20-01554

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

ANDRES OSWALDO BOLLAT VASQUEZ, individually and as next friend to Luisa Marisol Vasquez Perez de Bollat, and as father and next friend to A.B.; A.B.; LUISA MARISOL VASQUEZ PEREZ DE BOLLAT; JOSE MANUEL URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA MARIA MARTINEZ DE URIAS; SALOME OLMOS LOPEZ, individually and as next friend to Evila Floridalma Colaj Olmos and J.C.; J.C.; EVILA FLORIDALMA COLAJ OLMOS,

Plaintiffs-Appellees,

—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, senior official in charge of U.S. Citizenship and Immigration Services; MATTHEW T. ALBENCE, senior official in charge of U.S. Immigration and Customs Enforcement; WILLIAM P. BARR, Attorney General; DONALD J. TRUMP, President,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, BOSTON

BRIEF OF *AMICUS CURIAE* NATIONAL CITIZENSHIP AND IMMIGRATION SERVICES COUNCIL 119 IN SUPPORT OF APPELLEES AND AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Council 119 hereby certifies that it has no parent corporations and that no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Citizenship and Immigration Services Council 119 ("Council 119") is a labor organization that represents over 14,000 bargaining unit employees of the United States Department of Homeland Security's U.S. Citizenship and Immigration Services ("USCIS"). Council 119's constituents include approximately 1,000 asylum officers and refugee officers who operate USCIS Asylum Pre-Screening Operation, which has been responsible for a large part of USCIS's "credible fear" and "reasonable fear" screenings, and for implementing the DHS policy called the Migrant Protection Protocols (the "MPP").

Council 119 has a special interest in this case because, as representative of the collective bargaining unit of federal government employees who are at the forefront of interviewing and adjudicating the claims of individuals seeking protection in the United States, its members have first-hand knowledge as to whether the MPP assures the United States' compliance with international and domestic laws concerning due process for asylum seekers and the protection of refugees and whether the MPP is necessary to deal with the flow of migrants through our nation's southern border.

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this *amicus* brief.

Members of the *amicus curiae* signed up to be asylum and refugee officers to help our nation fulfill its commitment to international and domestic laws. They did not sign up to administer the MPP, a policy that is contrary to our country's longstanding tradition, international treaty obligations, and statutory law.

This brief relies solely upon information that is publicly available, and it does not rely on any information that is confidential, law enforcement sensitive, or classified. It represents only the views of Council 119 on behalf of the bargaining unit and does not represent the views of USCIS or USCIS employees in their official capacities.

SUMMARY OF ARGUMENT

The commitment to providing a safe haven to persecuted people is etched into our nation's identity. That commitment is perhaps best reflected in the sonnet enshrined at the pedestal of the colossal sculpture sitting in New York harbor that has welcomed many generations of Americans: "*Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!*" The promise of safety and an opportunity to build a permanent life without persecution is a part of our nation's moral fabric that pre-dates the founding. This promise has been reinforced by our nation's laws, which,

over the course of several decades and consistent with our international treaty obligations, have established a standardized and agile system for identifying, vetting, and protecting refugees. That system endured for decades across multiple administrations, ensuring that refugees would not be returned to territories where they would be persecuted or tortured.

But, in the last three years, the Executive Branch of our government has sought to dismantle our carefully crafted system of vetting asylum claims, and with it, America's position as a global leader in refugee protection. The MPP is part of that dismantling. It fundamentally changed our nation's procedures for the processing of asylum applicants who enter the United States through our nation's southern border with Mexico. Prior to the MPP, our country's processing of asylum applicants ensured—as required by our international treaty obligations—that people fleeing persecution would not be, pending adjudication of their asylum application or anytime thereafter, returned to a territory where they may face persecution or threat of torture. The MPP upended that process in favor of a new one purportedly designed to address the challenges faced by our immigration system as a result of migrants from Guatemala, Honduras, and El Salvador (referred to as the "Northern Triangle") entering the United States through our southern border.

Under the MPP, thousands of asylum seekers entering the United States through the southern border or apprehended within the United States near the southern border have been forced to return to Mexico where they are required to remain pending adjudication of their asylum applications. While waiting for a decision on their asylum applications, many will face persecution. By forcing a vulnerable population to return to a dangerous territory, the MPP abandons our tradition of providing a safe haven to the persecuted and violates our international legal obligations. It also violates our statutory law: the asylum statute that is used for its justification does not allow—as understood and interpreted by those charged with administering the asylum system—the Administration to return noncitizens who are already within our country's borders to a contiguous country.

