assess
 9 whether it is more likely than not that the alien will face persecution or torture if
 10 returned to Mexico.” MPP Guiding Principles, Dkt. 14-1 at 18-19. This screening is
 11 known as a non-refoulement interview. *Id.* at 11, 15-16. “If USCIS assesses that an alien
 12 who affirmatively states a fear of return to Mexico is more likely than not to face
 13 persecution or torture in Mexico, the alien may not be processed for MPP,” meaning that
 14 he or she may not be returned to Mexico. *Id.* at 19. Stated differently, an alien should not
 15 be “returned to Mexico ... if the alien would more likely than not be persecuted on account
 16 of race, religion, nationality, membership in a particular social group, or political opinion”
 17 or be “tortured” if “returned pending removal proceedings.” *Id.* at 22. An alien may raise
 18 a fear claim at any point in the MPP process. *Id.* at 18; October 28, 2019 Assessment of
 19 the Migrant Protection Protocols at 8 (“MPP Assessment”).¹

20 When an alien expresses a fear of return to Mexico, the asylum officer “conduct[s]”
 21 the non-refoulement interview “in a non-adversarial manner, separate and apart from the
 22 general public.” USCIS Memo, Dkt. 14-1 at 15. “The purpose of the interview is to elicit
 23 all relevant and useful information bearing on whether the alien would more likely than
 24 not face persecution on account of a protected ground, or torture, if the alien is returned to
 25 Mexico pending the conclusion of the alien’s” full removal proceedings. *Id.* Interviews
 26

27 ¹ Available at
 28 https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (last visited, December 4, 2019).

1 may be conducted “in person, via video teleconference, or telephonically.” *Id.* Prior to
 2 conducting the interview, officers are instructed to “confirm that the alien has an
 3 understanding of the interview process.” *Id.* In conducting the interview, officers “should
 4 take into account” all “relevant factors,” including “[t]he credibility of any statements made
 5 by the alien in support of the alien’s claims and such other facts as are known to the
 6 officer,” such as information about “the region in which the alien would reside in Mexico,”
 7 and “[c]ommitments from the Government of Mexico regarding the treatment and
 8 protection of aliens returned” to Mexico. *Id.* at 16. Once the asylum officer makes an
 9 assessment, the assessment is “reviewed by a supervisory asylum officer, who may change
 10 or concur with the assessment’s conclusion.” *Id.*

11 Aliens placed in MPP are allowed “sufficient” time to confer with their attorneys
 12 before their scheduled removal hearings. MPP Guidance, Dkt. 14-1 at 22. With respect to
 13 the actual non-refoulement interview itself, however, “provided [that] the MPP
 14 assessments are part of either primary or secondary inspection,” DHS “is unable to provide
 15 access to counsel during the assessments given the limited capacity and resources at ports-
 16 of-entry and Border Patrol stations as well as the need for the orderly and efficient
 17 processing of individuals.” *Id.* at 15; *see also* 8 C.F.R. § 292.5(b) (“[N]othing in this
 18 paragraph shall be construed to provide any applicant for admission in either primary or
 19 secondary inspection the right to representation.”).

20 **B. THIS LAWSUIT**

21 Petitioners are parents of a family with five children from Guatemala who attempted
 22 to enter the United States. Petition, ¶¶ 1, 45. After being placed in full removal
 23 proceedings, Petitioners were determined to be amenable to MPP, and were temporarily
 24 returned to Mexico pending their removal proceedings. *Id.* ¶¶ 46, 50. At their first
 25 immigration court hearing, Petitioners articulated a fear of return to Mexico and, consistent
 26 with the MPP Guiding Principles, received non-refoulement interviews. *Id.* ¶ 50. The
 27 results of those interviews were that Petitioners did not demonstrate the requisite fear of
 28 persecution based on a protected characteristic or torture. *Id.* ¶ 57. At their next

1 immigration court hearing, Petitioners again articulated a fear of return to Mexico, and
 2 once again received non-refoulement interviews. *Id.* ¶ 60.

3 On November 5, Petitioners filed a Petition for Writ of Habeas Corpus accompanied
 4 by a Motion for a Temporary Restraining Order (TRO) and a Preliminary Injunction
 5 challenging the [P]olicy of not allowing “access to counsel” “during non-refoulement
 6 interviews.” Dkt. 1, ¶¶ 143-44. Petitioners purport to bring this action on “behalf of
 7 themselves” as well as a “proposed class” of individuals defined as “[a]ll individuals who
 8 are detained in ... custody in California awaiting or undergoing non-refoulement interviews
 9 pursuant to [MPP] and who have retained lawyers.” *Id.* ¶¶ 151-52. Petitioners filed a
 10 motion to certify that proposed class. *See* Dkt. 3-1.

11 On November 12, this Court granted Petitioners’ TRO Motion and ordered that
 12 “Respondents may not conduct Petitioners’ non-refoulement interviews without first
 13 affording them access to their retained counsel both before and during any such interview.”
 14 TRO Order at 10. This Court further set a briefing schedule governing Petitioners’
 15 preliminary-injunction and class-certification motions. *Id.* at 11. Petitioners then received
 16 non-refoulement interviews in accordance with the TRO Order. Asylum officers
 17 concluded that Petitioners would more likely than not be tortured upon return to Mexico,
 18 and so, Petitioners are no longer subject to MPP. Caudill-Mirillo Decl. ¶¶ 6-8.

19 LEGAL STANDARD

20 The standard for assessing whether the “extraordinary remedy” of a preliminary
 21 injunction is warranted is well-settled: the burden is squarely on Petitioners to “establish”
 22 that they are “likely to succeed on the merits,” that they are “likely to suffer irreparable
 23 harm in the absence of preliminary relief, that the balance of equities tips in [their] favor,
 24 and that an injunction is in the public interest.” *Garrabrants v. Fin. Industry Reg. Auth.*,
 25 No. 3:19-cv-01570, 2019 WL 5594920, at *2 (S.D. Cal. Oct. 29, 2019). In addition, the
 26 burden on Petitioners is “doubly demanding” because the injunction that they seek is a
 27 “mandatory injunction”—one that “orders” Respondents to provide the access to counsel
 28 that Petitioners seek. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). In such

cases, “unless the facts and law clearly favor” Petitioners, the motion must be denied. *Id.*; see also *Cejas v. Paramo*, No. 14-cv-1923-WQH-WVG, 2018 WL 3359623, at *1 (S.D. Cal. July 9, 2018) (not enough for Petitioners to show that they are “likely to succeed”).

ARGUMENT

The Court should deny the preliminary-injunction motion. Petitioners’ claims are not justiciable and, in any event, Petitioners have not demonstrated that they are likely to succeed on the merits of their claims. Nor have they demonstrated that unnamed class members will suffer irreparable harm absent preliminary injunctive relief.

I. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. PETITIONERS’ CLAIMS ARE NOT JUDICIALLY REVIEWABLE

1. The INA Forecloses Judicial Review Over Petitioners’ Claims

As a threshold matter, Petitioners’ claims are not justiciable because the INA precludes judicial review of the procedures used to arrive at return decisions.

8 U.S.C. § 1252(a)(2)(B)(ii) provides that “[n]otwithstanding any other provision of law (statutory or nonstatutory) ... no court shall have jurisdiction to review” any “decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.” The return decisions at issue here are squarely in the discretion of the Secretary. The statute authorizing such returns, 8 U.S.C. § 1225(b)(2)(C), provides that the Secretary “may return the alien to” the contiguous territory from which he or she arrived “pending a” full removal proceeding. (Emphasis added.) The use of “may” “brings along the usual presumption of discretion.” *Poursina v. USCIS*, 936 F.3d 868, 871 (9th Cir. 2019). And because that decision is discretionary, 8 U.S.C. § 1252(a)(2)(B)(ii) makes that decision judicially unreviewable.

And that bar extends not only to the discretionary decisions themselves, but also to the procedures used to arrive at those decisions. Claims that “directly dispute[]” acts “within the Secretary’s ... discretion” are subject to the jurisdictional bar in 8 U.S.C.

§ 1252(a)(2)(B)(ii) even if the challenge is to the process “that the Secretary uses.” *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2019). As the Ninth Circuit explained in reaching that holding, the “standards by which the Secretary reaches a decision within his or her ... discretion—and the methods by which the Secretary adopts those standards—are just as unreviewable as the Secretary’s ultimate decisions themselves.” *Id.*; *see also Bourdon v. DHS*, 940 F.3d 537, 545 (11th Cir. 2019) (“If a court can dictate which arguments the Secretary must entertain or how the Secretary weighs the evidence, then the Secretary can hardly be said to have ... discretion.”). In this case, Petitioners challenge the procedures used to arrive at the ultimate decisions to return them to Mexico. Under 8 U.S.C. § 1252(a)(2)(B)(ii), however, those procedures, including the access that Petitioners have to counsel, are unreviewable. As a district court in the District of Columbia recently concluded, such “APA claims” “fall[] squarely within the bar on judicial review” in 8 U.S.C. § 1252(a)(2)(B)(ii) because they challenge the “actual substance of the ... discretionary choice to [return aliens] to Mexico.” Ex. A at 36:5-10 (oral decision in *Cruz v. DHS*, No. 1:19cv2727 (D.D.C. Nov 21, 2019)).

The jurisdictional bar in 8 U.S.C. § 1252(a)(2)(B)(ii) also extends to Petitioners’ due-process claims. Claims styled as constitutional claims that are underpinned by the same facts and legal contentions as simultaneously asserted APA claims cannot evade the bar on judicial review adduced in 8 U.S.C. § 1252(a)(2)(B)(ii). *See Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 206 (3d Cir. 2006) (“Because evaluating these constitutional claims require us to revisit and review the Attorney General’s exercise of discretion ... we lack the jurisdiction to consider them.”); *see also Privett v. Sec., DHS*, 865 F.3d 375, 381 (6th Cir. 2017).

2. The Rule of Non-Inquiry Forecloses Judicial Review of Petitioners’ Claims

Petitioners’ claims are insulated from judicial review for a second and independent reason: the rule of non-inquiry bars judicial review of the procedures adopted to address non-refoulement in the return-to-contiguous-territory context.

Section 2242(a) of the Foreign Affairs Reform and Restructuring Act (FARRA), outlines the “policy of the United States” regarding obligations not to return or extradite individuals based on the Convention Against Torture (CAT). *See* FARRA § 2242(a), 112 Stat. 2681–822. Implemented as a “note” to 8 U.S.C. § 1231, *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 956 (9th Cir. 2012) (en banc), section 2242(a) places return and extradition decisions on equal footing in terms of judicial review, as both are mentioned in FARRA, yet neither return nor extradition are addressed in the withholding-of-removal statute, 8 U.S.C. § 1231. And section 2242(d) of FARRA provides that “nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention” except “as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act.” FARRA § 2242(d). That bar on judicial review extends to “regulations” promulgated to “implement” the United States’ non-refoulement obligations. *Id.*; *see, e.g.*, 22 C.F.R. § 95.2 (codifying regulations applicable to extradition decisions). Taken together, the interplay between these provisions and the INA evince a Congressional intent to insulate both return and extradition decisions from judicial review. In such circumstances, the rule of non-inquiry applies and courts are limited to simply evaluating whether the applicable procedures were followed in arriving at return determinations. If they were, “the court’s inquiry shall have reached its end.” *Trinidad*, 683 F.3d at 957; *Meza v. McGrew*, No. 11-60955-CIV-COHN, 2013 WL 12202484, at *7 (S.D. Fla. Sept. 16, 2013) (“FARRA reinforces the viability of the rule of non-inquiry by expressly providing that nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section save in one specific instance (orders of removal under the Immigration and Nationality Act) unrelated to extradition The intent of the Congress to preclude judicial review, therefore, was clear and unequivocal.”).²

² Though often applied in the extradition context, the Supreme Court has made clear that the rule of non-inquiry is not limited to the extradition context. *See Munaf v. Geren*, 553 U.S. 674, 700-01 (2008) (dismissing habeas petition alleging that “transfer to Iraqi custody is likely to result in torture” because “it is for the political branches, not the judiciary, to

Petitioners never claim that the existing non-refoulement procedures prescribed by MPP were not followed. Thus, their attempt to ask this Court to add additional procedures—namely the presence of counsel—to the interview process is barred by the rule of non-inquiry, because it is not within the province of this Court to direct the Secretary to add additional procedures to the non-refoulement interview process.

Although Petitioners invoke 8 U.S.C. § 1231 to argue that “the standard for non-refoulement in MPP is identical to the statutory standard for withholding of removal,” Mot. 16, that statute does not render the rule of non-inquiry inapplicable. This is so because 8 U.S.C. § 1231, as its title suggests, applies only to review of “removal” decisions, not return decisions, a fact underscored by the explicit mention of return in FARRA, but not the withholding statute itself. 8 U.S.C. §§ 1231(a), 1231(b)(3). Removal and return are not synonymous and “it would be anomalous to conclude that” Petitioners “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.” *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1127 (N.D. Cal. 2019). There is accordingly no textual basis to conclude that the protections in 8 U.S.C. § 1231 apply to return decisions, a conclusion buttressed by the fact that Congress explicitly discussed involuntary return in FARRA, yet omitted any mention of return in the plain text of 8 U.S.C. § 1231.

B. THE APA’S RIGHT-TO-COUNSEL PROVISION DOES NOT APPLY

1. The INA Supplants the APA in Non-Refoulement Interviews

Even if Petitioners’ APA claim was justiciable, that claim would fail on the merits because the APA’s right-to-counsel provision does not apply in immigration proceedings. Petitioners’ arguments to the contrary, Mot. 10-12, lack merit.

“Congress intended the provisions of the [INA] ... to supplant the APA in assess practices in foreign countries”).

immigration proceedings.” *Ardestani*, 502 U.S. at 133. Thus, in “immigration proceedings,” “the APA” does not “displace the INA,” *id.*, in large measure because the INA explicitly “deviat[es] from the” APA. *Id.* at 133-34; *Marcello v. Bonds*, 349 U.S. 302, 309 (1955) (“[W]hen in this very particularized adaptation there was a departure from the [APA] ... surely it was the intention of the Congress to have the deviation apply and not the general model.”). Moreover, 8 U.S.C. § 1229a(a)(3) provides that “[u]nless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States.” Here, however, section 1225(b)(2)(C), a subsection in “this chapter,” *id.*, applies, so section 1225(b)(2)(C) exclusively governs the procedures underlying return decisions. Because nothing in 8 U.S.C. § 1225(b)(2)(C) discusses any right to counsel, and because that provision contains the complete universe of mandatory procedures applicable to return decisions, the APA’s right-to-counsel provision does not apply.

