[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16732

D.C. Docket No. 1:16-cv-21868-DPG

MOVIMIENTO DEMOCRACIA, INC.,
LIBAN CONCEPCION LIO,
ALEXEIS LEYVA,
MICHAEL PEREZ PEREZ,
YORDANKI PEREZ VAREA,
ALEXANDER VERGARA PEREZ,
JEGNIER ALMAGUER CESPEDES,

Plaintiffs-Appellants,

versus

SECRETARY, DEPARTMENT OF HOMELAND SECURITY,
SECRETARY OF STATE, U.S. DEPARTMENT OF STATE,
UNITED STATES ATTORNEY GENERAL,
DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 21, 2017)

Before HULL and DUBINA, Circuit Judges, and RESTANI,[*] Judge.

PER CURIAM:

Twenty-four Cuban migrants sought sanctuary on the American Shoal Lighthouse (the "Lighthouse"), located seven miles south of Florida's Sugarloaf Key. They were discovered by the U.S. Coast Guard, detained aboard a cutter vessel, and classified as removable for not having reached U.S. dry land.[1] Movimiento Democracia, Inc. ("Movimiento"), U.S. citizen and lawful permanent resident family members of the Cuban migrants ("Family Plaintiffs"), and the detained Cuban migrants themselves ("Migrant Plaintiffs") challenged this determination before the district court, seeking a preliminary injunction based on alleged violations of the Cuban Adjustment Act ("CAA") and the Cuban migrants' Fifth Amendment due process rights. Following a hearing, the district court denied plaintiffs' motion and later granted summary judgment in favor of the Department of Homeland Security ("DHS"). Plaintiffs appeal this decision.

First, Movimiento contends that the district court improperly concluded it lacks standing to pursue this action and, alternatively, could not claim "next friend" status. As the district court both found that Migrant Plaintiffs had standing

[*] Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

[1] During the pendency of this appeal, all detained Migrant Plaintiffs have been repatriated to Cuba (7), or a third country (17).

and granted "next friend" status to Family Plaintiffs, we need not resolve Movimiento's claims on appeal. *See, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981). If analyzed, Movimiento's failure to adequately allege an injury in fact to itself or one of its members precludes finding organizational or associational standing, essentially for the reasons stated by the district court. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (associational standing); *Nat'l All. for Mentally Ill, St. Johns Inc. v. Bd. of Cty. Comm'rs of St. Johns Cty.*, 376 F.3d 1292, 1294 (11th Cir. 2004) (organizational and associational standing). Regarding "next friend" status, there has been no suggestion that Family Plaintiffs were unable to advance Migrant Plaintiffs' interests, thus the Migrant Plaintiffs have had adequate access to the court through Family Plaintiffs without extending "next friend" status to Movimiento. *Cf. Whitmore v. Arkansas*, 495 U.S. 145, 161–66 (1990) (requiring prospective next friends to show that the real party in interest is "unable to litigate his own cause due to, [*inter alia*] . . . lack of access to court").

Substantively, the Migrant and Family Plaintiffs first challenge the district court's review of the U.S. Coast Guard ("Coast Guard")'s interpretation and application of the "Wet-Foot/Dry-Foot" policy. Plaintiffs challenge the district court's grant of *Gonzalez* deference, *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000), and argue the Migrant Plaintiffs' presence on the Lighthouse constituted

presence in the United States under 8 U.S.C. § 1225(a)(1). Second, these plaintiffs argue that the Coast Guard's refusal to process them as refugees violated the Migrant Plaintiffs' Fifth Amendment procedural due process rights.

We have jurisdiction over this matter pursuant to 28 U.S.C. § 1291. Whether the district court applied the correct standard in analyzing the agency determination is a legal question reviewed *de novo*. *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 730 (11th Cir. 2014). The district court's grant of summary judgment in an Administrative Procedure Act ("APA") case is reviewed *de novo*. *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009). Finally, constitutional challenges to agency orders are reviewed *de novo*. *Toro v. Sec'y, U.S. Dept. of Homeland Sec.*, 707 F.3d 1224, 1230 (11th Cir. 2013). After a thorough review of the record and having the benefit of oral argument, we affirm the district court's grant of summary judgment.

Under the CAA, "Cuban nationals, who have no documents authorizing their presence in the United States, can remain in the United States without demonstrating that they suffered persecution or proving refugee status. The benefits of the CAA, however, can only apply to those Cubans who reach the United States (those with 'dry feet'), while Cubans who are interdicted at sea (those with 'wet feet') are repatriated to Cuba. This rule is commonly referred to

as the 'Wet-Foot/Dry-Foot' policy."[2] *U.S. v. Dominguez*, 661 F.3d 1051, 1067 (11th Cir. 2011) (citing the Cuban Adjustment Act, Pub. L. No. 89–732, § 1, 80 Stat. 1161 (1966) (codified as amended at 8 U.S.C. § 1255 (2006))). The "Wet-Foot/Dry-Foot" policy does not alter the Immigration and Nationality Act ("INA")'s definition of the United States, but does treat Cubans reaching the United States differently from migrants of other nationalities in view of the CAA. Relevant to this appeal, the INA defines "United States" to include "the Continental United States." 8 U.S.C. § 1101(38). Unlike its predecessor, the Immigration Act of 1917, the INA makes no reference to U.S. waters. *Compare* Immigration Act of 1917, Pub. L. No. 301, § 1, 39 Stat. 874 (1917).

