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BOARD OF IMMIGRATION APPEALS
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FALLS CHURCH, VA

Amicus Invitation No. 20-21-02

AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, HUMAN RIGHTS FIRST, NATIONAL JUSTICE FOR OUR NEIGHBORS, AND TAHIRIH JUSTICE CENTER REQUEST TO APPEAR AS AMICI CURIAE AND BRIEF

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REQUEST TO APPEAR AS AMICI CURIAE

The organizations requesting to appear as amici curiae before the Board of Immigration Appeals (BIA or Board) are national immigration legal service providers. Collectively, the organizations and their members represent thousands of noncitizens annually before U.S. Citizenship and Immigration Services, the immigration courts, the BIA and federal courts. In addition to direct representation, amici provide legal orientation and assistance to pro se immigrants and their families; training, technical assistance and other support to lawyers, judges and other community stakeholders; and public and community education on immigration law and policy.

The **American Immigration Lawyers Association ("AILA")** is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security (DHS), immigration courts and the Board of Immigration Appeals, as well as before federal courts.

The **Catholic Legal Immigration Network, Inc., ("CLINIC")** is the nation's largest network of nonprofit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia. Agencies in CLINIC's network employ approximately 2,300 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. CLINIC's promotion of the dignity and rights of immigrants is

informed by Catholic Social Teaching and rooted in the Gospel value of welcoming the stranger. In 2019, CLINIC established the Estamos Unidos Asylum Project in Ciudad Juarez, Mexico to respond to the crisis in legal counsel created by the Migrant Protection Protocols. Through this project, CLINIC provides know your rights sessions and, in limited situations, seeks pro bono counsel for asylum seekers awaiting U.S. court dates in Mexico.

The **Florence Immigrant & Refugee Rights Project ("Florence Project")** provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. We believe that all people facing deportation should have access to counsel, understand their rights under the law, and be treated fairly and humanely. Annually, the Florence Projects provides free legal and social services to over 10,000 non-citizens facing removal in Arizona. The Florence Project has provided bi-national legal assistance to individuals seeking asylum in Nogales, Sonora, Mexico since 2017 in collaboration with the Kino Border Initiative.

Human Rights First is a non-governmental organization established in 1978 that works to ensure the United States' leadership on human rights globally, and compliance domestically with its human rights commitments. Human Rights First operates one of the largest programs for pro bono legal representation of refugees in the nation, working in partnership with volunteer lawyers at leading law firms to provide legal representation, without charge, to thousands of indigent asylum applicants. Human Rights First has conducted extensive research and issued reports about the current and historical practices of, and legal framework governing, the United States' expedited removal procedures and non-refoulement obligations, and the forced return policy known as the Migrant Protection Protocols ("MPP").

National Justice for Our Neighbors ("JFON") was established by the United Methodist Committee on Relief in 1999 to serve its longstanding commitment and ministry to

refugees and immigrants in the United States. JFON's goal is to provide hospitality and compassion to low-income immigrants through immigration legal services, advocacy, and education. JFON employs a small staff at its headquarters in Annandale, Virginia, which supports 18 sites nationwide. Those 18 sites collectively operate in 14 states and Washington, D.C., and include over 40 clinics. JFON advocates for interpretations of federal immigration law that protects immigrants' rights to notice, fundamental fairness, and due process.

The **Tahirih Justice Center** is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its beginning in 1997, Tahirih has provided free legal and social services assistance to more than 27,000 individuals, many of whom have sought asylum and other relief through removal proceedings in immigration court. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country.

AILA, CLINIC, Florence Project, Human Rights First, JFON, and Tahirih Justice Center request to appear as amici curiae in response to the BIA invitation numbers 20-21-02 and 20-24-02, inviting public comment as to whether the Notice to Appear (NTA) practices for respondents placed in the administration's Migrant Protection Protocols (MPP) comply with legal obligations and, as a related matter, whether respondents not designated as "arriving aliens" can be lawfully subjected to MPP. AILA benefits from its members' experience advising and – in a very limited

