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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: Amicus Invitation No. 20–04–12 Arriving Alien	**Amicus Invitation No. 20–04–12**

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE

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REQUEST TO APPEAR AS *AMICUS CURIAE*

The Immigration Reform Law Institute respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 20-04-12 (B.I.A. 2020). The *amicus curiae* brief is submitted with this request.

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens and lawful permanent residents, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's parent organization, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

ISSUE PRESENTED

1. Is an alien who has come approximately 50 miles into the United States still an alien who is "arriving" under section 235(b)(2)(C) of the Immigration and Nationality Act, such that he or

she may be returned to contiguous territory pending a proceeding under section 240 of the Act? In other words, has such an alien exceeded the temporal or geographic limit to the application of the "arriving" language in section 235(b)(2)(C) of the Act? See *Matter of M---D---C---V---*, 28 I & N Dec. 18 at 23 (B.I.A. 2020).

2. Is the distinction in prior law between exclusion and deportation proceedings relevant to this issue? E.g., *Matter of Z*, 20 I & N Dec. 707 (B.I.A. 1993).

SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") reflects Congress's recognition that the administration and enforcement of immigration law would at times require granting immigration officials a certain amount of flexibility and discretion. The contiguous territory return provision, codified at 8 U.S.C. § 1225(b)(2)(C), is an example of such a grant. It enables immigration officials to determine whether aliens who meet the statutory requirements should await their removal proceedings in the contiguous foreign territory from which they arrived.

Aliens who are apprehended following a ground entry into U.S. territory may be returned to foreign contiguous territory at the discretion of immigration officials. The plain language of the statute makes clear that Congress authorized this return not for "arriving aliens," but for aliens "arriving on land." Although the terms may seem interchangeable, they are not. As will be explained, an "arriving alien" enters the U.S. through a port-of-entry, while an alien "arriving on land" does not require entrance at a port-of-entry.

This distinction enables immigration officials to apprehend and return aliens who have illegally entered the U.S. but have not yet completed their journey to the territory from which they entered. A broad interpretation and application of contiguous territory return that does not limit application to aliens apprehended at the border or at a port-of-entry is necessary for proper

implementation of the INA. Implying any time or geographic limitations, other than the requirement that the alien be "arriving on land," would impermissibly narrow the statute and conflict with the intentions of Congress as manifested in the INA and its subsequent amendments.

ARGUMENT

1. An alien who has come approximately 50 miles into the United States is still "arriving" under section 235(b)(2)(C) of the Immigration and Nationality Act and thus is amenable to contiguous territory return pending a proceeding under section 240 of the INA.

As the Supreme Court has explained, in order "[t]o implement its immigration policy, the Government must be able to decide (1) who may enter this country and (2) who may stay here after entering." *Jennings v. Rodriguez,* 138 S. Ct. 830, 836 (2018). Congress has done both things through the INA and its subsequent amendments. 8 U.S.C. § 1101 *et seq*. The INA is a complex and comprehensive system of rules and procedures in which Congress has authorized immigration officials to apprehend, categorize, and process aliens using various procedures, such as expedited removal, legal admission, and the contiguous territory return provision of § 235(b)(2)(C).

This provision, "which became effective in 2009 and has not changed in the interim," provides immigration officials with the authority to return certain aliens "arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States . . . to that territory pending a proceeding under section 240." *EJRO v. McLane*, No. SA-20-CV-1157-JKP, 2020 U.S. Dist. LEXIS 234144, at *11 (W.D. Tex. Dec. 14, 2020); 8 U.S.C. § 1225(b)(2)(C). As will be discussed, the concept of contiguous territory return is not a new one in American immigration law. Furthermore, the discretion provided by the statute to return aliens who are "arriving on land" to the country from which they entered enables immigration officials to manage caseloads and detention center capacities.

Under the authority granted by the INA, DHS issued the Migrant Protection Protocol ("MPP") to administer a new inspection policy at the southern border that would implement contiguous territory return. Kirstjen M. Nielsen, Secretary, Dep't of Homeland Security, Policy Guidance of the Implementation of Migrant Protection Protocols (Jan. 25, 2019) ("Section 235 of the Immigration and Nationality Act (INA) addresses the inspection of aliens seeking to be admitted to the U.S. and provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum."). The policy "directs the return of asylum applicants who arrive from Mexico" to await resolution of their claim in a full removal proceeding instead of an expedited removal proceeding. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 506 (9th Circ. 2019) (per curiam). Immigration officials have discretion to decide which MPP eligible applicants will be returned and which will be detained or paroled into the United States pending their removal hearing. *Id*. As the Board of Immigration Appeals ("BIA" or "the Board") recently explained, "an alien who is arriving on land from a contiguous foreign territory may be returned by the DHS to that country pursuant to the Migrant Protection Protocols." *Matter of M---D---C---V---*, 28 I. & N. Dec. 18, 27 (B.I.A. July 14, 2020).

