

No. 19-1212

IN THE
Supreme Court of the United States

DAVID PEKOSKE, ACTING SECRETARY OF HOMELAND
SECURITY, ET AL.,
Petitioners,
v.
INNOVATION LAW LAB, ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF NONGOVERNMENTAL ORGANIZA-
TIONS AND LAW SCHOOL CLINICS AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

*Amici*² are nongovernmental organizations and law school clinics that serve and defend the rights of asylum seekers, including those forcibly returned to Mexico under the Migrant Protection Protocols (“MPP”). The Court will decide issues that directly relate to *Amici*’s shared commitment to ensuring people fleeing persecution and torture receive meaningful access to refugee protection as guaranteed by law. *Amici* present this Court with a brutal truth: MPP subjects people to life-threatening dangers in Mexico, effectively blocks the vast majority from access to U.S. humanitarian protection, and puts refugees at risk of return to harm in the countries they fled. *Amici* share an interest in ending MPP.

SUMMARY OF ARGUMENT

MPP is an illegal and inhumane policy that denies refugees—adults and children who fled persecution or have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)—access to the U.S. asylum system and ultimately to refugee protection. MPP subjects vulnerable, traumatized people to unspeakable harms that rival the persecution they fled. This result is neither accidental nor incidental, but by de-

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, made a monetary contribution to the preparation or submission of the brief.

² The list of *Amici* is at the Appendix.

sign. *Amici* illustrate the human toll of MPP in support of Respondents' argument that MPP violates the United States' statutory and treaty-based *non-refoulement* obligations. MPP forces individuals to endure prolonged exposure to extreme violence, including the risk of death, in Mexico. Those in MPP are easily identified as migrants and targeted for attacks. Those who survive the violence and squalid conditions to pursue their cases face further obstacles to refugee protection. MPP makes it nearly impossible for individuals to secure counsel or effectively present a legal claim. For the few able to retain counsel, MPP erects nearly insurmountable barriers to their receiving effective representation.

Because MPP compels individuals to remain in and travel through dangerous border regions, returning to the United States for Immigration Court hearings imposes a life-threatening burden. Thousands have been ordered removed *in absentia*—some because dangerous conditions, including being kidnapped, prevented them from attending their hearings. Fear, violence, and life-threatening conditions forced others to abandon their claims. Some have disappeared.

In implementing MPP, the United States violates its legal commitment to the core principle of *non-refoulement*, which prohibits States from sending individuals to countries where they would be threatened with persecution, torture, or other serious human rights violations. MPP also violates the United States' commitment to provide meaningful opportunities for those fleeing persecution to present their claims for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Far from affording the "protection" or "protocols" of its name, MPP indiscriminately and ar-

bitrarily delivers refugees to persecution, torture, and other serious harms the United States purports to stand against. The government implemented MPP with knowledge of these likely harms, and through MPP effectively denies asylum seekers and others access to protection without regard for the merits of their claims.³

ARGUMENT

I. MPP SUBJECTS PEOPLE TO EXTREME DANGER THAT PREVENTS ASYLUM SEEKERS FROM ESTABLISHING THEIR CLAIMS

A. MPP Subjects Asylum Seekers to Extreme Violence and Danger

1. From the moment individuals are returned to Mexico under MPP, they face unrelenting violence that threatens their lives and effectively blocks their access to humanitarian protection in the United States. The experiences recounted here merely scratch the surface of the terror that stalks those returned to Mexico under MPP:

Nora, a Salvadoran asylum seeker, suffered brutal attacks under MPP despite asking U.S. border officers for protection, “th[inking she and her three-year-old son] would be safe.” Miriam Jordan, *I’m Kidnapped: A Father’s Nightmare on the Border*, N.Y. Times (Dec. 21, 2019).⁴ Nora and her son were abducted twice in Mexico and held hostage for ransom.

³ *Amici* focus here on MPP’s impact on those seeking asylum but note the government does not screen individuals placed into MPP, such that migrants and individuals with other claims, including victims of trafficking, also suffer under MPP.

⁴ <https://www.nytimes.com/2019/12/21/us/border-migrants-kidnapping-mexico.html>.

The only place Nora could find to stay was a squalid tent encampment in the dangerous Mexican city across the border from where her MPP hearing would be held. *Id.* After Nora was returned under MPP, three men grabbed her just outside the encampment, blindfolded her, and “took turns raping her over several hours, in front of her son, before dumping the two of them on the side of a road.” *Id.*

A Honduran education-rights activist fleeing political persecution with her 11-year-old daughter was expelled to Ciudad Juárez under MPP. There, she was kidnapped and raped by multiple men. Human Rights First (“HRF”), *Publicly Reported Cases of Violent Attacks on Individuals Returned to Mexico Under the “Migrant Protection Protocols”* 70 (Dec. 15, 2020).⁵ She escaped, and out of fear, again sought safety in the United States. *Id.* Department of Homeland Security (“DHS”) officers sent her back to Mexico where she was abducted again, while her daughter hid to avoid being taken. *Id.* The kidnappers forced the woman into prostitution and threatened to sex traffic her daughter, playing a recording of the girl saying, “Hi, Mommy,” to terrorize the woman. *Id.*

Others forcibly returned to Mexico have been killed. A 35-year-old Salvadoran asylum seeker was kidnapped, fatally stabbed, and dismembered after the government returned him, his wife, and two young children to Tijuana under MPP. Wendy Fry, *Central American Migrant Who Sought U.S. Asylum Slain in Tijuana*, L.A. Times (Dec. 12, 2019).⁶ Over the course

⁵ [https://www.humanrightsfirst.org/sites/default/files/Publicly ReportedMPPAttacks12.15.2020FINAL.pdf](https://www.humanrightsfirst.org/sites/default/files/Publicly%20ReportedMPPAttacks12.15.2020FINAL.pdf).

⁶ <https://www.latimes.com/california/story/2019-12-12/attorney-central-american-in-mpp-program-murdered-in-tijuana>.

of the previous seven months, he and his family had repeatedly told U.S. officials they were not safe in Tijuana—to no avail. *Id.*

2. These are not isolated cases. Reprehensible violence against people returned to Mexico under MPP is rampant. One organization documented “at least 1,314 public reports of murder, torture, rape, kidnapping, and other violent attacks against asylum seekers and migrants returned to Mexico under MPP.” HRF, *Humanitarian Disgrace: U.S. Continues to Illegally Block, Expel Refugees to Danger* 13 (Dec. 16, 2020).⁷ Médecins Sans Frontières (“MSF”) reported 75 percent of its patients returned to the border city of Nuevo Laredo under MPP in October 2019 alone were kidnapped. MSF, *No Way Out: The Humanitarian Crisis for Migrants and Asylum Seekers Trapped Between the United States, Mexico and the Northern Triangle of Central America* 31 (Feb. 2020).⁸ A 2019 study of asylum seekers in MPP found approximately one quarter of those interviewed were threatened with or experienced physical violence in Mexico. Tom K. Wong, *Seeking Asylum: Part 2*, U.S. Immigr. Policy Ctr. 9 (Oct. 29, 2019).⁹ The true scale of violence is surely far greater, as most individuals returned to Mexico under MPP have not spoken with human rights investigators or journalists. Moreover, many do not feel safe reporting violence to the Mexican police due to the police’s frequent complicity in human rights abuses and crimes. See U.S. Dep’t of State, Bu-

⁷ <https://www.humanrightsfirst.org/resource/humanitarian-disgrace-us-continues-illegally-block-expel-refugees-danger>.

