U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
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Falls Church, Virginia 22041

Office of the Chief Clerk

December 31, 2020

Elissa Steglich, Esquire
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Re: Amicus Invitation No. 20-04-12

[redacted]

Dear Amici:

The Board of Immigration Appeals received on December 23, 2020 your request for extension of time in which to file your amicus curiae brief. Your request is hereby **GRANTED** as follows:

Your brief and two copies should be submitted to the Board, no later than **January 25, 2021.** In addition please attach a copy of this letter to the front of your brief.

Respectfully,

Latonya Latney
Appeals Examiner
Information Management Team

cc:

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VA

In the Matter of **Amicus Invitation No. 20-04-12**	

REQUEST TO APPEAR AS AMICI CURIAE AND BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION JOINED BY HUMAN RIGHTS FIRST AND THE NATIONAL IMMIGRANT JUSTICE CENTER

[1] Additional attorneys listed on signature page.

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REQUEST TO APPEAR AS AMICI CURIAE

The organizations requesting to appear as amici curiae before the Board of Immigration Appeals (Board or "BIA") 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 BIA, as well as before federal courts.

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.

The **National Immigrant Justice Center** ("NIJC")[2] is a Chicago-based not-for-profit organization that provides legal consultations and representation to low-income immigrants, refugees, and asylum seekers. Each year, NIJC represents hundreds of asylum seekers before the immigration courts, BIA, federal courts, and Supreme Court of the United States through its legal staff and a network of approximately 2000 pro bono attorneys.

AILA, joined by Human Rights First and NIJC, request to appear as amici curiae in response to the BIA invitation number 20-04-12. The Board may grant permission to amicus curiae to appear, on a case-by-case basis, if the public interest will be served thereby. 8 C.F.R. § 1292.1(d). The Board invited public comment on questions relating to the meaning and application of the "arriving" language in section 235(b)(2)(C) of the Immigration and Nationality Act (INA). Respondent in the underlying matter was subject to the administration's Migrant Protection Protocols ("MPP"), otherwise known as the Remain in Mexico policy.

AILA benefits from its members' experience advising and–in a very limited capacity given the challenges of the program–representing respondents in MPP proceedings. AILA submits this brief to ensure that fairness and the agency's obligation to do justice are considered in weighing the issue presented.

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 MPP.

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[2] NIJC sought to file a brief in response to this amicus invitation in advance of the original January 4, 2021 deadline set by the Board. Due to courier service error, NIJC's brief arrived at the Board one day late, on January 5. AILA was granted a briefing extension, setting a new deadline of January 25, 2021. NIJC now joins with AILA to timely file this brief, and NIJC has separately withdrawn the brief received by the Board on January 5.

Since the initiation of MPP, NIJC has been directly involved in representing asylum seekers subject to this policy at the tent facility in Laredo, Texas. NIJC also represents unaccompanied children whose parents have been forced to remain in Mexico under MPP and other asylum seekers separated from family members because of MPP. NIJC also represents asylum seekers who now reside in the interior of the United States, but whose proceedings began in MPP. As a result, NIJC has a weighty interest in rational, consistent and just decision-making by the Executive Office for Immigration Review ("EOIR") in cases involving respondents subject to the Remain in Mexico policy.

Agency precedent on this issue will affect many of the clients AILA members, Human Rights First and NIJC serve and the pro bono attorneys they counsel. In addition to its direct knowledge of MPP as applied to asylum seekers, AILA, Human Rights First and NIJC have subject matter expertise concerning removal practice and procedure that can assist the Board in its consideration of the present appeal. As such, AILA, Human Rights First and NIJC's involvement in this matter serve the public interest. AILA, Human Rights First and NIJC have previously requested and been granted leave to appear as Amici curiae in numerous cases before the Board and the Attorney General. AILA, Human Rights First and NIJC therefore respectfully ask for leave to appear as Amici curiae and file the following brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Board posed two questions in this matter: (1) Whether a noncitizen who has come approximately 50 miles into the United States is still "arriving" under INA §235(b)(2)(C) and may be returned to contiguous territory pending proceedings under INA §240; and (2) Whether the distinction in prior law between exclusion and deportation proceedings is relevant to this issue. *BIA Amicus Invitation No. 20-04-12*. To a large degree, Amici must address these