capacity given the challenges of the program – representing respondents in MPP proceedings. CLINIC has a significant interest in the outcome of this decision because it is critical to this work to be able to advise asylum seekers of the charges against them so they can understand their rights, including which side bears the burden of proof on which issues. The Florence Project directly serves individuals in MPP in Tucson and Nogales, many of whom have confusing and incomplete information in their NTAs. JFON, Human Rights First and Tahirih Justice Center provide direct representation to individuals subject to MPP and monitor and document their treatment in the program.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In December 2018, DHS announced its MPP or Remain in Mexico program, which forces asylum seekers to remain in Mexico while awaiting their removal proceedings in the United States. This unprecedented program now operates along the U.S.-Mexico border across three states and has pushed over 60,000 asylum seekers from locations including the Northern Triangle and Cuba[2] into some of the most dangerous states in Mexico.[3] Many asylum seekers in the program, including children, have been kidnapped, extorted, assaulted, raped, and suffered homelessness, health emergencies, and even death.[4]

DHS argues that it has the authority to implement such a program under INA § 235(b)(2)(C). Amici maintain that MPP violates the immigration statute, the U.S. Constitution, and U.S. international obligations to asylum and related protection-seekers. The U.S. Court of

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[2] *See* Latin America Working Group, Updated Remain in Mexico: Impacts, available at https://www.lawg.org/updated-infographic-remain-in-mexico-impacts/.
[3] *See* US Department of State, Mexico Travel Advisory, available at https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.
[4] *See* Human Rights First, Delivered to Danger, available at https://www.humanrightsfirst.org/campaign/remain-mexico.

Appeals for the Ninth Circuit recently upheld a lower court's finding that the program likely violates the immigration statute. *Innovation Law Lab v. Wolf*, No. 19-15716, 2020 WL 964402 (9th Cir. Feb. 28, 2020). While the lower court's injunction against the program remains subject to a stay, *Wolf v. Innovation Law Lab*, No. 19A960, 2020 WL 1161432 (U.S. Mar. 11, 2020), the legality of the program remains in significant doubt.

The two identical amicus invitations – numbers 20-21-02 and 20-24-02 – shine a spotlight on some of the more dubious practices of DHS in implementing the MPP program.[5] First, DHS issues NTAs that fail to designate whether a noncitizen is considered an "arriving alien," a noncitizen present in the United States without having been admitted or paroled, or a noncitizen who has been admitted but is removable for specified reasons.[6] The missing information undermines any ability of a respondent to properly understand, prepare for, and defend themselves in the resulting removal proceedings. More significantly, the practice has permitted DHS to circumvent the credible fear process outlined in the INA and forcibly return asylum seekers to Mexico to await removal proceedings.

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[5] The practices underlying these amicus invitations are not the only serious problems with the way DHS is implementing the program. Amicus AILA submitted a brief in response to the Board's invitation number 19-11-5 addressing several due process concerns including listing incomplete or incorrect addresses on NTAs and falsely representing court hearing information. *See* Kate Morrissey, "San Diego Immigration Court Overwhelmed by Remain in Mexico Cases," San Diego Union Tribune (Jun. 3, 2019) available at https://www.sandiegouniontribune.com/news/immigration/story/2019-05-31/san-diego-immigration-court-overwhelmed-by-remain-in-mexico-cases; Adolfo Flores, "Border Patrol Agents are Writing 'Facebook' as a Street Address for Asylum-Seekers Forced to Wait in Mexico," Buzzfeed News (Sept. 27, 2019), available at https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico; Gustavo Solis, "CBP agents wrote fake court dates to send migrants back to Mexico, records show," San Diego Union Tribune (Nov. 7, 2019), available at https://www.sandiegouniontribune.com/news/immigration/story/2019-11-07/cbp-fraud

[6] The underlying case documents reflect that "the Department of Homeland Security through its representative has argued that the omission of that information is actually deliberate and that it is the intention of the Department of Homeland Security not to inform the respondent of that information." Amicus Invitation No. 20-21-02, IJ Dec. at 2. The agency has also recently included invented court dates on NTAs. Kate Smith, "ICE told hundreds of migrants to show up to court on Thursday- for many, those hearings are fake," CBS (Jan. 31, 2019), available at https://www.cbsnews.com/news/immigration-court-ice-agents-hundreds-of-immigrants-fake-court-dates-2019-01-30-live-updates/