⁸ <https://www.msf.org/report-no-way-out-central-american-migration>.

⁹ <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

reau of Democracy, H.R. and Lab., Mexico 2019 Human Rights Report 18 (2020) (migrants victimized by Mexican “police, immigration officers, and customs officials”). Finally, pandemic-related travel restrictions have further limited reporting and documentation.

The state of Tamaulipas, where the government returned 30,000 migrants and asylum seekers to Nuevo Laredo and Matamoros, is designated by the U.S. Department of State as a Level 4, “Do Not Travel” zone—the same level assigned to Afghanistan, Iran, Libya, and Syria. See U.S. Dep’t of State, Bureau of Consular Affairs, *Mexico Travel Advisory*.¹⁰ Other border regions to which individuals are sent under MPP are also extremely dangerous, posing a high risk of homicide, kidnapping, and other crimes. *Id*; U.S. Dep’t of State, Overseas Sec. Advisory Council, *Mexico 2020 Crime & Safety Report: Tijuana* (July 29, 2020);¹¹ U.S. Dep’t of State, Overseas Sec. Advisory Council, *Mexico 2020 Crime & Safety Report: Ciudad Juárez* (June 24, 2020).¹²

3. Many asylum seekers in MPP are targeted because of their race, nationality, gender, sexual orientation, or other protected characteristics. See, e.g., HRF, *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Chil-*

¹⁰ <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (last visited Jan. 21, 2021).

¹¹ <https://www.osac.gov/Content/Report/6da3d429-8e47-4cf5-b483-1949341e677f>.

¹² <https://www.osac.gov/Content/Report/24a57125-75ad-473b-b1bc-190280d20573>.

dren to Escalating Danger 10–12 (May 2020);¹³ Human Rights Watch (“HRW”), *DHS OIG Formal Complaint Regarding ‘Remain in Mexico’* (June 2, 2020).¹⁴ For example:

A Cuban woman who was kidnapped and gang raped in Nuevo Laredo was told by her kidnappers “this is what we do to Cubans here.” HRF, *Human Rights Fiasco: The Trump Administration’s Dangerous Asylum Returns Continue* 18 (Dec. 2019).¹⁵

Ernesto, a gay Guatemalan man returned under MPP to Mexico in July 2019, was repeatedly extorted and assaulted by cartel members and targeted due to his sexual orientation—for which he was also persecuted in Guatemala. Complaint ¶ 19, *Nora v. Wolf*, No. 1:20-cv-00993 (D.D.C. Apr. 16, 2020). The cartel forced Ernesto to pay weekly extortion, and at a higher rate because of his sexual orientation, telling him “this [being gay] is more expensive.” HRF, *Pandemic as Pretext, supra*, at 10. Ernesto lives in constant fear of the cartel: “I know that any time these people can return, and I may not have enough money to pay them.” *Id.*

4. Children in particular suffer horrific physical and psychological harm in MPP—both as victims themselves and as witnesses to attacks on their parents. Children, many under five, make up at least one third of those returned to danger under MPP. Kristi-

¹³ <https://www.humanrightsfirst.org/sites/default/files/PandemicAsPretextFINAL.pdf>.

¹⁴ https://www.hrw.org/news/2020/06/02/dhs-oig-formal-complaint-regarding-remain-mexico#_ftn10.

¹⁵ <https://www.humanrightsfirst.org/resource/human-rights-fiasco-trump-administration-s-dangerous-asylum-returns-continue>.

na Cooke et al., *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, Reuters (Oct. 11, 2019).¹⁶ There are at least 318 public reports of kidnappings or attempted kidnappings of children in MPP, likely an extremely small fraction of the actual number. HRF, *Humanitarian Disgrace*, *supra*, at 13.

Young children scarred by kidnappings in MPP include an 11-year-old boy who was kidnapped with his father hours after the government returned them to Nuevo Laredo. *This American Life: The Out Crowd*, Chi. Pub. Radio (Nov. 15, 2019).¹⁷ The kidnappers held them for days and threatened to sell the child's organs. *Id.* After the kidnapping, the boy was so traumatized he “stopped talking altogether.” Emily Green, *Trump's Asylum Policies Sent Him Back to Mexico. He Was Kidnapped 5 Hours Later by a Cartel*, Vice News (Sept. 16, 2019).¹⁸

A Central American child in MPP was kidnapped in Mexico with her mother before fleeing alone across the border when her mother was kidnapped for a second time. Physicians for Human Rights, *Forced into Danger: Human Rights Violations Resulting from the Migrant Protection Protocols* (Jan. 19, 2021).¹⁹ The girl said that during the first kidnapping, “[t]hey would come and take my mother all the time. . . . My mother would tell me not to scream or cry and just to

¹⁶ <https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1>.

¹⁷ <https://www.thisamericanlife.org/688/the-out-crowd>.

¹⁸ <https://www.vice.com/en/article/pa7kkg/trumps-asylum-policies-sent-him-back-to-mexico-he-was-kidnapped-five-hours-later-by-a-cartel>.

¹⁹ <https://phr.org/our-work/resources/forced-into-danger/>.

hide when she was not there. She would ask me to cover my ears and my eyes . . . I dream of people coming after me with guns and they kill me. . . . I see my body filled with blood.” *Id.*

Others, like a 10-year-old Guatemalan girl kidnapped with her mother, have been forced by their persecutors to watch the persecutors sexually assault their mothers. HRW, “*Like I’m Drowning*”: *Children and Families Sent to Harm by the US ‘Remain in Mexico’ Program* (Jan. 6, 2021).²⁰ The kidnappers burned the girl’s mother with acid. *Id.* U.S. officials returned the family to Ciudad Juárez under MPP despite this brutal attack. *Id.*

The danger, trauma, and conditions children experience in MPP “create[] chronic and severe psychological stress” and “can lead to significant long-term negative consequences for child development,” according to a child psychology expert.²¹ Michael Garcia Bochenk, *US: ‘Remain in Mexico’ Program Harming Children*, Human Rights Watch (Feb. 12, 2020).²²

B. The Danger to Those in MPP Is a Direct Result of the Policy Itself

1. Just to reach U.S. Immigration Court, those in MPP are forced to run a gauntlet of kidnapping and assault—unconscionable violence no one attending a non-MPP hearing in the United States would face. Individuals must travel through dangerous border

²⁰ <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program>.

²¹ The devastating impact of MPP on children is further addressed in the brief of amici curiae Young Center et al.

²² <https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children>.

regions, often in the middle of the night, to appear at ports of entry for Immigration Court, as the government instructs individuals in MPP to appear at ports of entry as early as 4:30 a.m. for morning hearings. See *Examining the Human Rights and Legal Implications of DHS' "Remain in Mexico" Policy: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec.*, 116th Cong. 105, 131, 139, 142 (2019). As a result, asylum seekers are routinely kidnapped going to or from their MPP hearings.

