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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

INNOVATION LAW LAB, et al.,

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.,

Defendants.

Case No. 19

1 the MPP, and; (2) even assuming Congress has authorized such returns in general, does the MPP  
2 include sufficient safegua any  
3 alien to a territory where life or freedom would be threatened In support of their  
4 motion for a preliminary injunction, the plaintiffs have sufficiently shown the answer to both  
5

6 First, the statute that vests DHS with authority in some circumstances to return certain  
7 the individual plaintiffs or others  
8 similarly situated. Second, even assuming the statute could or should be applied to the individual  
9 plaintiffs, they have met their burden to enjoin the MPP on grounds that it lacks sufficient  
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Furthermore, nothing in this order obligates the government to release into the United States any alien who has not been legally admitted, pursuant to a fully-adjudicated asylum application or on some other basis. DHS retains full statutory authority to detain all aliens pending completion of either expedited or regular removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

II. BACKGROUND

In December of 2018, the Secretary of the DHS, Kirstjen Nielsen, announced adoption of *See December*

-18. DHS explained that pursuant to the tates will begin the process of invoking Section 235(b)(2)(C) of the *Id.* DHS asserted that under the claimed statutory authority, individuals arriving in or entering the United States from Mexico illegally or without proper documentation may be returned to Mexico for the duration of their immigration proceedings. *Id.*

In January of 2019, DHS issued a further press release regarding the implementation of the MPP. *See* AR 11-15.

Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted into the U.S. and provides specific procedures regarding the treatment of those not

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

The CIS Policy Memorandum providing guidance for implementing the MPP specifically addresses the issue of aliens who might face per2s42s4-7(f a)7(li)-13(e)4(ns 4Dico )122f rs42s4-turnq04(s



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F.3d 1108, 1117 (9th Cir. 2007).<sup>4</sup>

IV. DISCUSSION

A. Justiciability

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

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





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persecution.



1 certain other aliens who have not been admitted or paroled  
2 arrive in the United States without specified identity and travel documents, or who have  
3 removed from the United States without  
4 further hearing or review a fear of persecution. 8 U.S.C.  
5 §1225 9

6 Subparagraph (b)(1) provides that aliens who indicate either an intention to apply for  
7 asylum or a fear of persecution are to be referred to an asylum officer for an interview.  
8 §1225(b)(1)(A)(ii). The officer is to make a written record of any determination that the alien has  
9 not shown a credible fear. §1225(b)(1)(B)(iii)(II). The record is to include a summary of the  
10 material facts presented by the alien, any additional facts relied upon by the officer, and the  
11  
12 persecution. *Id.*

13 The alien in that scenario is entitled to review by an immigration judge of any adverse  
14 decision, including an opportunity for the alien to be heard and questioned by the immigration  
15 judge, either in person or by telephonic or video connection. §1225(b)(1)(B)(iii)(II). Additionally,  
16 aliens are expressly entitled to receive information concerning the asylum interview and to consult  
17 osing prior to the interview and any review by an  
18 immigration judge. §1225 removal under  
19 subparagraph (b)(1) still has substantial procedural safeguards against being removed to a place  
20 where he or she may face persecution.

21 nspection of *other* aliens  
22 that aliens

23 clearly and beyond a doubt entitled to be admitted §1225(b)(2)(A). Section

24  
25 <sup>9</sup> Subparagraph (b)(1) also expressly gives defendants discretion to apply expedited removal to  
26 aliens already present in the United States who have not been legally admitted or paroled, if they  
27 are unable to prove continuous presence in the country for more than two years.  
28 §1225(b)(1)(A)(iii).



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On its face, therefore, the contiguous territory return provision may be applied to aliens described in subparagraph (b)(2)(A). Pursuant to subparagraph (b)(2)(B), however, that *expressly*

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

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

11 Defenda

12 place aliens eligible for expedited removal into section 1229a proceedings, defendants contend  
13 thereby triggering the exclusion from subparagraph (b)(2)  
14 when DHS elects actually to apply it to a particular alien. This argument is not supportable under  
15 the statutory language. Subparagraph (b)(2) shall not apply to an alien . . . to  
16 whom paragraph (1) *applies* nt inquiry therefore is whether the *language of*  
17 subparagraph (b)(1) encompasses the alien, not whether *DHS* has decided to apply the provisions  
18 of the subparagraph to him or her. Because there is no dispute the language of subparagraph (b)(1)  
19 describes persons in the position of the individual plaintiffs, the exclusion from subparagraph  
20 (b)(2) reaches them.

21 Finally, defendants make a statutory intent argument based on the circumstances under  
22 which the contiguous return provision was originally enacted. Defendants assert the provision was  
23 adopted by Congress as a direct response to the Board of Immigration Appeals decision in *Matter*  
24 *of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). In *Sanchez-Avila*, the government argued it  
25 had a long-standing and legal pract

26 *Id.* at 450. The government noted that it  
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*Id.*

*Id.*

The *Sanchez-Avila*

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

*Id.* at

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

*Id.* As a result, the Board declined to treat the practice as valid. *Id.*

Defendants contend that because the contiguous territory return provision purportedly was a direct Congressional response to *Sanchez-Avila*, it should be seen as authorizing the return of aliens such as the named plaintiff

*Sanchez-Avila* was a resident

alien commuter whose application for entry was not granted given apparent grounds to exclude his involvement with controlled substances. *Id.* at 445. Thus, there is no indication he was an undocumented applicant for admission subject to expedited removal under subparagraph (b)(1). To the extent Congressional intent to supersede the result of *Sanchez-Avila* can be inferred, doing so would not show Congress intended the contiguous territory return provision to apply to aliens subject to subparagraph (b)(1).

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

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

1 with the question, Congress could and would choose to authorize DHS to impose contiguous  
2 territory return on aliens subject to expedited removal, and that the appearance of the provision in  
3 subparagraph (b)(2) was essentially a matter of poor drafting. It is also possible, however, that  
4 Congress authorized contiguous return only for aliens not subject to expedited removal because  
5 that was the particular issue presented by *Sanchez-Avila* and/or *g02ancongress a19*

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1 comment is implicated if, and only if, they are subject to the contiguous territory return provision,  
2 notwithstanding the discussion above. In that instance, the question would be whether the  
3 defendants were obligated to comply with APA notice and comment rules with respect to adopting  
4 procedures to address refolement concerns.

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1 apply the contiguous return provision to plaintiffs and others in their position, plaintiffs have  
2 shown a likelihood of success on the refoulement issue, whether that is best characterized as a  
3 claim under their second, third, or fourth claims for relief, or some combination thereof.  
4

5 C. Other injunction factors

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

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

19 Defendants attempt to rebut the showing of harm by arguing the merits  
20 contending the individual plaintiffs were all processed consistent[ly] with applicable law  
21 had sufficient opportunity to assert any legitimate fears of return to Mexico. As reflected in the  
22  
23 law on those points is not correct. The organizational plaintiffs have also shown a likelihood of  
24 harm in terms of impairment of their ability to carry out their core mission of providing  
25 representation to aliens seeking admission, including asylum seekers. *Cf. East Bay Sanctuary*, 909  
26 F.3d at 1242 (describing cognizable harms to organizational plaintiffs for standing purposes.)

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