No. 19-1212

In the Supreme Court of the United States

CHAD F. WOLF,
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 THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Office of the United Nations High Commissioner for Refugees ("UNHCR") is the organization entrusted

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no one other than *amicus curiae* and its counsel made any such monetary contribution.

by the United Nations General Assembly with responsibility, alongside governments, for providing international protection to refugees and other persons of concern, and for seeking permanent solutions to refugees' problems. G.A. Res. 428 (V), Annex, Statute of the Office of the UNHCR ¶ 1 (Dec. 14, 1950). UNHCR fulfills its mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8(a). UNHCR's supervisory responsibility is also reflected in the Preamble and Article 35 of the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 ("*1951 Convention*"), and Article 2 of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 ("*1967 Protocol*"), requiring States to cooperate with UNHCR in the exercise of its mandate and to facilitate its supervisory role.

UNHCR has won two Nobel Peace Prizes for its work caring for people affected by forced displacement. There are 79.5 million such people in the world today. *See* UNHCR, *Global Trends: Forced Displacement in 2019*, at 2 (June 18, 2020), https://www.unhcr.org/5ee200e37.pdf. The views of UNHCR are informed by its seven decades of experience supervising the treaty-based system for refugee protection. UNHCR's interpretation of the *1951 Convention* and the *1967 Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees and others of concern. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretive guidelines on the application of international law, including the *1951 Convention* and the *1967 Protocol*, to refugees and asylum-seekers.

UNHCR has long been concerned with ensuring that States meet their obligations of non-refoulement. This

concern "arises from [UNHCR's] special responsibility to provide for the international protection of refugees." *See* Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement, in Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Erika Feller et al. eds., 2003).

As relevant to the current case, UNHCR has specifically worked to ensure that States continue to meet their obligations of non-refoulement in the context of transfer agreements with third countries. In 2013, UNHCR issued *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers* (May 2013), ("*Bilateral Transfer Arrangement Note*"). In 2018, UNHCR issued another guidance on transfer agreements, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries* (April 2018) ("*Legal Guidance Paper*"). These guidance documents reflect the current state of international law on the transfer of asylum-seekers.

Given UNHCR's long engagement on ensuring that States meet their obligations of non-refoulement, including in instances of transfer agreements, it has a specific interest in this matter. As discussed below, this Court should consider the United States' obligations to asylum-seekers under international law in construing the provisions of the Immigration and Nationality Act ("INA") at issue in this case.

SUMMARY OF ARGUMENT

UNHCR presents its views on the international law principles governing transfer agreements involving asylum-seekers to assist the Court in addressing the second

question it has certified: "Whether [the Migrant Protection Protocol] is consistent with any applicable and enforceable non-refoulement obligations." By treaty and by statute, the United States is in fact bound by the principle of non-refoulement, which applies fully in the transfer of asylum-seekers to a third country. And the Migrant Protection Protocols ("MPP") violate this applicable principle of non-refoulement in numerous ways.

I. The United States is party to international instruments governing asylum-seekers and preventing refoulement, including the United Nations Protocol Relating to the Status of Refugees, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Congress enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, to bring United States refugee law into conformance with the *1967 Protocol*. UNHCR has supervisory authority for construing States' obligations under the Protocol and the United Nations Convention Relating to the Status of Refugees incorporated therein, and has issued authoritative guidance on States' international law obligations to protect refugees and asylum-seekers. In interpreting the INA, which codifies the obligation of non-refoulement,[2] this Court should consider these obligations, as reflected in UNHCR's interpretive guidance.

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[2] The United States' obligation to protect against refoulement goes beyond section 1231, the statutory provision at issue here. Section 1231 is one of many statutory safeguards implemented by the United States to fulfill its obligation under international law. This brief focuses on section 1231 because that section is at issue in this particular litigation, but the principle of non-refoulement is foundational to international and domestic refugee laws at large. *See* Pet. App. 25a–27a.