This Court’s TRO Order—which was issued after highly abbreviated briefing—suggested that the reasoning in *Ardestani* and *Marcello* was inapplicable because neither case held “that the INA supersedes the APA in *all* immigration proceedings” and that both “cases deal specifically with deportation proceedings, not immigration proceedings in general.” TRO Order at 7; *see also id.* at 7-8. The Government respectfully submits that this conclusion misreads *Ardestani* and *Marcello*, both of which repeatedly emphasize that the displacement of the APA is not circumscribed to deportation proceedings, but rather all “immigration proceedings.” *Ardestani*, 502 U.S. at 133. Indeed, if it were true that the logic of *Ardestani* and *Marcello* was only confined to “deportation proceedings,” TRO Order at 7, then, by extension, neither decision would displace the APA right-to-counsel provision in expedited removal proceedings, which are different and distinct from deportation proceedings. Yet courts have repeatedly and unequivocally concluded that the APA right-to-counsel provision does not govern expedited removal proceedings because the principle underlying both *Ardestani* and *Marcello* is that the INA enacted a comprehensive scheme governing all immigration proceedings, one that does not

1 accommodate the APA. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th
 2 Cir. 2011) (“[W]e are aware of *no applicable statute or regulation indicating that such*
 3 *aliens have any such right.*” (emphasis added)); *United States v. Quinteros Guzman*, No.
 4 3:18-cr-00031-001, 2019 WL 3220576, at *10 (W.D. Va. July 17, 2019) (“[W]hen
 5 Congress passed the legislation including the expedited removal procedures, it did so
 6 against the background of the holdings in *Marcello* and *Ardestani*, which had established
 7 the *general proposition* that the APA did not apply to immigration proceedings.” (emphasis
 8 added)).

9 The TRO Order also said that “even if the INA did supplant the APA here,” because
 10 “there are no provisions addressing whether asylum seekers have access to retained counsel
 11 prior to and during a *non-refoulement* interview,” “the APA default provisions necessarily
 12 apply.” TRO Order at 8. But the congressional scheme makes clear that that view is
 13 mistaken. The INA is clear when a right-to-counsel applies in various immigration-related
 14 proceedings. The absence of any right to counsel in the return context demonstrates that
 15 there is no such right and that it would be wrong to use the APA to engraft onto the INA a
 16 right that Congress rejected because “Congress generally acts intentionally when it uses
 17 particular language in one section of a statute but omits it in another.” *DHS v. MacLean*,
 18 574 U.S. 383, 135 S. Ct. 913, 919 (2015); *see also Russello v. United States*, 464 U.S. 16,
 19 23 (1983). Thus, “when Congress intended an alien to have a right to counsel, it knew how
 20 to make that right clear” and “Congress would not have needed to do so . . . had it
 21 considered the right to counsel under the APA to apply generally to removal statutes.”
 22 *Quinteros Guzman*, 2019 WL 3220576, at *10. In full removal proceedings, Congress
 23 provided a statutory right to counsel, enshrined in 8 U.S.C. § 1362, but Petitioners have
 24 explicitly disavowed reliance on this statutory right by conceding that “non-refoulement
 25 interviews under MPP are not removal proceedings.” Mot. 11. Thus, the fact that there is
 26 no statutory or regulatory provision “addressing whether asylum seekers have access to
 27 retained counsel prior to and during a non-refoulement interview,” TRO Order at 8,
 28 buttresses, rather than detracts from, the conclusion that the APA’s right to counsel

provision does not apply. Indeed, returning to the expedited removal context, the same argument could be made that although the INA addresses the right to counsel “prior to and during a” credible fear interview, *id.* at 8, it is silent as to whether a right to counsel exists in the remainder of the expedited removal proceeding. But the Ninth Circuit has explicitly interpreted that silence as evincing explicit Congressional intent *not* to create “any such right” to counsel. *Barajas-Alvarado*, 655 F.3d at 1088.³

Stripped of the APA’s general right-to-counsel provision, Petitioners cannot demonstrate a likelihood of success on the merits of their APA claim. Each of their remaining arguments, *see* Mot. 12, falters. Petitioners claim that the “INA right to counsel” applies as articulated in 8 C.F.R. § 292.5(b) “whenever an individual is examined.” Mot. 12. They omit, however, that the regulation, which generally provides that individuals “examin[ed]” “have the right to be represented” specifically disclaims creating any right to counsel: “nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation.” 8 C.F.R. § 292.5(b); *see also Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013) (“Because Gonzaga was properly deemed an ‘applicant for admission’ ... , we conclude that 8 C.F.R. § 292.5(b) did not entitle him to counsel during primary or secondary inspection.”). Indeed, this is why DHS is not obligated to provide counsel in non-refoulement interviews that occur as part of either the primary or secondary inspection process. USCIS Memo, Dkt. 14-1 at 15.⁴

2. Even If the INA Did Not Displace the APA, the APA’s Right-to-Counsel Provision Would Still Not Apply Here.

Even if the APA applied, the plain text of the APA’s right-to-counsel provision shows that that provision does not apply to MPP non-refoulement interviews. In pertinent

³ This conclusion is in accord with the fact “no right to counsel attaches ... at an extradition hearing.” *Anderson v. Alameida*, 397 F.3d 1175, 1180 (9th Cir. 2005).

⁴ Petitioners appear to concede that “non-refoulement interviews occur before immigration proceedings begin,” Mot. 15, reinforcing the conclusion that when these interviews occur as part of the primary or secondary inspection process, no right to counsel applies.

part, 5 U.S.C. § 555(b) provides that “[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by [an]other qualified representative. A party is entitled to appear in person or by or with counsel or [an]other duly qualified representative in an agency proceeding.” The plain text of this provision forecloses Petitioners’ claim for two independent reasons: (1) they are not “compelled to appear” at non-refoulement interviews, and (2) non-refoulement interviews are not “agency proceeding[s]” for purposes of the APA. *Id.*

First, as the Ninth Circuit has held, the limited right to counsel enshrined in 5 U.S.C. § 555(b) is a “right to counsel to any *witness subpoenaed* to appear before any federal agency.” *SEC v. Higashi*, 359 F.2d 550, 551 (9th Cir. 1966) (emphasis added); see also *Miss. River Corp. v. F.T.C.*, 454 F.2d 1083, 1093 (8th Cir. 1972) (“The Statute ... appears to be designed for the protection of the witnesses, not for the benefit of the litigants.”); *United States v. McPhaul*, 617 F. Supp. 58, 59 (W.D.N.C. 1985) (“The summonses in question *require* the respondents to appear and produce the documents.” (emphasis added)). Taken as a whole, then, 5 U.S.C. § 555(b) “applies” only “to agency adjudications of liability” in which an individual is forced to appear. *Hyatt v. U.S. PTO*, 146 F. Supp. 3d 771, 784 (E.D. Va. 2015). That result comports with “the ordinary meaning o[f] the word compel” which is to “cause or bring about by force, threats, or overwhelming pressure.” *Atmosphere Hospitality Mgmt., LLC v. Shiba Investments, Inc.*, No. 5:13-cv-0040-KES, 2018 WL 3626326, at *3 (D.S.D. July 30, 2018) (quoting Black’s Law Dictionary (10th ed. 2014)).

Petitioners were not compelled to appear at their non-refoulement interviews under any plausible definition of that term. They instead took the affirmative step of articulating a fear of returning to Mexico, without any compulsion, and then elected to appear at their non-refoulement interviews. No subpoena, demand, or “overwhelming pressure,” *id.*, exists in this case sufficient for the strictures of 5 U.S.C. § 555(b) to be satisfied. And because the non-refoulement interview has no bearing on whether Petitioners are ultimately

1 removable, the non-refoulement process also does not constitute an “adjudication[] of
2 liability.” *Hyatt*, 146 F. Supp. 3d at 784.⁵

3 Second, the APA’s right to counsel applies only in “agency proceeding[s],” 5
4 U.S.C. § 555(b), which the APA defines as a “rule making,” an “adjudication,” or a
5 “licensing proceeding.” 5 U.S.C. § 551(12); *see also* 5 U.S.C. § 551(5), (7), (9). Because
6 a non-refoulement interview is clearly neither a rulemaking nor a licensing proceeding,
7 Petitioners must show that it is an “adjudication” as that term is defined by the APA. But
8 an adjudication is an “agency process for the formulation of an order” which is defined as
9 “the whole or a part of a final disposition ... of an agency in a matter.” *Int’l Tel. & Tel.*
10 *Corp. Comm’cns Equipment & Sys. Div. v. Local 134, Int’l Brotherhood of Electrical*
11 *Workers, AFL-CIO, et al.*, 419 U.S. 428, 443 (1975). The “phrase ‘whole or part’ refers to
12 components of that which is itself the final disposition required by the definition of ‘order’”
13 in 5 U.S.C. § 551(6).” *Id.* Thus, “intermediate proceeding[s]” before the agency that do
14 not result in a “final disposition” do not constitute “adjudication[s]” under 5
15 U.S.C. § 551(7). *Foley-Wisner & Becker v. N.L.R.B.*, 682 F.2d 770, 774 (9th Cir. 1982);
16 *see also Family Farm Alliance v. Salazar*, 749 F. Supp. 2d 1083, 1100 n.10 (E.D. Cal.
17 2010). The non-refoulement interview process is the paradigmatic example of an
18 intermediate proceeding that does not result in a final disposition. The outcome of the non-
19 refoulement interview has no impact on whether Petitioners will ultimately be deemed
20 removable, and indeed, the non-refoulement process assesses an entirely different
21 question—fear of temporary return to Mexico—than the issue that a final disposition in
22 Petitioners’ case would determine, namely whether Petitioners are permanently removable
23 to their home countries. *See* Petitioners’ TRO Reply at 2 n.1 (“Plaintiffs’ non-refoulement
24

25 ⁵ Petitioners’ reliance on *Smiley v. Dir. Office of Workers Comp. Programs*, 984 F.2d 278,
26 282 (9th Cir. 1993)), *see* Mot. 11, is misplaced. In *Smiley*, the Ninth Circuit relied on the
27 fact that “hearings held under the Longshore Act” demanded a right to counsel due to
28 specific regulations and internal agency guidelines. *Id.* Though the Ninth Circuit cited 5
U.S.C. § 555(b) in passing, it was only in conjunction with the other, more specific sources
of a right to counsel, and the Ninth Circuit certainly did not opine on whether the
compulsion requirement of 5 U.S.C. § 555(b) was satisfied.

1 interview ... has nothing to do with the merits of their asylum case.”).

2 In the TRO Order, this Court asked the parties to address whether “access to retained
3 counsel includes confidential, in-person communication, as opposed to telephonic
4 communication.” TRO Order at 9 n.4. Because 5 U.S.C. § 555(b) does not apply for each
5 of the reasons articulated above, this Court has no need to reach this issue. But if this Court
6 were to determine that the APA’s right-to-counsel provision applies, this Court should
7 conclude that the provision does not mandate in-person consultation. In the Sixth
8 Amendment context—which is to say, in the criminal-proceeding context—courts have
9 routinely held that restrictions on the manner in which defendants communicate with
10 counsel are constitutionally permissible. *See Mann v. Reynolds*, 46 F.3d 1055, 1060 (10th
11 Cir. 1995); *Aswegan v. Henry*, 981 F.2d 313, 314 (8th Cir. 1992). Moreover, the text of
12 the APA’s right-to-counsel-provision is disjunctive, as the right to be “accompanied” by
13 counsel does not extend to being represented in “an agency proceeding.” 5
14 U.S.C. § 555(b). In addition, as the Government noted in its TRO opposition, neither
15 Petitioners’ complaint nor their preliminary injunction motion seeks the relief of in-person
16 pre-meetings with counsel in preparation for non-refoulement interviews. TRO Opp. 8. It
17 is “axiomatic that the complaint may not be amended by the briefs.” *Candor v. United*
18 *States*, 1 F. Supp. 3d 1076, 1082 (S.D. Cal. 2014), so Petitioners have failed to properly
19 raise this issue in their preliminary injunction motion. Finally, Petitioners have already
20 conceded that given that the non-refoulement interviews themselves frequently occur
21 telephonically, telephonic “attorney participation in that interview” is permissible because
22 the interview “does not require confidentiality” and is “telephonic.” TRO Reply at 3 n.2;
23 TRO Order at 9 n.4.⁶

24 C. THE POLICY IS NEITHER ARBITRARY NOR CAPRICIOUS

25 Because the APA is inapplicable in this case, given the jurisdictional bar in 8

26 ⁶ Although this Court relied on the term “accompanied” in 5 U.S.C. § 555(b), TRO Order
27 at 9 n.4, as the statute and case law make clear, the right to have an attorney physically
28 present only attaches when a “person is compelled to appear.” *Id.* The Government has
shown that Petitioners were not compelled to appear.

1 U.S.C. § 1252(a)(2)(B)(ii), Petitioners’ arbitrary-and-capricious claim must be rejected on
2 that basis alone. In any event, Petitioners have fallen far short of showing that the Policy
3 is arbitrary and capricious. *See* Mot. 15-18.

4 Petitioners’ first argument is that the procedure deviates from procedures in
5 “credible and reasonable [fear] interviews conducted for purposes of seeking asylum or
6 withholding of removal.” Mot. 16. But neither analog is a proper point of comparison.

7 The withholding-of-removal statute, *see* 8 U.S.C. § 1231(b)(3), applies only when
8 assessing the ultimate question of whether permanently *removing* an alien to the country
9 of his or her origin is more likely than not to result in persecution based on a protected
10 ground or torture. Those considerations, however, are different and distinct from whether
11 temporarily returning an alien to Mexico runs afoul of the withholding of removal statute,
12 and, accordingly, it is reasonable that the procedures used to evaluate return determinations
13 are different from the procedures used in the withholding-of-removal context. *See*
14 *Innovation Law Lab*, 366 F. Supp. 3d at 1126-27 (“[A]s noted above and as reflected
15 generally in subdivision (b) of § 1231, the potential issues relating to sending an alien to a
16 contiguous territory as opposed to his or her ‘home’ country may not be identical.”). The
17 text of the statute buttresses this conclusion, as it clearly applies only to decisions to
18 “remove an alien to a country,” not to return an alien to a country. 8 U.S.C. § 1231(b)(3);
19 *see also Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434 (BIA 2008).