questions in the abstract since the amicus question itself provides no context or particulars of the matter in question. The underlying materials the BIA shared upon request contain limited details.[3] The decision of the immigration judge references "I-213s" that "demonstrate that respondents were arrested by Immigration officials after the respondents had actually entered the United States." I.J. at 4 (citing to Exhibit 3). No I-213 was included in the response to the request for underlying case documents. Absent the I-213, it is not clear that the questions posed in the Board's amicus invitation are even relevant to the facts of the case because nothing in the materials shared describes how and where the Respondent was apprehended, nor how long after crossing the U.S. border the apprehension occurred. This lack of critical information prevents Amici from offering full and complete analysis of this case and limits the ability to respond to the questions posed by the Board.

The statute restricts application of INA § 235(b)(2)(C) to people who are "arriving," which must be understood to mean people who have not effectuated an "entry."[4] The regulations further limit the return of noncitizens to contiguous territories to people apprehended at ports of entry. Amici maintain that INA § 235(b)(2)(C) cannot apply to non-"arriving aliens" in most instances. The rare circumstance where a non-"arriving alien" *might* be subject to INA § 235(b)(2)(C) is unlikely to be presented where a noncitizen is encountered 50 miles into the United States because that noncitizen is unlikely to have been detected immediately upon entry and unlikely to have been under surveillance for the entirety of her time before apprehension. Given that the possible exception to the legal prohibition on applying INA § 235(b)(2)(C) to

[3] The Board provided redacted case documents to amicus AILA upon request, limited to the oral decision of the immigration judge, Notice to Appear and a "tear sheet" in the English language. These documents are not publicly accessible through the EOIR website. *See* https://www.justice.gov/eoir/amicus-briefs (last visited Jan. 18, 2021).
[4] Amici argue that noncitizens such as the respondent in this matter and all other protection-seekers placed in MPP fall outside the scope of INA § 235(b)(2)(C). That issue is currently before the U.S. Supreme Court. *See Gaynor v. Innovation Law Lab et al.* (No. 19-1212).

noncitizens not presenting at a port of entry is extremely narrow and seemingly not presented here, the answer to the first question is no: a noncitizen apprehended 50 miles inside the United States most likely cannot be returned to Mexico. In considering the second question, the entry doctrine is relevant and likely outcome determinative for the reasons set forth below.

ARGUMENT

I. Lack of access to case information prevents amici from offering expertise on pertinent issues.

Amici have previously noted that the utility of amicus briefing to the Board is undermined by the Board's unwillingness to share details about the case with potential amici.

In a recent published decision, the Board dismissed the arguments of amici as "anecdotal evidence" that referenced "cases not before us." *Matter of J.J. Rodriguez*, 27 I&N Dec. 762, 765, 766 (BIA 2020). That misapprehends the nature of amicus briefing; it is supposed to bring in expertise and arguments not available to the particular noncitizen whose case is before the Board.

More to the point, asking amici to write about issues identified by the Board in isolation from the facts of the case is inconsistent with the nature of the common law. It presupposes that the issues identified by the Board ought to be in fact the determinative issues in the case. Where amici have access to the facts of the case, they can draw the Board's attention to other aspects of the case upon which the case can–or in some cases, should–be decided. This is what happens in the federal courts. The Federal Rules of Appellate Procedure make amicus briefs due seven days after a party brief is due specifically to allow amici to review party briefing in advance of submitting amicus briefing. FED. R. APP. P. 29., note on subdivision (e) ("The 7-day stagger was

adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument.")