II. The primary responsibility to provide protection rests with the State where asylum is sought. Thus, asylum-seekers should ordinarily be processed in the territory of the State where they arrive or which otherwise has jurisdiction over them. International refugee law does permit a State to transfer asylum-seekers to a *safe* third country for the purpose of processing their asylum claims. However, any such transfer must be subject to safeguards, primary among them an enforceable agreement between the transferring and receiving States. Further, before transferring any individual asylum-seeker, the State must afford the asylum-seeker an individualized screening and other protections to guard against the possibility of refoulement.

III. The court of appeals' holding that the MPP violates United States' treaty-based non-refoulement obligations, codified at 8 U.S.C. § 1231(b)(3)(A) and elsewhere in the INA, is consistent with international law. *See* Pet. App. 38a. The violations are numerous: (A) the Government has failed to enter into an enforceable bilateral agreement with Mexico before returning noncitizens there under the MPP program; (B) the Government has failed to make any assessment as to whether the conditions in Mexico comport to international standards; (C) the Government does not ensure, during an individualized interview, that the asylum-seeker is protected from refoulement by being returned to Mexico; and (D) the Government has failed to ensure that asylum-seekers returned to Mexico can in fact pursue their claims in the United States.

These failures of the MPP create the very real risk that asylum-seekers returned to Mexico will be subject to refoulement or chain-refoulement, in violation of the

United States' international obligations. Section 1231 of the INA should be read so as to avoid such violations.

ARGUMENT

I. The United States Is Required by the *1967 Protocol* To Protect Asylum-Seekers It Transfers to Third Countries

The United States has bound itself to international instruments that inform international standards for the transfer of asylum-seekers to third countries pending resolution of their petitions for asylum. In deciding the second question presented by this case, this Court must construe the applicable statutes consistently with the United States' international law obligations to asylum-seekers to the fullest extent possible. In doing so, it should consider UNHCR's authoritative guidance on the state of international law and practice as it relates to the transfer of asylum-seekers.

A. The Immigration and Nationality Act Should Be Interpreted Consistently with the International Law Principle of Non-Refoulement

The *1951 Convention* and *1967 Protocol* are the foundational international instruments that govern the legal obligations of States to protect refugees. The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention*. *1967 Protocol* art. 1, ¶¶ 1–2.[3]

The United States acceded to the *1967 Protocol* in 1968, *see* 19 U.S.T. 6223, thereby binding itself to the international refugee protection regime contained in the

[3] The *1967 Protocol* universalizes the refugee definition in Article 1 of the *1951 Convention*, removing the geographical and temporal limitations. *Id.* ¶¶ 2–3.

1951 Convention. Congress enacted the Refugee Act of 1980, which amends the INA, expressly to "bring United States refugee law into conformance with the [*1967 Protocol*]." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987); *see also Negusie v. Holder*, 555 U.S. 511, 537 (2009) (Stevens, J., concurring in part).

Under the *1951 Convention* and *1967 Protocol*, a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country." *1951 Convention* art. 1, ¶ A(2); *1967 Protocol* art. 1, ¶¶ 2–3.

The core of the *1951 Convention* and *1967 Protocol* is the obligation of States to safeguard the principle of non-refoulement. Set out in Article 33 of the *1951 Convention*, States have the obligation not to return a refugee to any country where he or she faces persecution or a reasonable possibility of serious harm:

> (1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of the territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

1951 Convention art. 33, ¶ 1. This principle is broad in scope. The expression "in any manner whatsoever" indicates that the concept of refoulement must be construed expansively. This is so because one of the foundational goals of international refugee law is to ensure that refugees who have sought safety abroad are not returned to a

country in which they may face the very persecution, torture and potential death that they escaped their home country to avoid.[4] *See* UNHCR Exec. Comm., *Non-Refoulement, No. 6 (XXVIII)*, U.N. Doc. No. 12A A/32/12/Add.1 (Oct. 12, 1977); UNHCR Exec. Comm., *General Conclusion on International Protection*, No. 79 (XLVII), U.N. Doc. A/AC.96/878 (Oct. 11, 1996).