20 Similarly, Petitioners’ reliance on “the right to consult counsel before” credible fear
21 interviews is likewise inapposite. Mot. 16. The credible-fear process applies only to aliens
22 placed in expedited removal—not to those aliens, like Petitioners, placed into full removal
23 proceedings. As noted above, it is reasonable to use different procedures in different
24 contexts. More importantly, even if the credible fear process was a suitable point of
25 comparison, the Ninth Circuit has held that there is *no right to counsel* in expedited removal
26 proceedings. *See Barajas-Alvarado*, 655 F.3d at 1081-821, 1088 (“Congress authorized
27 administrative review for expedited removal orders only if the alien claims a fear of
28 persecution if returned to the alien’s home country, and an immigration officer deems this

1 fear to be not credible Barajas-Alvarado’s claim that he was denied his right to counsel,
 2 is meritless on its face.”); *see also Quinteros Guzman*, 2019 WL 3220576, at *9. Instead,
 3 as Petitioners note, during the credible-fear process, aliens have a limited right to “consult”
 4 with an attorney *before* their credible-fear interview, so long as the consultation does not
 5 “unreasonably delay the process.” 8 U.S.C. § 1225(b)(1)(B)(iv); Mot. 16; 8 C.F.R. §
 6 208.30(d)(4). But that limited consultation right is circumscribed to consultation with an
 7 attorney “prior to the interview.” 8 U.S.C. § 1225(b)(1)(B)(iv); *Quinteros Guzman*, 2019
 8 WL 3220576, at *9. Neither the statute nor the regulations confer a right to have an
 9 attorney present during the credible fear interview itself, a fact that the regulations
 10 underscore: “Any person or persons with whom the alien chooses to consult *may* be present
 11 at the interview and may be permitted, in the discretion of the asylum officer, to present a
 12 statement at the end of the interview.” 8 C.F.R. § 208.30(d)(4) (emphasis added).

13 Petitioners finally assert that the justification for not allowing counsel to be present
 14 in interviews, *i.e.* the “need for the orderly and efficient processing of individuals” in
 15 conjunction with “limited capacity and resources at ports-of-entry and Border Patrol
 16 Stations,” USCIS Memo, Dkt. 14-1 at 15, is “transparently absurd.” Mot. 17. To the
 17 contrary, however, the agency reasonably concluded that in view of “the limited capacity
 18 and resources at ports-of-entry and Border Patrol stations, as well as the need for the orderly
 19 and efficient processing of individuals,” USCIS Memo, Dkt. 14-1 at 15, it was necessary
 20 to limit access to counsel during non-refoulement interviews. *See Caudill-Mirillo Decl.* ¶¶
 21 9-10; *Garrett Decl.* ¶¶ 8-14; *Marin Decl.* ¶¶ 14-20. And since MPP is one of the “few
 22 congressionally authorized measures to process the approximately 2,000 migrants who are
 23 currently available arriving at the Nation’s southern border on a daily basis,” the agency
 24 was entitled to enhance the efficacy of MPP. *Innovation Law Lab*, 924 F.3d at 510.

25 The aspersions Petitioners cast on the agency’s explanation clearly transgress the
 26 limited standard of review applicable to an arbitrary-and-capricious claim, as courts cannot
 27 “substitute [their] judgment for that of the agency,” and a challenged action withstands
 28 arbitrary and capricious review so long as there is a “rational connection between the facts

found and the choices made.” *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1150 (9th Cir. 2016). Petitioners protest that the agency’s justifications are “problem[s] of Defendants’ own making” because “[n]o law required Defendants to create MPP in the first place.” Mot. 17. But the agency, facing an enormous challenge, used a congressionally-authorized tool to combat that challenge, and nothing in the INA requires any more than what the agency did. Similarly, Petitioners’ cursory assertion that “it is not challenging to provide access to counsel,” Mot. 17, seeks to have this Court usurp the agency’s role and ignore the agency’s expertise in implementing MPP and the day-to-day challenges the agency faces. See Caudill-Mirillo Decl. ¶¶ 9-10; Garrett Decl. ¶¶ 8-14; Marin Decl. ¶¶ 14-20. And Petitioners’ suggestions that “it would be a simple matter to connect retained counsel to the conversation telephonically,” Mot. 18, is another textbook example of Petitioners cloaking their policy preferences in the garb of an arbitrary-and-capricious challenge.

D. PETITIONERS’ DUE-PROCESS CLAIMS FAIL

Petitioners contend that the Policy violates their procedural and substantive due process rights. Mot. 18-22. But Petitioners’ status as unadmitted aliens who are “applicants for admission,” 8 U.S.C. § 1225(b)(2), forecloses their ability to show a likelihood of success on their Due Process claims as given the limited due process rights they possess, Petitioners received all process due.

“To establish a due process violation, a plaintiff must show that he has a protected property interest under the Due Process Clause and that he was deprived of the property without receiving the process that he was constitutionally due.” *Levine v. City of Alameda*, 525 F.3d 903, 905 (9th Cir. 2008). Longstanding Supreme Court precedent makes clear that aliens like Petitioners who have not been admitted into the United States lack due-process rights beyond whatever rights are conferred on them by statute. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights

1 regarding his application.”); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953)
 2 (“Whatever the procedure authorized by Congress is, it is due process as far as an alien
 3 denied entry is concerned.”); *Barajas-Alvarado*, 655 F.3d at 1088 (“[N]on-admitted aliens
 4 are entitled only to whatever process Congress provides”). This conclusion flows directly
 5 from the proposition that “aliens receive constitutional protections” “only” when they have
 6 “developed substantial connections” with the United States. *United States v. Verdugo–*
 7 *Urquidez*, 494 U.S. 259, 271 (1990).

8 In this case, Petitioners were never admitted into the United States and were returned
 9 to Mexico. They were then paroled into the United States for the limited purpose of
 10 attending their immigration hearing. That “granting of temporary parole” does not affect
 11 Petitioners’ “legal status,” as a contrary holding “is inconsistent with the congressional
 12 mandate, the administrative concept of parole, and the decisions of” the Supreme Court.
 13 *Barber*, 357 U.S. at 189-90; *Mezei*, 345 U.S. at 215 (“[S]uch temporary harborage, an act
 14 of legislative grace, bestows no additional rights.”); *Yuen Sang Low v. Att’y Gen. of U.S.*,
 15 479 F.2d 820, 823 (9th Cir. 1973) (“The law, however, is that aliens paroled into the United
 16 States have not been admitted into the United States.”). Accordingly, Petitioners are
 17 situated no differently than any other unadmitted alien at a port of entry and have no rights
 18 under the Due Process Clause other than those rights explicitly granted by Congress. And
 19 because there is no statutory right to counsel in non-refoulement interviews, the existing
 20 procedures prescribed by MPP satisfy all obligations under the Due Process Clause.

21 Even if Petitioners’ initial entry into the United States was regarded as being
 22 determinative of their Due Process rights, the conclusion would remain the same. “*Mezei*
 23 established what is known as the entry [doctrine], which provides that although *aliens*
 24 *seeking admission into the United States* may physically be allowed within its borders
 25 pending a determination of admissibility, such aliens are legally considered to be detained
 26 at the border and hence as never having effected entry into this country.” *Rodriguez v.*
 27 *Robbins*, 715 F.3d 1127, 1140 (9th Cir. 2013) (emphasis in original); *see also Alvarez-*
 28 *Garcia v. Ashcroft*, 378 F.3d 1094, 1097, 1098 (9th Cir. 2004). Thus, even if Petitioners

1 had not been returned and then subsequently paroled, pursuant to the entry doctrine, they
 2 would still be entitled “only to whatever process Congress provides.” *Barajas-Alvarado*,
 3 655 F.3d at 1088.

4 Notably, Petitioners do not address the fact that they were returned without being
 5 admitted and subsequently paroled, and, accordingly, this Court has no need to reach
 6 Petitioners’ due process arguments. In any event, Petitioners’ arguments regarding the
 7 scope of the entry doctrine, Mot. 20-21, fail on their own terms. First, Petitioners assert
 8 that they “were initially apprehended inside the United States, not at the port of entry,
 9 making the entry [doctrine] entirely inapplicable to them.” Mot. 20. To the contrary,
 10 however, that is the precise point of the entry doctrine: to note that though unadmitted
 11 aliens may be “physically” in the United States, their physical presence does not change
 12 the scope of the rights they have. *Rodriguez*, 715 F.3d at 1140.⁷ Second, Petitioners assert
 13 that the entry doctrine only applies to “the ultimate merits of their asylum claims.” Mot.
 14 21. But this Court has never embraced such a limited application of the doctrine and has
 15 applied it, for example, in assessing the due process rights of aliens detained during the
 16 course of removal proceedings, a claim completely divorced from the merits of the aliens’
 17 asylum claims. *See Rodriguez*, 715 F.3d at 1140; *see also Cancino Castellar v. McAleenan*,
 18 388 F. Supp. 3d 1218, 1245 (S.D. Cal. 2019) (same).

19 Finally, even if the temporary parole of Petitioners did not control the analysis under
 20 the Due Process Clause, and even if Petitioners were not subject to the entry doctrine, the
 21 Policy still passes muster under the three-factor procedural due process test espoused in
 22 *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). *See* Mot. 19. Petitioners, citing “asylum
 23 and withholding of removal cases,” contend that the “private interest is paramount.” *Id.*
 24 But because the considerations that temporary return to Mexico entail are different and
 25 distinct from assessing whether permanent removal to Petitioners’ home countries is

26
 27 ⁷ The sole case Petitioners rely on, *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th
 28 Cir. 2014), Mot. 20, is readily distinguishable, as that case arose in the criminal context, an
 area “not implicating the government’s plenary power to regulate immigration.” *Kwai Fun
 Wong v. United States*, 373 F.3d 952, 973 (9th Cir. 2004).

1 appropriate, and because the Mexican government has “commit[ed] to honor its
2 international-law obligations,” *Innovation Law Lab*, 924 F.3d at 509, Petitioners’ private
3 interest in this case is not dispositive or weighty, since they have limited rights as aliens
4 paroled into the United States for a discrete, limited purpose. The second factor, the risk
5 of error and the value of the procedural safeguard that Petitioners seek, favors the
6 Government. MPP “provides sufficient procedural safeguards” to prevent erroneous return
7 determinations, including a non-adversarial interview designed to “elicit all relevant and
8 useful information,” explicit confirmation that the alien understands the interview process,
9 and supervisory asylum officer review. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 496
10 (9th Cir. 2007); USCIS Memo, Dkt. 14-1 at 15-16. Given the “narrow” “determinations”
11 that immigration officers “must make,” in conjunction with these existing “procedural
12 safeguards,” any “additional or substitute procedural safeguards ... would produce marginal
13 protections, if any, against erroneous determinations,” *Morales-Izquierdo*, 486 F.3d at 496,
14 and Petitioners offer no evidence for their unsubstantiated assertion that the “risk of error
15 is large.” Mot. 19. Finally, the third factor also firmly favors the Government, as DHS has
16 explained that it “is unable to provide access to counsel during the assessments given the
17 limited capacity and resources at ports-of-entry and Border Patrol stations as well as the
18 need for the orderly and efficient processing of individuals.” USCIS Memo, Dkt. 14-1 at
19 15; Caudill-Mirillo Decl. ¶¶ 9-10; Garrett Decl. ¶¶ 8-14; Marin Decl. ¶¶ 14-20. When the
20 “cost in terms of resources and delay would be substantial,” and the value of additional
21 procedural safeguards is minimal, as here, no procedural due process violation occurs,
22 because “[d]ue process does not require such a poor bargain.” *Morales-Izquierdo*, 486
23 F.3d at 496; *see also Cruz Pleitez v. Barr*, 938 F.3d 1141, 1147 (9th Cir. 2019) (finding in
24 immigration context that “fiscal and administrative burdens” constituted a substantial
25 “burden on the government” such that “due process” was not violated). That conclusion is
26 consistent with the fact that “each contracting state” retains significant discretion in
27 assessing refoulement. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 248 (BIA 2014), and is
28 likewise consistent with applying the rule of non-inquiry.

1 With respect to Petitioners’ substantive due process claim, meanwhile, Petitioners
 2 have not identified the requisite liberty or property interest that has been infringed. It is
 3 uncontroverted that the Policy does not infringe on Petitioners’ ability to develop attorney-
 4 client relationships prior to non-refoulement interviews, so there is accordingly no basis to
 5 believe that the Policy deprives Petitioners “of confidential access to or assistance to
 6 counsel.” Mot. 21. And though Petitioners claim their “constitutional rights” are being
 7 violated, Mot. 21, Petitioners make no Sixth Amendment right to counsel claim, with good
 8 reason: litigants “in removal proceedings have no Sixth Amendment right to counsel.”
 9 *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008). Thus, when undertaking a “careful
 10 description of the asserted right,” Petitioners’ claim is ultimately that completely
 11 unimpeded access to counsel is a “fundamental” constitutional right. *Reno v. Flores*, 507
 12 U.S. 292, 302 (1993). Petitioners offer no support for their assertion, which is unsurprising,
 13 because even “the Sixth Amendment does not require ... full and unfettered contact
 14 between” clients “and counsel.” *Mann*, 46 F.3d at 1060.

15 **II. THE REMAINING PRELIMINARY INJUNCTION FACTORS FAVOR** 16 **DENYING PETITIONERS’ MOTION**

17 Because the named Petitioners have obtained the ultimate relief they seek in this
 18 lawsuit—a determination that they cannot be returned to Mexico, see Caudill-Mirillo Decl.
 19 ¶¶ 6-8, Petitioners could potentially obtain injunctive relief only if their accompanying
 20 motion for class certification is granted, as “[i]n the absence of class certification, the
 21 preliminary injunction may properly cover only the named plaintiff and should be no more
 22 burdensome to the defendant than necessary to provide complete relief to the plaintiff.”
 23 *Meyer*, 2011 WL 11712610, at *2. For the reasons articulated in the Government’s
 24 opposition to the class-certification motion, class certification is inappropriate, and that, by
 25 itself, suffices to deny the preliminary injunction motion.

26 But even if this Court were to grant the class-certification motion, injunctive relief
 27 would still not be warranted because Petitioners have not proffered concrete, tangible
 28 evidence that class members will suffer irreparable harm in the absence of preliminary

1 relief. “A plaintiff must do more than merely allege imminent harm sufficient to establish
 2 standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to
 3 preliminary injunctive relief.” *Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668,
 4 674 (9th Cir. 1988) (emphasis in original); *see also Garcia*, 786 F.3d at 746 (“Harm must
 5 be proved, not presumed.”); *Mohebbi v. Khazen*, No. 13-cv-03044-BLF, 2018 WL
 6 4927119, at *3 (N.D. Cal. Oct. 10, 2018) (“The Court acknowledges that irreparable harm
 7 to Defendants may exist However, at present any such harm is purely speculative.”).
 8 Petitioners devote only a single paragraph to addressing irreparable harm, and simply state,
 9 without any support, that the “denial of access to or assistance to counsel” “risks an
 10 erroneous decision that could result in” class members’ “persecution, torture, or death.”
 11 Mot. 22. That is precisely the type of “[s]peculative” injury that does not justify the
 12 extraordinary remedy of injunctive relief, as there is a dearth of evidence as to how or why
 13 the outcome of specific class members’ fear assessments would be impacted if the
 14 injunction Petitioners seek was obtained.