For example, an Afro-Cuban asylum-seeking couple were kidnapped and terrorized in Nuevo Laredo in May 2020, shortly after the government returned them under MPP. For four days armed men held them hostage in a blood-soaked room, where migrants with missing body parts moaned on the floor. HRF, *Humanitarian Disgrace*, *supra*, at 15. The two were left terrified and forced to choose between traveling back through Nuevo Laredo to attend their immigration hearing or abandoning their asylum claims. *Id.*

A Honduran man was kidnapped while traveling with his 16-year-old son to Nuevo Laredo for their hearing, leaving his son alone. HRF, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* 5 (Oct. 1, 2019).²³ The man remains missing. *Id.*

During one MPP hearing, a 12-year-old boy and 16-year-old girl sobbed and begged not to be returned to Mexico where they had been kidnapped after a prior hearing. The boy told the judge: "I hope you can help

²³ <https://www.humanrightsfirst.org/resource/orders-above-massive-human-rights-abuses-under-trump-administration-return-mexico-policy>.

us please. I don't want to return to Mexico. We run a lot of risk." HRF, *Human Rights Fiasco*, *supra*, at 7.

2. Those in MPP are specifically targeted for violence in border regions. Indeed, violence has escalated since MPP was implemented, as the government essentially delivers individuals into the hands of highly organized criminal cartels exercising significant control in many regions of Mexico and corrupt Mexican officials. As one man claiming to be a member of the Juárez cartel explained, kidnapping asylum seekers is a direct response to policies, like MPP, which "keep[] people stuck in our country." *Vice: Warning From Wuhan & Cuban Hostage Crisis* (Showtime broadcast Apr. 19, 2020).²⁴ After being "pull[ed] off the streets and tak[en] to a safe house," asylum seekers whose families fail to pay ransom "end up where they end up. Maybe a mass grave." *Id.*

Mexican authorities are frequently linked to atrocities against migrants and asylum seekers. In June 2019, for example, uniformed Mexican federal police kidnapped a Honduran asylum seeker the government had returned to Ciudad Juárez under MPP. Held hostage for days, she was repeatedly sexually assaulted. HRF, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process* 4 (Aug. 2019).²⁵

3. The likelihood that individuals returned to Mexico will suffer serious physical violence grows each day they are forced to remain there under MPP. See Wong, *Seeking Asylum: Part 2*, *supra*, at 9 (estimat-

²⁴ <https://www.sho.com/vice/season/1/episode/4/warning-from-wuhan-and-cuban-hostage-crisis>.

²⁵ <https://www.humanrightsfirst.org/resource/delivered-danger-illegal-remain-mexico-policy-imperils-asylum-seekers-lives-and-denies-due>.

ing 18.7 percent of asylum seekers returned to Baja California will be threatened with physical violence within 10 days after return, and 32 percent within 90 days). As of January 2021, among the approximately 24,000 MPP cases still pending, 70 percent of those individuals will have been waiting in Mexico for a U.S. Immigration Court hearing for one year or more—if they managed to endure this long. See HRF, *Humanitarian Disgrace*, *supra*, at 11 (drawing on Syracuse University Transactional Records Access Clearinghouse (“TRAC”), *Details on MPP*).

C. Dangerous Conditions Have Compelled Asylum Seekers in MPP to Abandon Their Claims

1. The violence, despair, and insecurity people endure under MPP force many to abandon their claims for humanitarian relief. For example:

Two Venezuelan asylum seekers, who were kidnapped and beaten in Nuevo Laredo as they approached the U.S. port of entry, abandoned their claims. HRF, *Human Rights Fiasco*, *supra*, at 24. The men feared returning to the port of entry for their MPP hearings because it was where they had been kidnapped and later threatened by the same people who had previously abducted them. *Id.*

A Cuban woman who was raped after being returned to Matamoros under MPP—and then sent back to Mexico after an adverse fear screening—gave up on her asylum claim, terrified to return to Matamoros. HRF, *A Year of Horrors: The Trump Administration’s Illegal Returns of Asylum Seekers to Danger in Mexico* 3 (Jan. 2020).²⁶

²⁶ <https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf>.

A Guatemalan man and his 10-year-old son gave up their asylum claims after gang members kidnapped them. Silvia Foster-Frau, *Kidnapped and Attacked in Mexico, Migrants Are Giving up Their Asylum Claims*, San Antonio Express News (Sept. 29, 2019).²⁷

2. The dangers in Mexico force asylum seekers to choose between risking their lives in Mexico or in the countries they fled. For too many, the “choice” becomes waiting for death in Mexico or deciding it is better to die back home.

Mario, a Nicaraguan asylum seeker who fled political persecution, was repeatedly attacked, including when a man who identified him as a migrant hit him in the head with a wrench. Gus Bova, *Attacked in Mexico, Returned to Mexico: Trump Policy Ignores Danger to Asylum-Seekers*, Texas Observer (Sept. 30, 2019).²⁸ With blood pouring down his face, he begged U.S. officials to help him, but they refused to process him for weeks, only to eventually return him to Mexico under MPP. *Id.* He told a reporter he was “thinking of returning to Nicaragua” because “[h]e’d heard it costs thousands of dollars to repatriate a body . . . Cheaper to die at home.” *Id.*

A Cuban family fleeing political persecution was too afraid to travel to their final hearing after attending a prior hearing led to their kidnapping. Interview with Immigration Attorney by HRF (Jan. 6, 2020). They were convinced the Immigration Court, like the DHS officer who rejected their fear of return to Mexi-

²⁷ <https://www.expressnews.com/news/us-world/border-mexico/article/Kidnapped-and-attacked-in-Mexico-migrants-are-14474487.php>.

²⁸ <https://www.texasobserver.org/attacked-in-mexico-returned-to-mexico-trump-policy-ignores-danger-to-asylum-seekers/>.

co, would deny their claims and deport them to imprisonment and possibly death. *Id.*

A Honduran asylum seeker testified in Immigration Court that she was unable to complete an asylum application because she and her young child had been kidnapped and held for 10 days. Hearing Observation at Laredo MPP Immigration Court by HRF (Dec. 4, 2019). She told the judge: “My son cries a lot. He doesn’t want to go back to Mexico.” *Id.* Confronted with an impossible choice—be returned again to certain danger in Mexico or risk persecution in Honduras—she asked the judge to deport the family to Honduras: “[Our lives] are in danger. I want to go back to Honduras because, if something happens to me there, at least I have my family. But here, it’s just myself and my son, and God.” *Id.*

II. MPP OBSTRUCTS ACCESS TO ASYLUM BY IMPEDING ACCESS TO EFFECTIVE REPRESENTATION AND PREPARATION OF ASYLUM CLAIMS

A. MPP Erects Nearly Insurmountable Barriers to Obtaining Counsel and Effective Representation

The majority of individuals in MPP are prevented from meeting with counsel before they are forcibly returned to Mexico and are then unable to obtain effective counsel from a U.S. attorney.²⁹

1. Many U.S.-based attorneys are rightly afraid to take MPP cases. U.S.-based pro bono attorneys have been threatened with kidnapping and violence in connection with their work with individuals subject

²⁹ Individuals in immigration removal proceedings have a right to counsel at no expense to the government. 8 U.S.C. § 1362.

to MPP. Declaration of Kennji Kizuka (“Kizuka Decl.”) ¶ 15, *Immigrant Defs. Law Ctr. v. Wolf*, No. 2:20-cv-09893-JAK-SK (C.D. Cal. Oct. 21, 2020). And, the U.S. Department of State advises U.S. citizens not to travel to many regions where people are stranded under MPP. U.S. Dep’t of State, *Mexico Travel Advisory*, *supra*.

