

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAUDY ROMELI CONSTANZA LEMUS,
individually and as next friend to Hanz
Minoldo Morales Barrera, and as mother
and next friend to H.E.M.C., and
HANZ MINOLDO MORALES BARRERA,

Plaintiffs,

v.

CHAD F. WOLF, Acting Secretary of
Homeland Security,
MARK A. MORGAN, Acting Commissioner
of U.S. Customs and Border Protection,
KENNETH T. CUCCINELLI, II, Acting
Director of U.S. Citizenship and Immigration
Services,
MATTHEW T. ALBENCE, senior official
in charge of U.S. Immigration and Customs
Enforcement,
WILLIAM BARR, Attorney General,
DONALD J. TRUMP, President of the
United States,

Defendants.

Civ. No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. This case seeks to bring to safety a nine-year-old boy, H.E.M.C., and his father, Hanz Morales, who have been in hiding in Mexico for over five months due to the Trump administration’s brutishly misnamed “Migrant Protection Protocols” (MPP). Because MPP imperils them each day, and because it unlawfully abandons America’s legal obligations to asylum seekers, Plaintiffs ask this court to enjoin the program’s application to them.

2. Mr. Morales and H.E.M.C.'s mother, Plaintiff Maudy Constanza, fled Guatemala with their children to seek protection from the people who shot Mr. Morales four times. But as they were traveling north to seek America's help, U.S. officials were engaged in a far-reaching effort to prevent them from receiving it.

3. The centerpiece of that endeavor, the MPP program, seeks to keep out Central American migrants at any cost. Under this policy, American authorities expel migrants into dangerous Mexican border cities and require them to report back to a port of entry every time they are due to appear in immigration court. The policy is a boon for violent criminal groups that specifically persecute migrants in Mexico. The U.S. government knows migrants are persecuted, and it has both a legal duty not to send people back to places where that happens and decades-old procedures for determining when that duty applies. Yet MPP circumvents these procedures and systematically denies migrants any reasonable opportunity to escape its grip.

4. For many migrants, including Mr. Morales and H.E.M.C., being subject to MPP is like being forced to walk off the plank of a ship.

5. Mr. Morales and H.E.M.C. entered the United States in mid-July 2019 and were put in MPP, even as Ms. Constanza and their two daughters—entering just a few days earlier—were not put in MPP and were permitted to await their court hearings in Massachusetts. After about a week in U.S. custody, Mr. Morales and H.E.M.C. were sent to the city of Nuevo Laredo in the Mexican state of Tamaulipas—one of the most dangerous places in the Western Hemisphere.

6. When Mr. Morales was instructed to walk over the bridge from Laredo, Texas to Nuevo Laredo, Mexico, with his eight-year-old son, he pleaded with U.S. officials to do anything except send them to Mexico. But instead of interviewing him about this abject and obvious fear, officials threatened to jail him and permanently separate him from his son.

7. In Mexico, Mr. Morales and H.E.M.C. escaped a kidnapping attempt by armed men with ski masks. For days, they slept on the floor of a Mexican immigration building. At times they were hungry because it was too dangerous to go outside, even to buy food.

8. Mr. Morales and H.E.M.C. eventually found a pastor who gave them shelter. But they are still in grave danger. They rarely go outside. H.E.M.C. does not attend school. They are on the brink of mental breakdown.

9. Immigration laws provide a calibrated system for protecting asylum seekers while dealing expeditiously with those who turn up at our border. MPP abandons these protections, in service of the Trump administration's overwhelming and racist resolve to keep out Central American migrants and people of color.

10. As alleged below, Defendants' actions violate the statute purporting to authorize returning noncitizens to a contiguous territory; the legal framework governing asylum; Defendants' duty of non-refoulement—which prohibits sending people to places where they will be persecuted; the Administrative Procedure Act; and U.S. constitutional guarantees of due process and equal protection. Plaintiffs ask this Court to enjoin MPP's application to Mr. Morales and H.E.M.C.

PARTIES

11. Plaintiff Maudy Romeli Constanza Lemus fled Guatemala to seek asylum in the United States, and is now residing in Massachusetts. She brings suit individually and as mother and next friend to her nine-year-old son, H.E.M.C., and his father, Hanz Minoldo Morales Barrera.

12. Plaintiff H.E.M.C. fled Guatemala to seek asylum in the United States, but is now stranded in Mexico under the Trump administration's "Migrant Protection Protocols" (MPP). He appears by and through his mother and next friend, Ms. Constanza.

13. Plaintiff Hanz Minoldo Morales Barrera fled Guatemala to seek asylum in the United States, but is now stranded with H.E.M.C. in Mexico under MPP. He appears personally and, alternatively, by and through his next friend, Ms. Constanza.¹

14. Defendant Chad F. Wolf is the Acting Secretary of Homeland Security and the Cabinet-level officer responsible for the administration of U.S. immigration law, including implementing MPP. He is sued in his official capacity.

15. Defendant Mark A. Morgan is the Acting Commissioner of U.S. Customs and Border Protection (CBP), the component of the Department of Homeland Security (DHS) that is responsible for the initial processing of migrants at the border, including operating MPP. He is sued in his official capacity.

¹ Due to the danger faced by Mr. Morales in Mexico and the uncertainty regarding his ability to maintain contact with counsel, Mr. Morales appears here both personally and by and through Ms. Constanza as next friend.