In UNHCR's view, non-refoulement is so universal that it has become a principle of customary international law. *See* Lauterpacht & Bethlehem, *supra*. It is of such a fundamental importance that it appears not only in the refugee law framework but also as a central principle in various related bodies of international human rights law. *See* Convention against Torture art. 3; Committee on the Rights of the Child ("CRC"), *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6 (Sept. 1, 2005) (referencing CRC articles 6 and 37).

Article 33's obligation of non-refoulement applies to both returns and removals equally. *1951 Convention* art. 33(1) (noting the prohibition on refoulement "in any manner whatsoever"); *Bilateral Transfer Arrangement Note* at ¶ 3(vi) (prohibiting both the expulsion *and* the return of

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[4] The prohibition of refoulement applies to refugees and asylum-seekers alike, i.e., to those who have formally been recognized as refugees and to those whose status has not yet been determined. *See* UNHCR Exec. Comm., Note on International Protection, ¶ 11, U.N. Doc. A/AC.96/815 (Aug. 1993), http://www.unhcr.org/refworld/docid/3ae68d5d10.html; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, ¶¶ 26–31 (Jan. 26, 2007), http://www.unhcr.org/refworld/docid/45f17a1a4.html.

a refugee to a country where she fears persecution); UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*. "The prohibition … includes a wide range of actions whereby the refugee is forcibly removed from or forced to leave the territory of a host State. It is irrelevant whether this is labelled expulsion, deportation, repatriation, rejection, informal transfer…" Cornelis W. Wouters, *International Legal Standards for the Protection from Refoulement* 133 (Intersentia 2009) [hereinafter "Wouters"]. The scope of the protection from refoulement applies not only to the refugee's country of origin, but to any territory in which there is a threat of persecution. *Id.* at 134.

While the asylum process exists to determine who is in need of protection against refoulement, individuals are entitled to protection from refoulement while that adjudication is pending. Although States may enter into agreements with other States to receive asylum-applicants during the pendency of their claims, those transfers must ensure protection against refoulement, both to the home country and to any other country in which the asylum-seeker may face persecution or a reasonable possibility of serious harm, including the country receiving the transferred asylum-seekers. These principles apply with equal force to all asylum-seekers, whether they are subject to being removed or temporarily returned to another State.

Courts have a responsibility to construe federal statutes in a manner consistent with United States treaty obligations to the fullest extent possible. "It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 118 (1804), that '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 *McCulloch v. Sociedad Nacional de Marineros de Hondruas*, 372 U.S. 10, 20–21 (1963)); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained . . . by the courts . . . of appropriate jurisdiction . . . ."). Because the INA implicates the rights of asylum-seekers, this Court must necessarily consider the United States' international law obligations to protect asylum-seekers in construing it. *Cf. Clark* v. *Suarez Martinez*, 543 U.S. 371, 380–81 (2005). It should therefore construe section 1231, the statute at issue in this litigation, of the INA consistent with the United States' obligations under the *1951 Convention* and *1967 Protocol* and other international treaties to which it is party, including the Convention against Torture.

B. UNHCR Has Supervisory Responsibility for Implementation of Refugee Law Instruments

UNHCR is responsible for supervising the implementation of the *1951 Convention* and the *1967 Protocol*. *See supra* p.2. In exercising its supervisory responsibility to protect refugees, UNHCR looks to international human rights law to inform the substance of that protection. The preamble to the *1951 Convention* embeds the *Convention* within a broader human rights framework. *See 1951 Convention* at 1. UNHCR's governing body, the Executive Committee (of which the United States has been a member since 1959), has recognized that

> refugee law is a dynamic body of law based on the obligations of State Parties to the 1951 Convention and its 1967 Protocol . . . and which is informed by the object and purpose of these instruments and by developments in

> related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection.

UNHCR Exec. Comm., *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, No. 103 (LVI), U.N. Doc. A/AC.96/1021 (Oct. 7, 2005); *see also* UNHCR, *Note on International Protection* ¶ 32, U.N. Doc. A/AC.96/930 (July 7, 2000).