2. Qualified lawyers in border locations are also overwhelmed. Although cases for U.S.-based applicants are dispersed throughout the country, those in MPP have their hearings exclusively along the border where there is a limited pool of qualified lawyers. HRW, “*We Can’t Help You Here*”: *US Returns of Asylum Seekers to Mexico* (July 2, 2019);³⁰ Strauss Center, *MPP: Implementation and Consequences for Asylum Seekers in Mexico* 31 (May 2020).³¹

3. MPP erects further barriers to meeting with potential counsel in the United States. Those in MPP are allowed into the United States only on the day of their hearing, at which time they are taken directly to Immigration Court. See HRW, *U.S. Move Puts More Asylum Seekers at Risk: Expanded ‘Remain in Mexico’ Program Undermines Due Process* (Sept. 25, 2019).³² MPP applicants cannot meet with an attorney before their hearing unless they are *already* represented by the attorney and the attorney has filed a notice of representation with the court. *Id.* (“Armed guards now prevent attorneys in the US from interacting with MPP participants unless the attorneys

³⁰ <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>.

³¹ https://www.strausscenter.org/wp-content/uploads/PRP-218_-Migrant-Protection-Protocols.pdf.

³² <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk>.

have already filed official notices that they are representing specific participants.”). This means most of those in MPP cannot meet with representatives from non-profit legal services organizations to receive basic rights information or consultation for potential pro bono representation while they are in the United States for immigration hearings. The rights to legal information and representation afforded to asylum seekers in the United States are thus largely unavailable to those in MPP. *Id.*

4. For the alarmingly low number of individuals able to retain an attorney, MPP substantially impairs their ability to communicate with counsel and undermines the efficacy of representation. Individuals subjected to MPP live in extreme danger while in crowded shelters, tent encampments, or on the streets of Mexico. Many lack access to phones with reliable service, internet, or financial resources necessary to facilitate remote communication. See MSF, *No Way Out*, *supra*, at 30–31; HRF, *Pandemic as Pretext*, *supra*, at 2, 8–11. Due to pressing security concerns, some migrant shelters in Mexico restrict residents’ cell phone access—helping protect the lives of the asylum seekers living there but unintentionally hampering their ability to communicate with lawyers. Kizuka Decl. ¶ 17 (access restricted “to reduce the risk of a criminal entering the facility and using a cellphone to take photographs and record information about migrants that can be used to later target them for kidnapping and extortion”).

5. Despite the critical need for in-person meetings between counsel and their asylum clients, the few individuals in MPP who manage to retain counsel cannot meet with their attorney in the United States until immediately before their hearing. DHS purports to allow them only *one hour* to meet with their counsel,

but in practice, it is usually even less. *Examining the Human Rights and Legal Implications of DHS' Remain in Mexico Policy*, *supra*, at 18, 22; HRW, *US Move Puts More Asylum Seekers at Risk*, *supra*; Kizuka Decl. ¶ 22 (attorneys were sometimes provided only twenty minutes to meet with MPP clients before hearings at the San Diego Immigration Court).

MPP also prevents asylum seekers from confidentially communicating with counsel due to a lack of private meeting spaces at the courts. HRF, *Delivered to Danger*, *supra*, at 14. For example, “attorneys [at the San Diego Immigration Court were observed] speaking with clients in the waiting room in earshot of other returned asylum seekers, [ICE] officers, private security guards, and members of the public.” *Id.* Counsel were prevented from bringing cell phones or laptops into meetings with clients in the Laredo MPP Immigration Court, further impairing their ability to provide effective representation. Am. Immigration Lawyers Ass’n, *After AILA Attends Tour of the Laredo Tent Camp, Questions Still Abound* (Jan. 30, 2020).³³

These hurdles erected by MPP block the very few represented asylum seekers from effective representation by their attorneys, increasing the likelihood their claims will be denied.

B. Living Conditions for Those in MPP Prevent Them from Developing Their Claims

In addition to the constant risk of kidnapping, rape, and murder, asylum seekers face appalling conditions that make it extremely difficult to survive and nearly impossible to prepare their asylum cases.

³³ <https://thinkimmigration.org/blog/2020/01/30/after-aila-attends-tour-of-the-laredo-tent-court-questions-still-abound/>.

1. Many individuals in MPP are unable to support themselves, find safe housing, access health care, or send their children to school, much less prepare their cases. See generally HRW, “*Like I’m Drowning*,” *supra*.³⁴

Those who cannot afford private accommodations frequently stay in crowded shelters, while hundreds of asylum seekers returned to Matamoros have no choice but to live in a squalid tent encampment where cartels prey on migrants and there is little protection from the elements, including frequent flooding. *Id.* at 73–74; Caitlin Dickerson, *Inside the Refugee Camp on America’s Doorstep*, N.Y. Times (Oct. 23, 2020).³⁵

Medical professionals report adults and children suffer extreme psychological distress as a result of further traumas they experience living in the encampment. Global Response Management, *Medical Summary for Refugee Camp: Matamoros*.³⁶

Many individuals in MPP cannot find work to support themselves and their families while they await

³⁴ So many individuals under MPP are homeless that Customs and Border Protection (“CBP”) often does not even attempt to register their addresses in Mexico, in some cases writing on official immigration documents locations as vague as “Baja California” or “[d]omicilio [c]onocido” (“address known”). Kate Morrissey, *San Diego Immigration Court ‘Overwhelmed’ by Remain in Mexico Cases*, San Diego Union-Tribune (June 3, 2019), <https://www.sandiegouniontribune.com/news/immigration/story/2019-05-31/san-diego-immigration-court-overwhelmed-by-remain-in-mexico-cases>.

³⁵ <https://www.nytimes.com/2020/10/23/us/mexico-migrant-camp-asylum.html>.

³⁶ <https://www.humanrightsfirst.org/sites/default/files/GRM%20Report%20on%20Conditions%20in%20Matamoros.pdf>.

their hearings. They often are unable to obtain the documents needed to work legally in Mexico, jobs are scarce for migrants, and they cannot leave their children alone if they do obtain jobs. See generally HRW, “*Like I’m Drowning*,” *supra*.

For many, support from faith-based and humanitarian groups is the primary, if not only, source of food, shelter, clothing and other necessities. *Id.* Unable to afford necessities or access medical care, individuals in MPP can barely survive, let alone find and afford counsel or prepare their cases effectively. Delfina, a Honduran migrant, said of these conditions: “I feel like I am drowning.” *Id.* at 7. Another person said: “MPP kills us from the inside out.” *Id.* at 6.