16. Defendant Kenneth T. Cuccinelli holds himself out to be the Acting Director of U.S. Citizenship and Immigration Services (USCIS). USCIS is the DHS component responsible for administering our asylum laws and interviewing migrants who express a fear of return to a country, including as part of MPP. Mr. Cuccinelli is simultaneously serving as the senior official performing the duties of Deputy Secretary of DHS. Mr. Cuccinelli is sued in his official capacity.

17. Defendant Matthew T. Albence is the former Acting Director of Immigration and Customs Enforcement (ICE) and the senior official performing the duties of Director. ICE is the DHS component that carries out removal orders and oversees immigration detention. Mr. Albence is sued in his official capacity.

18. Defendant William Barr is the Attorney General of the United States and shares responsibility for implementing asylum and other immigration laws, including protecting noncitizens from being sent to countries where they face persecution or torture. He is sued in his official capacity.

19. Defendant Donald J. Trump is the President of the United States and is ultimately responsible for DHS's policies. He is sued in his official capacity.

JURISDICTION AND VENUE

20. This Court has jurisdiction pursuant to 28 U.S.C. §§ 2201-2202 (declaratory judgment) and 28 U.S.C. § 1331 (federal question jurisdiction), as Plaintiffs' claims arise under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., immigration laws, international law, and the U.S. Constitution.

21. Venue is proper in the District of Massachusetts because Defendants

are officers of the United States and Plaintiff Maudy Constanza resides in this district. 28 U.S.C. § 1391.

BACKGROUND

I. United States law requires protecting people from persecution.

22. United States law protects asylum seekers like Ms. Constanza, Mr. Morales, and their children. The law forbids sending people to countries where they will be persecuted or tortured, and provides migrants with an opportunity to see an immigration judge before they may be sent to a place where they fear such persecution or torture.

A. The United States has committed itself not to return people to places where they face persecution or torture.

23. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees arose from a commitment to protect refugees after the international community's failures during the Holocaust and World War II. The United States acceded to the Protocol in 1968, binding itself to the substantive provisions of the Convention.

24. The principle of non-refoulement is the core of these agreements. Under Article 33 of the Convention, the United States may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."

25. The United States also signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1988,

pledging not to “expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

B. U.S. statutes and regulations require review by an immigration judge before the government removes someone who fears persecution.

26. United States statutes and regulations implement these commitments by expressly barring the U.S. government from returning people to countries where they will be persecuted or tortured. See 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16.

27. Individuals in removal proceedings may apply for asylum and for two other related, non-discretionary forms of protection—withholding of removal and protection under CAT.

28. Asylum is a discretionary form of relief that may be granted to individuals with a well-founded fear of persecution on account of a protected ground—*i.e.*, their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1101(a)(42)(A), 1158.

29. Withholding of removal under 8 U.S.C § 1231(b)(3) *must* be granted to noncitizens who demonstrate that their “life or freedom would be threatened” on account of a protected ground in the country to which they face removal. Relief under CAT *must* be granted to noncitizens who demonstrate that are more likely than not to be tortured in the country to which they face removal. 8 C.F.R. §§ 208.16-208-18. These two forms of mandatory protection implement the United States’ non-refoulement obligations.

30. Because they are mandatory forms of protection, withholding of removal and CAT relief are available even when noncitizens are otherwise subject to summary removal processes in which immigration officer orders removal without a proceeding in front of an immigration judge.

31. For example, when individuals with certain criminal convictions are placed in a summary process called “administrative removal,” or when those previously-removed are placed in a summary process to “reinstate” their prior removal order, they can still assert a fear of return to the country of intended removal. See 8 U.S.C. §§ 1228(b), 1231(a)(5); 8 C.F.R. §§ 208.31(a), 238.1(b)(2)(i), 238.1(f)(3), 241.8(e). Regulations then provide them with an interview in which an asylum officer conducts an initial assessment of their fear. 8 C.F.R. §§ 208.31, 238.1(f)(3), 241.8(e). Where the officer finds a “reasonable fear”—defined as a “reasonable possibility” that a noncitizen would be persecuted on account of a protected ground, or tortured—the noncitizen is referred for full withholding of removal or CAT proceedings in front of an immigration judge. *Id.* § 208.31. And where an asylum officer does not find such a fear, an individual receives a review of that reasonable fear determination by an immigration judge. *Id.* § 208.31(g).

32. DHS lacks unreviewable authority to send noncitizens to a country in which they fear persecution or torture. See 8 C.F.R. §§ 208.31, 1208.16(a).

33. Another summary removal process is the “expedited removal” of certain individuals at the border. Expedited removal procedures apply to noncitizens who arrive in the United States at a port of entry and who engage in

misrepresentation or lack a visa or other document permitting their admission, 8 U.S.C. § 1225(b)(1). DHS may also apply these proceedings to recent illegal border crossers, *i.e.*, those apprehended within 100 miles of the border and who cannot show that they have been in the United States for more than two weeks. See 8 U.S.C. § 1225(b)(1)(A)(iii); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004). But noncitizens who demonstrate a “credible fear of persecution or torture” avoid expedited removal and are placed into regular removal proceedings under 8 U.S.C. § 1229a, where they may apply for asylum, withholding of removal, and CAT relief. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30(e)(2)-(3), 235.6. If an asylum officer does not find a credible fear, the decision is reviewable by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

II. The Trump administration is violating laws governing its treatment of those fleeing persecution, and it is doing so as a result of animus against Central American and non-white immigrants.

