No. 20-1554

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDRES OSWALDO BOLLAT VASQUES, individually and as next friend to Luisa Marisol Vasquez Perez de Bollat, and as father and next friend to A.B.; A.B.; LUISA M. VASQUEZ PEREZ DE BOLLAT; JOSE M. URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA M. MARTINEZ DE URIAS; SALOME OLMOS LOPEZ, individually and as next friend to Evila Floridalma Colaj Olmos and J.C.; J.C.; EVILA FLORIADALMA 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 U.S. District Court
for the District of Massachusetts, No. 1:20-cv-10566-IT

Brief for Immigration and Refugee Legal Services Providers, Law-School Clinics, and Community Organizations as *Amici Curiae* Supporting Plaintiffs-Appellees and Affirmance

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CORPORATE DISCLOSURE STATEMENT

All *amici curiae* certify under Local Rule 26.1 that none of them has a parent corporation and that no publicly held corporation owns 10% or more of their stocks.

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INTRODUCTION

At the end of 2018, the current administration adopted a policy, misnamed the Migrant Protection Protocols (MPP), that forces asylum seekers to brave one of the most dangerous places in the world while they wait for U.S. immigration authorities to consider their asylum claims. The record here shows the human consequences of that policy. Plaintiffs fled their home countries of Guatemala and El Salvador to seek safety in the United States after receiving several death threats. Three who did so before MPP took effect were allowed to enter the country and present their asylum claims here in safety, as Congress intended and international law requires. The others—three women and two young children—were sent to Mexico, where they have endured under constant threat of violence and privation. One of them was raped, another had Mexican officials threaten to leave her effectively stateless by destroying important documents, and most were forced to live for months in a ramshackle encampment without adequate housing, sanitation, or medical care. *See* ECF No. 45 at 5-9. Their suffering is the MPP's predictable result.

The Government pretends that this inhumane policy somehow serves the greater good "by reducing a backlog of cases so that asylum seekers with bona fide claims can proceed through the system more swiftly." Gov't Br. 1. Do not believe it. The current administration's immigration policies in general, and its implementation of the MPP in particular, belie that objective. Rather than improve the Nation's asylum

system, the MPP's purpose is to sabotage it. It thus aligns with the administration's broader mission to sharply curtail nearly all forms of immigration to the United States—especially by people of color. As part of that effort, the administration has tried to retool the U.S. immigration system's regulatory and adjudicatory apparatus to foreclose any protection for asylum seekers, no matter the circumstances.

As Plaintiffs contend, that objective violates Congress's will and jeopardizes compliance with international obligations under the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees (together, the Refugee Convention). *See* U.N. Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (entered into force Oct. 4, 1967); *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). Like the district court, this Court should recognize that the MPP's application to Plaintiffs is unlawful and affirm the injunction.

INTEREST OF THE *AMICI CURIAE*

The *amici* are legal services providers, law-school clinical programs, and community-based organizations who work with and advocate for immigrant communities, including immigrants seeking asylum. They have made it their mission to support and represent immigrants seeking safety in the United States while working to ensure the fair and just application of the Nation's immigration laws to those individuals. As the MPP has made it much more difficult for asylum seekers to present their claims for protection and have them fairly adjudicated, so too has it made

the *amici*'s mission that much harder to accomplish. It has also harmed many members of immigrant communities in Massachusetts and beyond, particularly those from Central America, who have family members seeking to join them in safety here, and whose interests *amici* also represent. The *amici* thus have a strong interest in seeing the injunction affirmed and the MPP ultimately declared unlawful.

A list of the *amici* organizations appears in the Appendix. Aside from *amici* Greater Boston Legal Services and the Harvard Immigration and Refugee Clinic, who represent Plaintiff-Appellee Evila Floridalma Colaj Olmos in her pending removal proceeding, no party or its counsel authored this brief in whole or in part, nor did any person besides *amici*, their members, or their counsel contribute money intended to fund its preparation or submission. Fed. R. App. P. 29(a)(4)(e). All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2).

ARGUMENT

Straining to reconcile its policy with the Immigration and Nationality Act's (INA) asylum regime, the Government portrays the MPP as salvation for an asylum system so overburdened that it risks collapse. Gov't Br. 1. Yet one cannot understand the MPP's true purpose without understanding its place in the Trump administration's immigration policies more broadly. Those policies betray a singular drive to keep immigrants—especially asylum seekers—out of the country, effectively constructing a legal and regulatory as well as physical wall around the United States. Considered in that context, the MPP's role as a keystone

in that bulwark becomes clear. And that aim—to abolish asylum in fact, if not in name—simply cannot be squared with either the INA's express recognition of asylum, including for those who enter the country without proper authorization, or with our obligations under the Refugee Convention. *See* 8 U.S.C. §§ 1158(a)(1), 1225(b)(1)(A)(ii), (B).[1]