In construing statutes pertaining to immigration law, this Court has relied on UNHCR guidance to discern the United States' international law obligations to protect asylum-seekers. *See, e.g.*, *Negusie*, 555 U.S. at 537 (referring to UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, "to which the Court has looked for guidance in the past"); *Cardoza-Fonseca,* 480 U.S. at 438–39 (looking to the *Handbook* for guidance).

Of interest here, UNHCR has issued considerable guidance to clarify States' obligations to asylum-seekers and refugees under international law with regard to States' interests in forming bilateral or multilateral transfer agreements of asylum-seekers. *See Bilateral Transfer Arrangement Note*; *Legal Guidance Paper*; *see also* UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers* (Sept. 2019) [hereinafter, "*Irregular Onward Movement Guidance*"]. UNHCR's guidance draws on international refugee law and human rights principles indicated by the *1951 Convention* and the *1967 Protocol.* These principles include the fundamental protection against non-refoulement, which applies to any asylum-seeker that a State wishes to transfer to a third country during the processing of the individual's asylum claim.

II. The Principle of Non-Refoulement Applies to Transfer Agreements Between States

Asylum-seekers should ordinarily be processed in the State in which they seek asylum. *See* UNHCR, *Protection Policy Paper: Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (Nov. 2010) [hereinafter "*Extraterritorial Processing Paper*"]; *Irregular Onward Movement Guidance* at ¶¶ 16–32.[5]

As a limited exception to this general rule, States may enter into formal agreements to facilitate the transfer of asylum-seekers to other States to await processing. However, a State may not use these agreements to "divest itself of responsibility and shift that responsibility to another State" or "as an excuse [by the State] to deny or limit its jurisdiction under international refugee and human rights law." *Extraterritorial Processing Paper* at ¶ 49. Rather, any agreement should "contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole." *Bilateral Transfer Arrangement Note* at ¶ 3(iv). In order to ensure that the participating States comply with the mandates of the *1951 Convention*, the agreement should be "governed by a legally binding instrument … enforceable in a court of law." *Id.*

A State does not absolve itself of responsibility to prevent refoulement by transferring the individual to another State. *Bilateral Transfer Arrangement Note* at

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[5] *See also Handbook* ¶ 192(vii) ("The applicant should be permitted to remain in the country pending a decision on his…request…unless it has been established…that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.")

¶ 3(viii). The transferring State is responsible if the receiving State goes on to refoule the transferred person. *Id.* at ¶ 4; Guy Goodwin-Gill & Jane McAdam, The Refugee in International Law, 252-53 (3d ed. 2007) ("While a State that *actually* returns a refugee to persecution . . . remains primarily responsible for that act, the first State, through its act of expulsion, may be jointly liable for it."); *see also* Wouters at 140.

Accordingly, any arrangement that involves the return or transfer of people who may be in need of international protection from one country to another must encompass key refugee protection safeguards in order to avoid placing individuals at risk of refoulement. This is so even if the purpose of the transfer is for the asylum-seekers to await the asylum determination by the transferring State in the receiving State. For any such arrangement to be appropriate under international law, it needs to be governed by a legally binding instrument that is challengeable and enforceable in a court of law by affected asylum-seekers. *Bilateral Transfer Arrangement Note* at ¶ 3(v).

The transfer arrangement needs to guarantee that each asylum-seeker:

- will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer;[6]

[6] In certain limited circumstances, a State may transfer an asylum-seeker without an individualized assessment. *Legal Guidance Paper* ¶ 5. Those circumstances are not present here, as they require both the existence and availability of certain objective standards of protection in the receiving State, as well as firm undertakings by that State that those returned will have access to protection, assistance

- will be admitted to the proposed receiving State, and permitted to remain while a determination is made;
- will be protected against refoulement;
- will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
- will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and
- if recognized as being in need of international protection, will be able to receive asylum and/or access a durable solution.