15 Indeed, the burden is squarely on Petitioners to show that class members are “likely
 16 to suffer irreparable harm in the absence of preliminary relief.” *Mohebbi*, 2018 WL
 17 4927119, at *3. Here, however, that showing is lacking because: (1) Petitioners do not
 18 even identify any named class members who would suffer irreparable harm in the absence
 19 of injunctive relief, and (2) even if the unnamed, unidentified class members obtained the
 20 relief sought and were able to have attorney present during their interviews, they could
 21 very well still nonetheless be returned to Mexico on account of not articulating a requisite
 22 fear of return due to persecution based on a protected ground or torture. At an absolute
 23 minimum, Petitioner must explain how or why the absence of counsel will change facts
 24 material to class members’ fear determinations in order to tether the injury they assert to
 25 the harm they claim. That explanation is completely absent here.

26 This need for such an explanation is particularly pronounced in this case because the
 27 harm Petitioners assert is mitigated “by the Mexican government’s commitment to honor
 28 its international-law obligations and to grant humanitarian status and work permits to

1 individuals returned under the MPP.” *Innovation Law Lab*, 924 F.3d at 510; MPP
2 Assessment at 4 (“DHS understands that MPP returnees in Mexico are provided access to
3 humanitarian care and assistance.”). Petitioners, in a sentence, also assert that “the denial
4 of fundamental rights is inherently irreparable harm,” Mot. 22-23, but the Government has
5 demonstrated that no fundamental rights were denied.

6 Because Petitioners have not shown irreparable harm, the balance of hardships also
7 weighs against granting Petitioners’ motion, as, if granted, the Government will be required
8 to comply with additional procedural prerequisites in numerous non-refoulement
9 interviews in California going forward. MPP is “one of the few congressionally authorized
10 measures available to process the approximately 2,000 migrants who are currently arriving
11 at the Nation’s southern border on a daily basis,” so any injunction that curtails the
12 Government’s ability to use that tool inflicts tangible and immediate harm. *Innovation*
13 *Law Lab*, 924 F.3d at 510. In addition, the Government has submitted evidence that an
14 injunction would undermine national security by impeding immigration officers from
15 discharging their duties with respect to both criminal investigations and the flow of illegal
16 immigration. See Garrett Decl. ¶¶ 14-17; Marin Decl. ¶¶ 21-24. Finally, “the public
17 interest favors the efficient administration of the immigration laws at the border,” and also
18 supports the Government. *Id.*

19 CONCLUSION

20 This Court should deny Petitioners’ preliminary-injunction motion.
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1 DATED: December 4, 2019

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court for the Southern District of California 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/ Archith Ramkumar

Archith Ramkumar

Trial Attorney

United States Department of Justice

Civil Division

Exhibit A

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALDER CRUZ,
Plaintiff,
vs.
DEPARTMENT OF HOMELAND
SECURITY, et al.,
Defendants.

. Case Number 19-cv-2727
. Washington, D.C.
. November 21, 2019
. 11:00 a.m.
. .
. .

- - - - -

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING, VOLUME II
BEFORE THE HONORABLE DABNEY L. FRIEDRICH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(Call to order of the court.)

THE COURTROOM DEPUTY: This is Civil Case Number 19-2727, Alder Cruz versus the Department of Homeland Security, et al.

Counsel, please come forward and introduce yourselves for the record.

MR. SHELDON: Good morning, Your Honor. Robert Sheldon for the plaintiff.

THE COURT: Good morning, Mr. Sheldon.

MR. WALKER: Good morning, Your Honor. Assistant United States Attorney Johnny Walker for the government.

THE COURT: Good morning, Mr. Walker.

So this is a continuation of the November 4th hearing on the plaintiff's motion for preliminary injunction, the defendant's motion to transfer.

I have reviewed the parties' supplemental briefs and am prepared to rule, but I am happy to hear any additional points either side would like to make.

MR. SHELDON: Thank you, Your Honor. Can I make some additional points?

First of all, I think in the original memorandum, the government was basically claiming that all statutory and constitutional claims by the plaintiff fail due to this bar. And now they're basically admitting, you know, on further

1 review, they say, there's no longer a jurisdictional problem for
2 challenges to statutory -- to authority, to the authority under
3 *Zadvydas*, which is basically what we were saying.

4 *Zadvydas* is directly on point. This is a Supreme Court
5 case. They discuss this exact bar, this exact statute, and, you
6 know, it's very clear that they say that -- I'm sorry. They
7 say, The aliens here, however, do not seek review of the
8 Attorney General's exercise of discretion. Rather, they
9 challenge the extent of the Attorney General's authority under
10 the post-removal period detention statute, and the extent of
11 that authority is not a matter of discretion. That is as
12 straightforward as it can get.

13 So our argument has always not been that it's a matter of
14 discretion. We're not saying, you know, that they shouldn't
15 have applied it specifically to the petitioner. We're saying
16 the defendants have no authority to be doing this at all to
17 somebody who is on United States soil, to someone who is in --
18 who has reached this country either under the statute, which,
19 you know, the statute is very clear. It says people arriving
20 only on land, and the title says the same thing. It says it
21 should be applied only to people arriving on land.

22 So, you know, we have the statutory and, obviously, the due
23 process and the other claims and the equal protection and the
24 other statutory, the APA claims.

25 So in no way are we arguing the discretion. So I just

1 think basically the government has conceded, the defendants have
2 conceded the jurisdiction, as we said.

3 Then there's the other arguments that we made. Basically,
4 the whole Section 1252(a)(2)(B)(ii), it's under a statute under
5 removal -- the section's on removal, and then it's under a
6 subsection on discretion. And it just, you know -- I would
7 analogize it to there's a lease, a 60-page lease, and on page 43
8 it talks about parking, and then it says the Court will have no
9 jurisdiction whatsoever to hear anything about this lease.

10 Congress would never have put such a broad jurisdictional
11 bar under removal orders and then discretionary claims when none
12 of that has anything to do with the petitioner in this case.
13 He's not asking for -- there's no removal order involved here.
14 He hasn't been removed. He hasn't even gotten close to that.
15 He hasn't even been found removable. And then on top of that,
16 he's not asking for any discretionary relief. Right on its
17 face, it doesn't work.

18 And then, of course, again, the breathtaking statement the
19 government is making that the Court has no jurisdiction to
20 analyze a constitutional issue, I mean, I think that was settled
21 in *Marbury v. Madison*. That's not --

22 THE COURT: Mr. Sheldon, let me ask you about the main
23 statutory argument you made in your briefing related to the
24 provision. You argued that Cruz was eligible for expedited
25 removal proceedings and not full, and therefore, the contiguous,

1 what's the word --

2 MR. SHELDON: Territory, I think.

3 THE COURT: -- the provision didn't apply to him. And
4 you've pivoted in the last hearing to this sort of textual
5 argument that was not raised in your briefs at all.

6 Are you conceding now your initial argument that you
7 briefed, or are you still arguing that?

8 MR. SHELDON: Thank you for asking about that, Your
9 Honor.

10 THE COURT: Do you agree that *Innovation Law Lab* is
11 correct and I shouldn't address that argument and should just
12 focus on the textual argument that you didn't brief?

13 MR. SHELDON: We're not asking you to address that
14 issue at all.

15 THE COURT: You're not?

16 MR. SHELDON: We're not asking you to. If the Court
17 wants to go further, that's fine, but --

18 THE COURT: But your whole brief --

19 MR. SHELDON: -- it's not necessary to our case.

20 THE COURT: Your whole brief was on that issue.

21 MR. SHELDON: That's correct, Your Honor. Let me
22 explain why.

23 We originally had thought the government was going to
24 challenge our -- that the plaintiff was in the United States,
25 because they filed under seal a notice to appear that actually

1 had been whited out amazingly, and it appeared in that notice to
2 appear that they were going to challenge this, so they weren't
3 admitting he was in the United States. Because the notice to
4 appear that the respondent has says that he's in the United
5 States. And I questioned, why would they file a whited-out
6 notice to appear unless they were planning to challenge that.
7 So we had assumed that they would.

8 And then in the end, they are basically conceding that.
9 They are admitting he was in the United States.

10 THE COURT: Okay. So you are now conceding the only
11 argument you thought you had now, or are you not? I just want
12 clarity for the record. Your whole brief is focused on the
13 other argument. And are you conceding that if I were to reach
14 that, that the *Innovation Law Lab* case is correctly decided,
15 or --

16 MR. SHELDON: Your Honor, that wasn't our only
17 argument. We also argued due process. We argued equal
18 protection. We argued --

19 THE COURT: No, no, I know. But on the statutory
20 piece, this textual argument was nowhere in your brief. I can
21 address both, but I'm wondering whether --

22 MR. SHELDON: I'm not asking the Court to address it.
23 We do think that the plaintiffs in *Innovation Law Lab* are right.
24 I think it's a pretty technical question, what does the
25 word "appears in" mean. It's a real question of, you know,

1 apply to. The question is does -- the word is "apply to," and
2 the law says that people who are in category (b)(1) are allowed
3 to be sent back to the contiguous territory. The people in
4 (b)(1) are supposed to be under expedited removal.

5 So then the question is, can you use (b)(2) for the people
6 in (b)(1), and then the law says it cannot be to the people
7 applied to -- it cannot be applied to the people in (b)(1). And
8 then the government's argument is well, we chose to put him in
9 (b)(2).

10 I mean, I think the plaintiffs in *Law Lab* have the better
11 of the argument. I don't think you can just have a category and
12 then -- for example, if the law says it applies to people over
13 18 and then someone is 16 and they choose to apply it, that
14 doesn't mean that the rest of the law that comes along suddenly
15 applies to that person.

16 But I don't want to argue that. I mean, I don't think
17 that --

18 THE COURT: But if --

19 MR. SHELDON: -- really is necessary for our case.

20 THE COURT: But if I find I have jurisdiction and if I
21 reject your textual argument, then you do want me to address
22 that?

23 MR. SHELDON: Sure. I mean, I --

24 THE COURT: All right. Anything else? Any other --

25 MR. SHELDON: I have a lot of things. Could I make a

1 few quick points here?

2 I would like the Court to understand that from our point of
3 view, the government -- I mean, this is one thing. This is a
4 perfect example where they just claim that jurisdiction is
5 barred for -- you know, completely. And then suddenly, they
6 say, Well, on further review, sure, you guys can discuss the
7 Constitution.

8 And by the way, they didn't even acknowledge that due
9 process could be heard under -- that it wasn't barred. They
10 said equal protection over statutory. The due process argument,
11 again, we're not arguing the specific --

12 THE COURT: I agree with you on that point.

13 MR. SHELDON: Thank you, Your Honor.

14 I would like the Court to understand that I -- from our
15 point of view, the government has not been straightforward from
16 the very beginning of this case, and I would just like to bring
17 out a few examples.

18 Page 2 of their original brief, they start out their case,
19 they say, At issue in this case are the procedures that apply to
20 aliens who are applicants for admission. Fine. Then they say,
21 I.e., those aliens present in the United States who have not
22 been admitted, as well as those who arrive at a port of entry.

23 The problem is, Your Honor, they are completely mixing
24 together two categories that just are completely separate. I
25 don't know if the word is misleading. They're -- I think they

1 know better. But they're making it seem to this Court as if
2 it's -- there's no distinction between applicants for admission,
3 you know, that's all one category, people in the United States,
4 people outside the United States. That is not the law, and that
5 hasn't been the law for 115 years in many, many very clear
6 decisions. So you know, there is a bright line.

7 And then the rest of the brief, it just continues on this
8 way, because, you know, the quotes that they give, we agree with
9 them. I mean, they say if -- it says, Any alien who is not
10 clearly and beyond a doubt entitled to be admitted, you know,
11 should -- I mean, we agree with that.

12 Just if I could have a minute, Your Honor, I would like to
13 go through some of these things --

14 THE COURT: Sure.

15 MR. SHELDON: -- because I think it is important here.

16 I mean, they say, It is firmly established, although aliens
17 seeking admission into the United States may physically be
18 allowed within its borders pending a determination of
19 admissibility, such aliens are legally considered to be detained
20 at the border and, hence, never effecting an entry into the
21 country.

22 Okay. That quote has to do with -- they have that on page
23 22 of their brief. That has to do with parole authority. That
24 says if somebody is seeking admission, they may be physically
25 allowed within the borders. Fine. We agree with that. That's

1 a completely different --

2 THE COURT: But isn't your guy seeking admission? By
3 his own admission, he comes across the border and is looking for
4 immigration agents to --

5 MR. SHELDON: Seeking admission may be physically
6 allowed within its borders. He wasn't allowed within the
7 borders.

8 THE COURT: I don't mean parole. In essence, isn't he
9 a guy coming across the border at a place other than a port of
10 entry seeking admission to the United States?

11 MR. SHELDON: Please let me respond.

12 An applicant -- the quote on page 20, An applicant for
13 initial entry has no constitutionally cognizable liberty
14 interest in being permitted to enter the United States. We
15 couldn't agree more. Okay? That's not the case here. That's
16 somebody at the border. That's somebody at the airport. That's
17 someone who has not been admitted. They have no constitutional
18 right.

19 Why is the government citing that when it has nothing to do
20 with this case? We completely agree.

21 Next quote they have: Aliens seeking entry from contiguous
22 lands obviously can be turned back at the border without more.
23 We don't disagree. Somebody at the border coming in can be
24 turned back. That's not the case here again.

25 THE COURT: Your guy who is not right at the border at

1 a port of entry or at the territorial border, he's not there,
2 but he's in close proximity to there. He says he's come across
3 the border, and he has no papers.

4 He's different?

5 MR. SHELDON: He's completely different under the
6 long, long line of cases. I mean, every single case says the
7 same thing.

8 And let me explain why, Your Honor. When you are dealing
9 with the Constitution, when you are dealing with due process, we
10 need bright lines. We need a clear distinction. We can't have
11 this murkiness that the government is talking about where oh,
12 Jeez, were they across the border, how far were they, did they
13 really -- that's not what the courts have decided. They have
14 said there is a bright line. Okay?

15 Because the Constitution deliberately -- unless the
16 government is going to say it was a drafting mistake, you know,
17 by the people that wrote the Constitution, the Constitution says
18 persons, and they chose that word on purpose. Okay? Persons
19 are all persons.

20 So then you could actually make an argument, what about
21 people in Afghanistan, and the courts have said no, that's going
22 too far, those aren't persons because they're not in the United
23 States.