Amici argue that an NTA that omits indication of the admission status of a respondent does not provide notice of the nature of the proceedings as required by law. And the factual allegations and statutory charges of removability do not cure the defect because they do not clarify the admission status allegation. Where DHS fails to include the required information on the NTA in violation of the statute and the applicable regulations, termination of the proceedings is appropriate. Finally, as a matter of law, individuals not alleged to be either an arriving alien or to have entered at a port of entry or by interdiction are not subject to INA § 235(b)(2)(C) where they otherwise fall into the provisions of INA § 235(b)(1).

NOTICE REQUIRES AN ALLEGATION OF ADMISSION STATUS

Congress identified specific pieces of information that must be included in any NTA to initiate removal proceedings. INA § 239(a)(1). First on the list of requirements is "the nature of the proceedings against the alien." INA § 239(a)(1)(A). Federal regulations also require any NTA to include "the nature of the proceedings against the alien." 8 C.F.R. § 1003.15(b)(1). Yet on contravention of the INA, immigration regulations and constitutional requirements, DHS routinely fails to provide the requisite notice to those in removal proceedings. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2111 (2018).

Fundamentally, the Board asks whether an allegation of admission status—namely, whether an individual is an arriving alien as defined by 8 CFR § 1001.1(q), a person present in the United States who has not been admitted or paroled, or a person admitted to the United States but removable—is necessary to describe the nature of proceedings. Amici contend that it is.

The designation of arriving alien, being present in the United States without admission or parole, or having previously been admitted, determines significant rights of a respondent before

the immigration court including liberty interests and procedural due process rights. The immigration court's jurisdiction to review custody and adjudicate relief stem from that designation. 8 C.F.R. §§ 1003.19(h)(1) (no bond jurisdiction over arriving aliens) and 1245.2(a)(1)(ii) (lack of jurisdiction over adjustment of status applications filed by most arriving aliens). Further, the assignment of burden of proof in removal proceedings stems from the specific categorization of respondent. INA §§ 240(c)(2) and (3).

The identification of admission status is prominent on the NTA, between other legally required information—the respondent's name and address, and the factual allegations and charge(s) of removability. Understanding the importance of the designation requires a brief explanation of the definition and consequences of each admission status.

The first possible admission status is a so-called "arriving alien." *See* Form I-862. "'Arriving alien' is a legal term of art explicitly defined" by federal regulation. *Bouchikhi v. Holder*, 676 F.3d 173, 177 (5th Cir. 2012). Specifically, "[a]rriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport." 8 C.F.R § 1001.1(q). Arriving aliens are not eligible to have the immigration court review their custody status. 8 C.F.R. §§ 1003.19(h)(2)(i)(B), 1236.1(c)(11). Arriving aliens are eligible to seek a withdrawal of their application to enter the United States. INA § 235(a)(4); 8 C.F.R. §§ 1235.4, 1240.1(d). Contrary to its general authority, the immigration court lacks jurisdiction to consider an arriving alien's application to adjust status to lawful permanent resident. *Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009); *see also Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009) (finding exclusive

jurisdiction over adjustment of arriving aliens with USCIS and limiting authority of BIA on motions to reopen of arriving aliens to pursue adjustment). On the other hand, an arriving alien may be eligible for adjustment of status with USCIS, so a noncitizen's categorization as an "arriving alien" means that they can pursue that relief if otherwise eligible. Finally, an arriving alien shoulders the burden of proof in court proceedings to prove that they are "clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible" to refute charges of removability. INA § 240(c)(2)(A); 8 C.F.R. §1240.8(b); *see also* INA § 291 (assigning burden of proof to noncitizen seeking entry).

