UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

YANT CARLOS GARCIA PERICHE; MANNY SILVEIRA, individually and as next friend to Yant Garcia Periche; YUSMILA GONZALEZ PEREZ, individually and as next friend to Dayami Gonzalez Perez; DAYAMI GONZALEZ PEREZ; EDGAR DAVID HERNÁNDEZ GÓMEZ, individually and as next friend to Elia Magdaly Lopez Mendez and M.H.; M.H.; and ELIA MAGDALY LOPEZ MENDEZ,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant.

Case No. 1:21cv20217

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges Defendant's application of its "Migrant Protection Protocols" (MPP) to Plaintiffs, in violation of United States statutes and regulations.

2. Plaintiffs are individuals and families from Guatemala and Cuba who are seeking asylum in the United States and, as a result of the MPP, have been returned to Tamaulipas, Mexico—an extremely dangerous area of that country, where they have experienced violence and live in fear—together with their next friend relatives who reside in Miami, Florida.

3. Under the MPP, Defendant is forcing asylum seekers like Plaintiffs who are encountered at the southern border of the United States to return to Mexico where they must remain for the duration of their removal proceedings.

4. By placing Plaintiffs in such danger, and under conditions that make it significantly more difficult for them to prepare their asylum cases, and appear for their hearings, Defendant is depriving them of a meaningful opportunity to seek asylum, and of their right to a full and fair hearing in violation of the Immigration and Nationality Act ("INA"), INA §§ 208, 240, 8 U.S.C §§ 1158, 1229a.

5. Furthermore, Defendant has ignored the need to ensure proper interpretation services are provided in MPP for certain non-English speakers—such as Plaintiffs from Guatemala—which is arbitrary and capricious under the Administrative Procedures Act ("APA").

6. Defendant similarly violated the APA when subjecting Plaintiffs from Cuba to the MPP without first considering important factors and reliance interests related to the treatment of Cuban "entrants" under federal law.

7. The MPP violates the APA and the INA in additional ways. It violates the INA because the authority Defendant cites for the policy, INA § 235(b)(2)(C), 8 U.S.C. § 1225(b)(2)(C), cannot be used against asylum seekers who, like all Plaintiffs here, are inadmissible solely under 8 U.S.C. § 1182(a)(7). And the policy violates the APA because it is thus contrary to law, and because, in creating it, Defendant has failed to comply with the APA's notice and comment requirements.

8. Plaintiffs now seek a declaration that the MPP is unlawful as applied to them, as well as an order enjoining Defendant from continuing to apply the MPP to them.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this matter under 28 U.S.C. §§ 1331 (federal question), 1346 (original jurisdiction), 2201 and 2202 (remedy), and pursuant to 5 U.S.C. § 702 (waiver of sovereign immunity).

10. Venue lies in the United States District Court for the Southern District of Florida because Defendant is an agency of the United States and Plaintiffs Manny Silveira and Yusmila Gonzalez Perez reside in this district. 28 U.S.C. §§ 1391(e).

PARTIES

Plaintiffs

11. Manny Silveira is a U.S. Citizen living in Florida. He brings suit on his own behalf and as next friend to his cousin, Yant Garcia Periche, aka Yanet Garcia Periche.

12. Plaintiff Yant Garcia Periche, aka Yanet Garcia Periche, fled Cuba to seek asylum in the United States, but is now stranded in Mexico under the MPP. She appears personally and, alternatively, by and through her cousin and next friend, Manny Silveira.[1]

13. Yusmila Gonzalez Perez is a U.S. Lawful Permanent Resident living in Florida. She brings suit on her own behalf and as next friend to her daughter, Dayami Gonzalez Perez.

14. Plaintiff Dayami Gonzalez Perez fled Cuba to seek asylum in the United States, but is now stranded in Mexico under the MPP. She appears personally and, alternatively, by and through her mother and next friend, Yusmila Gonzalez Perez.

15. Plaintiff Edgar Hernandez Gomez an asylum seeker living in Florida. He brings suit on his own behalf and as next friend to his wife and daughter, Elia Lopez Mendez and M.H.

16. Plaintiff Elia Lopez Mendez fled Guatemala to seek asylum in the United States, but is now stranded in Mexico under the MPP. She appears personally and, alternatively, by and through her husband and next friend, Edgar Hernandez Gomez.