24 But once you're in the United States, you do have a due
25 process right, and everything changes. And the government's

1 attempt to mix all this up and make it sound like, well, it's
2 all the same thing, they're arriving, they're not arriving, that
3 is not what the law has been for 115 years under every single
4 decision, except the government managed to dredge up two
5 decisions. There's one from the District of New Mexico and
6 another that they found from the Third Circuit that are -- I
7 mean, you read the decisions, and they actually even quote the
8 law. They know what the law is, and they just say, No, you
9 know, we're not going along with the law.

10 But the law is clear, clear as it can possibly be. Once
11 you're in the United States, you have constitutional rights.

12 And we quoted some of the decisions here, but there's so
13 many of them, and they go back a hundred years, and there's a
14 stack of them. They're all Supreme Court decisions. Why are we
15 going to follow the District Court of New Mexico, you know, on a
16 decision which is completely outside of the mainstream, outside
17 of any type of -- we're talking about black letter law here.
18 We're not talking about anything controversial.

19 Once you have stepped foot in the United States, you have
20 constitutional rights. Okay? So I mean, this Court cannot
21 treat these things as if they're the same thing, because that's
22 not what the law is, except for parole. But that's an exception
23 that I don't think anybody would argue with. Even defenders of
24 the due process, whatever, okay, you want to let people in so
25 they can argue their rights? Fine, let them in the United

1 States. But treat them as if they're at the border. That's a
2 whole other story.

3 But that's not the case here. This guy was in the United
4 States. He's entitled to constitutional rights. He has to get
5 due process. He has a right to a hearing before an impartial
6 tribunal. Armed police cannot just throw him out of the country
7 the way they did, Your Honor.

8 If that happens, I mean, I think, you know, we all have to
9 worry about our liberty. We all have to worry about -- if the
10 government is able to violate the law so clearly in a case like
11 this, you know, why not stretch it further. Where are they
12 going to stretch it to?

13 THE COURT: All right.

14 MR. SHELDON: You know, I don't know. I'm sure the
15 government isn't going to have an answer to that question, but
16 if you're going to ask them, okay, you want us to violate the
17 due process clause, you want us to violate 115 years of law?
18 How far are we going to do it? How far? Because he was across
19 the border? How far across the border? Are we going to make up
20 new law here, Your Honor?

21 The law is -- I'm not asking the Court to do anything that
22 isn't 100 percent clear under the law, and the only thing that's
23 not clear is the government when they're trying to mix
24 everything up and make it sound like there's a difference, you
25 know, because he hasn't been admitted. I mean, it doesn't

1 matter. There's people here who have never been admitted.
2 They've been here for 30 years. They have wives. They have
3 kids. All of a sudden, the government can just show up and,
4 what, can shoot them? Is there a limit? They were talking
5 about building a moat with alligators and snakes. How far can
6 the government go with this?

7 Someone has been here -- oh, they're just going to say a
8 little bit. I don't think that's something that this Court
9 should be making up new law, which is what the government is
10 asking the Court to do, you know. And something so incredibly
11 serious as the due process clause, there is a bright line, and
12 there's a bright line for a reason. It's to protect all of our
13 freedoms.

14 THE COURT: Okay.

15 MR. SHELDON: So, you know, and again, there's a
16 statutory argument, of course, which is not supposed to apply to
17 him. And then we've got all the other arguments. There's equal
18 protection. There's -- I mean, once you're in the United
19 States, you're in the United States, and the government just --
20 I mean, the procedures that they're using, I mean, I just -- I
21 have here the -- their document that they gave the respondent.
22 I mean, this is a joke, Your Honor. This is worthy of the
23 Soviet Union.

24 Migrant Protection Protocols Assessment Notice. First of
25 all, it's not even dated the day they threw him out of the

1 country. It's dated a month and a half later when presumably he
2 came back for a hearing. So in other words, he did not even
3 have a hearing before he was thrown out of any type. And then
4 it's not even signed by any officer. It just says, You did not
5 establish a clear probability. It has his name. It doesn't
6 even have his birth date. It says interview location, THAC
7 (phonetic), whatever that means. I mean, there's nothing here.
8 There's not even anything that anyone can review.

9 This is just a -- they're making a joke out of the
10 Constitution, Your Honor, and I hope this Court has the
11 authority and will take it -- you know, this Court has the
12 authority to invalidate actions by the defendant, and the Court
13 should do that.

14 On the way here, I walked by the Japanese Memorial. It
15 says, you know, President Reagan said this is a historical
16 wrong, and we're admitting it, and we don't want it to happen
17 again. And I just hope the Court is not going to be doing the
18 same kind of thing.

19 Thank you, Your Honor.

20 THE COURT: All right. Mr. Walker?

21 MR. WALKER: Thank you, Your Honor.

22 There are a few points I would like to make in response.
23 One is to the bulk of plaintiff's counsel's discussion about
24 when due process rights attach to an applicant for admission.

25 I don't think there is any authority for the proposition

1 that immediately upon stepping foot on United States soil
2 outside of a designated port of entry, that an applicant for
3 admission suddenly gains due process rights. That's second. In
4 *Zadvydas* and in this circuit's opinion in *Rafeedie*, the analysis
5 is more robust. It's based on the degree of connection and the
6 amount of time spent in the United States. In *Rafeedie*, the
7 D.C. Circuit held that due process rights had attached to lawful
8 permanent residents who had been in the country for many years.

9 Now, the case law we have about persons who are recent and
10 clandestine entrants into the country, the *Castro* decision from
11 the Third Circuit and the New Mexico decision that, though out
12 of district, contains a very thorough and persuasive analysis on
13 this point, is that those recent entrants do not have due
14 process rights.

15 And Mr. Cruz, indisputably, crossed the border, looked for
16 an immigration officer to present himself to, and did so
17 immediately, same day, within hours presumably. So that's the
18 due process point.

19 I also want to address the new textual argument that's come
20 up.

21 THE COURT: But you argue I don't have jurisdiction to
22 even get there.

23 MR. WALKER: That's correct. The 1252(a)(2)(B)(ii)
24 bars the due process claims in this case. But if you did get
25 there, then you would undertake the analysis that -- just

1 described, that due process rights do not attach to Mr. Cruz.

2 On the textual point about (b) (2) (C), the contiguous
3 removal authority, not applying to plaintiff because it applies
4 to those, quote, arriving in the country, Mr. Cruz's argument is
5 that because he was able to gain entry into the United States
6 without inspection, by crossing the border outside of a port of
7 entry, he is not arriving in the United States.

8 There is an important parenthetical, however, in the
9 (b) (2) (C) provision. It says, An applicant for admission
10 (whether or not arriving at designated port of entry).

11 THE COURT: Right. But is that just covering the
12 border away from the port of entry, or is it also covering the
13 area within miles of it?

14 MR. WALKER: I would say it's covering the border --
15 it's covering individuals precisely like Mr. Cruz who crossed
16 the border clandestinely outside of a port of entry. Certainly,
17 they are going to be able to cross the border, because they do
18 not present themselves at a port of entry, and thereby be able
19 to arrive for some hours in the United States. But (b) (2) (C)
20 clearly contemplates that it applies to them because it applies
21 to those applicants for admission arriving outside of a
22 designated port of entry. So that's the textual point.

23 The only other point I would like to make, Your Honor,
24 unless you have any questions, is to address --

25 THE COURT: Well, wait. Let me stop you there.

1 MR. WALKER: Certainly.

2 THE COURT: Do you have any case law at all on this
3 textual point?

4 MR. WALKER: I'm not aware of this textual point
5 having been advanced in any other case, Your Honor. So I don't
6 have any case law directly on the (b) (2) (C) textual argument.

7 THE COURT: All right. What about other contexts?
8 Are there analogous provisions in the Immigration and
9 Nationality Act that would be persuasive?

10 MR. WALKER: Not that I can think of, Your Honor. But
11 as I believe we discussed last time, we think the operative term
12 in (b) (2) (C) is "applicant for admission." Plaintiff is
13 certainly an applicant for admission because he has not gained
14 admission from the United States, and he is seeking admission to
15 the United States. (B) (2) (C) applies to applicants for
16 admission, including those like Mr. Cruz who arrive in the
17 United States outside of a designated port of entry.

18 The last point I would like to make is to address two cases
19 that plaintiff raised in the supplemental brief, and that's the
20 *Damus* case and the *Mantena* case.

21 I believe he presents these cases for the proposition that
22 procedural challenges are not covered by the -- bless you, Your
23 Honor. That procedural challenges are not covered by the
24 1252(a) (2) (B) (ii) jurisdictional bar. There are important
25 distinctions between the *Damus* case and the *Mantena* case and

1 this case that cause those cases not to apply.

2 In *Damus*, the -- I believe I mentioned at our last hearing
3 that there are cases where an ultimate decision may be
4 discretionary, but there are nondiscretionary procedural rules
5 that apply to those decisions that may be reviewable in a court.

6 And that was precisely what was at play in *Damus*. In
7 *Damus*, the claim was that the United States or, I believe it
8 was, ICE was no longer following mandatory procedures
9 specifically set out in a parole directive that had been
10 promulgated by the agency, and what the Court said is to the
11 extent that there are specific mandatory procedures in place, I
12 can review them.

13 The claims in *Damus* were also far more programmatic than
14 the claims in this case. In *Damus*, there was a class of
15 plaintiffs who presented statistical evidence of the broad
16 application of the policy they sought to challenge, and you
17 don't have allegations like that in this case.

18 *Mantena* is similar. This is the Second Circuit case the
19 plaintiff cited. There, the Court noted that the plaintiff was
20 challenging specific procedures that were set out in statutes
21 and regulations. Again, that's not what we have in this case.

22 And if Your Honor has no further questions, thank you, Your
23 Honor.

24 THE COURT: Okay.

25 MR. SHELDON: Could I have another few minutes?

1 THE COURT: Two minutes.

2 MR. SHELDON: So the government is saying arriving on
3 land doesn't mean arriving on land. It's an Orwellian world
4 where migrant protection protocols is now throwing them out of
5 the country. But arriving on land, how clear can that be?
6 They're arriving on land. "Arriving" means arriving to
7 everybody.

8 THE COURT: Let me ask you this question.

9 MR. SHELDON: Yes, Your Honor.

10 THE COURT: Hypothetically, what if Mr. Cruz didn't go
11 to a port of entry but came across the border and a border
12 patrol agent was standing right there? It's not a port of
13 entry, and he walked up like he did here, and he said, I need
14 asylum here. What --

15 MR. SHELDON: That's a completely different story. He
16 has no due process rights. He has no constitutional rights, and
17 they can do whatever they want.

18 THE COURT: And they can send him to Mexico --

19 MR. SHELDON: Of course.

20 THE COURT: -- as they did here? Okay.

21 MR. SHELDON: Oh, okay. Then we have -- of course,
22 then we have -- I don't know how to pronounce it here --
23 non-refoulement, what it is. Then we have other issues that --

24 THE COURT: But put that aside. Your statutory
25 argument, you would concede that person falls within this

1 discretionary authority?

2 MR. SHELDON: Sure. And I will take in the guy who
3 jumps over the fence and they grab him and throw him out,
4 whatever.

5 THE COURT: But what is your test? That they have to
6 see him cross the border? Is that the test that you would
7 suggest?

8 MR. SHELDON: No. I mean, my test applies to
9 someone -- I have clients that have been here 30 years and are
10 married to Americans and have kids.

11 THE COURT: But this is not Mr. Cruz. Mr. Cruz, by
12 his own admission --

13 MR. SHELDON: Right.

14 THE COURT: Let me finish. By his own admission, he
15 came across the border and tried to find immigration officials
16 to present himself and his asylum claim. That's his own
17 admission in the attached statement you've given me.

18 MR. SHELDON: Right.

19 THE COURT: Those are the only facts I have before me.

20 MR. SHELDON: Right. That's fine.

21 THE COURT: So where do you draw the line between him
22 and someone like we talked about just a few minutes ago? What
23 is the line that you're asking me to draw?

24 MR. SHELDON: He's in the United States.

25 THE COURT: But so is the other person --

1 MR. SHELDON: He's here in the United States.

2 THE COURT: So is the other person.

3 MR. SHELDON: He's not under --

4 THE COURT: Wait. Let me finish. What about the
5 other person who steps across and runs for 300 yards, but they
6 see him the whole way?

7 Is it that the agents actually have to see the crossing?
8 What is the line? Is it just that they've got to be literally
9 at the border? What's your position here?

10 MR. SHELDON: That case is not before this court.

11 THE COURT: But in order to understand your argument,
12 I need to understand what your position is. How do I interpret
13 this statute? It does talk about an alien who is an applicant
14 for admission. The government, I think, has a strong argument
15 that your client, Mr. Cruz, is an applicant for admission. He
16 crosses the border, and he tries to find a border patrol agent
17 to say, I'm here, help me.

18 MR. SHELDON: Who is talking about an applicant for
19 admission? The government is. That's not what the statute
20 says.

21 THE COURT: The statute refers to subparagraph (A),
22 and subparagraph (A) talks about in the case of an alien who is
23 an applicant for admission.

24 MR. SHELDON: Well, the statute that they're using is
25 their authority to throw people out of the country --

1 THE COURT: No, no. But let's stick with the statute.
2 I'm looking at subpart (C) and (A), and I'm just trying to
3 understand how I read these two provisions together, as you want
4 me to, and they don't cover your client.

5 MR. SHELDON: Your Honor, I would like the Court to
6 just really -- I apologize that we brought up all of that in our
7 original brief. We didn't realize the government was going to
8 concede.

9 This is a whole other story. This is a guy who entered the
10 United States --

11 THE COURT: No, it's not another story. This is a guy
12 who is applying for admission in effect.

13 MR. SHELDON: They are using the authority of
14 1225(b) -- (c), I guess, which says if they're arriving on land.
15 Okay? It only applies to -- the only authority they have --

16 THE COURT: Did he fly? He did arrive on land. You
17 don't dispute that?

18 MR. SHELDON: But he's not arriving on land. He's in
19 the United States.

20 THE COURT: Okay. And at what point is he in? When
21 both feet are across the border? At what point does he arrive?

22 MR. SHELDON: He's not under --

23 THE COURT: At what point does he arrive?

24 MR. SHELDON: He's not under the control of any U.S.
25 government official. He's freely in the United States. He can

1 walk around. He can come. He can go.

2 THE COURT: All right. So an immigrant who comes
3 through the border at a place where there are no border patrol
4 agents within a mile or two, he hits a sensor, the agents come
5 running to apprehend that immigrant, does that immigrant fit the
6 bill?