Greater access to the record of proceedings would permit amici to draw aspects of the case to the Board's attention and may alter the Board's understanding of the claim in question. In the common law system, context is crucial, and amicus input might help the Board avoid missteps and confusion. *See, e.g.*, *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (addressing removability and inadmissibility issues without noting that it involved a wobbler statute), clarified in *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Lemus Losa*, 24 I&N Dec. 734 (BIA 2012) (addressing inadmissibility under INA § 212(a)(9)(B) in case involving noncitizen inadmissible under § 212(a)(9)(C)), clarified by *Lemus-Losa v. Holder*, 576 F.3d 752, 761 (7th Cir. 2009), *Matter of Lemus Losa*, 25 I&N Dec. 734 (BIA 2012).

In this case, the Board has solicited amicus input only as to the section 235(b)(2)(C) issue. The Board has not solicited input on whether the inadmissibility charges are consistent with Fifth Circuit precedent, which would be binding on the case. Amicus briefly addresses the lurking inadmissibility issue, only to urge the Board to refrain from addressing that question without careful consideration and further amicus involvement.

II. The statute permits use of INA § 235(b)(2)(C) only against noncitizens "arriving" in the United States, a limitation confirmed by regulation.

The DHS errs in applying INA § 235(b)(2)(C) to respondents who are not "arriving aliens" or those who are not immediately apprehended upon arriving in the United States between ports of entry. Other respondents–generally, those classified as present without admission–are not amenable to being returned to Mexico because the statute only allows that tool to be employed as to individuals who are "arriving in" the United States, and non-"arriving aliens" are typically already within the United States when apprehended.

Prior to 1996, the Immigration and Naturalization Service (INS) employed a procedure whereby some individuals subject to exclusion proceedings were temporarily returned to a contiguous territory pending an exclusion hearing. *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444, 449-53, 462 (BIA 1996).

In June 1996, the Board considered the legality of this procedure. *Id.* The Board was unable to locate any authorization for it in statute or regulation. *Id.* at 464-65. While it did not find that return would be barred by the statute, *id.* at 465, the Board found that such actions should be governed by formal regulations. *Id.* at 466 (citing *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (BIA 1972, 1973; A.G. 1974).

At the time of *Matter of Sanchez-Avila*, a conference committee was debating major changes to the immigration statutes. When a final proposal emerged from conference committee, it included a provision in effect overturning *Sanchez-Avila*, or satisfying its requirement that the rule be explicitly authorized.

> (C) Treatment of aliens arriving from contiguous territory
> In the case of an alien described in subparagraph (A) 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 1229a of this title.

INA § 235(b)(2)(C) (emphasis added).

The provisions of § 235(b)(2) are found within INA § 235, which includes a variety of provisions relating to noncitizens seeking entry into the United States. Section 235(a) contains general definitional rules; § 235(b)(1) governs "expedited removal" proceedings; and § 235(c) governs exclusion of terrorists.

The structure of the statute confirms that § 235(b)(2)(C) sweeps less broadly than the expedited removal provisions. Congress has authorized the use of expedited removal proceedings

against both individuals "arriving in" the U.S. as well as certain individuals "described in" § 235(b)(1)(A)(iii). The section header distinguishes similarly. (INA § 235(b)(1) ("Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled")).[5] But INA § 235(b)(2)(C) applies on its face only to noncitizens "arriving" in the United States.

Thus, the statute requires that a noncitizen must be "arriving" to be subject to return to a contiguous territory.

A. The regulations confirm the statutory rule.

The only regulatory authority implementing § 235(b)(2)(C) is found at 8 C.F.R. § 235.3(d), which provides as follows:

> In its discretion, 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. Such alien shall be considered detained for a proceeding within the meaning of section 235(b) of the Act and may be ordered removed in absentia by an immigration judge if the alien fails to appear for the hearing.