17. Plaintiff M.H. is a minor child who fled Guatemala with her mother to seek asylum in the United States, but is now stranded in Mexico with her mother, under the MPP. She appears by and through her father and next friend, Edgar Hernandez Gomez.

Defendant

18. Defendant DHS is a cabinet-level department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). Its components include U.S. Citizenship and Immigration Services ("USCIS"), U.S. Customs and Border Protection ("CBP"), and U.S. Immigration and Customs Enforcement ("ICE"). Through these three sub-

[1] Due to the danger faced by each of the adult plaintiffs who are presently in Mexico, and the uncertainty regarding their ability to maintain contact with counsel, each appears here both personally and by and through a next friend.

agencies, DHS implements the MPP. USCIS, through its asylum officers, is responsible for the MPP fear screenings. CBP is responsible for the initial processing and detention of noncitizens who are apprehended near the U.S.-Mexico border. ICE is responsible for determining where and how asylum-seekers returned to Mexico under the MPP must present themselves for their removal proceedings, and aiding CBP, when necessary, to transport individuals back to Mexico.

STATEMENT OF FACTS

Background

19. United States law requires Defendant not to remove noncitizens to countries where they fear persecution, *see* 8 U.S.C. § 1231(b)(3), 8 C.F.R. § 208.16, and authorizes any such noncitizen "who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including [a noncitizen] who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [noncitizen]'s status," to apply for asylum. 8 U.S.C. § 1158.

20. For those noncitizens who are "arriving" in the United States and indicate either a fear of persecution or an intent to apply for asylum, but who are inadmissible either for lacking suitable travel and entry documents under 8 U.S.C. § 1182(a)(7) or for seeking admission into the United States by misrepresentation under 8 U.S.C. § 1182(a)(6)(C) (hereinafter "Credible Fear Eligibles," or CFEs), the law provides a "credible fear" process, in which Defendant must interview such individuals for the purpose of preliminarily determining their potential eligibility for asylum or withholding of removal. 8 U.S.C. § 1225(b)(1). Those who fail to indicate credible fear are removed "without further hearing or review," through expedited removal procedures. *Id.*

21. More specifically, to screen "arriving" noncitizens for CFEs, Defendant's regulations require Defendant to affirmatively ask individuals who are inadmissible under 8

U.S.C. §§ 1182(a)(7) or (a)(6)(C) whether they have "any fear or concern about being returned to [their] home country or being removed from the United States,"[2] and to refer those who indicate such fear or concern to an asylum officer for a credible fear interview. 8 C.F.R.§ 235.3(b)(2).

22. Such credible fear interviews must be conducted in "a nonadversarial manner," for the purpose of "elicit[ing] all relevant and useful information bearing on whether the applicant has a credible fear of persecution," and —if the noncitizen "is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language *chosen* by the" noncitizen—with an interpreter. 8 C.F.R. § 208.30(d) (emphasis added).

23. For other "arriving" noncitizens—i.e., non-CFEs (e.g., those inadmissible to the United States on grounds other than 8 U.S.C. §§ 1182(a)(7) or (a)(6)(C))—who are, specifically, arriving on land from a contiguous foreign territory (such as Mexico), the law authorizes Defendant to return them to that territory pending removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1225(b)(2)(C).

24. Following President Donald Trump's January 2017 Executive Order 13767, which ordered Defendant's Secretary to "take appropriate action […] to ensure that aliens described in [8 U.S.C. 1225(b)(2)(C)]" as arriving from a contiguous territory "are returned to the territory from which they came pending a formal removal proceeding,"[3] Defendant proposed amending the regulation implementing the statute, 8 C.F.R. § 235.3(d),[4] as reflected on Defendant's regulatory agendas beginning in the spring of 2017 through the fall of 2018.

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[2] U.S. Customs and Border Protection, *Claims of Fear* (July 17, 2020), https://www.cbp.gov/newsroom/stats/sw-border-migration/claims-fear.

[3] Executive Order 13767: *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2020), www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements.

[4] Notably, this regulation currently limits DHS's discretion to return noncitizens to a contiguous territory to only those who—unlike, e.g., Plaintiffs from Guatemala— "arrive[] at a land border port-of-entry."

25. Before publishing its agenda for spring 2019, however, the agency abruptly changed course and withdrew the proposed rule change.