In determining that the Migrant Plaintiffs should be detained, the Coast Guard applied its Enforcement Manual to interpret the INA's definition of "United States," finding that Migrant Plaintiffs had not reached the United States, i.e., had "wet feet," because the offshore Lighthouse on which they were present was an aid to navigation. The Coast Guard Manual states:

> Migrants interdicted in U.S. internal waters, U.S. territorial sea or onboard a vessel moored to a U.S. pier are not considered to have entered the U.S. Migrants located on pilings, low-tide elevations or

[2] The "wet-foot/dry-foot" policy was ended, in its entirety, by the White House on January 12, 2017. Office of the Press Secretary, *Statement by the President on Cuban Immigration Policy*, THE WHITE HOUSE (January 12, 2017), *available at* https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/statement-president-cuban-immigration-policy.

> aids to navigation[3] are not considered to have come ashore in the U.S. Migrants who reach bridges, piers, or other structures currently and permanently connected to dry land have not, as a matter of law, reached dry land; however, they are generally treated as if they had reached dry land in order to have a workable, operational standard from a policy perspective.

Maritime Law Enforcement Manual, Art. 8.D.1 (footnote added).

At the time of the INA's passage, authority to interpret the INA was vested with U.S. Immigration and Naturalization Services ("INS"), a component of the Department of Justice. The Homeland Security Act of 2002 later dissolved INS and transferred INS' authority to DHS. The Coast Guard is a component of DHS; however, under DHS regulations, it has not been granted any authority to "administer and enforce" the INA. *See* 8 C.F.R. § 100.1 (granting such authority to the following DHS components: U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection). The Coast Guard's authority to interpret the INA is instead grounded in an executive order, which provides that the DHS Secretary "shall issue appropriate instruction to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens." *See* Exec. Order No. 12,807, 57 Fed. Reg. 21,133 (1992).

[3] Lighthouses are "prominent beacons of varying size, color, and appearance employed to mark headlands, landfalls, harbor entrances, channel edges, hazards, and other features." 33 C.F.R. § 62.37. An "aid to navigation" is "any device external to a vessel or aircraft intended to assist a navigator to determine position or safe course, or to warn of dangers or obstructions to navigation." 33 C.F.R. § 62.3(a). Thus, although all lighthouses are aids to navigation, aids to navigation encompass things other than lighthouses.

The Maritime Law Enforcement Manual was issued in accordance with that executive order.

Despite plaintiffs' arguments, we conclude that the Coast Guard's decision in this instance is entitled to some deference. The district court applied *Gonzalez* deference, reasoning that the Coast Guard had engaged in "an informal adjudication with foreign policy implications." Here, plaintiffs argue that only *Christensen* deference should apply, that is, we should defer to the Coast Guard's interpretation "only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Co.*, 529 U.S. 576, 587 (2000).[4] We need not, however, determine whether the APA applies to the Coast Guard's immigration determination, whether an informal adjudication took place within the meaning of 5 U.S.C. § 555, or the exact level of deference owed. Even applying the lenient *Christensen* standard sought by plaintiffs, we find the Coast Guard's determination in this instance – that this particular Lighthouse does not constitute part of the "continental United States" within the meaning of 8 U.S.C. § 1101(38) – is persuasive.

Plaintiffs contend that the once-inhabited, eight-room Lighthouse, which rests on Florida land deeded to the U.S. government and was placed on the

[4] We owe no deference to DHS' mere litigating position. *See Romano-Murphy v. C.I.R.*, 816 F.3d 707, 715 (11th Cir. 2016). Thus, our only basis for deference on appeal must concern the Maritime Law Enforcement Manual and the Coast Guard's application thereof.

National Register of Historic Places, constitutes part of the continental United States. We conclude that the Lighthouse is instead properly considered part of the country's waters, thus falling outside the "United States" for purposes of the INA. It is undisputed that the Lighthouse rests on submerged land. The only part of the Lighthouse which is, or ever has been, above water is a man-made iron structure which had been decommissioned and deemed "abandoned," "unstable," and "unsafe" the year before Migrant Plaintiffs' landing. The Lighthouse lies seven miles from the nearest Florida Key, and has been unmanned since 1963, except for a few months in 1980, when it served as a lookout tower during the Mariel boatlift. Over the period between 1963 and its decommissioning in 2015, the Lighthouse simply housed an automated, rotating light.

Finally, plaintiffs' constitutional claim is predicated on their argument that the Migrant Plaintiffs should be considered to have been "present in the United States" for constitutional purposes. Any procedural due process right to apply for asylum which might flow from the INA would be predicated upon such presence, which is required by the asylum statute. *See Jean v. Nelson*, 727 F.2d 957, 981–83 (11th Cir. 1984) (finding no substantive due process right to asylum); 8 U.S.C. § 1158. As we have determined that the Migrant Plaintiffs were not "present in the United States," their constitutional claims necessarily fail.

Having disposed of all issues raised on appeal, we affirm the judgment of the district court.

AFFIRMED.