The second possible admission status is that of a noncitizen "present in the United States who has not been admitted or paroled." *See* Form I-862. Respondents who are physically present in the United States are permitted to seek review of their custody determination before the immigration court as a Constitutional matter. *Padilla et al. v. ICE et al.,* 2:18-CV-00928-MJP, Doc. 158. It also indicates that the noncitizen will typically not be eligible to adjust status in the United States. *See* INA § 245. Significantly, where DHS alleges the respondent is present without being admitted or paroled, DHS bears the initial burden to prove the respondent's alienage. 8 C.F.R. §1240.8(c). If DHS cannot do so, the proceedings must be terminated. *See* 8 C.F.R. § 1240.2(c); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (AG 2018). If DHS shows alienage, the burden shifts to the respondent to show "by clear and convincing evidence that [he or she] is lawfully in the United Sates pursuant to a prior admission" or that "[he or she] is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible" as charged. INA § 240(c)(2); 8 C.F.R. §1240.8(c).

Lastly, the third possible admission status is of a noncitizen "who has been admitted to the United States" but is removable for reasons stated elsewhere on the NTA. *See* Form I-862.

Here, the burden shifts completely to DHS to prove and sustain the charges "by clear and convincing evidence." INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). The designation also allows for the possible adjustment of status to lawful permanent resident of certain noncitizens, who would be ineligible to do so absent the previous admission. *See* INA § 245(a) and (c).

Because removal proceedings implicate grave deprivations of liberty, *see Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("That deportation is a penalty—at times a most serious one—cannot be doubted."), every individual facing deportation is entitled to the procedural due process guarantees of the Fifth Amendment. *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005); *see also Matter of G-Y-R-*, 23 I&N Dec. 181, 188 (BIA 2001) (explaining that notice requirements "are precise and require assiduous attention" because "[o]nce the advisals in the Notice to Appear are conveyed, serious consequences attach to an in absentia order of removal, and the avenues for relief are extremely limited"); *see Al Mutarreb v. Holder*, 561 F.3d 1023, 1027 (9th Cir. 2009) (indicating "whether an alien is properly charged with receiving an NTA he did not in fact get requires a due process inquiry—whether the method of service is 'reasonably calculated, under all the circumstances, to appri[s]e interested parties of the pendency of the action.'" (quoting *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002)). Each individual's due process rights entitle him to proper notice and an opportunity to respond to the charges made against him in "a full and fair hearing." *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (*en banc*) (citing *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000)); *see also United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014). If DHS does not give notice of which admission status DHS believes a respondent to hold, even the most experienced immigration attorney will be at a loss to fully advise a client as to the nature of the removal proceeding and their rights in that proceeding based on the NTA. The deficiency is highly

prejudicial, risking mis-assignment of the burden of proof, prolonged detention, and limitations on options for relief in addition to increased attorney time and cost to clients as well as multiple hearings in court. The information regarding admission status is critical for respondents to litigate their case meaningfully and to present evidence on their own behalf.

ALLEGATIONS OF REMOVABILITY FAIL TO REMEDY THE DEFECT

The factual allegations and charge included in an NTA—and in particular the NTAs in the underlying case records here—fail to advise a respondent of the nature of the proceedings as required by the INA.

The NTA at issue in the first amicus invitation 20-21-02 includes the following factual allegations: "You arrived in the United States at or near San Ysidro, California, on or about April 2, 2019. You were not then admitted or paroled after inspection by an Immigration Officer." It includes a charge of inadmissibility under INA 212(a)(7)(A)(i)(I), to wit:

> an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Rather than clearly stating the nature of proceedings, these allegations, combined with the charge, intentionally muddy the nature of the proceedings and, as a result, the relevant burdens of proof. First, DHS makes two inconsistent and confusing allegations. On the one hand, it alleges that the respondent has "arrived" in the United States, which suggests that the respondent is an arriving alien. At the same time, it alleges that the respondent was not admitted or paroled, which suggests that the respondent was physically present in the United States upon apprehension.

The NTA in the second matter, Amicus Invitation no. 20-24-02, is equally abstruse. DHS alleges that the respondent "illegally *entered* the United States at/near San Ysidro, California *Port of Entry*" while also not being admitted or paroled after inspection. (emphasis added) This respondent similarly was charged under INA § 212(a)(7)(A)(i)(I). The allegations and charge fail to clarify the nature of proceedings.