Finally, the MPP is entirely unnecessary, as our immigration system has the foundation and agility necessary to deal with the flow of migrants through our southern border. The system has been tested time and again, and it is fully capable—with additional resources where appropriate—of efficiently processing asylum claims by those with valid claims while removing those who are not entitled to protection. The MPP, contrary to the Administration's claim, does nothing to streamline the process, but instead increases the burdens on our immigration courts and makes the system more inefficient by diverting asylum

officers from their primary task of defensive asylum screenings and affirmative asylum adjudications.

Council 119's members are steadfast in their commitment to serving our country by continuing its proud tradition as a refuge for the persecuted while ensuring the safety and security of American citizens. The MPP betrays this tradition and would force Council 119's members to take actions contrary to their oath to uphold our nation's immigration laws. Accordingly, *amicus curiae* urges the Court to affirm the district court's entry of a preliminary injunction.

ARGUMENT

I. THE MPP IS CONTRARY TO AMERICA'S LONGSTANDING TRADITION OF PROVIDING SAFE HAVEN TO PEOPLE FLEEING PERSECUTION

A. America Has Been a Global Leader in Providing Protection to the Persecuted

Providing a safe haven to the persecuted is etched into the core of our national identity. Even before our country's founding, its lands served as a safe haven to those fleeing religious persecution in England and Holland.[2] Although the impact of these refugees' arrival is complex because of their treatment of the

[2] *See* William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006); Jeremy Dupertuis Bangs, Strangers and Pilgrims, Travellers and Sojourners, Leiden and the Foundations of Plymouth Plantation, vii, 7, 605, 614, 630 (2009).

First Nations that already lived here,[3] it cannot be denied that they serve as a symbol of America's promise as a safe haven for the persecuted.

The mid-19th century brought millions of refugees to America's doorstep.[4] Between 1847 and 1851, an estimated two million Irish fled starvation and disease wrought by the Great Famine, with 840,000 passing through the port of New York and many more arriving by way of Canada.[5] During the same period, German political refugees fleeing reactionary reprisals in the wake of the 1848 Revolution—known as the "Forty-Eighters"—came to America seeking freedom of thought and expression.[6]

Despite the promise of American ideals, our nation's treatment of refugees is not unblemished. Our country's policy towards Jewish refugees during World War II is a tragic example.[7] Although the United States accepted approximately 250,000 refugees fleeing Nazi persecution prior to the country's entry into World

[3] *See, e.g.*, David J. Silverman, *This Land is Their Land: The Wampanoag Indians, Plymouth Colony, and the Troubled History of Thanksgiving* (2019).

[4] *See* Philip A. Holman, Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook 3, 5 (David W. Haines ed., 1996).

[5] Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005). *See generally* William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees*, 1845-1851 (Margaret M. Mulrooney ed., 2003).

[6] *See generally* Adolf Eduard Zucker, The Forty-Eighters: Political Refugees of the German Revolution of 1848 (1967).

[7] Richard Breitman & Alan M. Kraut, American Refugee Policy and European Jewry, 1933-1945, 1-10 (1988).

War II, it refused to accept more as Nazi Germany increased its atrocities.[8] This indifference is reflected in the United States' denial of entry in 1939 to the *St. Louis*, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.[9] The ship returned to Europe where many of its occupants met their fate—254 would die in the Holocaust.[10] Nazi Germany found it "astounding" that countries that found it "incomprehensible why Germany did not wish to preserve in its population an element like the Jews . . . seem in no way particularly anxious to [welcome Jews] themselves, now that the opportunity offers."[11]

In many ways, our nation's refugee policy since the Second World War has sought to rectify our humanitarian failures during the most devastating of international conflicts. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as

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[8] Holman, *supra* note 4, at 5 (citing Congressional Research Service 1991:556).

[9] The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), https://archives.jdc.org/wp-content/uploads/2018/06/stlouis_minutesjune-5-1939.pdf.

[10] *Id*.