I. The MPP Is Part of a Series of Executive Actions That Seek to Prevent Asylum Seekers from Claiming Protection.

The MPP is a key component in a mix of actions that together seek to deter asylum seekers from coming to the United States to seek protection. Besides the MPP, these policies include, among others, "metering" at ports of entry (POEs) and asylum-transit bars, "zero tolerance" and family separation, and a spate of proposed and final regulations aimed at both asylum claims and those who press them. Their unified purpose is to make it nearly impossible for asylum seekers to present their claims effectively, just as difficult to prevail, and so painful that many just give up. The strategy uses "cruelty as deterrence": intentionally creating inhumane conditions for asylum seekers in "the fervent belief that [they] will stop coming to the U.S. once word gets out about the horrendous

[1] By acceding in 1968 to the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, the United States bound itself "to comply with the substantive provisions of Articles 2 through 34 of the [Refugee] Convention with respect to 'refugees' as defined in Article 1.2 of the Protocol." *INS* v. *Stevic*, 467 U.S. 407, 416 (1984); *see also Cardoza-Fonseca*, 480 U.S. at 429. Congress codified these obligations through the Refugee Act of 1980. *See Cardoza-Fonseca*, 480 U.S. at 436.

treatment they will receive at the border."[2]

Metering and Asylum-Transit Bars. The Government's brief dwells on whether asylum seekers like Plaintiffs have been "crossing the border illegally," a phrase that appears in some form seven times over the span of just four pages. Gov't Br. 1-4. Yet the Government ignores that asylum is available to any noncitizen "who is physically present in the United states or who arrives in the United States," "*whether or not* at a designated port of arrival" and "*irrespective* of ... [immigration] status." 8 U.S.C. § 1158(a)(1) (emphasis added). Despite the statute's recognition that asylum seekers may "arrive in the United States" without documentation and enter between POEs, *id.*, the current administration has still sought to turn away those who do.

To curtail asylum applications at POEs, the administration instituted a so-called "metering" policy at POEs along the border, under which the Border Patrol processes only a few asylum seekers each day (and sometimes none), leaving thousands more to languish indefinitely on a waiting list, unable to press their claims. *See* SHATTERED REFUGE at 32. The administration has also promulgated an interim final rule—since enjoined, *see E. Bay Sanctuary Covenant* v. *Trump*, 950 F.3d 1242, 1259 (9th Cir. 2020), and vacated under the Administrative Procedure Act

[2] OFF. OF SEN. JEFF MERKLEY, SHATTERED REFUGE: A U.S. SENATE INVESTIGATION INTO THE TRUMP ADMINISTRATION'S GUTTING OF ASYLUM 11 (Nov. 2019) (SHATTERED REFUGE).

(APA),[3] *see O.A.* v. *Trump*, 404 F. Supp. 3d 109, 118 (D.D.C. 2019)—that together with later presidential proclamations would disallow anyone from seeking asylum *unless* they enter through a designated port of entry. *See* 83 Fed. Reg. 55,934 (Nov. 9, 2018).

The goal of these measures is obvious: to make asylum inaccessible through a one-two punch of requiring asylum seekers to press their claims at POEs while also shuttering the POEs. And the administration has approached it from more than one direction. Last year, it promulgated an interim final rule to prevent individuals from seeking asylum unless they first sought "protection from persecution or torture while in a third country through which they transited en route to the United States." 84 Fed. Reg. 33,829, 33,830 (July 16, 2019). And by holding foreign aid funds essentially hostage, the administration has coerced the countries of Guatemala, El Salvador, and Honduras—the same countries that many asylum seekers on the southern border are fleeing in the first place—into signing "asylum cooperative agreements"[4] with the United States. *See* SHATTERED REFUGE at 30-31. Federal courts have blocked this asylum-transit bar, at least for now. *See E. Bay Sanctuary Covenant* v. *Barr*, 964 F.3d 832 (9th Cir. 2020) (affirming preliminary injunction); *CAIR Coal.* v. *Trump*, No. 19-2117 (TJK), 2020 U.S. Dist. LEXIS 114421

[3] The Government's appeal of this decisions is pending. *See* No. 19-5272 (D.C. Cir.).

[4] U.S. Dep't of Homeland Sec., *Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador* (Oct. 28, 2019), https://tinyurl.com/y4f5hfh7.

(D.D.C. June 30, 2020) (vacating asylum-transit bar under the APA).[5]

But the COVID-19 pandemic has since provided the administration another pretext for turning asylum seekers away. Beginning in March, the administration through the Centers for Disease Control and Prevention (CDC) tried to bar the entry of noncitizens lacking valid entry documents "who would otherwise be introduced into a congregate setting in a land POE or Border Patrol station at or near the United States border with Canada or Mexico."[6] While this order was at first adopted for a 30-day period, the administration has continued to extend it, and it remains in effect,[7] though legal challenges are pending.[8] No scientific evidence suggests that this new travel ban slows the virus's spread—indeed, other countries have managed to achieve lower infection rates while preserving

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[5] The Supreme Court stayed the injunction upheld in *E. Bay Sanctuary Covenant* pending any certiorari petition, which the Government may yet file. *See* 140 S. Ct. 3 (2019); Sup. Ct. R. 13. And the 60-day appeal period in *CAIR* has not yet run. *See* Fed. R. App. P. 4(a)(1)(B).