26. Then, on December 20, 2018, Defendant announced that 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."[5]

27. No federal register notice was issued in connection with this announcement or subsequently by Defendant regarding these new "Migrant Protection Protocols" (MPP). Instead, the policy has been defined by an evolving assortment of press releases and internal memoranda. For example, at some point, Defendant's CBP created a memorandum that redefined the term "arriving" to include any person encountered within four days of crossing the border. *See* Muster MPP Guiding Principles, *Bollat Vasquez v. Wolf*, No. 20-CV-10566 (D. Mass., May 7, 2020), ECF 43-1 ("Muster Memo").

28. Under the MPP, Defendant places CFEs—purportedly under 8 U.S.C. § 1225(b)(2)(C)—directly in Section 1229a removal proceedings and returns them to Mexico with instructions that they travel to a specific land port of entry to attend the proceedings.

29. Unlike the credible fear process, the MPP do not require Defendant to affirmatively ask individuals who are inadmissible under 8 U.S.C. §§ 1182(a)(7) or (a)(6)(C) whether they have "any fear or concern" about "being removed from the United States;" rather, in Defendant's effort to avoid "a rise in fear claims"—which it would largely presume fraudulent

[5] DHS, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration: Announces Migrant Protection Protocols* (Dec. 20, 2018), www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

or without merit—the MPP provides fear screenings only to those who "come forward on their own initiative."[6]

30. These MPP fear screenings dispense entirely with "the process or procedures described in [8 U.S.C. §§ 1158, 1225(b)(1), (3), and 1231(b)(3)], and their implementing regulations."[7]

31. Plaintiffs are asylum seekers from Guatemala and Cuba who are inadmissible under 8 U.S.C. § 1182(a)(7) and who Defendant is subjecting to the MPP.

32. As a result of the MPP, Plaintiffs have been "returned" to Tamaulipas—an area of Mexico near Brownville, Texas, where the U.S government has warned travelers of dangerous conditions, including rampant crime, kidnappings, murder, extortion, sexual assault, as well as impunity for local criminal groups.[8]

33. As a result of these conditions, Plaintiffs have faced significant obstacles to exercising their statutory rights to apply for asylum and attend their removal hearings.

Plaintiffs from Cuba

34. Plaintiff Garcia Periche is a Cuban national who suffered persecution in Cuba and fled to the United States seeking protection. Ex. 1 (Garcia Decl.) ¶ 3.

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[6] U.S. Dep't of Homeland Security, *Assessment of the Migrant Protection Protocols (MPP), Appendix A: Additional Analysis of MPP Fear-Assessment Protocol* (Oct. 28, 2019), www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf.

[7] U.S. Citizenship and Immigration Services, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, PM-602-0169* (Jan. 28, 2019), https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.

[8] *See* U.S. Dep't of State, *Mexico Travel Advisory* (Sep. 8, 2020), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

35. Plaintiff Garcia Periche requested asylum at the United States border on or about August 20, 2019.

36. Plaintiff Garcia Periche was detained by Defendant for two days, placed in removal proceedings and returned to Matamoros, Mexico to await removal proceedings.

37. Plaintiff Garcia Periche informed Defendant that she feared being returned to Mexico.

38. Plaintiff Garcia Periche has been residing in Matamoros and Reynosa, Mexico since 2019; she has moved several times between neighborhoods due to danger and violence.

39. Plaintiff Garcia Periche suffered an attempted sexual assault and was threatened with a gun in Reynosa, Mexico around August 2019.

40. Plaintiff Garcia Periche was physically assaulted when she was hit in the head with a bottle in Reynosa, Mexico in August or September 2020.

41. Plaintiff Garcia Periche has been caught in the crossfire of gun violence in Reynosa, Mexico.

42. Plaintiff Garcia Periche was physically harmed and fears for her life after she was hit with a car in Reynosa, Mexico on January 15, 2021.

43. Plaintiff Garcia Periche has serious medical conditions, including AIDS, and is immunocompromised; she feels she does not have access to high quality medical care in Mexico.

44. Plaintiff Garcia Periche fears traveling to the border to appear for immigration court hearings.

45. Plaintiff Garcia Periche has not been able to retain counsel for her immigration proceedings and was told by at least one legal organization that they could not represent her since she was in Mexico, and not unless she was on U.S. soil.