[11] Clarence K. Streit, *Germans Belittle Results*, N.Y. Times, July 13, 1938, at 12, https://timesmachine.nytimes.com/timesmachine/1938/07/13/issue.html; *see also No One Wants to Have Them: Fruitless Debates at the Jew-Conference in Evian*, Voelkischer Beobachter, (July 13, 1938), http://www.jewishvirtuallibrary.org/german-paper-ridicules-evian-conference.

the United Nations International Children's Emergency Fund and the World Food Programme, both of which provide support for refugees and displaced persons.[12]

After the war's end, in response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Truman directed the issuance of 40,000 visas to resettle the survivors in the United States.[13] Congress also took action by enacting the Displaced Persons Act of 1948—the first major refugee legislation in American history—that allowed for the admission of 415,000 displaced persons by the end of 1952.[14] The Displaced Persons Act of 1948 expired in 1952, when Congress passed the Immigration and Nationality Act ("INA"), placing immigration and nationality laws under the same statute for the first time.[15]

American compassion toward refugees following the Second World War was not limited to Holocaust survivors. In 1953, Congress enacted the Refugee Relief Act of 1953, which, along with its amendments, authorized the admission of

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[12] *See* Maggie Black, The Children and the Nations: The Story of Unicef, 25-35 (1986); Bryan L. McDonald, Food Power: The Rise and Fall of the Postwar American Food System 143 (2017).

[13] *See* Gil Loescher & John A. Scanlan, Calculated Kindness: Refugees and America's Half-Open Door 1945-Present 4-6 (1986).

[14] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Holman, *supra* note 3, at 5.

[15] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

214,000 refugees, including escapees from Communist-dominated countries.[16] In 1956, the United States permitted entry of over 30,000 refugees fleeing persecution in Hungary.[17] Soon after, the Refugee-Escapee Act of 1957 allowed for the resettlement of "refugee-escapees," defined as persons fleeing persecution in Communist or Middle Eastern countries.[18]

In the following years, the United States continued to welcome millions of refugees from other parts of the world. In 1958, Congress passed the Azores Refugee Act which authorized 2,000 special non-quota immigrant visas for victims of the earthquakes and volcanic eruptions that struck the Island of Fayal in 1957.[19] After the Cuban Revolution in 1959, the United States began admitting more than 58,000 Cubans fleeing persecution under the attorney general's parole authority.[20] And in 1965, President Lyndon B. Johnson opened the country to all Cubans seeking refuge from Fidel Castro's communist regime.[21] In order to more safely

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[16] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; *see* Holman, *supra* note 5, at 5.

[17] Carl J. Bon Tempo, Americans at the Gate: The United States and Refugees During the Cold War 70-73 (2008).

[18] Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; *see* Holman, *supra* note 4, at 6.

[19] Bon Tempo, *supra* note 18, at 107-15.

[20] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[21] *Id*.

and efficiently bring Cubans to the United States, the federal government created an airlift program which brought more than 250,000 Cuban refugees to the United States.[22] And around the same time, our nation also welcomed thousands fleeing persecution from the Soviet Union, Eastern Europe, and Afghanistan.[23]

The United States also began to undertake international treaty obligations related to refugee resettlement.[24] In 1968, the United States ratified the 1967 Protocol Relating to the Status of Refugees, a treaty drafted by the United Nations High Commissioner for Refugees ("UNHCR").[25] The 1967 Protocol removed the geographic and temporal limits to refugee resettlement contained in an earlier treaty, the 1951 Convention Relating to the Status of Refugees, which limited resettlement to European refugees displaced prior to 1951.[26] By ratifying the 1967 Protocol, the United States also became bound by all of the substantive provisions of the 1951 Convention,[27] and also agreed not to, among other things: (i)

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[22] *Id*.

[23] Mark Gibney, Global Refugee Crisis 91-92 (2d ed. 2010).

[24] *Id*. at 8-13.

[25] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[26] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

[27] Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l L. 1, 1 n.1 (1997).

discriminate against refugees on the basis of their race, religion, or nationality; (ii) penalize refugees for their illegal entry or stay in the country; or (iii) engage in "refoulement"—i.e., to "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 group or political opinion." [28]

To uphold the principle of asylum in the 1951 Convention and the 1967 Protocol, and to ensure that no refugees were returned to conditions of persecution, in 1972, the Immigration and Naturalization Service (the "INS")—an agency that was created in 1933—began granting asylum to foreign nationals already in the United States, using existing procedures, such as parole, stays of deportation, and adjustment of status, to allow foreign nationals who feared persecution in their homeland to remain in the country.[29]

The end of the Vietnam War created a large flow of refugees, with about 300,000 Southeast Asians entering the United States through the attorney general's parole authority between 1975 and 1980. The Indochinese Immigration and Refugee Act of 1975 funded their transportation and resettlement, and, in 1977,

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[28] *Id*. at 2.