(Emphasis added). While the statute authorizes return of noncitizens "arriving in" the United States at places other than ports of entry, the regulation does not employ the full extent of that authority, instead limiting this provision to individuals arriving at ports of entry.[6]

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[5] The reference in § 235(b)(2)(C) to "subparagraph (A)" is to § 235(b)(2)(A), which provides:

> (2) Inspection of other aliens
> (A) In general
> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, 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 proceeding under section 1229a of this title.
> (B) Exception. Subparagraph (A) shall not apply to an alien—
> ***
> (ii) to whom paragraph (1) [§ 1225(b)(1), i.e., expedited removal] applies.

INA § 235(b)(2)(A). Respondents such as the respondent in this matter could have been subjected to expedited removal when apprehended, so paragraph (1) "applies" to them; they would thus fall outside the scope of § 235(b)(2)(C). *See Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019) (staying injunction).

[6] In proposing this regulation, the drafters explained that the regulation "implements" the statute by adding a "long-standing practice of the Service." *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 443, 445 (Jan. 3, 1997) ("The proposed

It is black letter law that the Board is bound to apply regulations and may not second-guess the legality of regulations. *Matter of Fede*, 20 I. & N. Dec. 35, 36. (BIA 1989). At any rate, the regulations are permissible and sensible. It is true that under the statute, the regulations might have authorized use of § 235(b)(2)(C) against both noncitizens arriving at ports of entry and those arriving at other locations. But had the regulations drawn the line there, that would have implicated a host of other questions, such as how to assess whether someone is "arriving," who should make that judgment, and whether it should be amenable to review. The regulations evidently concluded that drawing the line underinclusively—to permit use of INA § 235(b)(2)(C) only against noncitizens arriving at ports of entry—was a more efficient way to administer the program while ensuring its legality.

Amici recognize that the Board interpreted this regulation not to place any limit on the authority to invoke § 235(b)(2) authority. *Matter of M-D-C-V-*, 28 I&N Dec. 18, 23-27 (BIA 2020). The Board's reasoning in that case was flawed, precisely because the Board reached the regulatory question before it resolved the questions presented here. The Board failed to fully consider the meaning of the term "arriving" in the statute. Had the Board taken note of the applicability of the entry doctrine to this question, it might have understood the problematic side effects of its reading of the regulation, which would have afforded it greater insight into the utility of the regulatory limitation. INA § 235(b)(2)(C) must by its nature be applied in the first instance by non-attorney border agents. The regulations do not limit application of § 235(b)(2)(C) to ports of entry because they were ignoring the statute; but because applying the full authority granted by Congress would be complicated to administer.

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regulation implements a new provision added to section 235(b)(2) of the Act to state that an applicant for admission arriving at a land border port-of-entry and subject to a removal hearing under section 240 of the Act may be required to await the hearing in Canada or Mexico. This simply adds to statute and regulation a long-standing practice of the Service.").

B. The subregulatory rules and procedures are not inconsistent with the current regulations; the regulations and statute must govern.

In 2017, then-President Trump issued an Executive Order ordering the DHS Secretary to "take appropriate action… to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding." *Border Security and Immigration Enforcement Improvements*, 82 Fed.Reg. 8793, Exec. Order No. 137672017 WL 388888 (Pres.) (Jan. 25, 2017).

In response to this order, government agencies considered regulatory action for some years.

> Executive Order 13767, section 7, Border Security and Immigration Enforcement Improvements, requires the Secretary to take appropriate action, consistent with the requirements of section 1231 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the Immigration and Nationality Act are returned to the territory from which they came pending a formal removal proceeding. This rulemaking proposes to amend 8 CFR 235.3(d) so that it is consistent with this requirement.

Unified Agenda of Federal Regulatory and Deregulatory Actions, *Return to Territory* (Fall 2018), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1651-AB13.