A. The INA vests the government with discretion to apply 8 U.S.C. § 1225(b)(2)(C).

i. 8 U.S.C § 1225 established different routes for removal procedures, it does not create distinct categories of removable aliens.

The INA established that "applicants for admission" are all those aliens "who arrive[] in the United States" or "present in the United States [without having] been admitted", and that such aliens "shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(1). Such applicants for admission "include[s] not just those who are expressly seeking permission to enter, but also those who are present in this country without having formally requested or received such permission." *Matter of Lemus*, 25 I. & N. Dec. 734, 743 (B.I.A. 2012). In fact, "[a]n alien's application for

admission begins on the day he or she is present in this country without having formally requested or received such permission." *Matter of M---D---C---V---*, 28 I. & N. Dec. 18, 20–21 (B.I.A. 2020). Therefore, an alien apprehended 50 miles within the U.S. border is an applicant for admission who may be considered "arriving on land."

Immigration officials inspect these applicants for admission "to ensure that they may be admitted into the country consistent with U.S. immigration law." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836-37 (2018). According to the Board, these inspections direct immigration officers to three potential procedures:

> First, if an alien is clearly and beyond a doubt entitled to be admitted, he will be permitted to enter, or remain in, the country without further proceedings. Second, if the alien is not clearly admissible, then, generally, he will be placed in . . . full removal proceedings. Third, if the alien is inadmissible on one of the two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings.

Matter of M---S---, 27 I. & N. Dec. 509, 510 (B.I.A. April 16, 2019) (internal quotation marks and citations omitted). While the Supreme Court has referred to the above as separate "categories," it did not state that these "categories" are mutually exclusive. *Jennings*, 138 S. Ct. at 837 (explaining that "aliens covered by § 1225(b)(1) are *normally* ordered removed . . . pursuant to an expedited removal process" while "aliens who are instead covered by § 1225(b)(2) are detained pursuant to a different process.") (emphasis added). Nothing in the Court's opinion indicates that this discussion should be considered a precedential holding. *See Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (internal quotations omitted) ("Questions which merely lurk in the record . . . [not] ruled upon, are not to be considered as having been so decided as to constitute precedents."). In other words, there is nothing in current law supporting this categorization of

aliens under 8 U.S.C. § 1225—the statute may create two separate "categories" of procedures for applicants for admission, but it does not create separate "categories" of applicants for admission.

Furthermore, an alien's eligibility to be processed under § 1225(b)(1) does not preclude DHS from choosing to process that alien under § 1225(b)(2)'s procedures. *See Matter of M---S---*, 27 I. & N. Dec. 509, 510 (B.I.A. April 16, 2019) ("If an alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in *either* expedited or full proceedings.") (emphasis added); *Matter of M---D---C---V---*, 28 I. & N. Dec. 18, 22 n.6 (B.I.A. July 14, 2020) ("DHS retains prosecutorial discretion to place aliens into section 240 removal proceedings even though they may also be subject to expedited removal under section 235(b)(1)(A)(i) of the Act."). *See also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (explaining "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands."); *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."). Congress understood that policy and enforcement prerogatives play an important role in deciding how to process aliens and whether and how to prosecute them, as evidenced by its grants of discretion throughout the INA. *See Reno v. Am-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (explaining that such "concerns are greatly magnified in the deportation context."). Therefore, in order to process an alien under § 1225(b)(1), the immigration officer must first make the determination that the alien is eligible for expedited removal, and then make a discretionary decision about whether to proceed with expedited or full removal proceedings. *M---S--- supra* at 510.

As the D.C. Circuit recently explained, IIRIRA amended section 235 of the INA to improve the expedited removal process, endowing "the Secretary of Homeland Security with the sole and

unreviewable discretion to designate which aliens within the statutory class will be subjected to expedited removal proceedings." *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 638–39 (D.C. Cir. 2020). This means that an alien who arrived from contiguous territory who is eligible for expedited removal may properly be returned to such territory to await full proceedings, as is commonly done under the MPP. Aliens who are processed under 8 U.S.C. § 1225(b)(2)(C) are thus not a separate class of aliens but a subset of the same class who are subject to different removal proceedings. The purpose of the statute is not to create endless "categories" or "classes" of aliens based on these different available proceedings; rather, the statute instructs immigration officials on the proper procedures and available discretionary actions for aliens based on the conditions of their arrival and potential claims for relief.