[29] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

Congress enacted a law allowing Southeast Asian refugees who had entered the United States through the attorney general's parole authority the opportunity to become lawful permanent residents.[30] In 1977, the INS also created a special Office of Refugee and Parole to address global refugee crises and implement refugee policies.[31]

In 1980, Congress enacted the Refugee Act, which sought to convert the existing *ad hoc* approach to refugee resettlement to a more permanent and standardized system for identifying, vetting, and resettling refugees.[32] The Refugee Act provided the first statutory basis for asylum in the United States[33] and aligned United States refugee law with our country's international treaty obligations, namely the 1951 Convention and the 1967 Protocol.[34] It did so, for example, by adopting the definition of "refugee" contained in Article 1 of the Convention[35] and—consistent with Article 33 of the Convention—prohibiting the

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[30] *Id*.

[31] *Id*.

[32] Claire Felter & James McBride, *How Does the U.S. Refugee System Work?*, Council on Foreign Relations (Feb. 6, 2017), https://www.cfr.org/backgrounder/how-does-us-refugee-system-work.

[33] Tom K. Wong, The Politics of Immigration: Partisanship, Demographic Change, and American National Identity 52-53 (2017).

[34] *See I.N.S. v. Stevic*, 467 U.S. 407, 425-26 (1984).

[35] *Compare* United Nations Convention Relating to the Status of Refugees, *supra* note 27, at art. 1A(2) *with* 8 U.S.C. § 1101(a)(42)(A).

removal of an alien to any country where "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[36]

In 1990, the INS promulgated a rule that mandated the establishment of a corps of professional asylum officers trained in international law and access to a center containing information on human rights.[37] The designers of the 1990 asylum rule aimed to achieve twin goals of compassion (through the prompt approval of meritorious cases) and control (by discouraging spurious or abusive claims).[38]

In 1994, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the "CAT"), which it had signed in 1988.[39] Article 3(1) of the CAT provides: "No State Party shall expel, return ('refouler') or extradite a person to another State

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[36] *Compare* United Nations Convention Relating to the Status of Refugees, supra *note* 27, at art. 33(1) *with* 8 U.S.C. § 1231(b)(3)(A).

[37] Gregg A. Beyer, Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities, 9 Am. U. Int'l L. Rev. & Pol'y 43 (1994).

[38] *Id.* at 44.

[39] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

where there are substantial grounds for believing that he would be in danger of being subjected to torture."[40]

Following the terrorist attacks on September 11, 2001 and the creation of DHS, USCIS became the primary agency to oversee refugee and asylum affairs, in cooperation with other agencies. As to refugee affairs, in 2005, USCIS formed the Refugee Corps, which is composed of specially-trained refugee officers who travel around the world to interview refugee applicants seeking resettlement in the United States.[41]

And as to asylum affairs, USCIS set up an Asylum Division to focus on three main areas. First, it is tasked with administering the "affirmative asylum" process, which involves an asylum application by an individual who is not in removal proceedings and who files Form I-589 with USCIS.[42] Second, it determines whether individuals subject to expedited removal who indicate an intention to apply for asylum or a fear of return to their home country have a "credible fear" of persecution or torture.[43] Individuals found to have a "credible fear" in the expedited removal process are placed in formal removal proceedings

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[40] *Id.*

[41] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[42] INA § 208; *see also* 8 CFR § 208.

[43] INA § 235; *see also* 8 C.F.R. § 235.3 and 8 C.F.R. § 208.30.

and may apply for asylum or withholding of removal as a defense to removal before an immigration judge, or pursue other forms of relief or protection from removal. Third, the Asylum Division evaluates whether an individual ordered removed by an immigration judge or convicted of certain crimes but expresses a fear of return to their home country has a "reasonable fear" of persecution or torture.[44] Individuals found to have a "reasonable fear" are referred to an immigration judge for withholding-only proceedings in which they may seek withholding of removal under INA § 241(b)(3), or withholding or deferral of removal under regulations implementing United States' obligations under the CAT.

Our country's process for dealing with displaced people is highly respected internationally. It has been highly adaptable, and it has effectively offered protection to qualified asylum seekers while also ensuring the enforcement of applicable laws, addressing national security concerns, and combatting fraud and abuse. The agility and success of the system is perhaps best reflected in the sheer number of refugees absorbed into the United States since the Second World War: nearly five million, representing well over 70 nationalities.[45]

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[44] *See* 8 C.F.R. §§ 238.1, 241.8, 208.31.