[6] CDC, *Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, at 2 (Mar. 20, 2020), https://tinyurl.com/y4v7stqj (Expulsion Order); *see also* 85 Fed. Reg. 16,559 (Mar. 24, 2020) (interim final rule to same effect).

[7] *See* WOLA, *Joint Statement: U.S. Expulsion Policy Leaves Migrants in Situations of Extreme Vulnerability Amidst Border Closings* (May 20, 2020), https://tinyurl.com/y4yg368a.

[8] *See J.B.B.C.* v. *Wolf*, No. 1:20-cv-01509-CJN (D.D.C. filed June 9, 2020) (challenging expulsion of 16-year-old unaccompanied Honduran boy under CDC order); *G.Y.J.P.* v. *Wolf*, No. 1:20-cv-01511-TNM (D.D.C. filed June 9, 2020) (same for 13-year-old Salvadoran girl); *Tex. Civil Rights Project* v. *Wolf*, No. 1:20-cv-02035-BAH (D.D.C. filed July 27, 2020) (same for 100 unaccompanied children awaiting expulsion in Texas).

asylum seekers' rights through nondiscriminatory health-screening and self-isolation policies.[9]

Under this order, the administration expelled more than 20,000 asylum seekers, including unaccompanied children, from the United States in March and April alone. *See* WOLA, *supra* note 7. And though the expulsion regime purports to create a safety valve allowing the Department of Homeland Security (DHS) to admit individuals based on "public safety, humanitarian, and public health interests," Expulsion Order at 2, DHS is loath to do so. "[B]etween March 21 and May 14, the U.S. government conducted only 59 screening interviews under the Convention Against Torture, with just two findings of reasonable fear." WOLA, *supra* note 7. The administration thus shows every sign of exploiting the pandemic to achieve its preferred objective: turning away asylum seekers.

The MPP is yet another way to achieve the same goal through similar means—stymying the presentation of asylum claims by turning asylum seekers away at the border. As Plaintiffs explain, the MPP expels asylum seekers swiftly, with none of the normal safeguards designed to prevent returning asylum seekers to places where they may face persecution or torture. *See* Pls. Br. 2, 46-48. In doing so, the MPP compounds the harm that asylum seekers suffer by making them await the likely denial of their claims in Mexico, where they are mercilessly targeted for

[9] *See* Human Rights First, *Responding to the COVID-19 Crisis While Protecting Asylum Seekers* at 2, https://tinyurl.com/y3kuuaro.

continued violence and persecution.[10]

Family Separation. The MPP's forced expulsion of asylum seekers to Mexico, where they must brave many of the same horrors from which they fled, also dovetails with policies the current administration implemented to make seeking asylum as painful as possible. Perhaps the best-known example is the "zero tolerance" policy requiring federal prosecutors to seek criminal charges against all adults caught trying to cross the border, a move coupled with thousands of asylum-seeking children being separated from their parents or guardians and imprisoned. SHATTERED REFUGE at 13-14; *see also Ms. L.* v. *ICE*, 302 F. Supp. 3d 1149, 1154-56 (S.D. Cal. 2018). The policy proved especially damaging because "[f]amilies and children have made up increasing shares of migrants apprehended at the border" over the past six years.[11]

A policy of family separation is cruel enough in the abstract, but the administration's execution of it has been almost unimaginably worse:

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[10] *See, e.g.*, Human Rights First, *Delivered to Danger* (May 13, 2020), https://tinyurl.com/r3f4bjv (documenting more than 1,000 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to remain in Mexico under the MPP as of May 2020); U.S. Dep't of State, Mexico 2018 Human Rights Report at 19-20 (Mar. 2019), https://tinyurl.com/uarosqt (acknowledging "victimization of migrants by criminal groups and in some cases by police, immigration officers, and customs officials" in Mexico).

[11] Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POLICY INSTITUTE (Feb. 27, 2020), https://tinyurl.com/y6hwndxl.

asylum seekers packed for extended periods into hastily constructed cage-like facilities without adequate sanitation or sleeping facilities. SHATTERED REFUGE at 18.[12] The administration also failed to provide adequate care for the many detained children, some as young as two years old or even younger; at least seven have died in detention since September 2018, many from treatable illnesses like influenza. SHATTERED REFUGE at 18-21.