46. Plaintiff Silveira is a U.S. citizen who is the cousin of Plaintiff, Yanet Garcia Periche. Ex. 2 (Silveira Decl.) ¶ 5.

47. Plaintiff Silveira has been helping to support his cousin in Mexico. He is in continuous contact with his cousin and suffers from stress and anxiety knowing his cousin is in danger in Mexico.

48. Plaintiff Dayami Gonzalez Perez is a Cuban national who suffered persecution in Cuba and came to the United States to seek asylum. Ex. 3 (Dayami Decl.) ¶ 3.

49. Plaintiff Dayami Gonzalez Perez went to the United States border and requested asylum on or about September 23, 2019; at that time she was detained by defendant for two days and then returned to Matamoros, Mexico.

50. When Plaintiff Dayami Gonzalez Perez must appear for immigration court hearings, she must present herself to the Defendant at the border crossing in Matamoros, Mexico at 5:00 am.

51. On September 23, 2019, Plaintiff Dayami Gonzalez Perez told Defendant she feared being returned to Mexico.

52. In October 2019 Plaintiff Dayami Gonzalez Perez was kidnapped, held for around five days, and raped, by a gang in Reynosa, Mexico.

53. Plaintiff Dayami Gonzalez Perez has not been able to find an immigration attorney to represent her in her immigration proceeding.

54. Plaintiff Dayami Gonzalez Perez fears traveling to the border to appear for immigration court hearings.

55. Plaintiff Yusmila Gonzalez Perez is a U.S. Legal Permanent Resident and mother of Plaintiff Dayami Gonzalez Perez. Ex. 4 (Yusmila Decl.) ¶ 5.

56. Plaintiff Yusmila Gonzalez Perez is suffering from extreme grief and stress, and feels helpless, knowing her daughter has been kidnapped and raped, and is in danger to this day, in Mexico.

57. In subjecting these Plaintiffs to the MPP, Defendant never took into consideration their status as Cuban nationals under federal law, specifically under the Cuban Adjustment Act of 1966, under Title V of the Refugee Education Assistance Act of 1980, under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, and their implementing regulations. *See* 8 U.S.C. § 1522; 8 U.S.C. § 1641(b)(7); 45 C.F.R. §§ 400 et seq., 401 et seq.

58. As Cuban nationals who are seeking asylum in removal proceedings and have not received a final order of removal, the Plaintiffs would qualify for certain mandatory benefits as Cuban "entrants" under those regulations—at least if they resided or were present in the United States.

59. Specifically, pursuant to these longstanding regulations, the U.S. Health and Human Services *must*, for a period of time following the arrival of a Cuban entrant in the United States, provide such person (through grants to states and other public and non-profit agencies) access to the same cash and medical assistance, as well as support services, available to refugees resettled in the United States. *See, e.g.*, 45 C.F.R. §§ 400.43(a)(4), 400.62, 400.318, 401.12.

60. Because they are subject to the MPP, Plaintiffs from Cuba do not reside and are not present in the United States, and are not provided access to those mandatory benefits.

61. Unlike the MPP, Defendants' previous entry policy decisions affecting Cuban nationals were preceded by at least *some* consideration of their particularized treatment under federal law.

62. For example, in 2005, Defendant issued internal guidance specifically limiting the application of the contiguous territory return authority under 8 U.S.C. § 1225(b)(2)(C) to Cuban asylum seekers at land border ports of entry—i.e., to only those who (1) had permission to legally reside in the contiguous territory to which they were being returned *and* who (2) were ineligible for discretionary parole under 8 C.F.R. § 212.5.[9]

63. This guidance was issued in combination with a special exemption from the need to indicate credible fear—and from expedited removal and related detention procedures—under 8 U.S.C. §§ 1225(b)(1) for Cuban nationals who, like Plaintiffs, were inadmissible to the United States solely under 8 U.S.C. §§ 1182(a)(6)(C) or (a)(7)[10] and in the context of "Wet Foot, Dry Foot"—a policy under which Defendant strongly favored paroling such individuals into the United States under 8 C.F.R. § 212.5 to apply for discretionary benefits made available to Cuban nationals paroled or admitted into the United States, under the Cuban Adjustment Act of 1966.[11]

64. Defendant ended this "Wet Foot, Dry Foot" policy with a Federal Register notice on January 12, 2017 "in light of" other policies and measures that the then outgoing Obama administration had adopted to reopen and facilitate U.S. relations with Cuba.[12]

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[9] 2006.03.27, ICE Detention & Deportation Officers' Field Manual, Appx. 16-6, https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf.