[45] David W. Haines, Safe Haven? A History of Refugees in America 4 (2010).

B. The World Is Experiencing Another Wave of Displacement

Today, the world is experiencing yet another surge in displacement wrought by conflict, civil war, famine, and violence.[46] The displacement spans the world, from the Middle East to Africa to Asia to Central America—the latter being a region that has a legacy of violence and fragile institutions resulting in part from the civil wars of the 1980s.[47] Now, perhaps more than ever, America needs to continue its longstanding tradition of offering protection, freedom, and opportunity to the vulnerable and persecuted.[48]

C. The MPP Is Part of an Assault on the American Commitment of Providing Safe Haven to the Persecuted

Despite the pressing need to afford protection to refugees fleeing violence and persecution, America's refugee resettlement and asylum systems are under siege. The Administration has implemented a barrage of measures whose impact and intent are to dismantle the pillars of our defining role as a refuge for the world's persecuted, its "huddled masses yearning to breathe free." After temporarily suspending the U.S. Refugee Admissions Program altogether at the

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[46] *See* UNHCR, *Global Trends: Forced Displacement in 2016*, at 5 (June 19, 2017), http://www.unhcr.org/5943e8a34.

[47] *Id*. at 2-3, 7.

[48] *See* Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs, 114th Cong. 114-115 (2017), http://docs.house.gov/meetings/.

start of 2017,[49] the Administration has increasingly slashed the number of refugees who can be resettled in the country each year,[50] and has actually admitted far fewer refugees than permitted by each annual refugee admissions ceiling.[51]

At our southern border, America's asylum system has fared no better. It began in 2018 with what has been dubbed as "Asylum Ban 1.0," which banned those entering through the southern border from accessing asylum protections.[52] Then came the MPP in 2019, which was followed by the "Third Country Transit Bar," a rule categorically denying asylum to almost anyone crossing into the United States through the southern border without first having applied for and been denied asylum in any country through which they transited.[53] The Administration then promulgated a rule implementing Asylum Cooperative Agreements under which refugees from the Northern Triangle countries are permanently removed to

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[49] *See* Executive Order Protecting the Nation From Foreign Terrorist Entry Into the United States (Mar. 6, 2017), https://www.whitehouse.gov/presidential -actions/executive-order-protecting-nation-foreign-terrorist-entryunited-states-2/.

[50] Michael D. Shear and Zolan Kanno-Youngs, *U.S. Cuts Refugee Program Again, Placing Cap at 18,000 People*, N.Y. Times, Sep. 27, 2019 at A16.

[51] For example, "[j]ust 22,491 refugees were resettled in the U.S. in fiscal year 2018, roughly half the 45,000 cap." Deborah Amos, *2018 Was Year of Drastic Cuts to U.S. Refugee Admissions*, Nat. Pub. Radio, Dec. 27, 2018.

[52] 83 Fed. Reg. 55934 (Nov. 9, 2018).

[53] 84 Fed. Reg. 33,829-45 (Jul. 16, 2019).

other Northern Triangle countries— which are themselves some of the most dangerous countries on earth and are the source of large numbers of refugees.[54]

Last, but not least, the Administration undertook efforts to limit the independence and work of asylum officers by, among other things, assigning Border Patrol agents to conduct "credible fear" interviews, including family processing at the "family residential centers."[55] Border Patrol agents are law enforcement officers tasked with "safeguard[ing] America's borders thereby protecting the public from dangerous people and materials."[56] They serve a distinct role from asylum officers, who "assess protection, humanitarian, and other immigration benefits and service requests throughout the world."[57] "Since Border Patrol agents started conducting initial asylum screenings in June [2019], they have approved fewer than half of the nearly 2,000 screenings they have completed,

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[54] 84 Fed. Reg. 63,994-64,011.

[55] *See* Julia Ainsley, Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Migrant Asylum Claims, NBC NEWS (July 29, 2019), https://tinyurl.com/y4l2cgx2.

[56] U.S. Customs and Border Protection, *About CBP*, https://www.cbp.gov/about.