34. The Trump administration dislikes the laws affording protections to people seeking asylum, and it is especially hostile to asylum protections for people from Central American nations and people of color.

35. This hostility is due in substantial part to animus toward Central Americans and other people of color.

36. President Trump’s animus toward Central American asylum seekers seeking protection in the United States is so strong that he has repeatedly voiced a desire to physically harm them. The President has reportedly suggested electrifying the border wall, fortifying it with an alligator moat, installing spikes on top to

pierce human flesh, and having soldiers shoot migrants' legs to slow them down.²

37. On information and belief, in addition to his own bigotry, President Trump's eagerness to harm Central American asylum seekers is driven by his view that scapegoating Central Americans and people of color helps him politically.

38. While campaigning for President, Trump repeatedly made racist statements about people of color, stating that Mexican immigrants were "rapists," and people who "bring[] drugs . . . [and] crime," and that others "coming from all over South and Latin America," and "probably—from the Middle East" were "not the right people."³

39. As President, Trump has asked why the United States would want more people from Haiti, El Salvador, and other nations he called "shithole countries," rather than people from countries like Norway,⁴ which is predominantly white. Trump has also said that Mexican migrants "aren't people" but "animals."⁵

40. As a consequence of this animus, Defendants have acted to undermine and destroy the asylum process. The President and Defendant Cuccinelli have repeatedly identified laws that preserve access to the asylum process as a

² Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. TIMES (Oct. 2, 2019), www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html.

³ Time Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), time.com/3923128/donald-trump-announcement-speech.

⁴ Ryan T. Beckwith, *President Trump Called El Salvador, Haiti 'Shithole Countries': Report*, TIME (Jan. 11, 2018), time.com/5100058/donald-trump-shithole-countries/.

⁵ Gregory Korte & Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Immigrants: 'These Aren't People. These Are Animals.'*, USA TODAY (May 17, 2018), www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/.

“loophole”; the President has also called asylum a “scam” and a “hoax,” and argued that most asylum requests are a fraudulent ploy to enter the country illegally.⁶ Indeed, the President has repeatedly denounced the very existence of Immigration Courts or due process for asylum claims, suggesting that “[w]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came from.”⁷

41. In response to President Trump’s demand that DHS keep out Central American asylum seekers by any means necessary,⁸ Defendants have worked to harm these asylum seekers and destroy the asylum system through an onslaught of illegal measures. These include taking migrant children from their parents, refusing to process asylum seekers at ports of entry, undermining the independence of asylum officers and the immigration courts, and engaging in a multi-faceted

⁶ See, e.g., *Rep. Tim Ryan calls Trump’s history visit to the DMZ an ‘appeasement tour’*, FOX NEWS (June 30, 2019), www.foxnews.com/transcript/rep-tim-ryan-calls-trumps-historic-visit-to-the-dmz-an-appeasement-tour; The White House, *President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crises* (Apr. 29, 2019), www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/; *Trump Says Some Asylum Seekers Are Gang Members*, CBS NEWS (Apr. 5, 2019), www.cbsnews.com/news/trump-says-some-asylum-seekers-are-gang-members-border-calexico-2019-04-05-today/.

⁷ Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 11:02 AM), twitter.com/realDonaldTrump/status/1010900865602019329; see also Donald J. Trump (@realDonaldTrump), Twitter (June 21, 2018, 8:12 AM), twitter.com/realDonaldTrump/status/1009770941604298753/.

⁸ Julie H. Davis and Michael D. Shear, BORDER WARS: INSIDE TRUMP’S ASSAULT ON IMMIGRATION 334-37 (2019) (Trump “gave Nielsen a direct order: Do not let any more people in”; he “wanted the troops to keep the ‘illegals’ out at all costs” and “refused to acknowledge that there were any legal limits on what the military could do”).

attempt to remake the law of asylum eligibility for the singular purpose of denying protection to Central American and other migrants.

42. For example, Attorney General opinions have attempted to cut-off asylum protection for individuals who are targeted by gangs. See, e.g., *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). DHS attempted to ban asylum for individuals who illegally crossed the southern border. See *East Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (enjoining ban), appeal pending, No. 18-17274 (9th Cir.). And DHS *did* ban asylum for individuals at the southern border and have not applied for and been denied asylum or similar protection in a country that they transited through. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019); see 8 C.F.R. § 208.13(c)(4).

III. The so-called “Migrant Protection Protocols” are a centerpiece of Defendants’ efforts to deny migrants the protection of U.S. law.

43. The “Migrant Protection Protocols” are an effort by the Trump administration to choke off the asylum system, hurt migrants, and prevent Central Americans and other people of color from entering the United States.

A. MPP is designed to deny migrants the protections of U.S. law.

44. In a December 20, 2018 press release, DHS announced that individuals “arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.”⁹

⁹ DHS, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration: Announces Migrant Protection Protocols* (Dec. 20, 2018), www.dhs.gov/

45. The release explained that, under MPP, the United States would detain asylum seekers at the border, process them, schedule their removal hearings, expel them to Mexico, and require them to present themselves at the border to attend court.

46. This is now in fact how MPP operates.

47. Defendants have not promulgated any regulations constituting or governing MPP, but have instead created this policy through press releases, memorandums, and shifting unilateral practices.