7 MR. SHELDON: Your Honor, we're not talking about a
8 lot of rights here. They have to give him minimal, minimal due
9 process rights. They have to give him a hearing. They have
10 to --

11 THE COURT: But answer my question.

12 MR. SHELDON: Yeah, that guy would absolutely be in
13 the United States, yeah. I mean, he's here. He's freely here.

14 All we're asking -- at that point he has to have a hearing.
15 They have to say, Are you an American citizen? Are you married
16 to an American? I mean, certain basic hearing. You can't just
17 take this guy and --

18 THE COURT: But those folks close to the border don't
19 have a constitutionally cognizable liberty interest. That's
20 what the cases have said. Right at the border.

21 MR. SHELDON: That they don't have a liberty? I am
22 not aware of these cases. The Third Circuit case is such an
23 outlier. There's a Third Circuit --

24 THE COURT: There's a D.D.C. case, the *American*
25 *Immigration Lawyers Association v. Reno*. There's the --

1 MR. SHELDON: That case is a parole case. That deals
2 with parole. Parole, again, is a completely other animal.

3 THE COURT: So your position is anyone who makes it
4 across the border has all the due process rights of somebody who
5 has been here working and living in the United States?

6 MR. SHELDON: I don't know if all the rights. They
7 have due process rights. They have to get some -- it's a
8 balancing test under *Mathews*, some kind of balance where they
9 get some kind of hearing before -- it's not the Soviet Union.
10 This is not Cuba. I mean, you have to give people some kind of
11 hearing before some kind of impartial tribunal.

12 That's what we do. We're lawyers. We deal with law. It's
13 not just grab someone, military guy with a gun grabs him and
14 throws him out. Who are you? What are you doing here?

15 THE COURT: But Mr. Sheldon, all the time they grab
16 people. I used to prosecute cases on the border. They grab
17 people, and they throw them across the border every day. It's
18 happening right now as we speak. That happens.

19 MR. SHELDON: It doesn't happen. They have to sign
20 something. They have to sign a voluntary departure, or they
21 have a right to a hearing.

22 THE COURT: He did sign something.

23 MR. SHELDON: Well, I mean, but they have to agree, or
24 they have a hearing. They get a right to a judge. They get a
25 right -- this guy wasn't even asked if he's American. They

1 didn't ask him, Are your parents American, nothing. He was just
2 thrown out of the country. They can't do that with somebody in
3 the United States.

4 Okay. We are talking about 1903. This is the beginning of
5 due process. This is before anything. This is our core, core
6 due process rights here we're talking about. In 1903, 115 years
7 ago, you know, Aliens who pass through our gates, even
8 illegally, may be expelled only after proceedings conforming to
9 traditional standards of fairness encompassed in due process of
10 law.

11 We're not asking much, but they can't do what they did.
12 This has to get enjoined. If this is allowed, we're going down
13 a murky, slippery slope, you know, that I don't think this
14 country wants to go down. And I think this Court has the power
15 to do something about it.

16 THE COURT: They did ask him where he was from; right?

17 MR. SHELDON: We don't know that. There's nothing.
18 The only paperwork the government has given us is one little
19 paper without his birth date on it that just says, you know, he
20 was given some kind of procedure. If he happened to bring up,
21 I'm in danger in Mexico, they would put him to a
22 more-likely-than-not standard.

23 THE COURT: Didn't they at least determine, because
24 they have to under the statute, that he wasn't coming from
25 Mexico?

1 I will ask the government that.

2 MR. SHELDON: This is a big country with a lot of
3 resources, with a massive amount of money. They can afford a
4 little bit of due process to these people. We are not asking
5 much.

6 THE COURT: My understanding was that he -- they were
7 aware that he was not seeking -- raising an asylum claim coming
8 out of Mexico, that he was from another country.

9 MR. SHELDON: That was a month and a half later when
10 he came back. The paper that they gave us is a month and a half
11 later, and it doesn't have the name of the officer. It doesn't
12 have any information at all.

13 We're right out of the Soviet Union. I mean, this is not
14 the United States of America.

15 THE COURT: Okay. Anything else, Mr. Sheldon? You've
16 gone way more than two minutes. Let's wrap it up.

17 MR. SHELDON: Last quote. Once an alien enters the
18 country, the legal circumstances changes, for the due process
19 clause applies to all persons, not citizens, within the United
20 States, including aliens, whether their presence is lawful,
21 unlawful, temporary, or permanent. *Zadvydas v. Davis*, see
22 *Plyler v. Doe*, *Mathews v. Diaz*, *Kwong Hai Chew v. Colding*, 1953,
23 *Yick Wo v. Hopkins*, 1886.

24 The distinction between an alien who has been effected and
25 enters into the United States and one who has never entered runs

1 throughout immigration law.

2 Thank you, Your Honor.

3 THE COURT: All right. Mr. Walker?

4 MR. WALKER: Yes. To respond to Your Honor's question
5 that you alluded to, we do know that the government did
6 determine that Mr. Cruz was from Guatemala because it does
7 appear in his notice to appear, and this was submitted with
8 the -- submitted by Mr. Cruz with his complaint.

9 THE COURT: And that was the day they apprehended him,
10 not the later date?

11 MR. WALKER: I'm not sure if it was the day they
12 apprehended him, but it was before he was returned to Mexico,
13 and that notice to appear does specifically note that he arrived
14 in the United States from -- at New Mexico and that he was a
15 native of Guatemala.

16 THE COURT: So he wasn't sent to Mexico until they
17 knew that he was not a person from Mexico who was raising a
18 claim for asylum?

19 MR. WALKER: That's what the notice to appear
20 indicates.

21 THE COURT: All right. Thank you.

22 MR. WALKER: Thank you.

23 TE COURT: All right. Before the Court is Alder
24 Cruz's motion for preliminary injunction directing the
25 government to return him to the United States during the

1 pendency of his immigration proceedings and to enjoin the
2 defendants from following the Migrant Protection Protocols.
3 Also before the Court is the defendant's motion to transfer
4 venue to the United States District Court for the Western
5 District of Texas.

6 The Immigration and Nationality Act contains a
7 comprehensive set of rules governing the admission of aliens
8 into the United States. In January of 2019, DHS issued the
9 Migrant Protection Protocols, MPP, which invoked the contiguous
10 return authority contained in Section 1225(b) (2) (C) and
11 initiated a new inspection policy along the southern border of
12 the United States.

13 Under the MPP, certain aliens arriving in the United States
14 by land from Mexico who are not admissible and who are placed in
15 removal proceedings may be returned to Mexico pending the
16 outcome of those removal proceedings. Under the MPP, these
17 applicants are processed for standard removal proceedings
18 instead of expedited removal, and they are then made to wait in
19 Mexico until an immigration judge resolves their asylum claims.

20 Immigration officials exercise discretion in returning the
21 applicants they inspect, but the MPP is categorically
22 inapplicable to unaccompanied minors, Mexican nationals,
23 applicants who are processed for expedited removal, and any
24 applicant who is more likely than not to face persecution or
25 torture in United States.

1 Cruz is a citizen of Guatemala who entered the United
2 States through Mexico unlawfully on May 10th, 2019. Cruz
3 alleges that he fled Guatemala to seek asylum in the United
4 States on May 3rd, 2019, because he experienced death threats
5 and the recent murder of his best friend. He claims that he was
6 targeted by a criminal gang because his sister is a leader of a
7 church group which helps children escape from a life of crime
8 with the Mara gangs.

9 The Court has limited information before it regarding
10 Cruz's arrival in the United States. The most fulsome account
11 of his arrival comes from a sworn statement attached to Cruz's
12 complaint in which he described his entry into the United States
13 as follows:

14 "We arrived at the United States border on May 10th in the
15 middle of the night looking for immigration agents, which was
16 easy because everyone was doing the same thing. Already being
17 in the United States, we walked over the train line until we
18 found an agent that was walking with a dog. As we directed our
19 way to him, he told us to stop and sit on the floor. Right
20 after, two other agents arrived and took us to a detention
21 center, Santa Teresa, New Mexico."

22 According to Cruz's statement, he was then held in DHS
23 custody in Santa Teresa, New Mexico, until being transferred to
24 Deming, New Mexico, and then to El Paso, Texas. On June 6,
25 2019, Cruz was returned directly from Texas to Mexico pursuant

1 to the MPP.

2 Also attached to Cruz's complaint is a copy of his notice
3 to appear, which set a hearing date of July 30th, 2019, before
4 an immigration judge in El Paso for removal proceedings and an
5 asylum claim. The notice to appear alleges that Cruz arrived in
6 the United States at or near Santa Teresa, New Mexico, on or
7 about May 9th, 2019. Cruz was interviewed by an asylum officer
8 on or around that date, but the asylum officer determined that
9 Cruz had failed to establish a clear probability of persecution
10 on account of a protected ground or torture in Mexico.

11 Cruz initially brought suit on July 5th, 2019, in the
12 United States District Court for the Southern District of
13 Florida. On July 21st, 2019, he moved for a preliminary
14 injunction in that court. On July 26, 2019, the government
15 moved to transfer venue to the United States District Court for
16 the Western District of Texas. Cruz did not respond to that
17 motion but instead on August 3rd, 2019, filed a notice of
18 voluntary dismissal.

19 Cruz then filed suit on September 11th, 2019, in the United
20 States District Court for the District of Columbia, and on
21 October 14th, 2019, Cruz filed his motion for a preliminary
22 injunction.

23 All present are familiar with the standards for transfer of
24 venue. So I won't go into detail here except to say that the
25 moving party bears the burden of showing that a plaintiff's

1 informed choice was inappropriate and that the case should be
2 transferred. To warrant a preliminary injunction, a plaintiff
3 must make a clear showing that he is likely to succeed on the
4 merits, he is likely to suffer irreparable harm in the absence
5 of preliminary relief, the balance of equities tips in his
6 favor, and an injunction is in the public interest.

7 The D.C. Circuit has suggested that the Supreme Court's
8 decision in *Winter* should be read to abandon the sliding scale
9 analysis in favor of a more demanding burden requiring a
10 plaintiff to independently demonstrate both a likelihood of
11 success on the merits and irreparable harm. A failure to show a
12 likelihood of success on the merits or a failure to show
13 irreparable harm is sufficient to defeat a motion for
14 preliminary injunction.

15 Although Cruz's claims arose in the Western District of
16 Texas such that this action could have been brought in that
17 district, the defendants bear a heavy burden in showing that
18 considerations of convenience and the interests of justice
19 overcome Cruz's choice of the District of Columbia as the forum.

20 For the following reasons, the defendants have not met
21 their burden:

22 First, Cruz challenges the legality of the MPP themselves,
23 not details regarding their implementation. Thus, the fact that
24 the MPP were applied to him in Texas is of limited relevance.

25 Second, the convenience of litigating this case in Texas is

1 minimal because, as the defendants admit, this case challenges
2 agency action under the APA and, therefore, will not require any
3 witnesses. The fact that Cruz's alien file is located in Texas
4 does not justify a transfer, given the ease with which the
5 information may be transferred electronically.

6 Third, although judges in the border districts have
7 substantial experience and expertise in dealing with immigration
8 issues, this case is not so limited in geographical scope as to
9 implicate the local interests in deciding local controversies at
10 home.

11 And finally, even though Cruz's choice of forum deserves
12 less deference than it otherwise would because he does not
13 reside here, resolution of this lawsuit in this district is
14 appropriate. The defendants reside here, and Cruz's lawsuit
15 concerns the legal basis for the MPP, which were devised and
16 promulgated here in this district.

17 Therefore, I will deny the defendant's motion to transfer
18 this case to the Western District of Texas.

19 Turning to Cruz's motion for a preliminary injunction, I
20 will first consider his likelihood of success on the merits.

21 As a threshold matter, the government contends that Cruz
22 has a low likelihood of success on the merits on some of his
23 claims because the INA strips this court of jurisdiction over
24 them. Section 1252(a)(2)(B)(ii) provides that notwithstanding
25 any other provision of law, statutory or nonstatutory, no court

1 shall have jurisdiction to review any decision or action of the
2 Attorney General or the Secretary of Homeland Security, the
3 authority for which is specified to be in the discretion of the
4 Attorney General or Secretary of Homeland Security.

5 This section also states that the government may return the
6 alien to that territory pending a proceeding under Section
7 1229(a) of this title. This language makes it clear that the
8 government's exercise of its contiguous removal authority is
9 discretionary. But whether this jurisdictional bar applies
10 depends on the type of claim at issue.

11 Turning first to Cruz's statutory claim, as the government
12 concedes, the Court has jurisdiction to consider this claim
13 because it concerns the legality of the program itself rather
14 than the substance of the Attorney General's discretionary
15 choices. The Court also has jurisdiction over the defendant's
16 equal protection claim because, as the government concedes, the
17 claim appears to concern the overall motivation of the MPP
18 policy and not the specific decision to return Cruz to Mexico.

19 With respect to Cruz's due process claim, there is a split
20 of authority on this issue. Several circuits have concluded, as
21 the government has argued here, that Section 1252(a)(2)(B)(ii)
22 bars review of such claims. See, for example, *Privett v.*
23 *Secretary of Department of Homeland Security*, a Sixth Circuit
24 case at 865 F.3d 375; *Jilin Pharmacy USA v. Chertoff*, a Third
25 Circuit case at 447 F.3d 196; and *Dave v. Ashcroft*, a Seventh

1 Circuit case, 363 F.3d 649.

2 But other courts have concluded that Section
3 1252(a)(2)(B)(ii) applies only to the substantive results
4 reached by the Attorney General in exercising his discretion,
5 not to the procedures used in executing those decisions.

6 For instance, another judge on this court has exercised
7 judicial review over a claim that ICE failed to comply with its
8 internal policies and procedures, finding Section
9 1252(a)(2)(B)(ii) inapposite because the plaintiffs were not
10 challenging the outcome of ICE's decisionmaking but the method
11 by which parole is currently being granted or denied. That's
12 *Damus v. Nielsen*, 313 F.Supp.3d at 327.

13 The Second Circuit has exercised judicial review over a
14 procedural challenge to the Secretary's discretionary revocation
15 of visas. See *Mantena v. Johnson*, 809 F.3d 721. And the Ninth
16 Circuit has concluded that Section 1252(a)(2)(B)(ii) does not
17 bar review of constitutional claims. See *Kwai Fun Wong v.*
18 *United States*, 373 F.3d 952.

19 I tend to agree with these courts. As the Ninth Circuit
20 stated in *Gebhardt v. Nielsen*, the Supreme Court has cautioned
21 us to hesitate before interpreting a statutory scheme that's
22 taking the extraordinary step of barring review of
23 constitutional claims. 879 F.3d at 988.

24 And the text of Section 1252(a)(2)(B) applies specifically
25 to discretionary determinations of the Attorney General, not to

1 collateral constitutional claims that might arise in executing
2 the Attorney General's statutorily conferred discretion.