B. Aliens who are apprehended within the U.S. border are still "arriving on land."

Both the MPP and the INA use the term "arriving from" to describe the aliens affected by the policy. *See* Kirstjen M. Nielsen, Secretary, Dep't of Homeland Security, Policy Guidance of the Implementation of Migrant Protection Protocols (Jan. 25, 2019); 8 U.S.C. § 1225(b)(2)(C). Courts and administrative documents have understood this language to apply to aliens seeking entry at ports of admission as well as those "apprehended between points of entry." DHS, *Assessment of the Migrant Protection Protocols (MPP)* at 1 (Oct. 28, 2019), *available at* https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf; *Jennings*, 138 S. Ct. at 836 (explaining that § 1225 applies to those "who arrive[] in the United States or [are] present in this country but ha[ve] not been admitted.") (internal quotation marks omitted). In fact, as recently pointed out by the Eastern District of New York, the practice of returning certain aliens to the contiguous territory from which they arrived is not new to U.S. immigration law. *See Adrianza v. Trump*, No. 20-cv-3919 (RPK), 2020 U.S. Dist. LEXIS

229523, at *3-4 (E.D.N.Y. Dec. 7, 2020) (explaining that "immigration officials have long returned some migrants to Canada or Mexico to await proceedings"). The *Adrianza* court explained that what was then known as the Immigration and Naturalization Service ("INS") authorized immigration officials to utilize contiguous territory return.

i. The defined term "arriving aliens" is separate and distinct from "aliens arriving on land."

Although Congress and DHS have long recognized the practice of contiguous territory return, neither has defined the term "arriving on land" as found in INA. The term "arriving alien," however, is used throughout the INA and has been defined in immigration regulations. 8 C.F.R. § 1.2 ("Arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry"); 8 C.F.R. § 1001.1(q) ("The term *arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry"). These regulations make clear that aliens who do not enter the country at a port-of-entry cannot be deemed "arriving aliens." *See Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007) (explaining that the alien in question "[wa]s not an arriving alien within the meaning of the regulations because he was apprehended inside the United States after crossing the border illegally"); *Singh v. United States Citizenship & Immigration Servs.*, No. C12-5474RAJ, 2014 U.S. Dist. LEXIS 21448, at *8 (W.D. Wash. Feb. 2014) ("Because Mr. Singh entered the United States without inspection and without authorization by an immigration officer, he is not an 'arriving alien.'"). The term "arriving alien" denotes application at a port-of-entry, whether the alien arrived on land or by some other method, while the provision in question only applies to aliens who come to the U.S. "whether or not at a designated port of arrival." 8 C.F.R. § 1.2; 8 U.S.C. § 1225(b)(2)(C). It is therefore clear that an "alien arriving on land" is not the same as an "arriving alien."

Additionally, when read in context of § 1225 as a whole, it is clear that an alien "arriving on land" cannot possibly be an "arriving alien". *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (explaining that courts are charged with reading the words "in their context and with a view to their place in the overall statutory scheme."); *Negusie v. Holder*, 555 U.S. 511, 545-46 (2009) (internal citations omitted) ("Where Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions, courts should not read one part of the legislative regime (the INA) to provide a different, and conflicting, solution to a problem that has already been specifically addressed elsewhere in the federal immigration regime."). *See also Reno*, 525 U.S. at 487 (explaining that the Court's interpretation of the statute "makes sense of the statutory scheme as a whole"). Certain provisions use the term "arriving alien" to describe the aliens such section applies to, while others, such as the contiguous territory return provision, do not. It should therefore be concluded that where Congress intended to refer to the defined term "arriving alien" it did so, and when it did not use the term it meant something else.

In fact, because the term "arriving alien" is used throughout the INA and not in § 1225(b)(2)(C), "[i]t is implausible to think that the definition of 'arriving alien' . . . was meant to define this different phrase in the statutory return provision, because the phrase there is surrounded by statutory text that conflicts with the regulatory language." *Adrianza v. Trump*, No. 20-cv-3919 (RPK), 2020 U.S. Dist. LEXIS 229523, at *33 (E.D.N.Y. Dec. 7, 2020). The fact that Congress defined "arriving alien" but did not use it in § 1225 provides direct support for the broader interpretation of "arriving on land." *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 U.S. Dist. LEXIS 57788, at *25 (N.D. Tex. Apr. 23, 2013) ("If Congress intended to limit the application . . . to aliens coming or attempting to come into the United States at a port of entry, it

would have used the term 'arriving alien'"). *See also Williams v. Paramo*, 775 F.3d 1182, 1188 (9th Cir. 2014) ("Because we assume that Congress means what it says in a statute, the plain meaning of a statute controls where that meaning is unambiguous.") (internal quotation omitted). Therefore, because the term "arriving alien" is used throughout the INA and not used in § 1225(b)(2)(C), that term and the term "arriving on land" have different meanings.