As DHS's Inspector General later confirmed, the administration embarked on this course even though it knew that DHS lacked the means to successfully account for (or reunite) the families it separated.[13] Most of the children were thus effectively rendered "unaccompanied" minors for immigration purposes, and a lack of sponsors for them—partly the result of the administration's decision to share potential sponsors' information with immigration-enforcement agencies—may well leave many in federal custody for years. *See* SHATTERED REFUGE at 23-26. Detention is traumatizing enough, and unaccompanied children "face extreme obstacles in adjudicating their immigration cases, including being forced to represent themselves in court," making them much less likely to prevail in claiming asylum protection. *Id*. at 27-28.

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[12] *Accord* Clara Long, *Written Testimony: "Kids in Cages: Inhumane Treatment at the Border"* (July 11, 2019), https://tinyurl.com/s9bygun.
[13] *See generally* U.S. Dep't of Homeland Sec.—Off. of Inspector Gen., *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families* (Nov. 25, 2019), https://tinyurl.com/y6sjqxyx.

While the administration claims that its practice of family separation has ended, *see* Executive Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018), in truth it continues in many forms—including through the MPP.[14] And in any case, the damage is done. Not only have many children been effectively orphaned and severely traumatized by the ordeal, but the policy sent a clear message that suffering awaits those who seek the United States' protection. As the record of Plaintiff's experiences show, the MPP works to similar effect. *See* ECF No. 45 at 5-9.

Anti-Asylum Regulations. On a different front, the current administration has continued its assault on asylum through the regulatory process. Several proposed or final regulations seek to make seeking asylum—already unimaginably difficult—even more onerous. For example, two new rules—one proposed and one finalized today—impose new, substantial fees on asylum seekers, charging them for applications and initial work authorizations. *See* 85 Fed. Reg. 46,788 (Aug. 3, 2020); 85 Fed. Reg. 11,866 (Feb. 28, 2020). Another, due to be finalized this month, would greatly prolong the time it takes for asylum seekers to obtain first-time work authorizations and allow only asylum seekers who entered through a POE to receive work authorization at all. *See* 85 Fed. Reg. 38,532 (June 26, 2020). Most asylum seekers—who often arrive with few

[14] *See* KIND, FAMILY SEPARATION: TWO YEARS LATER, THE CRISIS CONTINUES 12 (2020), https://tinyurl.com/y63432ak (reporting many children seek asylum without their parents as unaccompanied minors because of dangerous conditions in Mexico).

possessions and the clothes on their back, sometimes without shoes—can hardly afford to pay application fees or spend potentially years without lawful employment.

Other proposed regulations seek more directly to circumscribe the availability of asylum relief. One proposed at the end of last year would add new, mandatory criminal bars to asylum eligibility, including misdemeanors for using fraudulent documents—often necessary to flee one's country and seek asylum at all, *see Innovation Law Lab* v. *Wolf*, 951 F.3d 1073, 1087 (9th Cir. 2020). *See* 84 Fed. Reg. 69,640 (Dec. 19, 2019). Another proposed in June would, among other things, eliminate altogether certain categories, such as gender, from being considered particular social groups for asylum purposes, constrict the definition of political opinion for asylum-eligibility purposes, and exclude certain evidence critical to meeting an applicant's burden from even being considered. *See* 85 Fed. Reg. 36,264 (June 15, 2020). The upshot of these changes, according to Georgetown law professor Philip Schrag, would be to, "as a practical matter, end asylum in the United States for victims of persecution in other countries."[15]

Just like the MPP, these regulations serve the administration's ends both by making it easier than ever to deny asylum claims and by making the process so burdensome that many cannot endure it.

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[15] Philip G. Schrag, *The End of Asylum—For Now*, The Hill (June 16, 2020), https://tinyurl.com/y6qgcdkj.

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As Plaintiffs contend, Pls. Br. 49-52, the MPP cannot be defended or even explained as a rational adjunct to the Nation's asylum system. On the contrary, the only plausible explanation for it is the current administration's demonstrated hostility to the entire concept of asylum. Indeed, the current President has repeatedly condemned the asylum process and singled out asylum seekers themselves for scorn. He and others in his administration, such as Defendant-Appellant and current USCIS Acting Director Ken Cuccinelli, have claimed that the asylum process itself is a "loophole," a "scam," and a "hoax," and that most asylum requests are a fraudulent ploy to either enter or remain in the country illegally.[16] From his personal Twitter account, the President has denounced even

[16] *E.g.*, Ken Cuccinelli, *We Need to Tighten Up Loopholes in Our Asylum Laws*, THE HILL (Nov. 15, 2019), https://tinyurl.com/y5f3b3fs (claiming that smugglers coach large numbers of asylum seekers through credible-fear interviews as part of a "criminal enterprise"); *Sunday Morning Features Transcript*, FOX NEWS (June 30, 2019), https://tinyurl.com/y2w7fjfv ("Plenty of them are lying and saying they want asylum and trying to make up cases for asylum."); 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), https://tinyurl.com/y2btj2jj (referring to "the use of fraudulent or meritless asylum claims" as "[t]he biggest loophole drawing illegal aliens to our borders"); *Trump Says Some Asylum Seekers Are Gang Members*, CBS NEWS (Apr. 5, 2019), https://tinyurl.com/y37k3cx4 (disparaging asylum "as a 'scam' and a 'hoax'"); The White House, *Remarks by President Trump on the Illegal Immigration Crisis and Border Security*, (Nov. 1, 2018), https://tinyurl.com/y9x88wfj (claiming that asylum seekers "us[e] well-coached language" to make fraudulent claims).