Id. at ¶ 3(vi). If any of these standards are not or cannot be met by the receiving State, then the transfer violates international law. *Id.*

The obligation to ensure that conditions in the receiving State meet these requirements rests with the transferring State, prior to entering into such arrangements. It is not enough for the transferring State to merely assume that an asylum-seeker would be treated in conformity with these standards. Regular monitoring and review by the transferring State of the transfers and the conditions in the receiving State is also required to ensure they continue to meet international standards. *Id.* at ¶ 3(viii).

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and other guarantees. *Id.* Even in those limited circumstances, however, the transferring State has to provide individualized screenings for asylum-seekers who are part of vulnerable groups, including unaccompanied children. *Id.*

III. There Are Numerous Ways in Which the MPP is Not Consistent with International Law

A. The United States Has No Bilateral Agreement with Mexico

Neither party contests the fact that there is no legally binding bilateral agreement between the U.S. and Mexico. Yet, as highlighted immediately above, any arrangement between States for the transfer of asylum-seekers is to be governed by a legally binding instrument, challengeable and enforceable in a court of law by the affected asylum-seekers. *Bilateral Transfer Arrangement Note* at ¶ 3(v). The arrangement needs to clearly stipulate the rights and obligations of each State and the rights and duties of asylum-seekers. *Id.* Without such an agreement enforceable in Court, the United States cannot fulfill its duty of ensuring a receiving State has adequate safeguards in place to protect against refoulement prior to transfer.

Public statements made by the U.S. and Mexico in relation to the MPP do not detail specific implementation mechanisms in a legally binding instrument such that asylum-seekers could enforce its guarantees in a court of law. Further, the Mexican government has called the MPP program a "unilateral" action by the United States. *See, e.g.*, Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum-seekers to Mexico* (Feb. 20, 2019), https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf; Joint App. 147–48 (press release from the Mexican government stating it was "informed" by the United States of the MPP the morning of December 20, 2018, the same day it was formally announced as a policy by the Secretary of Homeland Security). Thus, the MPP does not "clarify the

responsibilities of each State and the procedures to be followed" in implementing the policy. *Extraterritorial Processing Paper* ¶ 8.

Without such an agreement, the United States cannot provide assurance that asylum-seekers will be safe from the risk of refoulement. There is also no guarantee that asylum-seekers will be accorded the relevant rights to which they are entitled under the *1951 Convention* and its *1967 Protocol*, including: admission and permission to stay; appropriate reception standards; access to health, education and basic services; safeguards against arbitrary detention. *Bilateral Transfer Note* at ¶ 3(vi); *Legal Guidance Paper* ¶ 4. An appropriate agreement would guarantee not only that the United States is not refouling asylum-seekers to harm in the receiving State, but also that the receiving State will not, in turn, refoule individuals to their country of origin or any other country.

B. The MPP Does Not Ensure that Asylum-seekers Are Accorded Safe and Adequate Treatment

In furtherance of its duties under the *1951 Convention*, the transferring State must ensure that a transfer arrangement guarantees that each asylum-seeker, *inter alia*, "will be treated in accordance with accepted international standards." *Bilateral Transfer Arrangement Note* at ¶ 3(vi).

The transferring State must take measures *prior* to any transfer to ensure that the asylum-seekers' rights under the Refugee Convention will be protected in the receiving State. *See supra* at 13–14. The State's duties to ensure adequate protection of the rights of asylum-seekers persist as long as the State has either de jure or de facto control over the applicant, regardless of whether the refugee has been transferred to another State. *Bilateral Transfer Arrangement Note* at ¶ 3(ii).

These arrangements "must address the basic needs of new arrivals, and provide for a stay consistent with the right to an adequate standard of living." *Extraterritorial Processing Paper* ¶ 23. Consistent with the mandates of the *1951 Convention* and its *1967 Protocol*, an individual shall not be subject to arbitrary detention. *Id.* ¶ 26. Additionally, the relocated individual must have legal status in the receiving State throughout the adjudication period. *Legal Guidance Paper* ¶ 4.