The Board recently addressed this distinction, explaining "that section 235(b)(2)(C) was not intended to be limited to the definition of arriving aliens" because

> when Congress enacted section 235(b)(2)(C) in 1996, it included aliens "(whether or not at a designated port of arrival)", which is clearly broader than the historical understanding of "arriving aliens," as well as the regulatory definition at 8 C.F.R. § 1001(q). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-28, Div. C, § 302(a), 110 Stat. 3003-546, 3009-583 ("IIRIRA"). At the same time, because section 235(b)(2)(C) is limited to aliens "arriving on land," it describes a class of aliens *narrower* than the regulation, which includes those arriving at ports of entry generally, that is land, air, or sea ports of entry.

Matter of M---D---C---V---, 28 I. & N. Dec. 18, 24 (B.I.A. 2020) (emphasis in original). As the Board explained, "the statute clearly gives [DHS] the authority and discretion to carry out," contiguous territory return "consistent with its duty to enforce the immigration laws." *Id*. at 25. The language of the statute makes clear that Congress granted immigration officials the power to return any aliens who are apprehended while "arriving on land" to the contiguous territory from which they came regardless of whether such apprehension takes place within U.S. territory.

Furthermore, the Board's determination that the regulatory definition of "arriving alien" as used throughout the INA does not apply to the term "arriving on land" is entitled to deference. *Karingithi v. Whitaker*, 913 F.3d 1158, 1161 (9th Cir. 2019) ("The BIA's interpretations of its regulations are due substantial deference, and should be upheld so long as the interpretation

sensibly conforms to the purpose and wording of the regulations.") (internal quotations omitted). *See also Kaganovich v. Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006) ("Deference is especially appropriate in the context of immigration law, where national uniformity is paramount."). It is entirely reasonable, based on the plain language of the INA and the "arriving alien" definitions in immigration regulations, for the Board to conclude that these terms mean different things.

ii. Aliens arriving on land are those apprehended before completing their migrant journey.

Because it is clear that aliens who arrive on land are not necessarily those who arrive at a port-of-entry, it is logical that the term "arriving on land" was intended to cover those aliens who have made illegal ground crossings and are apprehended shortly thereafter. Congress enacted IIRIRA to curb illegal immigration and to give immigration officials sufficient authority to administer and enforce the laws, including the contiguous territory return provision. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104–208, Div. C., 110 Stat. 3009–546 (1996). Any interpretation of 8 U.S.C. § 1225(b)(2)(C) that limits the term "arriving on land" is thus in direct conflict with the language, history, and intent of the provision.

In a recent dissenting opinion, Chief Judge Bress of the Ninth Circuit noted that the reach of the term "arriving" as used in 8 U.S.C. § 1225 can be found in the legislative history of IIRIRA. *Lado v. Wolf*, 952 F.3d 999, 1031–32 (9th Cir. 2020) (Bress, C. J., dissenting). He pointed out that the language omitted by the majority evidences that Congress intended the provision to apply to aliens apprehended within the borders of the U.S. between ports of entry. *Id*. ("Rep. Smith sought to ensure that aliens who had entered U.S. territory and proceeded some ways *past* the border should still be treated as arriving in the United States") (emphasis in original).

In addition, the Board recently explained that "the use of the present progressive tense arriving rather than the past tense arrived" indicates an ongoing process that permits DHS to

subject aliens "apprehended by DHS outside of a port of entry and charged with inadmissibility" to the contiguous territory return procedure. *Matter of M---D---C---V---*, 28 I. & N. Dec. 18, 22–23 (B.I.A. 2020). *See also United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress's use of a verb tense is significant in construing statutes."). It is reasonable to conclude that because the "statute clearly gives [DHS] the authority and discretion" without elaborating on whether "aliens who illegally enter the United States between ports of entry may be returned to contiguous territory," DHS may legally apply contiguous territory return to aliens apprehended as far as 50 miles within the U.S. borders. *Matter of M---D---C---V---*, 28 I. & N. Dec. 18, 25 (B.I.A. 2020). This choice of tense evidences that Congress did not consider an alien to cease arriving once he or she stepped onto U.S. territory. *See Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020). (explaining that an alien did not stop "arriving" the instant he "set foot on U.S. soil."). *See also Adrianza v. Trump*, No. 20-cv-3919 (RPJ), 2020 U.S. Dist. LEXIS 229523, at *31 (E.D.N.Y.) Dec. 7, 2020) (explaining that the term "arriving on land" represents "a process that extends beyond the moment in which an alien crosses a boundary line.").