DHS has adopted a practice of intentionally obscuring the charges against respondents apprehended near the border in order to unlawfully subject them to MPP. First, as will be discussed below, the omission of the admission status facilitated the improper return of thousands of asylum seekers to Mexico, where they face danger and experience a compromised ability to access counsel who would otherwise help them seek asylum in the United States.[7] In addition, the lack of notice of admission status deprived respondents who would have been eligible for judicial review of their custody status from exercising their statutory and constitutional rights. *See* Decision of Immigration Judge O'Connor, San Diego Immigration Court (Sept. 17, 2019) ("DHS was well aware that respondents could not be alleged to be arriving aliens but decided to send them to Mexico so that it could later cynically allege that they were arriving aliens when they presented themselves at the port of entry for their removal hearing.") *See also* ICE, Migrant Protection Protocol Guidance (Feb. 12, 2019) at n.1 (stating that "[o]n their hearing dates before an immigration judge, aliens who CBP initially encountered between the [ports-of-entries (POEs)] will come to a POE to attend their hearings, placing them within the 'arriving alien' definition.").

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[7] *See* AILA, Policy Brief: "Remain in Mexico" Plan Restricts Due Process, Puts Asylum Seekers Lives at Risk (Feb. 1, 2019), available at https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-remain-in-mexico-plan-chaos. DHS is also arguing that respondents in MPP who entered the United States prior to the Asylum Third-Country Transit Ban, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019), are nevertheless subject to it since they must enter the United States each time they come to court from Mexico.

It is critical to note that DHS is solely responsible for issuing any NTA. DHS created the MPP program and then has repeatedly operated the program in a manner designed to interfere, as much as possible, with the ability of noncitizens to obtain protection from persecution and other relief that they are entitled to under law. DHS has failed to offer any, let alone a reasoned, explanation for its intentional bad faith conduct. It is therefore up to the Board and the immigration courts to ensure that noncitizens have access to the courts and receive a full and fair hearing.

In cases like these, where the NTAs prepared by DHS omit critical statutorily required items, the Immigration Judges do not have the authority to correct the DHS's intentional errors, as doing so forces judges to abandon their roles as impartial adjudicators to instead become advocates for one party to the detriment of the other. The Immigration Judges do not have the authority to issue notices to appear or commence removal proceedings because this prosecutorial function is vested solely in DHS. *Compare* 8 C.F.R. § 1239.1(a) *with* 8 C.F.R. § 239.1(a). It creates a real concern of bias if Immigration Judges take on the DHS's prosecutorial responsibilities.

When DHS provides conflicting information in an NTA about whether a noncitizen is an arriving alien, an entrant without inspection or an admitted immigrant, or where DHS needlessly creates ambiguity as to this designation, it prevents noncitizens, their attorneys and the Immigration Judges from determining which set of rules apply and what relief is available.

TERMINATION IS THE APPROPRIATE REMEDY

As a matter of due process and fundamental fairness, the immigration court correctly terminated the proceedings in the cases underlying these amicus invitations. As discussed above,

the NTAs failed to provide the critical information of admission status on the NTAs. The admission status is central to the assignment of burdens of proof, availability of court-review of custody status, and ultimate relief options. A court cannot reach a determination of removability without knowing which party shoulders the burden of proof. To do so would violate procedural due process rights of notice and a meaningful ability to respond. *See Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (finding due process violation where DHS violated federal regulation in refusing to provide FOIA response).

The attorney general recently reiterated that "Immigration judges also possess the authority to terminate removal proceedings where the charges of removability against a respondent have not been sustained. *See* 8 C.F.R. § 1240.12(c). *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (A.G. 2018). The Board has supported termination of proceedings in similar contexts where legally-required notice is lacking. See *Matter of Sanchez-Herbert*, 26 I&N Dec. 43, 44 (BIA 2012) (citing *Matter of Lopez-Barrios*, 20I&N Dec. 203, 204 (BIA 1990) (terminating proceedings where proof of notice of proceedings not shown). In *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980), the Board held that evidence should not be admitted resulting in termination of proceedings where the government had violated federal regulations. As amicus AILA has argued recently to the Board in amicus invitation 19-11-5 regarding lack of sufficient notice of proceedings, termination is the correct remedy.