[57] Core Values and Guiding Principles for RAIO Employees, https://www.uscis.gov/sites/default/files/document/foia/Core_Values_and_Guiding_Principles_for_RAIO_Employees_LP_RAIO.pdf, at 8.

marking a steep drop from the usual rate of approvals done by asylum officers . . . ."[58]

As a result of these measures, a carefully crafted asylum system has been upended, its aims nightmarishly subverted from protection to punishment.

II. THE MPP CANNOT APPLY TO NONCITIZENS WHO ARE APPREHENDED WITHIN THE UNITED STATES

The Administration has sought to justify the MPP on the contiguous return provision codified at 8 U.S.C. § 1225(b)(2)(C). That provision provides 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."[59] As the District Court correctly recognized, the contiguous return provision only applies to persons who are "***arriving*** on land," not persons who have already entered the United States.[60] The District Court's interpretation of the phrase "arriving" is fully consistent with the statutory and regulatory framework governing asylum in our country.

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[58] Hamed Aleaziz, Under Trump's New Project, Border Patrol Agents Have Approved Fewer than Half of Asylum Screenings, BUZZFEED NEWS (Nov. 7, 2019), https://tinyurl.com/y5pbuh7h.

[59] 8 U.S.C. § 1225(b)(2)(C).

[60] *Id.* (emphasis added).

For example, as a longstanding practice, asylum officers complete Form I-862 when they conduct "credible fear" assessments of noncitizens subject to expedited removal who indicate an intention to apply for asylum or express fear of return to their home country.[61] That document sets forth the charges filed against the noncitizen and commands the noncitizen to appear before an immigration judge.[62] It also sets forth a menu of three options delineating the noncitizen's status in the country: (1) "You are an arriving alien"; (2) "You are an alien present in the United States who has not been admitted or paroled"; or (3) "You have been admitted to the United States, but are deportable for the reasons stated below."[63]

The manner in which Form I-862 (Notice to Appear) was completed with respect to a subset of the Plaintiffs-Appellees—who were apprehended after they had entered our country between ports of entry—demonstrates that the phrase "arriving" refers only to those individuals who are seeking to enter the United States at a designated port of entry. Once a noncitizen has successfully entered into the United States—either through admission at a port of entry or after passing

[61] 8 C.F.R. 208.30(f).

[62] *Id.*

[63] Dep't of Justice, DHS Notice to Appear Form I-862(updated Jan. 13, 2015), https://www.justice.gov/eoir/dhs-notice-appear-form-i-862.

the line that demarcates the United States from its contiguous neighbors—that individual is no longer "arriving" but is instead present in the United States.

In sum, an interpretation of the phrase "arriving" to include individuals who have already crossed into the United States is nonsensical and contrary to our nation's asylum laws.

III. THE MPP VIOLATES OUR NATION'S OBLIGATIONS TO NOT RETURN ASYLUM SEEKERS TO WHERE THEY MAY FACE PERSECUTION

The non-refoulement requirement of the 1967 Protocol and the CAT is a bedrock principle of international law governing asylum that is also codified in domestic law.[64] The administration of the MPP results in a violation of that obligation.

A. The MPP Inadequately Safeguards Those Who Fear Persecution in Mexico

The MPP results in violation of our nation's non-refoulement obligation in two fundamental ways. *First,* under the MPP, "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country."[65] "Immigration officers make inquiries into the risk of *refoulement* only

[64] *See* 8 U.S.C. § 1231(b)(3); *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

[65] *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J. concurring).

if an applicant affirmatively states that he or she fears being returned to Mexico"[66]—something that most asylum seekers to whom the MPP is applicable would not volunteer when being apprehended at the border. Accordingly, with respect to those individuals who do not express a fear of being returned to Mexico, the MPP "virtually guarantee[s] . . . [a] violation of the United States' *non-refoulement* obligations."[67] The likelihood of persecution in Mexico is not remote because, as demonstrated below, many of the asylum seekers forced to return to Mexico under the MPP belong to groups that face persecution in Mexico (as well as perhaps in their home countries).[68]

Second, the MPP directs that individuals who, unprompted, express a fear of persecution or torture in Mexico be referred for an interview before an asylum officer—but the interview process also virtually guarantees a violation of the non-refoulement obligation.[69] "The purpose of the interview is to elicit all relevant and useful information bearing on whether the alien would *more likely than not* face persecution on account of a protected ground, or torture, if the alien is returned to

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[66] *Id.*

[67] *Id.*

[68] *Id*.

[69] *See* USCIS, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, at 3, Jan. 28, 2019, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.