3 For these reasons, I will consider the merits of Cruz's due
4 process claim.

5 With respect to his APA claims, I agree with the government
6 that his claim that the MPP violates international law
7 principles of non-refoulement falls squarely within the bar on
8 judicial review, because with this claim Cruz is challenging the
9 actual substance of the Attorney General's discretionary choice
10 to remove Cruz to Mexico. See, for example, *INS v.*
11 *Cardoza-Fonseca*, 480 U.S. at 464, defining non-refoulement as
12 withholding of deportation. The same is true of the various
13 other policy objections Cruz raises to the MPP in his motion for
14 preliminary injunction at pages 25 through 28.

15 But I do not believe that Section 1252(a)(2)(B) precludes
16 review of Cruz's APA claims pertaining to the procedures
17 followed in promulgating the MPP. In *Innovation Law Lab v.*
18 *McAleenan*, 924 F.3d 503, the Ninth Circuit rejected the claim
19 that the MPP should have gone through notice and comment
20 rulemaking on the merits without considering the jurisdictional
21 implications of Section 1252(a)(2)(B), but because these APA
22 claims concern whether the government complied with its legal
23 obligations in promulgating the MPP rather than the substantive
24 exercise of the Attorney General's discretion, they are not
25 barred.

1 Turning to the merits, I conclude that Cruz's statutory
2 argument is unlikely to succeed. Section 1225(b)(2)(C) provides
3 that in the case of an alien described in subparagraph (A) who
4 is arriving on land from a foreign territory contiguous to the
5 United States, the Attorney General may return the alien to that
6 territory pending a proceeding under Section 1229(a) of this
7 title.

8 During the November 4th, 2019, hearing, Cruz argued for the
9 first time that because he was apprehended in the United States,
10 he is not an alien arriving on land from a foreign territory
11 contiguous to the United States or an applicant for admission as
12 described in subparagraph 1225(b)(2)(A).

13 But Cruz's own sworn statement makes clear that immediately
14 upon crossing the U.S./Mexican border on May 10th, he sought out
15 immigration agents. Moreover, the government's notice to appear
16 clarifies the location where Cruz entered the United States.

17 On this factual record, I conclude that Cruz was an alien
18 arriving on land from Mexico. I note that this argument could
19 benefit from briefing, but again, on the record before me, I
20 conclude this argument is unlikely to succeed.

21 I will turn to Cruz's principal statutory argument and the
22 only one that he raised in his motion, and that is, that the
23 contiguous removal provision did not apply to him because he was
24 eligible for expedited removal and was not an alien described in
25 subparagraph (A), which describes full removal proceedings. See

1 8 U.S.C. Section 1225(b) (2) (B) and (C) .

2 According to Cruz, because he was eligible for expedited
3 removal proceedings, the provision describing expedited removal
4 proceedings applied to him, and therefore, the proceeding
5 describing -- provision describing full removal proceedings
6 could not apply to him.

7 The Ninth Circuit recently considered and rejected the
8 statutory argument in *Innovation Law Lab*. The Court described
9 the primary interpretive question as follows: Does Section
10 1225(b) (1) apply to everyone who is eligible for expedited
11 removal or only to those actually processed for expedited
12 removal? 924 F.3d at 508.

13 Because the eligibility criteria for Subsections (b) (1) and
14 (b) (2) overlap, the Ninth Circuit could only tell which section
15 applied to the applicant by considering the processing decision
16 made during the inspection process.

17 The Court concluded that 1225(b) (1) does not apply to an
18 applicant who is processed under 1225(b) (2) (A), even if that
19 individual is rendered inadmissible by the statutory grounds
20 specified in 1225(b) (1). In other words, the contiguous removal
21 authority applies to any individual processed under
22 1225(b) (2) (A), even if the government could have chosen to
23 process the individual under 1225(b) (1) instead.

24 I agree with the Ninth Circuit's reasoning. Cruz was not
25 beyond the reach of the contiguous removal authority because the

1 expedited removal provisions apply only when an immigration
2 officer determines that an alien who is arriving in the United
3 States is inadmissible on certain statutory grounds. 8 U.S.C.
4 1225(b)(1)(A)(i).

5 But no such initial determination was made in this case.
6 Instead, the Department of Homeland Security exercised its
7 discretion to place Cruz in full removal proceedings. I share
8 the Ninth Circuit's doubt that Subsection (b)(1) applies to the
9 plaintiff merely because Subsection (b)(1) could have applied to
10 him.

11 Cruz, therefore, is unlikely to succeed on the merits of
12 his claim that the MPP are inconsistent with the INA.

13 I also find that Cruz's other claims are unlikely to
14 succeed on the merits.

15 First, his equal protection claim is unlikely to succeed
16 because the MPP are not facially discriminatory. They apply to
17 all citizens and nationals of countries other than Mexico
18 arriving in the United States by land from Mexico illegally or
19 without proper documentation.

20 Cruz argues that several statements made by President Trump
21 show that invidious discrimination was a true motivation behind
22 the MPP. But the Supreme Court has recently clarified in the
23 context of another equal protection claim against a Trump
24 Administration immigration policy that courts may consider only
25 whether the challenged policy is plausibly related to the

1 government's stated objection and must uphold the policy so long
2 as it can reasonably be understood to result from a
3 justification independent of unconstitutional grounds. *Trump v.*
4 *Hawaii*, 138 Supreme Court 2392 at 2420.

5 The MPP clearly relate to several such goals, including,
6 among others, reducing false asylum claims and preventing aliens
7 from disappearing into the United States before a court has
8 rendered a decision on their asylum claims.

9 Accordingly, Cruz's equal protection claim is unlikely to
10 succeed on the merits.

11 Cruz's due process claim is also unlikely to succeed
12 because an applicant for initial entry has no constitutionally
13 cognizable liberty interest in being permitted to enter the
14 United States. *Rafeedie v. INS*, 880 F.2d at 520, a D.C. Circuit
15 case.

16 The fact that Cruz was apprehended within the territorial
17 bounds of the United States does not overcome that principle.
18 It is firmly established that although aliens seeking admission
19 into the United States may be physically allowed within its
20 borders pending a determination of admissibility, such aliens
21 are legally considered to be detained at the border and, hence,
22 never having effected entry into this country. Quoting *American*
23 *Immigration Lawyers Association v. Reno*, a D.D.C. case at 18
24 F.Supp.2d at 58 through 59. See also *Castro v. Department of*
25 *Homeland Security*, a Third Circuit case at 835 F.3d at 448, and

1 *MSPC v. U.S. Customs and Border Patrol*, a District of New Mexico
2 case, 60 F.Supp.3d at 1175.

3 Absent a liberty interest cognizable under the due process
4 clause, Cruz's due process claim is likely to fail.

5 Cruz's APA claim based on the lack of notice and comment
6 rulemaking procedures for the MPP is also likely -- unlikely to
7 succeed because general statements of policy are exempted from
8 the notice and comment requirement. See 5 U.S.C. Section
9 553(b). See also *Lincoln v. Vigil*, 508 U.S. at 197.

10 As the Ninth Circuit has explained, the MPP qualifies as a
11 general statement of policy because immigration officers
12 designate applicants for return on a discretionary case-by-case
13 basis. *Innovation Law Lab*, 924 F.3d at 508.

14 Cruz's remaining APA claims concerning the promulgation of
15 the MPP are also unlikely to succeed. For instance, Cruz claims
16 that the government has acted arbitrarily and capriciously
17 because it has failed to demonstrate good reasons for departing
18 from its prior policy, but the DHS press release contained in
19 the record indicates several reasons for the policy change.

20 Cruz further claims that the policy is arbitrary and
21 capricious because it fails to achieve its stated goals. But
22 the government has cited authority indicating a rapid and
23 substantial decline in apprehensions in those areas where the
24 most amenable aliens have been processed and returned to Mexico
25 pursuant to MPP.

1 Finally, Cruz claims that the policy is not rationally
2 connected to any of its stated justifications and that its
3 purported rationale is pretextual.

4 For the reasons explained above in connection with Cruz's
5 equal protection claims, these arguments must fail.

6 As an independent ground for denying Cruz's motion for
7 preliminary injunction, I also find that he has failed to make
8 an adequate showing of irreparable harm.

9 Cruz fears that he will be deported from Mexico or will
10 otherwise suffer injury upon his return to Mexico. But as the
11 Ninth Circuit found in *Innovation Law Lab*, the likelihood of
12 harm is reduced somewhat by the Mexican government's commitment
13 to honor its international law obligations and to grant
14 humanitarian status and work permits to individuals returned
15 under the MPP.

16 Cruz also claims that his return to Mexico has created
17 various obstacles to his participation in the asylum process,
18 but he does not identify with specificity the obstacles that he
19 himself has encountered, nor has he linked any such obstacles to
20 the threat of irreparable harm.

21 Indeed, in this very case, Cruz was able to communicate
22 with his attorney and prepare a translated statement in support
23 of his motion for preliminary injunction.

24 Cruz cites evidence of violence in the Mexican border
25 region, but again, he has not shown how this violence creates a

1 danger of such imminence that there's a clear and present need
2 for equitable relief to prevent irreparable harm. *Chaplaincy of*
3 *Full Gospel Churches v. England*, a D.C. Circuit case at 454 F.3d
4 at 297.

5 Cruz's generalized claim of irreparable harm is further
6 weakened by his own delay in bringing this very lawsuit. Courts
7 have found that an unexcused delay in seeking extraordinary
8 injunctive relief may be grounds for denial because such a delay
9 implicates a lack of urgency and irreparable harm. *Open Top*
10 *Sightseeing USA v. Mr. Sightseeing LLC*, 48 F.Supp.3d at 90.

11 Cruz initially brought this lawsuit on July 5th but then
12 waited over two weeks to file his motion for preliminary
13 injunction. He then voluntarily dismissed that case on
14 August 3rd, but he waited over a month before refiling it in
15 this court. He then waited yet another month before refiling
16 his motion for a preliminary injunction in this court on
17 October 14. This pattern of long delays suggests a lack of
18 urgency on Cruz's part and further weakens his claim of imminent
19 and irreparable harm.

20 For these reasons, Cruz has not shown the existence of
21 irreparable harm necessary for a preliminary injunction.

22 Because Cruz has shown neither a likelihood of success on
23 the merits nor irreparable harm, I will not address the
24 remaining preliminary injunction factors, and I will deny Cruz's
25 motion for a preliminary injunction.

1 All right. I will put out a written order consistent with
2 this ruling.

3 And Mr. Sheldon and Mr. Walker, if Cruz decides not to
4 appeal, which I understand he may appeal my ruling, you should
5 meet and confer and propose a schedule for proceedings moving
6 forward. All right?

7 MR. SHELDON: Yes, Your Honor.

8 THE COURT: Anything else we need to address?

9 MR. WALKER: Not from the government's perspective.

10 MR. SHELDON: No, thank you, Your Honor.

11 (Proceedings adjourned at 11:57 a.m.)
12
13 - - - - -
14

15 CERTIFICATE OF OFFICIAL COURT REPORTER
16

17 I, Sara A. Wick, certify that the foregoing is a
18 correct transcript from the record of proceedings in the
19 above-entitled matter.
20
21
22

23 /s/ Sara A. Wick

24 SIGNATURE OF COURT REPORTER

November 26, 2019

DATE
25

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CRISTIAN DOE. *et al.*,
Plaintiffs,

v.

CHAD WOLF,
Acting Secretary of Homeland
Security; *et al.*,
Defendants.

No. 19 cv2119 DMS AGS

DECLARATION OF ASHLEY B. CAUDILL-MIRILLO

I, Ashley B. Caudill-Mirillo, pursuant to 28 U.S.C. § 1746, and based upon personal knowledge and information made known to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows relating to the above-captioned matter.

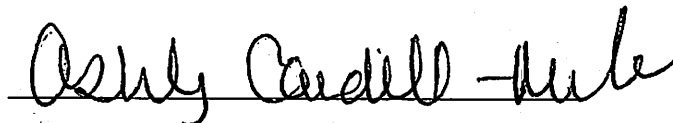
1. I am currently the Deputy Chief of the Asylum Division with U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS). I have held this position since February 2019. Prior to becoming the Deputy Chief of the Asylum Division, I served as the Management Branch Chief at Asylum Division Headquarters since 2015, where I was responsible for overseeing the Division's resource management and strategic planning, as well as its contracts, performance management initiatives, and labor-management obligations among other duties. I joined USCIS as an Asylum Officer in the New York Asylum Office in 2008 and in 2011, I became a Supervisory Asylum Officer. In 2012, I was selected to be the Deputy Director of the New York Asylum Office. Currently,

in my nationwide duties as well as with the Division's headquarters component, I am involved in policy development, quality assurance, and overall management of the asylum program.

2. On January 25, 2019, Secretary Nielsen issued a Memorandum for the Director of USCIS and other DHS component leadership titled, "Policy Guidance for Implementation of the Migrant Protection Protocols (MPP)." Pursuant to this Memorandum, DHS immigration officials, are required to refer any aliens who express a fear of return to Mexico to USCIS for "a *non-refoulement* assessment" when processing an alien for Section 235(b)(2)(C) removal. Asylum officers at USCIS conduct this assessment after completing a "*non-refoulement* interview" during the MPP process.
3. This interview is a non-adversarial process and access to counsel (telephonically or in-person) during the *non-refoulement* interview was not required but sometimes occurred on an ad hoc basis.
4. During the *non-refoulement* interview, asylum officers make a determination of whether the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion or would more likely than not be tortured while pending removal proceedings in Mexico.
5. The Petitioners received two *non-refoulement* interviews. The first screening interview on September 3, 2019 yielded a negative assessment of fear of both persecution or torture in Mexico. After the initial interview in September, the case was again referred by Border Patrol to USCIS, after the Petitioners appeared for a November 5, 2019 immigration judge hearing and re-claimed fear. The second interview was scheduled for and occurred on November 14, 2019.

6. During the second interview, an asylum officer reviewed the previous interview notes and created a summary of facts, reviewed the summary with Petitioners, and provided them with an opportunity to correct any errors, and confirm the accuracy of the summary. The asylum officer also inquired as to whether any events occurred between the first and second interview or any other information that may not have been shared during the first interview.
7. During the second interview on November 14, 2019, Petitioners stated that they received additional threats in between the first and second interview. The asylum officer elicited additional substantive testimony related to these events and other detail from the Petitioner, resulting in a USCIS determination that Petitioners would more likely than not be tortured upon return to Mexico while pending removal proceedings.
8. Because of the November 14, 2019 *non-refoulement* assessment, Petitioners were no longer subject to the MPP per the MPP Guiding Principles and were not returned to Mexico after this determination was made.
9. If an injunction was issued requiring counsel (be it telephonic or in-person) to be present at every single *non-refoulement* interview, it would cause an undue burden on the agency processing these cases given processing times and delays to the MPP process.
10. Interview slots are specifically allocated for applicants and balanced with scheduling constraints and space permitted at various DHS sites. If counsel is required at every interview but unavailable at the scheduled interview time, this would cause additional processing time and delays. Additionally, because there are limited telephone lines at most processing locations, any lost interview slot due to counsel unavailability would further delay processing in the MPP. This would be further complicated if counsel represents several clients and USCIS would be required to consistently revamp a predetermined interview schedule to meet their availability.