[10] *Id.*

[11] *Id.*; U.S. Dep't of Homeland Security, *Fact Sheet: Changes to Parole and Expedited Removal Policies Affecting Cuban Nationals* (Jan. 12, 2017), https://www.dhs.gov/sites/default/files/publications/DHS%20Fact%20Sheet%20FINAL.pdf (the "Wet Foot, Dry Foot" policy interpreted the Cuban Adjustment Act of 1966, which remains valid and makes Cubans alone eligible to apply and—in the government's discretion—receive a green card within one year of their being admitted or paroled into the United States, to "strongly encourage[e] the parole of Cuban nationals who arrived in the United States so that they could apply for relief" under the Act); U.S. Citizenship and Immigration Services, *Green Card for a Cuban Native or Citizen* (June 16, 2020), https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-a-cuban-native-or-citizen.

[12] *Id.* As a result of the ending of the policy, arriving Cubans would be treated at the border like nationals of other (non-contiguous) countries as follows: instead of being strongly considered for parole, they could now be placed in

65. Those policies and measures were substantially reversed or abandoned by the Trump administration.[13]

66. Crucially, however, the ending of the "Wet Foot, Dry Foot" policy did not affect the legal eligibility of Cuban nationals placed in removal proceedings for the *mandatory* federal benefits described above,[14] because, under the law, the benefits are available to Cuban nationals placed in removal proceedings *whether or not* they were paroled into the United States. *See, e.g.*, 45 C.F.R. §§ 401.12.

Plaintiffs from Guatemala

67. Plaintiff Lopez Mendez and her family speak Mam, an indigenous language. She speaks only limited Spanish. Ex. 5 (Lopez Decl.) ¶ 3.

68. In August 2019, Plaintiff Lopez Mendez entered the United States with her youngest child M.H. without inspection, was detained briefly by Defendant, and then returned to Mexico.

(and detained for the length of) expedited removal proceedings under 8 U.S.C. § 1225(b)(1). Those able to establish credible or reasonable fear (i.e., the threshold eligibility to apply for asylum or obtain protection from refoulement in such proceedings) would then be placed in regular removal proceedings before an immigration judge. *Id*.

[13] Amy Sherman, *Trump Has Largely Kept Promise to Reverse Obama's Cuba Policy* (July 15, 2020), https://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1378/reverse-barack-obamas-cuba-policy; Nora Gámez Torres and Michael Wilner, *Trump Adds Cuba Back to List of States Sponsoring Terrorism in Final Move against Island* (Jan. 11, 2021), http://www.miamiherald.com/news/nation-world/world/americas/cuba/article248289315.html.

[14] *Cf.* Monique O. Madam, *An Asylum Seeker is Freed, then Rearrested, as ICE Makes Cubans Languish in Detention* (Oct. 28, 2020), https://www.miamiherald.com/news/local/immigration/article246727026.html (describing, in a related context, the current "arbitrary nature of U.S. immigration policy" toward Cuba, and explaining that, while U.S. policies "favoring Cubans [have] remain[ed] in place" since the "phasing out" of the "Wet Foot, Dry Foot" policy, "they are just not being applied uniformly under the administration of President Donald Trump").

69. Plaintiff stated to Defendant in August 2019, and on multiple occasions thereafter, that she was afraid of returning to Mexico. However, she was unable to fully understand or communicate in Spanish and believes that the officers did not understand her.

70. At no time did Defendant provide Plaintiff with a mam interpreter when considering her fear of returning to Mexico.

71. In subjecting Plaintiff Lopez Mendez to the MPP, Defendant never took into consideration the requirement for language or interpretation services or assistance under federal law, specifically under 8 CFR § 208.30(d)(5), under Executive Order 13166, or under USCIS' Language Access Plan,[15] in connection with the requirement to determine their fear of returning or being removed to Mexico.

72. After being returned to Mexico under the MPP, Plaintiff Lopez Mendez and her daughter lived in a tent camp, where her daughter became ill.