the existence of immigration proceedings 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."[17] In response to refugees fleeing violence in Central America, the President claimed without basis that the refugees represented "an invasion of drugs, [an] invasion of gangs, [an] invasion of people."[18] He later declared, "Our country is full.... Turn around."[19]

As the New York Times reported ten months ago, the President privately asked his advisors whether he could keep refugees out of the country by building an electrified fence with flesh-piercing spikes and an alligator moat, crewed by soldiers who would "shoot migrants in the legs."[20] Rather than do that, he and his administration settled for policies like

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[17] Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 11:02 AM), https://tinyurl.com/y8snydbv; *see also* Donald J. Trump (@realDonaldTrump), Twitter (June 21, 2018, 8:12 AM), https://tinyurl.com/y3zaqk7d ("We shouldn't be hiring judges by the thousands, as our ridiculous immigration laws demand, we should be changing our laws, building the Wall, hire Border Agents and Ice [*sic*] and not let people come into our country based on the legal phrase they are told to say as their password.").

[18] The White House (@WhiteHouse), Twitter (Feb. 15, 2019, 1:07 PM), https://tinyurl.com/yyrppj87.

[19] Lauren Egan, *Trump Visits the Border and Warns: 'Our Country is Full...Turn Around'*, NBC NEWS (Apr. 5, 2019), https://tinyurl.com/y673mqrm.

[20] Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. TIMES (Oct. 2, 2019), https://tinyurl.com/y6l5a53j. None of the President's staff seems to have thought he was joking; they sought a cost estimate for the fortifications. *Id.*

the MPP: a way to keep out asylum seekers that may be less crude, but no less cruel. And it has been just as effective: barely five months ago, the head of the Border Patrol bragged to Congress that, thanks to "[t]his administration's networks of policies and international agreements," the Border Patrol can "apply [a] consequence or alternative pathway to almost 95 percent of those [it] apprehend[s], rather than releasing them into the interior of the United States."[21]

Contrary to the Government's claims, Gov't Br. 1, the MPP was never meant to save the country's asylum system; it was meant to end it.

II. Once Expelled to Mexico, Asylum Seekers Have Little Hope of Success in Their Removal Proceedings, Especially Given the Administration's Interference with the Fairness of Asylum Proceedings.

The Government also stresses that the MPP operates only "pending [asylum seekers'] full removal proceedings," holding out hope that, rather than permanently barring asylum seekers from entering the country, the MPP merely delays their entry "temporarily," while eventually letting through those "with bona fide claims." Gov't Br. 1, 10. That hope is hollow. In its efforts to put an end to an asylum system it views as illegitimate, the current administration has sought to remake the system that *adjudicates* asylum claims to ensure that even if an asylum seeker manages, against all odds, to clear the new hurdles interposed and request asylum, the claim will be denied.

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[21] Chishti & Bolter, *supra* note 11.

Through personnel, management, and other decisions, the administration has placed a heavy thumb on the scale against asylum seekers. Last year, Acting USCIS Director Cuccinelli forcibly reassigned the head of USCIS's Asylum Division, John L. Lafferty, a career civil servant who had recently praised the asylum process and those who administer it. *See* SHATTERED REFUGE at 41-42. Sources within USCIS told Senate staff that agency personnel interpreted the shakeup as "intended to send a message" that granting asylum is now disfavored. *Id.* Other reports tend to confirm their suspicions: political supervisors within the agency have reversed many decisions granting asylum or excluding applicants from the MPP, while almost none adverse to applicants have even drawn scrutiny. *Id.* at 44-45.[22]

The shakeup within the Asylum Division goes beyond its head. Over the last several months, the administration has assigned Border Patrol agents to conduct credible-fear interviews instead of the asylum officers normally responsible for them—because the President's top immigration adviser apparently thinks that asylum officers grant too many requests and wants more of them denied.[23] He is getting his wish: "Since Border Patrol agents started conducting initial asylum screenings in

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[22] *Accord* Dara Lind, *Exclusive: Civil Servants Say They're Being Used as Pawns in a Dangerous Asylum Program*, VOX (May 2, 2019), https://tinyurl.com/y25wkacw.

[23] *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.