ANY POLICY ENACTED UNDER INA §235(b)(2)(C) REQUIRING NONCITIZENS TO STAY IN CONTIGUOUS COUNTRIES CAN APPLY ONLY TO DESIGNATED ARRIVING ALIENS

DHS's refusal to plainly articulate the alleged status of the alien in the NTA is part and parcel of its attempt to improperly subject the maximum number of asylum seekers to MPP. The

administration has forced thousands of asylum seekers in the United States back into Mexico to await removal proceedings under MPP. But the statutory provision on which it relies is expressly limited to noncitizens who meet the definition of an arriving alien under 8 C.F.R. § 1001.l(q) and who are not described in INA § 235(b)(1). *See Innovation Law Lab v. Wolf*, No. 19-15716, 2020 WL 964402 (9th Cir. Feb. 28, 2020). Because the respondents in the cases underlying these amicus invitations do not meet those criteria, DHS wrongly placed them in MPP.

Section 235 of the INA establishes a procedure for the inspection of "applicants for admission." INA § 235 et seq. The definition of an "applicant for admission" is an either/or: *either* (1) "an alien present in the United States who has not been admitted"; *or* (2) "an alien ... 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)." INA § 235(a)(1). One noncitizen cannot be both. Thus, not all "applicants for admission" are "arriving aliens." The implementing regulations give meaning to the second category of noncitizens, defining "arriving alien" as follows:

> The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of entry, and regardless of the means of transport.

8 C.F.R. § 1001.l(q).

The specific contiguous-country provision the administration relies upon to support its MPP program provides the following:

> In the case of an alien ... who *is arriving* on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240.

INA§ 235(b)(2)(C) (emphasis added). The section tracks the language of INA § 235(a)(1) describing arriving noncitizens, whom the agency defined to be "arriving aliens."

The regulations implementing INA § 235(b)(2)(C) also make clear that only noncitizens who are in the process of arriving at the United States may be required to await their removal proceeding in Mexico. The regulations provide, "the Service may require any alien who appears inadmissible and *who arrives* at a land border port-of-entry from Canada or Mexico, to remain in that country while awaiting a removal hearing." 8 C.F.R. § 235.3(d) (emphasis added); *see also* 8 C.F.R. § 1235.3(d). Although noncitizens who are physically present in the United States but who entered without being admitted are deemed "applicants for admission," they are not "arriving aliens" because they were not encountered while asking to enter the United States at a port-of-entry – they are already here.

More importantly, however, no "applicant for admission" whether arriving or already in the United States who falls under INA § 235(b)(1) as inadmissible under INA § 212(a)(6)(C) or INA § 212(A)(7) may be returned to Mexico under INA § 235(b)(2)(C). As the Ninth Circuit explained:

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

Innovation Law Lab v. Wolf, No. 19-15716, 2020 WL 964402, at *10 (9th Cir. Feb. 28, 2020).

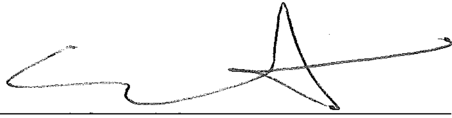
Despite the clarity in the statutory and regulatory language, DHS has swept up thousands of asylum and protection seekers who did not arrive at a land border port of entry, as required, and it has intentionally used wrongful and misleading NTAs to accomplish that result. The significant departure from long-standard practice in drafting and issuing NTAs marks the lengths

the agency has been willing to go to twist the program to fit its goals. The Board should reject this conduct, which has resulted in overwhelming harm and suffering to individuals.

CONCLUSION

The Board has the opportunity to hold the Department of Homeland Security accountable for unlawful behavior. The agency knowingly omitted critical information from respondents' NTAs to keep hidden the nature of the proceedings against them. The factual allegations and charges included on the NTAs in the MPP program further obscured the nature of those proceedings. And the agency took these actions to illegally place noncitizens already present in the United States in the MPP program in order to curtail access to the U.S. asylum system. Amici ask the Board to find that such NTAs are legally insufficient and justify termination. Further, amici ask the Board to hold that the return to Mexico pursuant to INA § 235(b)(2)(C) of any noncitizen described in INA § 235(b)(1) is unlawful and to provide immediate remedy to those asylum seekers who have been so prejudiced.

Respectfully submitted,



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