The MPP is at odds with the international standards for adequate reception of asylum-seekers discussed above for at least three reasons. *First*, the U.S. government, prior to implementing the MPP, made no substantial assessment of whether the Mexican government has the infrastructure in place to adequately provide for asylum applicants as they await their claims, as required by international law prior to the initiation of transfer arrangements.

Second, UNHCR is aware of human rights reporting that those in Mexico subject to the MPP are indeed in grave danger. Asylum-seekers awaiting their hearings in Mexico are reported to have been murdered, kidnapped, tortured, raped and otherwise sexually assaulted, extorted, and been targeted for other violent attacks.[7] Reports indicate that conditions in Mexico for asylum-seekers are unsafe in other ways as well, as many asylum-seekers are without access to safe shelter, sufficient food, proper sanitation, or adequate medical care.[8]

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[7] Human Rights First, *A Sordid Scheme, supra*; Mot. in Supp. TRO, Rodriquez Decl., ECF No. 20-3; Ramos Decl. ¶¶ 32, 37-44, ECF No. 20-7; Shepherd Decl. ¶¶ 10-21, ECF No. 20-11.

[8] Human Rights First, *A Sordid Scheme, supra.*

International law requires that the United States ensure that asylum-seekers are safe in the receiving State. Given the lack of conditions of safety in the location where the MPP is being implemented, this requirement cannot be met.

Third, the United States has failed to ensure that asylum-seekers awaiting adjudication in the United States will be permitted to remain in Mexico throughout the duration of the adjudication procedure. The Mexican government currently provides a one-year humanitarian visa to individuals as they await the adjudication of their asylum claims and can renew those visas. However, Mexico is under no obligation to provide or renew this one-year humanitarian visa, as it has no formal agreement with the United States to provide any visa for those in the MPP program. Accordingly, Mexico could refuse to provide visas and chain refoule asylum-seekers, for which they would have no legal relief, at any time. Moreover, this one-year period falls short of covering the current lengthy waiting period experienced on average by asylum-seekers in the United States. *See* TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Jan. 21, 2021) (compiling data from U.S. immigration court proceedings and finding, as of November 2018, cases remained pending in immigration court an average of 718 days prior to adjudication).

C. The MPP Does Not Provide Individualized Screening Interviews for All Asylum-seekers Who Have a Fear of Returning to Mexico

Because of "the grave consequences of an erroneous decision" to return someone to a country where they are at risk of harm, any determination of whether to transfer

an individual outside of the country requires an individualized assessment of the facts and circumstances of each case. UNHCR Exec. Comm., *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30*, 164 *(XXXIV)* (1983, rev. 2009); *Bilateral Transfer Arrangement Note* at ¶ 3(vi).

The MPP does not ensure that it screens all asylum-seekers, and the screening that the Government does provide is not adequate under international law standards. Under the current screening used to implement the MPP, asylum-seekers must affirmatively express fear of harm before they are allowed to present that fear to a United States official. Because few, if any, asylum-seekers are versed in American law, an asylum-seeker cannot be expected to *sua sponte* express a fear of returning to Mexico to await processing. Thus, the Government does not provide all asylum-seekers who have a fear of returning to Mexico with the screening that international refugee law requires to protect against refoulement.

The screening itself, for those who receive it, also does not comport with international law. To start, the screening requires asylum-seekers to establish that there is a "more likely than not" chance that they will be subject to persecution in Mexico on account of a protected ground. *See* Pet. App. at 57, 59. That standard is considerably higher than that used to determine if someone is eligible for asylum based on fear of persecution on account of a protected ground. *Id.* And the asylum decision is itself normally applied only after a full hearing in immigration court.

UNHCR further understands that the screening interviews themselves have become essentially pro forma. According to Human Rights First, the screening interviews have become cursory and hostile. Some MPP fear

interviews last only minutes, consist of yes-or-no questions, and focus on issues not relevant to fear of being sent to Mexico. If these reports are accurate, even partially so, then the screening interviews themselves also fall well short of international law standards in ensuring non-refoulement. *Bilateral Transfer Agreement Note* at 2; *Legal Guidance Paper* at 2.