48. Under MPP, Defendants send migrants to Mexico without the benefit of any of the existing statutory or regulatory procedures for evaluating whether they have a credible fear or reasonable fear of persecution in Mexico.

49. Instead, DHS purports to comply with its international and humanitarian obligations by providing “non-refoulement” interviews.

50. But these MPP non-refoulement interviews employ procedures and standards that drastically differ from credible fear or reasonable fear interviews and are designed to make it all but impossible for migrants to avoid MPP.

51. For example, to reduce the number of non-refoulement interviews, DHS decided that it would not ask migrants whether they feared persecution, but instead would provide interviews only to those who *affirmatively* express a fear.¹⁰

news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

¹⁰ DHS, *Assessment of the Migrant Protection Protocols (MPP), Appendix A: Additional Analysis of MPP Fear-Assessment Protocol* (Oct. 28, 2019), www.dhs.gov/

DHS also set an almost impossibly high standard, requiring migrants to remain in MPP unless they are “more likely than not” to experience persecution on account of a protected ground or torture—a standard much higher than “reasonable fear.” In fact, “more likely than not” is the same as the *merits* standard required to win withholding of removal in front of an immigration judge.¹¹

52. DHS’s decision to return a noncitizen to Mexico is also unilateral. Unlike in the reasonable fear or other summary removal contexts, a noncitizen who fears persecution in Mexico receives no review by an immigration judge.

53. DHS employs these procedures even though it knows or should know that Central Americans and other migrants subjected to MPP face a high likelihood of persecution in Mexico on account of their race, national origin, and particular social group.

54. These procedural shortcomings reflect MPP’s goal—to bar the entry of Central American and other migrants into the United States.

55. The goal has been clear from the start of MPP. While DHS’s December 2018 press release asserted that MPP would stop what it called the “exploit[ation]” of “asylum loopholes” by “[i]llegal aliens” and “fraudsters,” it also made clear that

sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf.

¹¹ See Kirstjen M. Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf; USCIS, *Policy Memorandum: Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, PM-602-0169 (Jan. 28, 2019), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.

MPP is not, in fact, designed to weed out illegal or fraudulent asylum claims in particular. Instead, as reflected in the press release, under MPP *all* individuals “arriving in or entering the United States from Mexico . . . illegally or without proper documentation”—in other words, substantially all asylum seekers coming in from Mexico—are forcibly returned to Mexico.

56. The press release hypothesized that because MPP would impose brutal conditions on all asylum seekers, “false asylum claims are expected to decline.” But on information and belief, in promulgating and implementing MPP, Defendants also expected, and wanted, meritorious asylum claims to decline.

57. MPP was designed to keep migrants out regardless of the strength of their asylum claims, and—by harming migrants rather than protecting them—to reduce the numbers of people who seek safety on our shores.

58. MPP is achieving its intended harm: it is brutally punishing migrants who seek to invoke the protection of the United States, in the hope that the numbers of asylum claims—whether legitimate or not—will decline.

59. As a consequence of MPP and other Trump administration policies, thousands of migrants are living in encampments near the border. On information and belief, thousands have experienced kidnappings and other forms of violence.

B. MPP relies on inapplicable statutory authority.

60. MPP purports to invoke 8 U.S.C. § 1225(b)(2)(C), entitled “Treatment of aliens arriving from contiguous territory.” That provision states that “[i]n 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.”

61. Subparagraph (A) refers to 8 U.S.C. § 1225(b)(2)(A), which requires DHS to detain and initiate removal proceedings under 8 U.S.C. § 1229a against noncitizens arriving in the United States who have facially valid entry documents, such as permanent resident cards or visas, but are nevertheless inadmissible due to criminal history, suspected terrorism, visa violations, or other reasons. Thus, for those noncitizens, § 1225(b)(2)(C) authorizes DHS to return them to Mexico or Canada during removal proceedings if they arrived by land from these countries.

62. But § 1225(b)(2)(A) does not apply, and consequently § 1225(b)(2)(C) does not apply, to those who arrive in the United States *without valid documents at all*, as most asylum seekers do. Those individuals are subject to different procedures, including the possibility of “expedited removal.” 8 U.S.C. § 1225(b)(1). They cannot, however, be returned to a contiguous territory under § 1225(b)(2)(C).

63. Moreover, even if that were not the case, § 1225(b)(2)(C) does not apply to noncitizens who illegally crossed the border, like Mr. Morales and H.E.M.C. Section 1225(b)(2)(C) applies only to noncitizens who are “arriving”—a term of art that DHS has defined as being limited to those who arrive at a port of entry or are interdicted at sea. See 8 C.F.R. §§ 1.2, 1001.1(q). Consistent with this limitation, DHS regulations interpret § 1225(b)(2)(C) to permit the agency, “[i]n its discretion,” to “require any alien who appears inadmissible and who *arrives at a land border*

port-of-entry from Canada or Mexico, to remain in that county while awaiting a removal hearing.” 8 C.F.R. § 235.3(d) (emphasis added). Because Mr. Morales and H.E.M.C. did not arrive at a port of entry, § 1225(b)(2)(C) does not apply.

FACTS

I. Ms. Constanza and Mr. Morales fled Guatemala with their children to seek safety in the United States.

64. Ms. Constanza and Mr. Morales fled Guatemala in 2019 with their three young children, seeking safety from the daily fear that they would be killed.