Mexico pending the conclusion of the alien's . . . immigration proceedings."[70] However, unlike other immigration contexts where the "more likely than not" standard is applied, the MPP interview process does not provide the concomitant protections that are necessary to meet the high evidentiary threshold.

Specifically, the "more likely than not" standard required by the MPP has traditionally been reserved for use in full-scale removal proceedings administrated by immigration judges, not summary removal processes where asylum officers have applied lower standards—the "credible fear" standard in the expedited removal process or the "reasonable fear" standard applied to determine whether a person has a "well-founded fear" of persecution in removal and affirmative asylum proceedings.[71] In full-scale removal proceedings, asylum seekers are provided a whole host of protections such as a full evidentiary hearing, notice of rights, access to counsel, time to prepare, and a right to administrative and judicial review.[72] The affirmative asylum process includes additional robust procedural protections.[73]

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[70] *Id.* (emphasis added).

[71] *See* 8 C.F.R. §§ 208.13(b)(1), 208.16; *see also Bartolme v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018).

[72] *See* 8 U.S.C. §§ 1362, 1229a(b)(4)(A), (B); 8 C.F.R. § 1240.3; *see also Colemenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000).

[73] *See* 8 U.S.C. §§ 208.9, 208.14.

The MPP, however, provides none of these safeguards. Under the MPP, the asylum officer's assessment can be performed "via teleconference, or telephonically," and the asylum seeker is not "provide[d] access to counsel during the assessment."[74] Nor is the asylum officer's determination reviewable by an immigration judge.[75] The lack of the right to prepare with counsel in connection with an MPP interview is especially problematic because, at the time of the interviews, many asylum seekers do not know whether they may face persecution in Mexico since they were only passersby through Mexico *en route* to the United States and also because they would "be unaware that their fear of persecution in Mexico is a relevant factor in determining whether they may lawfully be returned to Mexico."[76]

The standards of proof differ across stages for a reason. The standard is lower in the "credible fear" and "reasonable fear" interviews conducted before asylum officers because those interviews are *preliminary* assessments that efficiently dispose of facially unsupportable claims for relief under asylum law, the

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[74] *See* USCIS, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, at 3, Jan. 28, 2019, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.

[75] *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1116 (N.D. Cal. 2019).

[76] *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J. concurring).

withholding procedures, or the CAT. Asylum seekers who show "credible" or "reasonable" fear in these interviews are then given the chance to make their case to an immigration judge in a full evidentiary hearing where the "more likely than not" standard is applied and where the asylum seekers are provided the safeguards described above. Screening interviews of the type conducted under the MPP or in the "credible fear" and "reasonable fear" contexts are not appropriate fora for applying the "more likely than not" standard because these interviews do not allow asylum seekers a full and fair opportunity to make out a fully developed case regarding their risk of persecution, nor do they provide asylum officers an adequate basis to make a reliable and accurate determination of an individual's risk of persecution in a given country.

Moreover, the MPP fails to provide even the basic procedural protections available to asylum applicants subject to "credible fear" and "reasonable fear" interviews. Upon referral to a "credible fear" interview, asylum seekers are provided Form M-444, titled "Information about Credible Fear Interview," which describes the purpose of the interview and informs the applicant of: (i) the right to consult with other persons (including counsel); (ii) the right to request review of the asylum officer's determination by an immigration judge; (iii) the consequences of a failure to establish "credible fear"; and (iv) the right to rest 48 hours prior to

the interview.[77] Before a "credible fear" assessment can proceed, the asylum officer is *required* to confirm that the asylum seeker has received Form M-444 and to verify that the asylum seeker understands the credible fear determination process.[78] Individuals referred for a "reasonable fear" interview are afforded similar protections.[79] These protections are designed to ensure that the United States does not violate its non-refoulement obligation.

The MPP process, however, does not provide any of the safeguards provided to asylum applicants subject to "credible fear" and "reasonable fear" interviews. Yet, it imposes a significantly higher evidentiary standard previously reserved for a full-scale hearing before an immigration judge. This mismatch between the high evidentiary standard and the inadequate procedures all but ensures violation of the non-refoulement obligation.

B. Mexico Is Not Safe for Most Individuals Seeking Asylum from Persecution in Central America

Mexico is simply not safe for Central American asylum seekers. As the U.S. Department of State recently noted, "impunity for human rights abuses remain[s] a

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[77] 8 C.F.R. § 235.3(b)(4)(i); *Credible Fear FAQ*, USCIS.gov, https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40242 (last accessed June 25, 2019).