However, DHS did not promulgate any change to 8 C.F.R. § 235.3(d). Rather, the agency enacted new subregulatory rules that failed to mention the limitation in the regulations. On January 28, 2019, then-Secretary Nielsen promulgated "Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols," PM-602-0169, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf. She stated there, "Under the MPP, aliens who are nationals and citizens of countries other than Mexico (third-country nationals) arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings as a matter of

prosecutorial discretion. *Accord* 8 C.F.R. § 235.3(d)." *Id* at 1. [last accessed March 24, 2020]. She noted that statutory authority allows the Secretary of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving. *Id.* She did not discuss the regulatory limitation on the use of that authority.

Simultaneously with the Secretary's determination, additional agency memoranda and guidance were promulgated. Customs and Border Protection ("CBP") issued a document entitled "MPP Guiding Principles," U.S. Customs and Border Protection (Jan. 28, 2019) https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf. That document included a list of categories of noncitizens considered not amenable to being forcibly returned to Mexico.

> Aliens in the following categories are not amenable to MPP:
> - Unaccompanied alien children,
> - Citizens or nationals of Mexico,
> - Aliens processed for expedited removal,
> - Aliens in special circumstances:
>   - Returning LPRs seeking admission (subject to INA section 212)
>   - Aliens with an advance parole document or in parole status
>   - Known physical/mental health issues
>   - Criminals/history of violence
>   - Government of Mexico or USG interest,
> - Any alien who is more likely than not to face persecution or torture in Mexico, or
> - Other aliens at the discretion of the Port Director

Id. at 1. Notably absent from this list is someone who effectuated an entry into the United States.

A simultaneously issued document signed by then-Commissioner McAleenan stated that individuals could be returned to a country "from which they are arriving on land (whether or not at a designated port of entry)." Kevin K. McAleenan, U.S. Customs and Border Protection, *Implementation of the Migrant Protection Protocols* (Feb. 12, 2019) https://www.cbp.gov/sites/default/files/assets/documents/2019-

Jan/Implementation%20of%20the%20Migrant%20Protection%20Protocols.pdf [last accessed March 24, 2020]. The regulatory limitation was not discussed.

Documents issued by other federal agencies are similar. None of the agency documents note either the regulatory limitation to noncitizens encountered at ports of entry nor the distinction based on whether the noncitizen has effectuated an entry. *See* Nathalie R. Asher, U.S. Immigration and Customs Enforcement, *Migrant Protection Protocols Guidance* (Feb. 12, 2019) https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf; Ronald D. Vitiello, U.S. Immigration and Customs Enforcement, *Implementation of the Migrant Protection Protocols* (Feb. 12, 2019) https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf.

In July 2020, the Board issued *Matter of M-D-C-V-*, 28 I&N Dec. 18 (BIA 2020), finding that a noncitizen who arrives between ports of entry may be placed in MPP. That decision did not explicitly consider the entry doctrine, or how the concept of "arriving" was circumscribed by the entry doctrine at the time of the statute's enactment. Nevertheless, the Board's resolution of that case is consistent with the entry doctrine, since the noncitizen in *M-D-C-V-* was apprehended just inside the border and would likely have been treated as arriving under pre-1996 standards.

The *M-D-C-V-* decision noted that the language of the statute "implies some temporal or geographic limit" on who can be placed in MPP. *Id.* at 23. The limit is clearly exceeded when, as posed by the Board in this invitation, the noncitizen is apprehended 50 miles inside the United States.

III. The "entry doctrine" precludes returning noncitizens to contiguous territory where they are apprehended 50 miles inside the United States, because it governed the meaning of "arriving" at the time of the statute's enactment.

At the time of the enactment of INA § 235(b)(2)(C), the line between "exclusion" and "deportation" proceedings was drawn based on whether the noncitizen had effectuated an "entry" into the United States. Because this legal understanding governed the meaning of the word "arriving" in the immigration statute at the time of the statutory enactment, and because Congress did not diverge from it, that meaning must be given to the word "arriving" in this context.