73. Plaintiff Lopez Mendez moved with her daughter to a bedroom in a shared apartment in Matamoros, Mexico, but remains confined to the apartment due to the danger of assaults and kidnapping in the area.

74. Plaintiff Lopez Mendez fears traveling to the border for immigration court hearings. She indicates that on the days she must appear for immigration court hearings, she must present herself at the border at 4:30 am, which results in her traveling the night before and standing up waiting in the street in a dangerous border area all night long before the hearing.

75. Plaintiff Lopez Mendez has not been able to retain counsel for her immigration proceedings.

[15] U.S. Citizenship and Immigration Services, *Language Access Plan* (Dec. 2019), https://www.dhs.gov/sites/default/files/publications/uscisc-updated-language-access-plan-2020.pdf.

76. Plaintiff Hernandez Gomez is an asylum applicant living in Miami, Florida, and is the husband of Plaintiff Lopez Mendez, and the father to Plaintiff M.H. Ex. 6 (Hernandez Decl.) ¶ 5.

77. Plaintiff Hernandez Gomez suffers daily not having the love and support of his wife and three-year-old daughter. He needs his wife in the United States to help care for their six-year-old daughter, and lives in fear afraid that his wife and young daughter will be harmed and/or kidnapped in Mexico.

CLAIMS FOR RELIEF

Count 1
Violation of APA, 5 U.S.C. § 706(2)(A) as to Plaintiffs from Cuba, considering Cuban "entrants" under federal law, 45 C.F.R. §§ 400 et seq., 401 et seq.

78. Allegations 1-62 above are reincorporated herein.

79. The Administrative Procedure Act (APA) requires the Court to "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

80. A policy is arbitrary and capricious if the agency failed to consider important factors bearing on its implementation, and separately if the agency fails to consider the possible reliance interests affected by the policy's promulgation. *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1901 (2020).

81. Were Plaintiffs from Cuba, who are asylum seekers in removal proceedings, not subject to the MPP, they would qualify for certain mandatory benefits as Cuban "entrants" under federal law. *See, e.g.*, 45 C.F.R. §§ 400 et seq., 401 et seq.

82. By subjecting Plaintiffs from Cuba to the MPP without considering important factors and possible reliance interests related to the treatment of Cuban entrants under federal law, Defendant acted arbitrarily and capriciously under the APA.

Count 2
Violation of APA, 5 U.S.C. § 706(2)(A) as to Plaintiffs from Guatemala, considering language services requirements under federal law, 8 CFR § 208.30(d)(5), EO 13166

83. Allegations 1-33 and 63-71 above are reincorporated herein.

84. Were Plaintiffs from Guatemala, who are indigenous language speakers, not subject to the MPP, they would be explicitly entitled to and receive certain mandatory language services or assistance for purposes of determining their fear of persecution in Mexico. 8 U.S.C. § 1225(b)(1)(A)(2); 8 CFR § 208.30(d)(5); Executive Order 13166.

85. The MPP does not similarly provide for language services or assistance, which Plaintiffs from Guatemala have not received.

86. By subjecting Plaintiffs from Guatemala to the MPP, without considering important factors and possible reliance interests related to language services requirements for purposes of determining fear of persecution under federal law, Defendant acted arbitrarily and capriciously under the APA. *See Regents of the Univ. of California*, 140 S. Ct. at 1901.

Count 3
Violation of APA, 5 U.S.C. § 706(2)(A), and 8 U.S.C. § 1108(a) (right to apply for asylum), as to all Plaintiffs

87. Allegations 1-71 above are reincorporated herein.

88. Federal law provides, with certain exceptions, that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply

for asylum in accordance with this section or, where applicable, section 1225(b) of this title." 8 U.S.C. § 1158(a)(1).

89. Defendant's application of the MPP to Plaintiffs is contrary to law, *see* 5 U.S.C. § 706(2)(A), under 8 U.S.C. § 1158(a)(1), because it materially deprives them of their right to apply for asylum.

90. Defendant returned Plaintiffs to Tamaulipas State, an extremely dangerous area in Mexico, for which the U.S government has issued a travel warning, advising of dangerous conditions including rampant crime, kidnappings, murder, extortion, sexual assault, as well as impunity for the criminal groups.

91. Plaintiffs remain in this area because it is near the part of the border where they must appear for immigration court hearings.