June [2019], they have approved fewer than half of the nearly 2,000 screenings they have completed, marking a steep drop from the usual rate of approvals done by asylum officers...."[24] As asylum officers told one reporter, "decisions to let an asylum seeker stay are often reviewed—and blocked or overturned—by asylum headquarters," but decisions going the other way "don't appear to get reviewed at all." Lind, *supra* note 22.

Neither IJs nor the BIA have been spared these pressures; IJs themselves have sounded the alarm. In 2018, the National Association of Immigration Judges (NAIJ) lodged a formal grievance after the Justice Department took the unusual step of replacing a Philadelphia IJ who decided to delay the deportation of a Guatemalan national, a move that NAIJ's president called "a direct interference with a judge's decisional independence."[25] The administration also promulgated an interim final rule that now allows the Director of the Executive Office of Immigration Review—a political appointee—to adjudicate immigration cases that have been pending more than 90 days before a single BIA member or 180 days before a panel. *See* 84 Fed. Reg. 44,537 (Aug. 26, 2019). Of course,

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[24] 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. *See also* SHATTERED REFUGE at 46-48 (discussing recent administration changes to training that have effectively made more stringent the standards that asylum seekers must meet in screening interviews).

[25] Jeff Gammage, *Immigration Judges File Grievance over Justice Dept.'s Removal of Philly Jurist Who Delayed Man's Deportation*, PHILA. INQUIRER (Aug. 8, 2018), https://tinyurl.com/y639m74t.

given the administration's ramped-up immigration-enforcement efforts, the BIA's workload will only increase—as will the number of cases that find themselves under the EOIR Director's purported jurisdiction. The NAIJ has understandably decried the change as one that "takes steps to dismantle the Immigration Court system" and "end[ ] any transparency and assurance of independent decision making over individual cases."[26]

The administration has not limited its efforts to managerial or programmatic changes. It has also tried to use the Executive Branch's legal interpretive authority to restrict asylum protection by overruling BIA precedent. *See, e.g.*, *Matter of L–E–A–*, 27 I&N Dec. 581 (A.G. 2019) (attempting to restrict asylum by vacating a decision recognizing nuclear families as "particular social groups"); *Matter of A–B–*, 27 I&N Dec. 316 (A.G. 2018) (attempting to restrict asylum for victims of non-state actors and women presenting gender-based claims by overruling precedent recognizing domestic violence as a basis for asylum); *but see De Pena-Paniagua* v. *Barr*, 957 F.3d 88, 94 (1st Cir. 2020) (remanding BIA decision relying on *A–B–*).

All these developments give cause to doubt that asylum seekers banished to Mexico under the MPP will receive fair consideration of their claims during removal proceedings. Central to our legal system's idea of

[26] Hon. Ashley Tabaddor, *Statement by Immigration Judges Union on Major Change Announced to Immigration Courts* (Aug. 23, 2019), https://tinyurl.com/y23kpm8w; *see also* NAIJ, *The Immigration Court—In Crisis and in Need of Reform* (Aug. 2019), https://tinyurl.com/y4lberbo.

procedural fairness is the importance of "[a] fair trial in a fair tribunal," *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (citation omitted), and the avoidance of bias or even the *potential* for bias on the part of the adjudicator. *See Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1905-06 (2016). These norms apply just as much in administrative adjudications, such as removal proceedings, as they do in judicial ones. *See Withrow* v. *Larkin*, 421 U.S. 35, 46-47 (1975). Indeed, that is why administrative adjudicatory processes are generally "structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Butz* v. *Economou*, 438 U.S. 478, 513 (1978).

The current administration's actions have compromised the independence of IJ and BIA decision-making and stacked the deck against asylum claims at every turn. By assigning "enforcement-minded" Border Patrol agents to perform credible-fear interviews and assessments, for example, the administration has effectively allowed those agents to "occupy the roles of police, judge, and jury" in considering asylum claims.[27] And it has replicated that improper commingling of enforcement and adjudicative functions within the Immigration Court system itself, both by applying what amount to sanctions against decision-makers who rule for

[27] Josiah Heyman, Jeremy Slack & Daniel E. Martínez, *Why Border Patrol Agents and CBP Officers Should Not Serve as Asylum Officers*, CENTER FOR MIGRATION STUDIES (June 21, 2019), https://tinyurl.com/y4catdtf.

noncitizens and by assigning adjudicatory functions to political appointees like the EOIR Director, steps that IJs themselves have decried as threats to their independence. *See supra* note 26.

Nor is structural bias on the part of the adjudicators the only obstacle to fair removal proceedings for asylum seekers caught in the MPP's web. As the record here shows, the conditions that those in Plaintiffs' positions must navigate—traversing dangerous territory to show up at 4:30 a.m. local time for hearings, with no or minimal access to counsel and inadequate translation services—make it all but impossible for asylum seekers to present their claims effectively. *See* ECF No. 45 at 6-9. Data bear that out as well: asylum seekers forced to present their claims from Mexico under the MPP are far less likely to have counsel, and far more likely than asylum seekers within the United States to abandon their claims.[28]

That of course is the point. The current administration is refashioning the Nation's asylum system into one in which "the answer is always no." SHATTERED REFUGE AT 40. By forcing asylum seekers to find their way through this system from a place where homelessness and terror await them, the MPP powers that machine.