C. Abysmal Representation Rates and Impediments to Effective Representation Lead to a Predictably Low Rate of Asylum Grants in MPP

1. Ninety-seven percent of individuals in MPP whose cases have been decided did not have an attorney. TRAC, *Details on MPP* (Dec. 2020) (44,372 out of 45,740).³⁷ By contrast, in non-MPP proceedings, 91 percent of non-detained asylum seekers (30,212 out of 33,127) and 53 percent of detained asylum seekers (4,870 out of 9,141) whose cases concluded in FY 2018 had legal representation at some point during their proceedings. TRAC, *Asylum Decisions* (Dec. 2020).³⁸

2. In immigration cases, “[h]aving a lawyer is associated with better outcomes at every stage in the im-

³⁷ <https://trac.syr.edu/phptools/immigration/mpp/> (last visited Jan. 21, 2021).

³⁸ <https://trac.syr.edu/phptools/immigration/asylum/> (last visited Jan. 21, 2021).

migration court process.” Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Calif. L. Rev. 785, 815 (2018). Studies have shown non-detained individuals are nearly five times more likely to succeed in their cases if they are represented by counsel. See, e.g., Nat’l Immigrant Justice Ctr., *Access to Counsel*.³⁹

The vast majority of individuals in MPP are denied the proven benefit of representation in asylum proceedings.

3. Indeed, MPP applicants represented by counsel are nearly 12 times more likely to receive relief than those without an attorney. See TRAC, *Details on MPP, supra* (of final in-person MPP decisions, 284 out of 1,138 represented applicants (24.9 percent) received relief compared to 243 out of 11,690 unrepresented individuals (2.1 percent)).

4. This is not surprising. Asylum seekers without representation often struggle to prepare applications and present critical evidence. MPP multiplies the difficulties unrepresented asylum seekers confront. Struggling to protect themselves from violence, find even basic housing, and afford sufficient food, few asylum seekers in MPP have access to computers or the internet, which are essential to compiling asylum applications and submitting evidence. *Amici* have observed numerous instances in which unrepresented MPP asylum seekers with *bona fide* claims have been denied protection or given up claims due to lack of legal representation. See HRW, “*We Can’t Help You Here*,” *supra*, at 35–36; Kizuka Decl. ¶¶ 23–26.

³⁹ <https://immigrantjustice.org/issues/access-counsel> (last visited Jan. 20, 2021).

For example, a teenage Nicaraguan political activist who had been persecuted for his participation in anti-regime protests was denied U.S. refugee protection despite having a strong prima facie claim. See Kizuka Decl. ¶ 24. Unable to find an attorney to represent him, the teenager did not know he could submit written witness declarations or that he needed to translate crucial evidence he had submitted to the Immigration Court (rendering the court unable to consider it). *Id.* Believing appeal without an attorney was futile, he waived his right to appeal, resigned to being deported to endure continued persecution in Nicaragua. *Id.* ¶ 25. He was transferred to a U.S. immigration detention center for deportation and has not been heard from again. *Id.* ¶ 24.

III. MPP BLOCKS VIRTUALLY ALL REFUGEES FROM HUMANITARIAN PROTECTION IN THE UNITED STATES

The inevitable result of subjecting asylum seekers to grave dangers and impeding their access to counsel is that almost no one in MPP obtains U.S. refugee protection.

1. Of the more than 70,000 migrants and asylum seekers placed in MPP since its implementation, only 523 people—*less than 1 percent*—have been granted relief while in MPP. See U.S. Customs & Border Protection (“CBP”), *Migrant Protection Protocols FY 2020*.⁴⁰ Tens of thousands have been ordered removed. *Id.* For a significant number of these individuals, the gauntlet of MPP rather than the merits decided these cases. Nearly 72 percent of all concluded MPP cases resulted in *in absentia* decisions, with many individuals unable to attend court because of

⁴⁰ <https://www.cbp.gov/newsroom/stats/migrant-protection-protocols-fy-2020> (last visited Jan. 20, 2021).

the dangers and brutal conditions of MPP. See TRAC, *Details on MPP, supra* (32,929 *in absentia* decisions out of 45,740 completed cases).

A mere 4.1 percent of MPP cases completed with an in-person decision (i.e., excluding *in absentia* decisions) were successful. See *id.* (527 grants of relief out of 12,828 cases completed in-person). By contrast, asylum seekers in removal proceedings overall received humanitarian relief in 26.3 percent of cases in FY 2020—a protection rate greatly reduced by a swath of recent asylum regulatory and policy changes but still seven times higher than in MPP. See TRAC, *Asylum Denial Rates Continue to Climb* (Oct 28, 2020).⁴¹ MPP applicants had a much lower success rate than applicants from the same countries generally, demonstrating the unjust, detrimental impact MPP has had on asylum seekers’ ability to receive humanitarian relief. See *id.* (for overall removal proceedings in FY 2020, asylum grant rate of 54.3 percent for Venezuelans, 39.5 percent for Cubans, 38.5 percent for Nicaraguans, 18.1 percent for Salvadorans, 14.2 percent for Guatemalans, and 12.7 percent for Hondurans).

2. These staggering statistics convey only part of the story. The government’s now-indefinite postponement of MPP hearings due to COVID-19, initially begun in March 2020, has forced thousands to remain even longer in danger in Mexico, blocked from access to protection. See U.S. Dep’t of Justice, *Department of Justice and Department of Homeland Se-*

⁴¹ <https://trac.syr.edu/immigration/reports/630/>.

Excluding MPP cases from the FY 2020 figures would result in an even starker contrast in protection rates. Available data on MPP cases is not disaggregated by fiscal year of decision, however.

curity Announce Plan to Restart MPP Hearings (July 17, 2020).⁴² Whether these individuals will be able to hang on for their day in court, or if they will even know when that day has come, remains to be seen. See HRF, *Humanitarian Disgrace*, *supra*, at 24.

3. Dangerous conditions and limited access to court have resulted in unparalleled levels of *in absentia* removal orders in MPP. See CBP, *Migrant Protection Protocols FY 2020*, *supra* (reporting 28,040 MPP *in absentia* removal orders as of July 17, 2020) (last visited Jan. 6, 2021). Shockingly, abducted asylum seekers are among those ordered removed *in absentia*, even when immigration judges are informed the reason an individual did not appear is because he was kidnapped. See HRF, *Pandemic as Pretext*, *supra*, at 3, 13; HRF, *Human Rights Fiasco*, at 24. Immigration judges have stated they are pressured to issue *in absentia* decisions in every instance in which an individual in MPP does not appear. Amnesty Int’l USA, *Statement for Hearing on “Examining the Human Rights and Legal Implications of DHS’s ‘Remain in Mexico’ Policy”* (2019).⁴³

4. MPP is imposed indiscriminately, including on many individuals with *bona fide* claims for humanitarian protection, such as:

Alec, a Honduran Evangelical Christian targeted for leading youth away from gangs and toward faith, Kate Morrissey, *First Person from ‘Remain in Mexico’*

⁴² <https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings>.