92. Since residing in Mexico, Plaintiffs have endured physical attacks, rape, kidnapping, fear, and have been exposed to gun violence.

93. Defendant has interfered with Plaintiff's' right to apply for asylum by requiring them to remain in extreme danger, and put their lives and liberties in jeopardy, in order to access the United States' asylum system.

94. It is during immigration court hearings that Plaintiffs must file an asylum application and provide evidence to establish eligibility for asylum.

95. The dangerous conditions in Tamaulipas state, including violence and kidnappings which Plaintiffs have already experienced, may prevent or deter Plaintiffs from being able to appear at their immigration court hearings, which would deprive them of their right to apply for asylum.

Count 4

Violation of APA, 5 U.S.C. § 706(2)(A), and 8 U.S.C. § 1229a (right to a full and fair hearing), as to all Plaintiffs

96. Allegations 1-71 above are reincorporated herein.

97. Asylum applicants in removal proceedings are entitled to a "full and fair hearing", including the right "to be represented… by counsel of the [applicant's] choosing…a reasonable opportunity to examine the evidence against the [applicant], to present evidence on the [applicant's] own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a. *See, also, Matter of RC-R-*, 28 I&N Dec. 74, 77 (BIA 2020); *Mendez v. U.S. Atty. Gen,* 285 F. App'x 685, 687 (11th Cir. 2008).

98. Defendant has violated Plaintiffs' right to a full and fair hearing under 8 U.S.C. § 1229a by requiring Plaintiffs to return to Mexico and await immigration court proceedings there.

99. On account of being forced to remain in Mexico, Plaintiffs have not been able to retain counsel for their immigration proceedings.

100. Due to their physical distance, in addition to the violence and danger Plaintiffs endure in Mexico, the Plaintiffs face difficulty in preparing evidence, examining evidence against them, and in being able to attend their court hearings.

Count 5
Violation of APA, 5 U.S.C. § 706(2)(A), and 8 U.S.C. § 1225(b)(2)(C) (contiguous territory return)

101. Allegations 1-71 above are reincorporated herein.

102. Federal law provides that noncitizens "to whom paragraph (1) [Section 1225(b)(1) expedited removal] applies" are not subject to Defendant's contiguous return authority under 8 U.S.C. § 1225(b)(2)(C). *See* 8 U.S.C. § 1225(b)(2)(B)(ii).

103. Section 1225(b)(1) "applies" to persons who, like Plaintiffs, are inadmissible solely under either 8 U.S.C. §§ 1182(a)(6)(C) or (a)(7).

104. Defendant's application of the MPP to Plaintiffs is, thus, contrary to law, *see* 5 U.S.C. § 706(2)(A), under 8 U.S.C. § 1225(b)(2)(B)(ii).

Count 6

Violation of APA, 5 U.S.C. § 553(b), (c), (d) (notice and comment) as to all Plaintiffs

105. Allegations 1-71 above are reincorporated herein.

106. The APA renders invalid legislative rules that are adopted without notice and an opportunity for comment during a 30-day period. 5 U.S.C. § 553.

107. MPP and its procedures for determining whether an individual is more likely than not to face persecution or torture in Mexico, as well as its procedures for determining when and how an individual "arrives" for purposes of implementing 8 U.S.C. § 1225, are legislative rules. The program has brought a sea-change in the processing of asylum claims at the border and created a new mandatory process for non-refoulement determinations that does not comply with the regulations for any existing process for assessing fear of return, and a new definition of the word "arrives" that does not comply with existing regulations.

108. The government did not promulgate regulations or provide opportunity for public comment relating to MPP, including non-refoulement procedures. Instead, DHS issued only vague guidance and has been making up the procedures governing MPP as it goes. MPP, its non-refoulement procedures, and its procedures for determining status of arrival, are operating in violation of the notice-and-comment requirements of the APA.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs request that the Court grant the following relief:

a. Enter an order enjoining Defendant from continuing to apply the MPP to Plaintiffs;

b. Issue a declaration that the MPP is unlawful as applied to Plaintiffs;

c. Award Plaintiffs their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and

d. Grant any other and further relief that this Court may deem fit and proper.

Dated: January 19, 2021

Respectfully Submitted,

*/s/ Amien Kacou*_____
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** Motion to appear pro hac vice forthcoming.*