Furthermore, allowing immigration officials to apply § 1225(b)(2)(C) to aliens apprehended while "arriving on land" within U.S. borders is consistent with rules of statutory construction against surplusage. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.) (referring to the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (discussing the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."). Because the provision specifies that it applies to those "arriving on land (whether or not at a designated port of arrival)," barring immigration officials from returning aliens apprehended within U.S. borders after an illegal border crossing would make the

parenthetical language superfluous. *Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) ("It is a time-honored tenet that all words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous."). Preventing DHS from considering aliens apprehended between ports of entry as aliens "arriving on land" eviscerates the meaning of the provision.

2. The distinction in prior law between exclusion and deportation proceedings is relevant insomuch as an alien who made an "entry" into the U.S. is similar to an alien apprehended while "arriving on land" from contiguous foreign territory.

Immigration law before 1996 "provided for two types of removal proceedings: deportation hearings and exclusion hearings." *Hose v. I.N.S.*, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). Aliens within the U.S. were subjected to deportation proceedings while aliens outside the U.S. "seeking admission" were subject to exclusion. *Landon v. Plasencia*, 459 U.S. 21, 25 (1982). The differences between exclusion and deportation included location, notice required, rights related to appeal, and substantive rights available. *Id*. at 27. *See also Yin Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010) (explaining that "non-citizens who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who presented themselves at a port of entry for inspection were subjected to more summary exclusion proceedings."). In other words, illegal aliens who had made it into the U.S. were afforded greater rights than aliens who applied for admission.

In 1996, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Through IIRIRA, Congress sought to eliminate separate "classes" of removable aliens to expand the applicability of expedited removal and contiguous territory return. *Matter of M---D---C---V---*, 28

I. & N. Dec. 18, 25-26 (B.I.A. July 14, 2020) (explaining that in IIRIRA "Congress broadened the class of aliens who could be returned to Mexico to await proceedings"). Ultimately, the Board found that due to these amendments, "under section 235(b)(2)(C) of the Act, an alien who is arriving on land from a contiguous foreign territory may be returned . . . regardless of whether the alien arrives at or between a designated port of entry." *Id.* at 27.

A. Arriving on land is similar to an entry under prior immigration law.

Before IIRIRA, aliens who had made an "entry" into the United States were subject to deportation proceedings. 8 U.S.C. § 1225(b) (1988). BIA precedent interpreting the INA had established four requirements to show an "entry": "(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 Z–*, 20 I. & N. Dec. 707, 707 (B.I.A. 1993). *See also* 8 U.S.C. § 1101(a)(13) (1988) (an entry was "any coming of an alien into the United States from a foreign port or place"). For example, the alien in *Matter of Z–* "debarked from his vessel at a place not designated as a port of entry and fled into the interior undetected" and therefore was considered to have entered the United States. *Id*. *See also Nyirenda v. INS*, 279 F.3d 620, 625 (8th Cir. 2002) ("We conclude that petitioners were sufficiently free from official restraint to effect an entry because they were driving out of sight of immigration officials while traveling on a highway for approximately two miles within the United States."). This definition and Congress's intention to better enable the expedited removal of illegal aliens as manifested in IIRIRA show that the current statute and its implementing regulations must be interpreted broadly to allow aliens apprehended between ports of entry but within U.S. borders to be subjected to MPP.

Prior law is also instructive in that it supports the premise that an alien who has illegally entered U.S. territory is still "arriving" and not an alien who is physically present without authorization. *See Matter of G-*, 20 I. & N. Dec. 764, 765 (B.I.A. 1993). ("The mere crossing into the territorial waters of the United States whether detected or undetected, has never been held to constitute 'physical presence' in this country 'free from official restraint.'"). *See also Matter of Martinez-Serrano*, 25 I. & N. Dec. 151, 154 (B.I.A. 2009) (explaining that "an act of entry may include other related acts that occurred either *before, during, or after* a border crossing, so long as those acts are in furtherance of, and may be considered to be part of, the act of securing and accomplishing the entry.") (emphasis added).

CONCLUSION

For the foregoing reasons, an alien who is apprehended between ports-of-entry within U.S. borders is an alien who is "arriving" under section 235(b)(2)(C) of the INA and is amenable to contiguous territory return.

December 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2020, I, Gina M. D'Andrea, submitted three (3) copies of the foregoing *amicus curiae* brief to the Board of Immigration Appeals at the following address:

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