65. Mr. Morales had been shot four times in Guatemala after witnessing a murder. After the shooting, he and his family left home and lived in different cities in Guatemala, but they were never safe. They eventually returned to their home and lived there for months largely in hiding, going outside only as necessary.

66. In June 2019, Ms. Constanza and Mr. Morales left Guatemala and began the dangerous journey to the United States with their children. Their oldest child, H.E.M.C., was eight years old.

67. Mr. Morales and Ms. Constanza separated at the end of their journey.

68. Ms. Constanza crossed the border with their two daughters on or around July 13, 2019. Mr. Morales and H.E.M.C. have not seen them since.

69. After being apprehended by CBP, Ms. Constanza and her daughters were processed, given notices to appear in immigration court—where their asylum case will be decided—and paroled into the United States. They are now living with relatives in Massachusetts.

II. Mr. Morales and H.E.M.C. were forcibly sent to Nuevo Laredo, Mexico under the so-called “Migrant Protection Protocols.”

70. As Mr. Morales and H.E.M.C. prepared to seek asylum in the United States, the Trump administration was deepening its efforts to ensure that they would not receive that protection.

71. On July 16, 2019, just three days before Mr. Morales and H.E.M.C. entered the United States, DHS enacted a rule making them ineligible for asylum because they had not applied for it in Mexico. And in South Texas, DHS was rolling out an expansion of MPP.

72. As they traveled to the U.S., Mr. Morales and H.E.M.C. did not know of these efforts.

73. On or around July 19, 2019, they crossed the border near McAllen, Texas, fully expecting and wanting to encounter U.S. officials and ask for their help.

74. Mr. Morales and H.E.M.C. were apprehended by CBP and issued Notices to Appear in immigration court for removal proceedings.

75. But CBP officials also issued Mr. Morales and H.E.M.C. a notice stating that they had been “identified for processing under the Migrant Protection Protocols.” As explained in the notice, Mr. Morales and H.E.M.C. would be sent to Mexico and could not return to the United States until it was time to report to the port of entry for their next hearing.

76. The notice provided that Mr. Morales and H.E.M.C. could consult with counsel “through any available mechanism,” including arranging to meet with an attorney at the hearing facility on the day of their hearing. They could also meet

with an attorney “at a location in Mexico of [their] choosing” or by phone or email, or another “remote communication method of [their] choosing.”

77. As the notice explained, to pursue their claims for protection Mr. Morales and H.E.M.C. would have to appear for their next court date, approximately three months later, by presenting themselves at 9am at a bridge connecting Nuevo Laredo, Mexico to Laredo, Texas.

78. H.E.M.C.’s attendance was expressly required.

III. Mr. Morales pleaded with American officials not to send him to Nuevo Laredo.

79. Neither Mr. Morales nor H.E.M.C. had ever been to Nuevo Laredo when they were first processed for MPP.

80. Nuevo Laredo is part of the Mexican state of Tamaulipas, for which the U.S. Department of State has issued a travel advisory of “Level 4: Do Not Travel”—the same level issued for Syria and Afghanistan.

81. The State Department warns against travel to Tamaulipas, stating that “[h]eavily armed members of criminal groups often patrol areas of the state . . . and operate with impunity.” The State Department notes that criminal activity is common—including “gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault”—and “law enforcement has limited capability to respond.”

82. U.S. government employees may travel in Tamaulipas only in limited areas between the U.S. consulates and U.S. ports of entry. They may not use Mexican highways to travel between cities in Tamaulipas or be out between

midnight and 6am in Nuevo Laredo.¹²

83. Migrants are specifically hunted by violent criminal groups in Nuevo Laredo, and elsewhere in Tamaulipas and Mexico. Criminal groups target migrants for kidnapping and extortion near the bridge to Laredo, outside migrant shelters, at bus stations, or at other locations. Central American migrants are especially targeted and vulnerable.

84. DHS is or should be aware of these conditions.

85. When Mr. Morales learned that he and H.E.M.C. would be sent to Nuevo Laredo, he was terrified and told officials that it was too dangerous. They told him there was nothing they could do about it.

86. About a week after they entered the United States, Mr. Morales and H.E.M.C. were escorted to the bridge and told to walk across to Nuevo Laredo.

87. Mr. Morales was so afraid that he refused to cross. He sat down on the bridge in the hot sun and told H.E.M.C. to sit next to him. He begged officials to do anything with him—including taking him to jail—as long as they did not send him and H.E.M.C. to Mexico. Mr. Morales and H.E.M.C. were crying.

88. An official told Mr. Morales and H.E.M.C. that because they did not cooperate, they would be separated—Mr. Morales would be sent to jail for a long time, and H.E.M.C. would be sent to a facility for minors—and they would never see each other again. H.E.M.C. heard this and was inconsolable.

¹² Department of State, *Mexico Travel Advisory* (Dec. 17, 2019), travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

89. Officials took Mr. Morales and H.E.M.C. back to a holding facility. The next day, officials told them that they had another chance to cooperate. This time, when Mr. Morales and H.E.M.C. were escorted to the bridge, they crossed it.

90. Mr. Morales did not know and was not informed that he could have a non-refoulement interview, and that, if DHS found it more likely than not that he and H.E.M.C. would face persecution or torture, they could not be sent to Mexico.