⁴³ <https://www.amnestyusa.org/wp-content/uploads/2019/11/11.18.2019-Amnesty-International-Statement-for-House-HSC-Border-Security-Subcommittee-Hearing-on-RIM-1.pdf>.

to Win Asylum Released into US After Day in Detention, San Diego Union-Tribune (Aug. 7, 2019);⁴⁴

Jesus, a former police officer in Venezuela, detained and tortured after refusing to arrest anti-regime protestors, Joel Rose, *This Migrant Won in Immigration Court, and the U.S. Sent Him to Mexico Anyway*, NPR (Jan. 9, 2020);⁴⁵ and

D.T., a 26-year-old doctor who fled Cuba after being labeled a dissident and beaten by police, Anna-Catherine Brigida et al., *Between Borders*, Texas Observer (June 30, 2020).⁴⁶

Under MPP, the fates of asylum seekers like Alec, Jesus, and D.T. too rarely turn on the strength of their claims and more often hinge on the strength of their luck—to secure counsel, survive the dangers and deprivations of waiting in Mexico, and avoid being kidnapped *en route* to their hearings.

IV. MPP VIOLATES THE UNITED STATES' NON-REFOULEMENT OBLIGATIONS

Returning people to serious harm in Mexico not only blocks many from an effective opportunity to present claims for refugee protection but also violates U.S. domestic and international humanitarian obligations, including the principle of *non-refoulement*.⁴⁷

⁴⁴ <https://www.sandiegouniontribune.com/news/immigration/story/2019-08-07/despite-asylum-win-government-may-return-migrant-to-mexico-again>.

⁴⁵ <https://www.npr.org/2020/01/09/794587498/this-migrant-won-in-immigration-court-and-the-u-s-sent-him-to-mexico-anyway>.

⁴⁶ <https://www.texasobserver.org/between-borders/>.

⁴⁷ The prohibition against *refoulement* is set forth in treaties ratified by the United States, see Protocol Relating to the Status of Refugees, art. 33, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S.

A. The Government Adopted MPP with Full Knowledge that Those Subject to the Policy Would Face Extreme Danger

The government instituted MPP with knowledge of the harms it would inflict on returned asylum seekers. At the time of MPP’s implementation, U.S. Department of State reports described “violence against migrants by government officers and organized criminal groups” as one of “[t]he most significant human rights issues” in Mexico and recognized that migrants were especially likely to be victims of human trafficking. See, e.g., U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Mexico 2017 Human Rights Report (2018); U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2018 Trafficking in Persons Report (2018). Human rights groups also warned “the dangers facing refugees and migrants in Mexico ha[d] escalated” since 2017. E.g., HRF, *Mexico: Still Not Safe for Refugees & Migrants* (Mar. 2018).⁴⁸

Refugees and migrants in Mexico thus suffered from a lack of state protection well before MPP, with many facing harm on account of immutable characteristics for which they were persecuted in their home countries. The U.S. Department of State has, for ex-

6577 (incorporating the *non-refoulement* provisions of Convention relating to Status of Refugees, 189 U.N.T.S. 150); U.N. General Assembly, Convention Against Torture, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (U.S. ratification Oct. 21, 1994); International Covenant on Civil and Political Rights (ICCPR), art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (U.S. ratification June 8, 1992), and is a norm of customary international law, see, e.g., Exec. Comm. of the High Commissioner’s Programme, *Note on International Protection*, ¶ 16 U.N. Doc. A/AC.96/951 (Sept. 13, 2001).

⁴⁸ https://www.humanrightsfirst.org/sites/default/files/Mexico_Not_Safe.pdf.

ample, documented extreme violence and human rights violations in Mexico against LGBTI persons, women, children, and persons with disabilities, along with staggeringly high rates of impunity for these abuses. See, *e.g.*, U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Mexico 2017 Human Rights Report (2018); U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Mexico 2016 Human Rights Report (2017). Indeed, two-thirds of asylum seekers fleeing the Northern Triangle who were interviewed by UNHCR in 2016 had suffered gender-based and sexual violence in Mexico. See Amnesty Int’l (“AI”), *Americas: ‘No Safe Place’: Salvadorans, Guatemalans, and Hondurans Seeking Asylum in Mexico Based on Their Sexual Orientation and/or Gender Identity*, AI Index AMR 01/7258/2017 (Nov. 27, 2017).⁴⁹ In an internal draft memorandum, DHS recognized that Mexico’s nascent asylum system faces serious capacity challenges, U.S. Dep’t of Justice & U.S. Dep’t of Homeland Sec., *Draft Memorandum: Policy Options to Respond to Border Surge of Illegal Immigration*,⁵⁰ as has long been the case, see *infra*, pp. 30–32, and the Department of State noted that Mexican immigration officials were known to “abuse migrants and to force them to accept voluntary deportation and discourage them from seeking asylum.” U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Mexico 2018 Human Rights Report 19 (2019).

The government has continued to implement MPP with full awareness of the persecution and harm that the program inflicts. And as public reports document-

⁴⁹ <https://www.amnesty.org/en/documents/amr01/7258/2017/en/%20/>.

⁵⁰ <https://www.documentcloud.org/documents/5688664-Merkleydocs2.html>.

ing the harms proliferated, the government responded by expanding MPP and accelerating the forcible returns. HRW, *Q&A: Trump Administration’s “Remain in Mexico” Program* (Jan. 29, 2020) (discussing continued expansion of MPP throughout 2019 despite mounting evidence of harms).⁵¹ No measure of suffering has been enough to put a stop to MPP. During a Congressional hearing, then-Acting DHS Secretary Kevin McAleenan acknowledged reports of kidnappings but refused to explain whether the government assessed threats to individuals it returns to Mexico under MPP. *House Homeland Sec. Hearing on Global Threats*, at 02:11:28 (C-SPAN broadcast, Oct. 30, 2019).⁵² When presented during a Congressional hearing with reports of widespread violence against people placed in MPP, then-Acting DHS Secretary Chad Wolf declined to explain why DHS continued to implement MPP despite this violence. U.S. Senate Comm. on Homeland Sec. and Governmental Affairs, *Resources & Authorities Needed to Protect & Secure Our Homeland* at 01:00:20 (Mar. 4, 2020);⁵³ see also *Lawyer Defending Trump Policy Makes Stunning Admission*, CNN (Mar. 11, 2020) (including audio recording of DHS attorney urging Immigration Court to enter *in absentia* removal order for kidnapped Venezuelan asylum seeker, stating kidnapping is “potentially a reality for every respondent” in MPP).⁵⁴

⁵¹ <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program>.

⁵² <https://www.c-span.org/video/?465777-1/fbi-director-wray-acting-dhs-secretary-mcaleenan-testify-global-threats>.

⁵³ <https://www.hsgac.senate.gov/resources-and-authorities-needed-to-protect-and-secure-the-homeland>.

⁵⁴ <https://www.cnn.com/videos/politics/2020/03/11/valencia-migrant-kidnapped-awaiting-asylum-hearing-pkg-lead-vpx.cnn>.