Pre-1996 law treated synonymously individuals who were "arriving" in the United States and people who had not made an "entry." *See* 8 U.S.C. § 1226(a) (1992) (applying exclusion rules to "an *arriving alien* who has been detained for further inquiry under section 1225"); 8 U.S.C. § 1227(a) (1992) (provided that "[a]ny alien.... *arriving in* the United States who is excluded under this chapter, shall be immediately deported") (emphasis added).

The "entry" concept had developed over decades through court adjudication and agency rules. At the time of enactment of INA § 235(b)(2)(C), an entry was defined as follows:

> (1) a crossing into the territorial limits of the United States, i.e., physical presence;
> (2)(a) inspection and admission by an immigration officer, or
> (b) actual and intentional evasion of inspection at the nearest inspection point; and
> (3) freedom from official restraint.

Matter of G-, 20 I. & N. Dec. 764, 768 (BIA 1993). All three elements were required for an entry; mere physical presence in the United States would satisfy only the first prong and would be insufficient unless the other two prongs were also satisfied.

The second prong of the entry definition held that a noncitizen could make an entry either lawfully (i.e., after being inspected) or unlawfully (also known as "entry without inspection"). Whether the noncitizen entered lawfully or unlawfully, the noncitizen needed to be free from

official restraint for some period of time in order to have effectuated an entry. *Matter of Estrada–Betancourt*, 12 I. & N. Dec. 191, 193-4 (BIA 1967) (3 hours). That was the third prong.

In addition to the above-cited cases, a substantial body of published case law authoritatively interprets these rules. *See Matter of Jimenez-Lopez*, 20 I. & N. Dec. 738, 741 (BIA 1993); *Matter of Z-*, 20 I. & N. Dec. 707, 712 (BIA 1993); *Matter of Patel*, 20 I. & N. Dec. 368, 374 (BIA 1991); *Matter of Ching and Chen*, 19 I & N Dec. 203, 205 (BIA 1984); *Matter of Lin*, 18 I&N Dec. 219 (BIA 1982); *Matter of Yam*, 16 I & N Dec. 535 (BIA 1978); *Matter of Loulos*, 16 I & N Dec. 34 (BIA 1976); *Matter of Pierre*, 14 I & N Dec. 467, 468 (BIA 1973); *Matter of A—*, 9 I&N Dec. 356 (BIA 1961). At the time of the enactment of § 235(b)(2)(C), the meaning of the relevant terms was settled.

The specific goal of INA § 235(b)(2)(C) was to overturn *Matter of Sanchez-Avila* and to reinstate the practice of temporarily returning to Mexico people who were being placed into exclusion proceedings. The temporary return policy rejected by *Sanchez-Avila* applied only to individuals in exclusion proceedings, i.e., those who had not effectuated an entry. Under pre-1996 law, individuals considered to be "arriving" in the United States were people in exclusion proceedings, i.e., those who had not effectuated an entry. Congress used that same language in § 235(b)(2)(C). Given the express Congressional acknowledgment of then-applicable law, its use of a term that had a fixed meaning under the pre-1996 law, and its stated intention to return to pre-*Sanchez-Avila* practice, Congress must be understood to have incorporated the entry doctrine into this provision of the law.

Of course, the exclusion / deportation legal regime was substantially altered by the 1996 laws. *Cf.* 8 U.S.C. § 1101(a)(13) (1997) (defining "admission") with 8 U.S.C. § 1101(a)(13) (1995) (governing "entry"). But references to entry have not been eliminated from the statute.

See, e.g., 8 U.S.C. §§ 1325, 1326 (referring to unlawful entry and unlawful reentry). Thus, the entry doctrine retains some significance under the immigration laws, even if the rules have changed. By applying the extraterritorial provisions only to individuals "arriving" in the United States, Congress invoked the prior law, and precluded use of those provisions to individuals found within the United States, even individuals who had entered unlawfully.