91. Mr. Morales did not know that because, in his case, CBP *followed* the DHS policy seeking to reduce the number of non-refoulement interviews by declining to inform migrants about them.

92. But CBP officials also *failed to follow* their own guidance requiring noncitizens who express a fear of return to Mexico to be referred for an interview.

93. Had Mr. Morales been informed that he could have a non-refoulement interview, he would have requested one.

IV. Mr. Morales and H.E.M.C. were nearly kidnapped in Nuevo Laredo, had nowhere to stay, and were hungry because they could not safely buy food.

94. Nuevo Laredo was every bit as dangerous as Mr. Morales feared.

95. With nowhere to go, Mr. Morales and Hanz stayed in the Mexican immigration building on the Nuevo Laredo side of the bridge for days, sleeping on the floor.

96. After their first night in Nuevo Laredo, Mr. Morales and H.E.M.C. were attempting to buy a change of clothes near the bridge when they were nearly kidnapped by three armed men with ski masks who entered the store.

97. The next time they went out, Mr. Morales saw that some men were following them and ran with H.E.M.C. back to the Mexican immigration building.

98. At the Mexican immigration building, Mr. Morales and H.E.M.C. saw some people that went out to buy food or other items and never came back; those who had stayed behind said that they had been kidnapped.

99. Mr. Morales and his son were sometimes hungry because they were afraid to go out to buy food.

100. One night, when H.E.M.C. woke up on the floor of the Mexican immigration building and did not see his father, he began crying and screaming. Mr. Morales had gotten up to try to charge his cell phone on a nearby wall.

V. Mr. Morales and H.E.M.C. entered hiding outside Tamaulipas and returned to Court in Laredo.

101. Mr. Morales' family finally found help through a Massachusetts church that had connections to a Mexican pastor. The pastor helped Mr. Morales and H.E.M.C. find shelter outside Tamaulipas and farther from the border, where they have been since approximately August. The pastor has also helped Mr. Morales and H.E.M.C. to reach their court hearings.

102. Mr. Morales and H.E.M.C. continue to be in danger any time they venture outside. They stay inside as much as possible.

103. Nevertheless, Mr. Morales has made efforts to stabilize his situation in Mexico. He has attempted to rent an apartment, but was told that the owner would not rent to Central Americans. He also tried to find work, but was told by businesses that they would not employ migrants. Even when shopping for food, Mr.

Morales has encountered store workers who are unwilling to serve him.

104. In August, H.E.M.C. celebrated his ninth birthday in hiding with his father, crying for his mother and sisters.

105. In October, Mr. Morales and H.E.M.C. returned to Nuevo Laredo for their first court hearing.

106. The hearing was held in San Antonio, Texas and attended in person by an immigration judge and by a DHS attorney.

107. But Mr. Morales and H.E.M.C. were barred from attending in person. Instead, like other migrants subject to MPP in Laredo, they were required to participate via video from a makeshift courtroom in a tent near the bridge.

108. With the help of the pastor and an organization in the United States, Mr. Morales obtained an attorney.

109. Mr. Morales and H.E.M.C. returned for their next immigration court hearing in November 2019. Again, the hearing occurred in San Antonio, and Mr. Morales and H.E.M.C. were constrained to participate remotely from Laredo.

110. With the help of his counsel, Mr. Morales formally requested a non-refoulement interview for the first time.

111. The non-refoulement interview occurred over the phone after the November court hearing. Mr. Morales told the interviewer about the discrimination and kidnapping attempt that they had experienced in Mexico. He and H.E.M.C. were upset and crying during the interview. Their counsel was not present.

112. Mr. Morales was never told the result of his interview. Nor did he ever

receive any document confirming that the interview had ever happened.

113. After his interview, Mr. Morales and other migrants were escorted back over the bridge and forcibly returned to Nuevo Laredo.

114. U.S. government officials gave Mr. Morales and H.E.M.C. a date for their final removal hearing months later. This time, to be processed for their hearing, they will be required to report to the bridge at 4:30 a.m.—a time when U.S. government employees are forbidden to be outside in Nuevo Laredo.

115. At that hearing, their applications for protection from removal to Guatemala will be decided. Because Mr. Morales and H.E.M.C. are subject not only to MPP but also to the July 16, 2019, ban on asylum for those who did not first apply in a third country, the immigration judge will presumably find that they are eligible only for withholding of removal and CAT relief, and they will have to meet the higher evidentiary standard required for these forms of relief.

116. If the immigration judge's decision is appealed by either side, Mr. Morales and H.E.M.C. could spend another four to eight months, or longer, awaiting the results of that appeal in Mexico.

117. Mr. Morales and H.E.M.C. continue to live in hiding in the apartment arranged by the pastor. They are entirely dependent on the pastor and his family to purchase their food and other necessities.

118. Mr. Morales and H.E.M.C. reasonably believe that it is too dangerous to go outside.

119. Other than attending church on Sundays with the pastor, Mr. Morales

and H.E.M.C. stay inside. H.E.M.C. does not attend school. Days go by in which he sees no one but his father.

120. Mr. Morales and H.E.M.C. have been deeply traumatized due to the actions of the U.S. government. H.E.M.C. asks his father why this is happening to them. He becomes inconsolable if he loses sight of his father, even for a moment. Mr. Morales and H.E.M.C. feel hopeless and cry daily. On many days, Mr. Morales can barely function. For him and H.E.M.C., life has become almost intolerable.