B. MPP Has Failed to Provide Meaningful Fear Screenings to Prevent *Refoulement*

1. The government has claimed those in MPP have the opportunity—“at any time”—for a so-called *non-refoulement* fear interview. See Br. of Petitioners 34. But U.S. officials do not inform individuals these interviews are available. Rather, individuals must affirmatively request them. Memorandum from Todd A. Hoffman, Exec. Dir., Admissibility & Passenger Programs, to Dirs., Field Operations, U.S. Customs & Border Prot. (Jan. 28, 2019).⁵⁵

2. When these screenings—frequently conducted without counsel—do occur, they are perfunctory and nearly always result in asylum seekers being returned to danger, even when they are visibly injured or report brutal attacks.

A Cuban asylum seeker, who was kidnapped, beaten, and raped by Mexican police after being returned to Mexico, fled to the border upon being released and begged U.S. officials for medical attention and a fear screening. HRF, *Humanitarian Disgrace, supra*, at 14. She was denied both and returned to Ciudad Juárez while visibly injured. *Id.*

A nine-year-old disabled girl who was kidnapped with her mother and sexually assaulted after being returned under MPP failed a fear screening interview despite the harms they had suffered and the fact that the girl should have been exempt from MPP due to her disability. See Am. Immigration Council, *Statement of the American Immigration Council Submitted to the House Committee on Homeland Security Subcomm. on Border Sec., Facilitation, & Operations 3*

⁵⁵ <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20FO%20Memo%201-28-19.pdf>.

(Nov. 21, 2019).⁵⁶ Immediately after being returned to Tijuana, they were kidnapped at knifepoint just blocks away from the port of entry. *Id.* The mother reported the nightmare they endured for the next 13 days: “[t]hey tied my daughter up in a sheet so she could not move. They beat us repeatedly. They took off all our clothes, touched us sexually, raped us, and masturbated in front of us. They . . . said they would light me on fire.” *Id.* at 4.

One mother broke down crying as she told officers of the kidnapping and sexual abuse she and her young son had suffered *en route* to join her husband and older son, who were already in the United States seeking asylum. An officer told them not to worry—that they would be permitted to join their family members. Only after U.S. officials put the family on a bus did the mother and son learn they were being sent to Matamoros. Interview with Asylum Seeker by National Immigration Law Center (Jan. 15, 2020).

Examples of the failed fear screening process abound. See, e.g., Fry, *Central American Migrant Who Sought U.S. Asylum Slain in Tijuana*, *supra* (Salvadoran father murdered in Tijuana after being returned there under MPP and despite repeatedly expressing fear of return to U.S. officials); Bova, *Attacked in Mexico*, *supra* (describing Nicaraguan asylum seeker’s return to Mexico under MPP without a fear screening despite attempts to explain that in Mexico he had been “stabbed . . . in his right side” and kidnapped by two men who “tied his hands with a cable, beat him, and burned him”); Adam Isaacson, *Practicing Asylum Law in El Paso: “MPP Is Just—It’s*

⁵⁶ https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/statement_for_the_house_migrant_protection_protocols_11_21_19.pdf.

Utterly Insane,” WOLA Podcast (May 7, 2020) (finger of Honduran asylum seeker severed by kidnappers in Ciudad Juárez after government returned him there under MPP).⁵⁷

3. Since March 2020, even the pretense of fear screenings has largely been abandoned. CBP has used the pandemic as an excuse to turn away almost all individuals in MPP requesting fear screening interviews at ports of entry. Letter from Immigration Rights Groups to DHS & CBP Re: CBP Blocking “Migrant Protection Protocols” Fear Screenings (June 20, 2020);⁵⁸ HRF, *Humanitarian Disgrace*, *supra*, at 3–4.

C. Those in MPP Are at Risk of “Chain Refoulement” to the Countries They Fled

The principle of *non-refoulement* prohibits “any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened.” Exec. Comm. of the High Commissioner’s Programme, *Note on International Protection* ¶ 16, U.N. Doc. A/AC.96/951 (Sept. 13, 2001). This includes “chain” *refoulement*, the return of an asylum seeker to a third country that then sends the asylum seeker to another country in which he will face persecution and danger, often the very country the asylum seeker fled. MPP is responsible for precisely this kind of *refoulement*.

Even before MPP, *refoulement* from Mexico was pervasive. Between May and September of 2017, Amnesty International surveyed asylum seekers and

⁵⁷ <https://www.wola.org/analysis/practicing-asylum-law-in-el-paso-mpp-is-just-its-utterly-insane/>.

⁵⁸ <https://www.humanrightsfirst.org/sites/default/files/CBPBlockingMPPFearScreeningLetter.pdf>.

migrants in Mexico to determine whether Mexican officials were implementing their *non-refoulement* obligations. It found the National Institute of Migration (“INM”), the body responsible for regulating migration in Mexico, systemically ignored safeguards codified in Mexican law to protect asylum seekers. Analysis of 500 survey responses found 120 instances where *refoulement* had likely occurred—approximately 24 percent. See AI, *Overlooked, Under-Protected: Mexico’s Deadly Refoulement of Central Americans Seeking Asylum* AI Index AMR 41/7602/2018 8 (Jan. 2018).⁵⁹ Many surveyed were deported to their country of origin despite explicitly expressing a fear of return. Amnesty International also gathered 297 responses of people who passed through migration detention centers. *Id.* at 6. Of those, 75 percent were never informed of their right to seek asylum in Mexico, *id.* at 5, and 69 percent stated that INM officers never asked their reasons for leaving their home country, *id.* at 10.

INM also routinely loaded undocumented asylum seekers and migrants into vans and sent them to detention centers. *Id.* Under Mexican law, these individuals would then have 15 days to present arguments and seek legal counsel. *Id.* at 14. Yet INM often pressured detainees to sign papers accepting voluntary return to their country of origin, waiving rights to counsel, and forgoing the 15-day procedural guarantee. *Id.* These practices directly contravene Mexico’s obligations under its own domestic law and heighten the risk of *refoulement* to a third country.

Yet, in the face of evidence of widespread *refoulement*, the United States implemented MPP,

⁵⁹ <https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf>.

sending tens of thousands of individuals to Mexico where they risked being sent back to persecution in their home country. And since implementation, Mexico's foreign ministry has "boast[ed]" about its "robust detention and deportation figures." David Agren, *Migrants Brave the "Beast" as Mexico Cracks Down Under US Pressure*, *The Guardian* (June 5, 2019).⁶⁰ INM's head vowed to take an enforcement-first approach to migration, pledging 2,500 deportations per day. Beatrice Cuevaz, *Instala INM 12 Puntos en Frontera Sur, Prevé Deportar Dos Mil 500 al Día [INM Installs 12 Points on the Southern Border, Plans to Deport 2500 a Day]*, *Tribuna de Los Cabos* (June 18, 2019).⁶¹ Mexico's abysmal record of protecting asylum seekers and enforcement-first approach lead to a serious risk of wrongful chain return. The United States furthered Mexico's expulsion of those seeking asylum in the United States by funding repatriation programs. See, e.g., Mica Rosenberg et al., *U.S. Government Funds Free Rides from Mexico for Migrants*, *Reuters* (Aug. 30, 2019).⁶²

COVID-19 has only exacerbated these risks. Since the onset of the pandemic, INM has systematically emptied detention centers by deporting asylum seekers and migrants *en masse*, either abandoning them at Mexico's southern border or illegally forcing them across the southern border into Guatemala. HRF, *Pandemic as Pretext*, *supra*, at 16–17. In April 2020

⁶⁰ <https://www.theguardian.com/world/2019/jun/05/migrants-brave-the-beast-as-mexico-cracks-down-under-us-pressure>.