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[28] *See* TRAC, *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases* (Dec. 19, 2019), https://tinyurl.com/y2vctmtj (finding that non-MPP asylum seekers are seven times more likely than MPP asylum seekers to have an attorney and that half of MPP asylum seekers fail to appear for hearings, leading to *in absentia* denials, compared with just 11 percent of asylum seekers allowed to remain in the United States).

III. Interpreting the INA to Authorize the MPP Calls the Nation's Compliance with Its Obligations Under the 1951 Refugee Convention and the 1967 Protocol into Serious Doubt.

Plaintiffs contended below that the MPP is separately unlawful because it defies the United States' obligations under binding international treaties. *See* ECF No. 1, ¶¶ 23-25, 133-38; ECF No. 28 at 3-5, 26-28. Those obligations prevent the United States from, among other things, expelling or returning refugees to places where their lives or liberty would be threatened on account of race, religion, nationality, social-group membership, or political opinion. *See Stevic*, 467 U.S. at 416-17 (explaining that the United States assumed non-refoulement and other obligations by acceding to the 1967 Protocol to the Refugee Convention). In enjoining the MPP, however, the district court declined to reach that argument, holding instead that the text of the INA alone foreclosed the policy's validity. ECF No. 45 at 22 n.23. So on one level, this case is mainly about the correct understanding of the INA's contiguous-return provision, 8 U.S.C. § 1225(b)(2)(C), and that is how the Government has tried to frame it. Gov't Br. 7.

Yet the United States' compliance with its international duties and the statutory question here are not unrelated. As the Supreme Court has said, "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions," or "background principles of construction." *Bond* v. *United States*, 572 U.S. 844, 857 (2014) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S.

244, 248 (1991)). One of those "background principles" is that Congress normally means to honor, not ignore, the Nation's commitments under international law and treaties that it has ratified. *See F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). Put differently, "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *accord United States* v. *Lachman*, 387 F.3d 42, 55 (1st Cir. 2004).

Here, the Government defends the MPP by offering an interpretation of the INA's contiguous-return provision that, it claims, authorizes it to forcibly remove or expel those seeking asylum to some of the most dangerous places on Earth—ones it advises its own citizens and personnel to avoid for their physical safety.[29] Asylum seekers there are routinely targeted for violence and terrorism because of their status as non-Mexicans forced to remain in Mexico while they seek a safe haven outside their home countries. *See* ECF No. 45 at 5 n.7; U.S. Dep't of State, *supra* note 10. For exactly those reasons, a federal appeals court has already held that the MPP likely violates the United States' international non-refoulement obligations as they are codified under the INA. *Innovation*

[29] *See* U.S. Dep't of State—Bur. of Consular Affairs, *Mexico Travel Advisories*, https://tinyurl.com/yxd6drq4 (last visited Aug. 3, 2020) (assigning Tamaulipas, Mexico, a "Level 4: Do Not Travel" advisory for crime and kidnapping and restricting travel for U.S. government employees).

Law Lab, 951 F.3d at 1093. And it is not alone in questioning the administration's faithfulness to international laws on the treatment of refugees. Not even two weeks ago, the Federal Court of Canada concluded that the administration's disregard for international obligations to asylum seekers prevents Canada from insisting that asylum seekers first lodge their claims with the United States. *See Can. Council for Refugees* v. *Minister of Imm., Refugees & Citizenship*, 2020 FC 770 (Can. Fed. Ct. July 22, 2020).

These assessments of the administration's compliance (or lack of compliance) with international obligations not only give serious pause, but also reinforce the correctness of the district court's bottom-line conclusion. At the very least, the Government's interpretation of the INA calls into grave doubt its compliance with its obligations under the Refugee Convention.

Among other things, the Refugee Convention compels States to uphold and safeguard asylum seekers' rights to seek and enjoy asylum. *See, e.g.*, *Garcia* v. *Sessions*, 856 F.3d 27, 54-61 (1st Cir. 2017) (Stahl, J., dissenting) (discussing the United States' international obligations to asylum seekers, including extending them the right to work, obtain travel documents, and seek naturalization); UNHCR Exec. Comm., No. 94 (LII) Conclusion on the Civilian and Humanitarian Character of Asylum, U.N. Doc. A/57/12/Add.1 (2002) (recognizing that "[r]espect for the right to seek asylum ... should be maintained at all times"); UNHCR Exec. Comm., No.