121. In Massachusetts, Ms. Constanza lives with the anguish of knowing that her partner and son are unsafe. She cries alone in the bathroom, and then washes her face and tries to be strong for her daughters. Whenever she cannot reach Mr. Morales and H.E.M.C., Ms. Constanza is overtaken by fear. The constant worry about whether they are safe occupies her mind at all times, leaving her unable to focus on anything else.

CLAIMS FOR RELIEF

Count 1

Violation of the INA and APA – Contiguous Territory Return Provision (8 U.S.C. § 1225(b)(2)(C); 8 C.F.R. § 235.3(d); 5 U.S.C. § 706(2))

122. The foregoing allegations are realleged and incorporated herein.

123. Title 8, Section 1225(b)(2)(C)—which authorizes DHS to return certain individuals to a contiguous territory during their immigration proceedings—does not apply to Mr. Morales and his son for two independent reasons.

124. First, § 1225(b)(2)(C) does not apply to individuals who entered the United States without inspection, *i.e.*, by crossing the border. Instead, by its own

terms, it applies only to noncitizens who are “arriving”—a term defined by regulation to include only individuals presenting themselves at a port of entry or interdicted at sea. See 8 C.F.R. §§ 1.2, 1001.1(q); see also 8 C.F.R. § 235.3(d) (interpreting § 1225(b)(2)(C) to permit DHS to “require any alien who appears inadmissible and who *arrives at a land border port-of-entry from Canada or Mexico*, to remain in that county while awaiting a removal hearing” (emphasis added)).

125. Second, § 1225(b)(2)(C) only applies to noncitizens to whom § 1225(b)(2) applies, not to noncitizens to whom § 1225(b)(1) applies. Sections 1225(b)(1) and (b)(2) divide noncitizens into two categories, and provide different procedures for each. And § 1225(b)(2)’s express terms make it inapplicable to noncitizens to whom § 1225(b)(1) applies, including Mr. Morales and H.E.M.C.

126. Applying MPP to Mr. Morales and H.E.M.C. is thus contrary to the Immigration and Nationality Act (INA) and its regulations, in violation of the APA. See 5 U.S.C. § 706(2).

Count 2
Violation of the INA and APA – Asylum Law
(8 U.S.C. § 1158; 8 C.F.R. § 208.1 et seq.; 5 U.S.C. § 706(2))

127. The foregoing allegations are realleged and incorporated herein.

128. Title 8, Section 1158 permits noncitizens to apply for asylum in the United States regardless of their status or manner of entry. Statutes and regulations carefully balance protecting asylum seekers with other American interests, including in expeditious removal procedures and in ensuring that the

United States is not alone in bearing responsibility for those fleeing persecution. See generally 8 U.S.C. §§ 1158, 1225(b)(1); 8 C.F.R. §§ 208.1 et seq.

129. MPP upends Congress's scheme for addressing asylum in the context of third countries and its scheme for removing individuals who express a fear of persecution.

130. Applying MPP to Mr. Morales and H.E.M.C. is thus contrary to the INA and its regulations, in violation of the APA. See 5 U.S.C. § 706(2).

131. Further, to the extent challengeable in this proceeding, the government's bar on asylum for Mr. Morales and H.E.M.C. based on their failure to apply for asylum in Mexico, see 8 C.F.R. § 208.13(c)(4), violates 8 U.S.C. § 1158 and applicable regulations.

Count 3
Violation of Defendants' Non-Refoulement Obligations
(8 U.S.C. § 1231(b)(3); 5 U.S.C. § 706(2); international law)

132. The foregoing allegations are realleged and incorporated herein.

133. The INA bars removing a noncitizen to a country where it is more likely than not that the noncitizen will face persecution or torture. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16.

134. The duty of non-refoulement is also a *jus cogens*—that is, a universal, and obligatory norm of customary international law from which the United States cannot derogate, and which U.S. courts are bound to enforce.

135. Recognizing this duty, DHS and Department of Justice regulations ensure that noncitizens have the opportunity to see an immigration judge before being sent to a country in which they fear persecution or torture.

136. Mr. Morales and H.E.M.C. did not receive non-refoulement procedures consistent with U.S. and international law. Even when Mr. Morales sat on the bridge and implored U.S. officials not to send him to Mexico, officials did not refer him for a fear interview. Rather, they threatened to permanently and illegally separate him from his child if he did not put aside his fear and cross the bridge.

137. Mr. Morales and H.E.M.C. were then unlawfully sent to Mexico despite the high likelihood of persecution and torture that they and other Central American migrants face there.

138. DHS failed to comply with non-refoulement procedures and Mr. Morales and H.E.M.C.'s right not to be removed to a country where they face persecution. The United States thus violated its obligations under international law, the INA, its regulations, and the APA, see 5 U.S.C. § 706.

Count 4
Violation of the APA – Notice and Comment
(5 U.S.C. § 553)

139. The foregoing allegations are realleged and incorporated herein.

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

141. MPP and its procedures for determining whether an individual is more likely than not to face persecution or torture in Mexico are legislative rules. The

program has brought a sea-change in the processing of asylum claims at the border and created a new mandatory process for non-refoulement determinations that does not comply with the regulations for *any* existing process for assessing fear of return.