[78] 8 C.F.R. § 208.30.

[79] 8 C.F.R. § 1208.31.

problem" in Mexico.[80] In 2018, "Central American gang presence spread farther into [Mexico] and threatened migrants who had fled the same gangs in their home countries."[81] There were also reports of kidnapping migrants for ransom or conscription into criminal activity.[82] And despite professing a commitment to protecting the rights of persons seeking a safe haven, the Mexican government has proven unable to provide this protection. According to an NGO report relied upon by the State Department, 5,824 crimes were reported against migrants in just 5 Mexican states, and only 1% of the reported crimes were resolved by the Mexican authorities.[83]

The risk of persecution in Mexico is even higher for the most vulnerable segments of asylum seekers. Many asylum seekers are ethnic minorities from indigenous cultures. Members of those cultures face persecution in Mexico that is similar to the persecution they face in their home countries. Indeed, the National Human Right Commission recently recognized that indigenous women are among

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[80] U.S. Department of State, *Mexico 2018 Human Rights Report*, at 1 (Mar. 13, 2019), available at https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf.

[81] *Id.* at 19.

[82] *Id.* at 20.

[83] *Id.* at 20.

the most vulnerable groups in Mexican society.[84] Migrant women at large are at particular risk of sexual assault. In one study, nearly one-third of women fleeing the Northern Triangle have experienced sexual abuse during their journey through Mexico.[85] "Given the frequency of sexual and gender-based violence, many migrant women take contraceptives before migrating to avoid the risk of pregnancy from rape by armed criminal groups, locals, or their smugglers."[86]

Sexual minorities also face extraordinarily high rates of persecution and violence in Mexico. According to the UNHCR, two-thirds of LGBTI migrants from El Salvador, Guatemala, and Honduras who applied for asylum reported having been victims of sexual violence in Mexico.[87]

IV. THE MPP IS NOT DESIGNED TO REDRESS THE CHALLENGES FACING OUR IMMIGRATION SYSTEM

The pre-MPP removal procedures struck an efficient balance between vetting asylum claims and expeditiously removing individuals without a viable

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[84] *Id.* at 28-29.

[85] Doctors Without Borders, Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis 5 (2017).

[86] Anjali Fleury, *Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women*, May 4, 2016, United Nations University, https://unu.edu/publications/articles/fleeing-to-mexico-for-safety-the-perilous-journey-for-migrant-women.html.

[87] U.S. Department of State, *Mexico 2018 Human Rights Report*, at 19-20 (Mar. 13, 2019), available at https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf.

asylum claim. The system was not, as the Administration has claimed, fundamentally broken. With adequate resources, it is capable of dealing with the flow of migrants seeking to enter the United States through our southern border. Rather than redressing the challenges faced by our immigration system, however, the MPP adds to them. The MPP actually *increases* the number of asylum seekers who will be given a chance to appear before an immigration judge. The expedited removal procedure adequately vetted asylum seekers with viable asylum claims and allowed expeditious deportation of those who lacked such a claim. Specifically, under the expedited removal procedure, individuals who did not present a "credible fear" were expeditiously removed from the country while those who could meet the "credible fear" threshold were allowed to proceed to a formal hearing before an immigration judge. This process promoted efficiency and judicial economy by screening out non-viable asylum claims early in the process, while upholding our nation's non-refoulement obligations by ensuring that persons with credible asylum claims are afforded an opportunity to articulate and support those claims through a robust judicial process.

Under the MPP, however, all asylum seekers who are subject to the MPP—regardless of whether they have a "credible fear" of persecution—are processed under the standard removal process set forth in 8 U.S.C. § 1299a that takes place

before immigration judges. In other words, individuals who would never see an immigration judge under the expedited removal procedure are now added to the backlog of cases in line for a full hearing. This adds to the already overwhelming burden on our country's immigration judges, and further delays hearings for asylum seekers with meritorious claims.

CONCLUSION

Asylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our nation's legal commitment to not returning the persecuted to a territory where they will face persecution. They should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our nation and our international and domestic legal obligations.

Respectfully submitted,

Dated: August 3, 2020

/s/ Jennifer Martin Foster

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I hereby certify that, on August 3, 2020, the foregoing brief was filed with the Clerk of the Court using the Court's CM/ECF system. I further certify that counsel for all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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