Executed this 4 day of December, 2019.

A handwritten signature in black ink, reading "Ashley Caudill-Mirillo", written over a horizontal line.

Ashley B. Caudill-Mirillo
Deputy Chief, Asylum Division
U.S. Citizenship and Immigration Services
Department of Homeland Security

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CRISTIAN DOE, et al.,

Plaintiffs,

v.

CHAD F. WOLF, Acting Secretary of
Homeland Security; et. al.,

Respondents.

Case No. 19cv2119 DMS AGS

**DECLARATION OF
SCOTT GARRETT**

I, Scott Garrett, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Division Chief for San Diego Sector Border Patrol's Law Enforcement Programs Division. I have held this position since December 2018. Prior to occupying this position, I was the Patrol Agent in Charge of the Indio Station, El Centro Sector Border Patrol from 2015 to 2018; Associate Chief at Border Patrol Headquarters in Washington, D.C. from 2012-2015; Assistant Chief Patrol Agent in Miami Sector from 2008-2012; Assistant Chief at Border Patrol Headquarters from 2006-2008. I have held various other positions since joining Border Patrol in 1996.
2. In my current position, I oversee the following programs within San Diego Sector: Prosecutions, Strategic Planning, Strategic Communications, and Specialty Programs.
3. My responsibilities include directing and making major policy decisions and recommendations within the program areas; planning and directing assignments involving the enforcement of criminal and immigration laws; developing operational plans for the division, etc.
4. This declaration is based upon my personal knowledge, information obtained from other individuals employed by U.S. Border Patrol and U.S. Customs and Border Protection (CBP). I submit this declaration to explain Border Patrol's processing of Migrant Protection Protocols (MPP) aliens within the San Diego Sector.

- 1 5. Border Patrol San Diego Sector has operational responsibility that encompasses 60
2 miles of land border between California and Mexico, as well as the coastal region of
3 California, extending to the Oregon state line. There are eight Border Patrol stations, a
4 Special Operations Detachment, a robust intelligence unit, and over 2,300 sworn
5 federal law enforcement agents and mission support staff.
- 6 6. The farthest stations from downtown San Diego where the immigration courts are
7 located are approximately sixty-five miles north (Newton-Azrak station) and sixty-five
8 miles east (Boulevard station).
- 9 7. Border Patrol, a sub-component of CBP and DHS, is tasked with preventing the illicit
10 trafficking of people and contraband between the official ports of entry and
11 apprehending individuals who do not present themselves for immigration inspection at
12 the ports.
- 13 8. San Diego Sector Border Patrol implemented the MPP on March 1, 2019. Since that
14 time San Diego Sector has processed approximately 6,200 cases through the program,
15 which includes some aliens originally apprehended by Yuma Sector and Rio Grande
16 Valley Sector. El Centro Sector has also processed approximately 6,800 cases which
17 includes aliens apprehended by Tucson Sector. All these cases from San Diego and El
18 Centro Sectors were referred to the San Diego Immigration Court under MPP.
- 19 10. San Diego Sector Border Patrol stations are not “detention facilities” and do not have
20 the capacity to hold aliens for extended periods of time. They have secure holding
21 facilities used primarily for short-term confinement of individuals who have recently
22 been detained, or are being transferred to or from CBP and a court, jail, prison, or other
23 agency. Our stations are subject to the National Standards on Transport, Escort,
24 Detention, and Search (TEDS) that do not contemplate visitation between detainees
25 and attorneys/representatives or family members in our short-term custody.
- 26 11. Border Patrol stations’ short-term holding facilities have very limited space for
27 temporary holding and processing, and detainees are not provided access to visitors
28 until transferred to another facility that can address potential long-term detention where

adequate space is available. For Border Patrol, these aliens could be awaiting transfer to Immigration and Customs Enforcement (ICE) for detention during their immigration proceedings, to the U.S. Marshals or state and local law enforcement for criminal prosecution, or to the ports of entry for removal from the United States.

12. ICE is the component of the Department of Homeland Security that has long-term detention facilities with suitable security and facilities to host attorney and family visitation.

13. Unlike ICE detention facilities, Border Patrol stations do not have private space, meeting rooms, interview rooms, or private offices in which aliens can meet with family or attorneys.

14. Allowing visitation at Border Patrol stations by family or attorneys would have an adverse impact on Border Patrol's law enforcement operations and internal security. Border Patrol stations have very limited staff and those staff members are usually working multiple modalities of duties to ensure the maximum number of agents are in the field to address and deter the illegal immigration flow and introduction of contraband into the country. If required to allow visitation by family or attorneys with aliens at Border Patrol stations, additional resources and civilian staffing would be necessary to ensure a safe admission within a facility not designed to provide legal counsel access.

15. Border Patrol stations require heightened security that do not lend themselves to visitation.

16. The holding areas at the stations are in or adjacent to open processing areas where law enforcement investigations may be ongoing with a risk of sensitive information being overheard by visitors, the disclosure of which could compromise the effectiveness of our law enforcement techniques and procedures. These investigations could involve interviews with confidential informants, material witnesses, victims of trafficking, kidnapping and extortion, among others.

- 1 17. Many of the Border Patrol facilities are outdated and extremely small. Requests for
2 funding to enlarge capacities and create additional space for, and separation among,
3 booking/processing, investigations, intelligence gathering, etc., have failed. There are
4 a limited number of interview rooms which are generally used for criminal
5 investigations, administrative processing, and telephonic USCIS interviews. These
6 rooms are also adjacent to open processing areas and are accessed only through the
7 open processing area.
- 8 18. When individuals are first arrested and processed at the stations, they are provided
9 with a list of free legal services, and have access to counsel by telephone. This is the
10 case for all aliens including aliens processed for MPP.
- 11 19. Before aliens are returned to Mexico under MPP, usually within a day or two of
12 apprehension, they are given a court date in the future. While in Mexico, they have the
13 ability to contact and consult with any attorney they wish by phone or in person.
- 14 20. When they return to the port of entry for their court hearing, they are transported to the
15 immigration court where they can meet with their attorneys for at least an hour prior to
16 their hearing at the immigration court.
- 17 21. After their court hearing, if an MPP alien expresses a fear of returning to Mexico, they
18 may contact their attorney at the station by telephone prior to USCIS Asylum Office's
19 non-refoulement interview.
- 20 22. USCIS asylum officers (AO) have not conducted in-person interviews with aliens at
21 the various Border Patrol stations. They have done so telephonically. If an MPP alien
22 asserts fear of return to Mexico, the station contacts USCIS who then provides the
23 station with the date and time of the interview. On the scheduled appointment, a
24 Border Patrol Agent (BPA) must escort the alien from the holding cell to an interview
25 room. The BPA will dial the phone number provided by USCIS to reach the
26 AO. Once a connection is established, the BPA leaves the room. The AO contacts an
27 interpreter if one is needed and then conducts the interview. Once the interview is
28 finished, a BPA must escort the alien back into his or her holding cell.

1
2 23. San Diego Sector Border Patrol alone has processed approximately 6,200 MPP
3 cases. Given the large number of MPP cases, San Diego Sector Border Patrol does not
4 have the manpower or the facilities to allow in-person meetings between respondents
5 and attorneys to prepare for non-refoulement interviews.

6 24. On November 21, 2019, there were approximately 190 individuals processed by
7 Border Patrol who were scheduled to appear in immigration court. This number does
8 not include those cases processed by CBP's Office of Field Operations, which operates
9 the ports of entry. While daily numbers vary, this illustrates the number of MPP aliens
10 who report to the port of entry for transport to court, and then returned to the port
11 and/or stations after their hearing.

12
13 I declare that the foregoing is true and correct to the best of my knowledge,
14 information, and belief.

15 Executed this 4th day of December, 2019.

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19 SCOTT GARRETT
20 Division Chief, San Diego Sector Border Patrol
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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA
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4 CRISTIAN DOE, et al.,
5 Plaintiffs,

6 v.

7 CHAD F. WOLF, Acting Secretary of
8 Homeland Security; et. al.,
9 Respondents.

Case No. 19cv2119 DMS AGS

**DECLARATION OF
MARIZA MARIN**

10
11 I, Mariza Marin, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge
12 and information made known to me in the course of my employment, hereby declare as
13 follows relating to the above-captioned matter.
14

- 15
16 1. I am the Assistant Director of Field Operations, San Diego, for U.S. Customs and
17 Border Protection (CBP). I have been in this role since September of 2019.
18 2. In this capacity, I oversee the planning, directing, and timely execution of Border
19 Security programs and other law enforcement activities in the land, air, and sea
20 environments within the San Diego Office of Field Operations (OFO) area of
21 responsibility. I also provide managerial oversight in policy guidance, assure program
22 implementation and compliance, and evaluate program effectiveness throughout CBP's
23 San Diego Field Office. Further, I serve as the fourth-line supervisor for CBP's
24 Admissibility Enforcement Units (AEUs) and Criminal Enforcement Units at the San
25 Ysidro, Otay Mesa, and Calexico POEs. I have particularly detailed firsthand
26 knowledge of operations of the AEU at the San Ysidro POE.
27 3. Prior to my current position, I held the position of the Assistant Port Director for
28 Passenger Operations for the Otay Mesa POE since July of 2019; of Supervisory CBP
Officer, Watch Commander, at the San Ysidro POE, since February of 2016, and as

1 Supervisory CBP Officer at the San Ysidro POE since February of 2014. I have been
2 employed by CBP since 2008.

3 4. I submit this declaration to explain the processing of aliens, and more specifically,
4 aliens referred to the Migrant Protection Protocols (MPP) within the San Diego OFO
5 area of responsibility.

6 5. The San Diego OFO has five land POEs within its area of responsibility: San Ysidro,
7 Otay Mesa, Tecate, Calexico, and Andrade.

8 6. As with the U.S. Border Patrol, OFO is a sub-component within CBP.

9 7. CBP is a component of the Department of Homeland Security.

10 8. OFO is the largest sub-component within CBP and is responsible for border security—
11 including anti-terrorism, immigration, anti-smuggling, trade compliance, and
12 agriculture protection—while simultaneously facilitating the lawful trade and travel at
13 U.S. ports of entry that are critical to our Nation's economy. The San Ysidro POE is
14 the busiest land POE in the Western Hemisphere. For fiscal year 2019, through the end
15 of August, the San Ysidro POE processed more than 11 million northbound
16 pedestrians, more than 13 million northbound vehicles, and more than 34 million
17 northbound travelers altogether.

18 9. OFO managers at the San Ysidro POE must account for the magnitude and diversity of
19 operations, and strategically allocate, and at times, re-allocate finite resources to ensure
20 that mission needs, initiatives, and priorities are met.

21 10. The San Diego OFO implemented the MPP in January of 2019.

22 11. Since its inception, the San Diego OFO has processed approximately 1100 aliens
23 pursuant to MPP.

24 12. Amenable aliens arriving at the San Ysidro POE or Calexico POE are initially
25 processed for MPP at the POE at which they attempted to enter the U.S.

26 13. Under the MPP, alien respondents are returned to Mexico while they await their
27 immigration court proceedings. For aliens processed at the San Ysidro and Calexico
28

1 POEs, the proceedings take place at the immigration court located in downtown San
2 Diego.

3 14. The detention facilities at the San Ysidro and Calexico POEs, like other ports, are not
4 designed to hold aliens for periods longer than 72 hours. They have secure holding
5 facilities used primarily for short-term confinement of individuals who have recently
6 been detained, or are being transferred from CBP to another government agency or
7 detention facility, including but not limited to U.S. Immigration and Customs
8 Enforcement (ICE), the U.S. Department of Health and Human Services (HHS), court,
9 jail, prison, other agencies.

10 15. These short-term holds are for *all* inadmissible and deportable aliens pending their
11 processing and, where appropriate, their transfer to ICE, HHS, or other federal
12 agencies, as well as all individuals subject to criminal prosecution awaiting transfer to
13 the custody of third-party federal or state agencies such as the U.S. Marshals.

14 17. Generally, MPP respondents are returned to Mexico within a day or two after
15 encounter.

16 18. Once returned to Mexico, and while waiting for their hearing before the immigration
17 court, they also have the opportunity to contact and consult with an attorney.

18 19. ICE is the DHS component that has long-term detention facilities, with suitable
19 security and facilities to host attorney and family visitation.

20 20. The ports have never been designed to accommodate for visitation by family or
21 attorneys at the port of entry in pending immigration cases.

22 21. Such visitations would have an adverse impact on the port's law enforcement
23 operations and internal security. These enforcement activities could involve sensitive
24 criminal investigations on drug cartels and human trafficking organizations involving
25 multiple loads of various controlled substances and people concealed in vehicles.
26 Interviews with confidential informants, material witnesses, criminal defendants,
27 immigration violators, victims of crimes, etc. are being conducted on a regular basis
28 throughout the port's secure areas.

22. The port has a limited number of private interview rooms, which are generally used for criminal investigations, administrative processing, and occasionally USCIS interviews.

23. Unlike ICE detention facilities, the ports do not have rooms available for use by the public, confidential interviews with counsel, or visitation with family.

24. Nor do the ports have the manpower to supervise MPP respondent visits, as most officers are at the inspection booths in primary and secondary inspection ensuring and facilitating lawful trade and travel, and preventing the introduction of contraband into the United States.

25. The San Ysidro POE is subject to the National Standards on Transport, Escort, Detention, and Search (TEDS) that does not contemplate visitation with detainees in our short-term custody.

26. Once MPP respondents are finished with their immigration court appearance, they are returned to the San Ysidro POE for return to Mexico. These respondents include those initially apprehended by the San Ysidro POE, as well as those processed and apprehended by the Calexico POE, San Diego Sector Border Patrol, and El Centro Sector Border Patrol.

27. I have reviewed pertinent records for San Ysidro POE for November 20, 2019. While daily numbers vary, there were 224 individuals scheduled for their immigration court appearance, of which 116 showed up for transport to court. This number illustrates the volume of people that the San Ysidro POE processes on a daily basis under MPP.

I declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 4th day of December, 2019.


MARIZA MARIN
Assistant Director Border Security

San Diego Field Office
Office of Field Operations
U.S. Customs and Border Protection

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