⁶¹ <https://tribunadeloscabos.com.mx/noticias/nacional/instala-inm-12-puntos-en-frontera-sur-preve-deportar-dos-mil-500-al-dia-30745>.

⁶² <https://widerimage.reuters.com/story/us-government-funds-free-rides-from-mexico-for-migrants>.

alone, INM summarily deported more than 3,500 Central American migrants and asylum seekers from detention centers, including many who had been returned under MPP. *Id.* A 32-year-old Guatemalan woman subjected to MPP was returned to Ciudad Juárez in April 2019 and told to return to El Paso for her initial MPP hearing in September, five months later. Interview with Attorney for Asylum Seeker by AI (June 25, 2019). While she was on the street with two other Guatemalan women, Mexican police approached her and attempted to extort her; when she refused to pay, the police took her and the other women to the airport. Although the woman expressed a fear of return to Guatemala and even showed the Mexican police her U.S. Immigration Court documents, she was, nevertheless, forcibly returned to Guatemala.

The lack of safeguards against wrongful deportation is particularly concerning given the extent of violence and persecution in the countries from which MPP individuals have fled. The Nicaraguan government has effected a brutal crackdown of violence and repression against political dissidents since 2018. U.S. Dep't of State, Bureau of W. Hemisphere Affairs, *U.S. Support for a Return to Democracy in Nicaragua*.⁶³ Venezuela is in the midst of a sustained political and humanitarian crisis, and the entirety of the country is under a Level 4 “Do Not Travel” advisory from the U.S. government, as is Cuba.⁶⁴ Guatemala,

⁶³ <https://www.state.gov/u-s-support-for-a-return-to-democracy-in-nicaragua/> (last visited Jan. 7, 2021).

⁶⁴ U.S. Dep't of State, Bureau of Consular Affairs, *Cuba Travel Advisory*, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/cuba-travel-advisory.html> (last visited Jan. 21, 2021); U.S. Dep't of State, Bureau of Consular Affairs, *Venezuela Travel Advisory*, <https://travel.state.gov/content/>

El Salvador, and Honduras have homicide rates four to eight times higher than what the World Health Organization considers to be epidemic levels. AI, *Overlooked, Under-Protected, supra*, at 5. Nevertheless, MPP results in the unlawful return of asylum seekers to these very nations.

CONCLUSION

The decision of the court of appeals should be affirmed.

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Appendix

APPENDIX: AMICI

ADL (the Anti-Defamation League)
Advocates for Basic Legal Equality, Inc. (ABLE)
Aldea – The People’s Justice Center
Allard K. Lowenstein International Human Rights
Clinic, Yale Law School
American Friends Service Committee
American Gateways
American Immigration Council
Amnesty International USA
ASISTA Immigration Assistance
Asylum Access Global
Asylum Access México
Asylum and Human Rights Clinic, University of
Connecticut School of Law
Asylum Seeker Advocacy Project (ASAP)
AsylumWorks
Boston University International Human Rights
Clinic
California Collaborative for Immigrant Justice
Capital Area Immigrants’ Rights Coalition
Catholic Migration Services, Inc.
Central American Legal Assistance
Central American Refugee Center (CARECEN-NY)
Central American Resource Center (CARECEN-LA)
Center for Human Rights and Constitutional Law
Center for International Human Rights,
Northwestern Pritzker School of Law
Center for Social Justice, Seton Hall University
School of Law
Center for Victims of Torture
Coalition for Humane Immigrant Rights (CHIRLA)
Columbia Law School Immigrants’ Rights Clinic
Community Immigration Law Placement Clinic,

2a

The University of Arizona James E. Rogers
College of Law
Community Legal Services in East Palo Alto
Cornell Asylum & Convention Against Torture
Appellate Clinic
Deportation Research Clinic, Buffett Institute for
Global Affairs, Northwestern University
Dolores Street Community Services
Esperanza Immigrant Rights Project
Florence Immigrant and Refugee Rights Project
Fordham Law School Feerick Center for Social
Justice
Georgia Asylum & Immigration Network (GAIN)
Global Justice Clinic
Haitian Bridge Alliance
HIAS, Inc.
HIAS Pennsylvania
Hofstra Law School Asylum Clinic
Human Rights First
Human Rights Initiative of North Texas
Human Rights Watch
Humanitarian Immigration Law Clinic,
Elon University School of Law
Immigrant Defenders Law Center
Immigrant Justice Corps
Immigrant Justice Task Force of the Wellington
Avenue United Church of Christ
Immigrant Law Center of Minnesota
Immigrant Legal Advocacy Project
Immigrant Legal Defense
Immigrants' Rights and Human Trafficking Program,
Boston University School of Law
Immigration Equality
Instituto para las Mujeres en la Migración, A.C.
(IMUMI)
International Human Rights Law Clinic, American

University Washington College of Law
International Justice Resource Center
International Refugee Assistance Project (IRAP)
International Rescue Committee
Jewish Family Service of San Diego
Justice Action Center
Justice and Immigration Clinic,
University of La Verne College of Law
Kino Border Initiative
La Raza Centro Legal San Francisco
Las Americas Immigrant Advocacy Center
Latin America Working Group (LAWG)
Lawyers for Good Government, Project Corazon
Matamoros
Legal Aid Justice Center
Los Angeles LGBT Center
Louisiana Advocates for Immigrants in Detention
Médecins Sans Frontières / Doctors Without Borders
Mid-South Immigration Advocates
Migrant and Immigrant Community Action Project
Migrant Center for Human Rights
Minnesota Interfaith Coalition on Immigration
Mississippi Center for Justice
National Immigration Law Center
National Immigration Project of the National
Lawyers Guild (NIPNLG)
New Mexico Immigrant Law Center
Oasis Legal Services
Oxfam America
Pars Equality Center
Physicians for Human Rights
Project Lifeline
Public Counsel
Quixote Center
Refugee and Immigrant Center for Education and
Legal Services (RAICES)

Refugees International
Refugio del Rio Grande, Inc.
Rocky Mountain Immigrant Advocacy Network
Safe Horizon
San Antonio Region Justice For Our Neighbors
Santa Clara Law School - International Human
Rights Clinic
Santa Fe Dreamers Project
Southwestern Law School Community Lawyering
Clinic
St. Thomas University School of Law Immigration
Clinic
Sueños Sin Fronteras de Tejas
Texas Civil Rights Project
The Right to Immigration Institute
UCLA Immigrant Family Legal Clinic
UCLA School of Law Criminal Defense Clinic
Unitarian Universalist Service Committee
University of Maryland Carey Immigration Clinic
University of the District of Columbia Immigration
and Human Rights Clinic
USC Gould School of Law Immigration Clinic
VECINA
Washington Office on Latin America (WOLA)
Witness at the Border
Women's Refugee Commission, Inc.