77 (XLVI) General, U.N. Doc. A/50/12/Add.1 (1995) (reaffirming "that respect for fundamental humanitarian principles, including safeguarding the right to seek and enjoy in other countries asylum from persecution ... is incumbent on all members of the international community," and urging "continued commitment of States to receive and host refugees and ensure their protection in accordance with accepted legal principles").[30] Congress made plain its intent to "bring United States law into conformity with [those] international treaty obligations" by enacting the Refugee Act of 1980. S. Rep. No. 96-256 at 4 (1979); *accord* H.R. Rep. No. 96-781 at 20 (1979) (Conf. Rep.); *Cardoza-Fonseca*, 480 U.S. at 436.

As Chief Justice Marshall said more than two centuries ago, federal courts should avoid interpreting federal statutes like the INA in such a manner "if any other possible construction remains." *Murray*, 6 U.S. (2 Cranch) at 118. Plaintiffs here have offered just such a construction. Due regard for the United States' international obligations and Congress's presumed intent to abide by them favor its adoption at least as much as the statutory text itself. *Cf. Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (explaining that avoidance canons are "a tool for choosing between com-

[30] Recognizing the United Nations High Commissioner for Refugees' role in supervising compliance with treaties on the protection of refugees, federal courts consistently rely on the Commissioner's guidance when examining the United States' obligations under the Refugee Convention and 1967 Protocol. *E.g.*, *Cardoza-Fonseca*, 480 U.S. at 438-39; *Bringas-Rodriguez* v. *Sessions*, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (en banc).

peting plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious ... doubts").

In sum, for the Government to prevail, it must do more than show that its preferred interpretation of the INA is reasonable, or even that its reading is better than the one Plaintiffs offer. It must instead show that *only* its preferred interpretation is reasonable because Plaintiffs' alternative is unambiguously wrong. It cannot clear that high bar—particularly when multiple courts and judges have already agreed with Plaintiffs' reading. *Cf. Kolbe* v. *BAC Home Loans Servicing, LP*, 738 F.3d 432, 456 (1st Cir. 2013) (en banc) (opinion of Lipez, J.) ("[T]he provision is ambiguous, and its lack of clarity is underscored by the lack of consensus in the decisions of other courts.").[31] The district court thus rightly decided that Plaintiffs had a right to remain in the United States to pursue their full remedies before an Immigration Court, including asylum, withholding of removal, and relief under the Convention Against Torture. It was equally

[31] Of course federal agencies may interpret ambiguous statutory commands, and courts must defer to their reading so long as it is reasonable. *See Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). But ambiguity exists—and deference is triggered—only "[i]f a court, employing *traditional tools of statutory construction*," cannot discern Congress's intent. *Id.* at 843 n.9 (emphasis added). And interpretive presumptions like the *Charming Betsy* canon are among those "traditional tools." *See, e.g.*, *Nat'l Ass'n of Homebuilders* v. *Defenders of Wildlife*, 551 U.S. 644, 665-66 (2007) (presumption against implied repeal); *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (constitutional avoidance).

right to reject the Government's contrary reading of the INA's contiguous-return provision.

CONCLUSION

For these reasons and those Plaintiffs and their other *amici* provide in their briefs, the Court should affirm the district court's decision.

Respectfully submitted,

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Boston University School of Law Immigrants' Rights and Human Trafficking Program

Brazilian Women's Group

Catholic Charities of the Archdiocese of Boston

Catholic Legal Immigration Network, Inc.

Chelsea Collaborative Inc.

Children's Law Center of Massachusetts

De Novo Center for Justice and Healing

Greater Boston Legal Services

Harvard Immigration and Refugee Clinic

Immigrant Legal Advocacy Project

Justice Center of Southeast Massachusetts

Kids in Need of Defense

Massachusetts Immigrant and Refugee Advocacy Coalition

Massachusetts Law Reform Institute

Northeastern University School of Law Immigrant Justice Clinic

Organizacion Maya K'Iche

No. 20-1554

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDRES OSWALDO BOLLAT VASQUES, individually and as next friend to Luisa Marisol Vasquez Perez de Bollat, and as father and next friend to A.B.; A.B.; LUISA M. VASQUEZ PEREZ DE BOLLAT; JOSE M. URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA M. MARTINEZ DE URIAS; SALOME OLMOS LOPEZ, individually and as next friend to Evila Floridalma Colaj Olmos and J.C.; J.C.; EVILA FLORIADALMA 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 U.S. District Court
for the District of Massachusetts, No. 1:20-cv-10566-IT

CERTIFICATE OF COMPLIANCE

I, Joshua M. Daniels, counsel for the *amici curiae*, certify under Fed. R. App. P. 29(a)(4)(G) and 32(g)(1) that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word-count function of Microsoft Word, the word-processing software used to prepare the brief, the brief contains 6,405 nonexcluded words.

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No. 20-1554

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CERTIFICATE OF SERVICE

I certify under Fed. R. App. P. 25(b)-(c) and 31(b) that a true and correct copy of this brief was served on August 3, 2020 to the following counsel of record in this appeal through CM/ECF:

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