There is no appeal from the decision made at the screening interview to transfer an asylum-seeker to Mexico. *See* USCIS, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols* (Jan. 28, 2019), https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf; DHS, *Supplemental Policy Guidance for Additional Improvement of the Migrant Protection Protocols* (Dec. 7, 2020), https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf. Particularly given the numerous procedural issues associated with the screening interview, the lack of an appeal right is also in violation of international law.

Those without counsel will have received limited or no legal information and typically do not have a full understanding of their rights or the consequences of failing to exercise them. Coupled with the heightened standards of proof for screening interviews and rules around how adjudicators must decide cases at the screening stage, it is especially important that individuals have access to an appeal of the screening decision.[9]

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[9] In UNHCR's experience, it is often challenging for asylum-seekers to obtain representation during screening. Less than eight

D. The MPP Does Not Give Asylum-seekers Adequate Access to Asylum Procedure in the United States

The point of a transfer agreement is typically to provide a place for asylum-seekers to await the processing of their asylum claims in the transferring State. Therefore, the asylum-seeker must have "legal *and physical* access to asylum procedures and the necessary facilities for submitting applications" and have available to them "legal advice and interpretation, and adequate time for the preparation of claims." *Extraterritorial Processing Paper* at 6 (emphasis added).

The MPP lacks these key safeguards, as readily shown by the grant rates of U.S. asylum claims. Less than two percent of asylum-seekers in the MPP are ultimately granted relief. The asylum grant rate is approximately 40 percent for those outside of the program. *See* TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/ (last visited Jan. 21, 2021) (providing the proportion of MPP cases in which relief was granted); TRAC Immigration, *Asylum Decisions*, https://trac.syr.edu/phptools/immigration/asylum/ (last visited Jan. 21, 2021) (providing the proportion of non-MPP cases in which asylum was granted in removal proceedings).

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percent of asylum-seekers in the MPP program are represented by counsel; while nationally the rate of asylum-seekers represented by counsel is approximately 37 percent. This is no small problem. A study of data released by the U.S. Government shows that an asylum-seeker is 5.5 times more likely to receive a positive determination if he or she is represented by a lawyer. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 6, 9 (2015).

This disparity is not happenstance. UNHCR believes, based on its first-hand observations, that it exists because asylum-seekers in the MPP program do not have adequate opportunity to pursue their U.S. asylum claims. And the disparity proves that numerous individuals with valid claims in the MPP are denied asylum in the U.S. and are left at risk of refoulement. Both are the very type of violation of international refugee law that the INA, including section 1231, is intended to guard against.

The MPP therefore violates the INA, including section 1231, as it lacks the key safeguards necessary to ensure adequate access to asylum procedure in the United States.

First, the MPP forces asylum-seekers to travel from Mexico to access the legal system with jurisdiction over their claims in the United States. *See* USCIS, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*. To UNHCR's knowledge, the United States has made no provisions for how asylum-seekers are to return safely to a port of entry after being sent to Mexico or how they are to enter the United States for matters other than court hearings; i.e., meetings with legal counsel or obtaining documents pertaining to their cases. DHS, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (Dec. 20, 2018), https://tinyurl.com/yxaau738 ("Aliens will have access to … the U.S. for their court hearings.").

Second, the fact that asylum-seekers are not allowed to remain in United States territory in between court appearances makes the process of finding effective legal representation difficult, if not practically impossible. This is particularly true for vulnerable groups with little finan-

cial means to afford travel for themselves let alone for recurring meetings with legal counsel. Asylum-seekers face tremendous difficulty accessing lawyers barred in the United States as they wait in Mexico, and the policies make it nearly impossible for these applicants to meet their attorneys in person, diminishing the quality of legal representation they will receive.

CONCLUSION

For the foregoing reasons, UNHCR respectfully urges this Court to hold that the MPP is not consistent with the United States' non-refoulement obligations, which are codified in the Immigration & Nationality Act, including in section 1231 of that act.

Respectfully submitted.

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