Further, in INA § 235(b)(1), Congress explicitly authorized the use of expedited removal proceedings against *both* individuals who were "arriving" in the U.S. and certain individuals present without admission. *See* 8 U.S.C. § 1225(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(iii). This shows—within the very same § 235—that Congress knew how to describe individuals present without admission and "arriving" noncitizens when it wished to do so. The choice to apply the extraterritorial provisions only to individuals "arriving" in the United States must be understood as intentional. As such, the return of non-"arriving" persons to Mexico is not permissible under the statute.

IV. Respondent is not inadmissible under § 212(a)(7).

The noncitizen in this case was charged with inadmissibility under INA § 212(a)(7). The Board's decision in *M-C-D-V-* discussed this question briefly, but the issue had been conceded by the noncitizen in that case. 28 I&N Dec. at 20. Moreover, that decision was premised on Ninth Circuit case law that has since been overruled, case law that runs contrary to Fifth Circuit precedent, which applies to this case.

M-C-D-V- noted that the case arose in the Ninth Circuit, 28 I&N Dec. at 20, and thus relied on the Ninth Circuit's decision in *Minto v. Sessions*, 854 F.3d 619, 624 (9th Cir. 2017). In the interim, *Minto* was overruled by a unanimous en banc panel. *Torres v. Barr*, 976 F. 3d 918, 925-932 (9th Cir. 2020) (en banc). Furthermore, the reasoning in *Torres* is consistent with Fifth

Circuit precedent in *Marques v. Lynch*, 834 F.3d 549, 561 (5th Cir. 2016), which likewise interprets § 212(a)(7) to impose conditions "at the time" that a noncitizen applies for admission.

The Board has instructed amici to limit their submissions to the issues identified by the Board, so Amici will refrain from addressing that issue at length. Amici would urge the Board to revisit that issue in another case where full attention can be paid to the issue. At an appropriate time, the Board ought to consider the following:

First, there are several reasons to doubt such a reading of the statute. To read § 212(a)(7) as applicable to noncitizens apprehended within the United States would sub silentio amend a provision that has remained unaltered since 1952. That reading of § 212(a)(7) would render § 212(a)(6)(A) nugatory, since every undocumented individual would be inadmissible under § 212(a)(7). Moreover, Congress created certain exceptions to § 212(a)(6)(A) inadmissibility, such as for VAWA self-petitioners; if § 212(a)(7) is read more broadly, those exceptions will be essentially read out of the law.

Apart from those reasons for doubting that reading, there is a reason that the en banc Ninth Circuit rejected *Minto* unanimously: the contrary reading is not a viable construction of the text of the statute. INA § 212(a)(7) does not merely reference whether a noncitizen is an applicant for admission; it refers to "the time of application for admission." That precise phrase is not defined, *cf.* INA § 101(a)(4), but the term "admission" is. INA § 101(a)(13)(A). It refers to an actual lawful entry into the United States. That definitional section is consistent with the documents referenced in § 212(a)(7), all of which are documents that give authorization to enter the United States. The legislative history also supports this reading of § 212(a)(7). Thus, in an appropriate case, the Board should address these issues and find that § 212(a)(7) is inapplicable

except for individuals seeking an admission into the United States, which by statute may occur only at a port of entry.

CONCLUSION

Returning noncitizens who entered the United States—and certainly persons found 50 miles from the border—to Mexico for pending removal proceedings is improper because it runs afoul of the plain language of INA § 235(b)(2)(C), was not contemplated by Congress, and has no regulatory support. The immigration judge in this case properly found that DHS had failed to provide proper notice of the hearing. I.J. at 3. Termination of proceedings on that basis was appropriate. The immigration judge also correctly concluded that INA §235(b)(2)(C) did not apply to Respondent.

Respectfully submitted, January 21, 2021

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