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

Count 5
Violation of the APA – Arbitrary, Capricious, and Unlawful Agency Action
(5 U.S.C. § 706)

143. The foregoing allegations are realleged and incorporated herein.

144. The APA requires courts to “compel agency action unlawfully withheld.” 5 U.S.C. § 706(1).

145. DHS has unlawfully deprived Mr. Morales and H.E.M.C. of procedures required by law before sending noncitizens to countries where they fear persecution. See 8 C.F.R. § 208.31.

146. Courts shall also “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to constitutional right, power, privilege, or immunity,” “in excess of statutory jurisdiction, authority, or limitation, or short of statutory right” or “without observance of procedure required by law.” 5 U.S.C. § 706(2).

147. MPP's non-refoulement procedures are arbitrary and capricious, an abuse of discretion, unlawful, unconstitutional, and *ultra vires*. Through MPP, DHS has unlawfully claimed authority to make unilateral determinations about whether migrants may be sent to Mexico notwithstanding their fear of persecution. MPP is a drastic and unexplained departure from prior practice, including from all existing procedures for determining whether noncitizens may be sent to countries where they fear persecution.

148. This departure from prior non-refoulement procedures has occurred even though DHS is or should be aware that all or virtually all Central American migrants face a reasonable fear of persecution in Tamaulipas and Mexico, where they are targeted by violent criminal groups based on their identity as Central Americans and migrants.

149. MPP's inadequate non-refoulement procedures are also evidence that MPP as a whole is arbitrary, capricious, and unlawful. MPP relies on an unexplained change in DHS's interpretation of 8 U.S.C. § 1225(b)(2)(C); it represents a drastic departure from DHS's prior system for addressing asylum seekers at the border; and it cannot be said to be calculated to "Protect[]" migrants with legitimate asylum claims. Instead, MPP punishes those fleeing violence with exposure to conditions DHS knows to be perilous and even fatal.

150. MPP and its non-refoulement procedures, including as applied to Mr. Morales and H.E.M.C., are arbitrary and capricious and otherwise violate 5 U.S.C. § 706.

Count 6
Violation of Due Process
(U.S. Constitution, amend. V)

151. The foregoing allegations are realleged and incorporated herein.

152. Due process safeguards noncitizens' liberty interest in the fair adjudication of applications for relief and benefits made available under the immigration laws. See *Arevalo v. Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003). Because immigration law protects Mr. Morales and H.E.M.C. from being sent to a country in which they are more likely than not to face persecution, due process entitles them to fair procedures to determine whether they should receive protection from being sent to Mexico. Yet Mr. Morales and H.E.M.C. were sent to Mexico and remained there for four months without *any* procedure to determine whether they would face persecution or torture there. Although they finally received a non-refoulement interview in November 2019, it was not a fair proceeding. Instead, it was conducted by a DHS official who, on information and belief, was carrying out DHS's policy not to permit migrants to escape MPP.

153. In addition, the substantive protections of the Due Process Clause also protect individuals from government conduct that "shocks the conscience," including state action that places individuals at a substantial risk of serious harm. See *Irish v. Maine*, 849 F.3d 521, 526 (1st Cir. 2017); *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001). Defendants deliberately abandoned procedures for protecting migrants who fear persecution and sent Mr. Morales and H.E.M.C. to Nuevo Laredo, Tamaulipas—a city and state where Defendants knew or should have

known Central American and other migrants could not be expected to live safely. Because of that action, Mr. Morales and H.E.M.C. suffered a kidnapping attempt, have lived in hiding for more than five months, and are deeply traumatized. The government's actions sending an eight-year-old boy and his father into known danger shock the conscience and violate the substantive requirement of the Due Process Clause.

Count 7
Violation of Equal Protection
(U.S. Constitution, amend. V)

154. The foregoing allegations are realleged and incorporated herein.

155. Plaintiffs have a right under the Fifth Amendment to the U.S. Constitution to equal protection of the laws. MPP and its inadequate non-refoulement process are motivated by racial animus and animus based on national origin and are unlawful. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977).

156. Through the application of MPP, Plaintiffs have been harmed by Defendants' violation of equal protection.

PRAYER FOR RELIEF

Plaintiffs ask that this Court grant the following relief:

1. Declare that MPP and its non-refoulement procedures are unlawful, and that Mr. Morales and H.E.M.C.'s inclusion in MPP was unlawful;
2. Enjoin Defendants from applying MPP to Mr. Morales and H.E.M.C.;

3. Order Mr. Morales and H.E.M.C. be permitted to enter the United States and remain during the pendency of their 8 U.S.C. § 1229a removal proceedings and any appeals;

4. Alternatively, order that Mr. Morales and H.E.M.C. be provided with a non-refoulement interview that is, at a minimum, consistent with the requirements and pre-existing practice for reasonable fear interviews under 8 C.F.R. § 208.31, including the opportunity for review by an immigration judge.

5. Award attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504, if applicable; and,

6. Order any further relief this Court deems just and proper.

Respectfully submitted this 3rd day of January, 2020.

Susan Church (BBO # 639306)
Demissie & Church
929 Massachusetts Ave., Ste. 01
Cambridge, MA 02139
(617) 354-3944
sbc@demissiechurch.com

/s/ Adriana Lafaille
Matthew R. Segal (BBO # 654489)
Adriana Lafaille (BBO # 680210)
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
Boston, MA 02110
(617) 482-3170
alafaille@aclum.org