No. 19-1212

IN THE

Supreme Court of the United States

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CHAD F. WOLF, ACTING SECRETARY OF
HOMELAND SECURITY, *et al.*,
Petitioners,

v.

INNOVATION LAW LAB, *et al.*,
Respondents.

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

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**BRIEF OF *AMICUS CURIAE*
AMERICAN STATISTICAL ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE

The American Statistical Association ("ASA") respectfully submits this brief as amicus curiae.[1] The ASA is the world's largest community of statisticians, and one of the oldest continuously operating professional science societies in the United States. Its members generally hold advanced degrees and serve in industry, government and academia in more than 90

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[1] Pursuant to Rule 37.6, amicus affirms that no party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than amicus or their members or counsel made a monetary contribution to the brief. All parties have consented to the filing of this brief.

countries, advancing research and promoting sound statistical practice to inform public policy. With over 18,000 members, who are primarily but not exclusively located in the United States, the American Statistical Association is the "Big Tent for Statistics" worldwide. Since its founding in 1839, the American Statistical Association has supported excellence in the development, application, and dissemination of statistical science through meetings, publications, membership services, education, accreditation, and advocacy.

The ASA has a strong interest in supporting the appropriate use of statistics, not only for academic, scientific, and commercial purposes, but also when used to implement government policy and law. As this case involves the application of statistics concerning the application process for asylum seekers, the ASA provides herein its views concerning the potential misuse of the cited asylum statistics in this case.[2]

INTRODUCTION AND
SUMMARY OF ARGUMENT

In his autobiography, American author and humorist Mark Twain famously stated that "[t]here are three kinds of lies: lies, damned lies, and statistics." Mark Twain, *Mark Twain's Autobiography: Volume I* 246 (P.F. Collier & Son Co. 1924). While it would be eminently unfair to describe all statistics as lies, it would be also unfair (and unjust) to use statistics to mislead. Statistics is a noble science with a rich history of benefiting humanity. In an appropriate statistical analysis, equally important are the data and the

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[2] While ASA's interest is focused on the proper use of statistics in this case (and generally in the law), ASA takes no position on the wisdom or legality of the immigration policies or laws at issue in this case.

assumptions used to generate and extrapolate from the data. Because the field of statistics commonly relies upon the judicious use of assumptions, the literature in the field is filled with examples and corrections for biases which may be injected as a result of those assumptions. Careful comparisons with realistic assumptions provide statistical evidence that promotes informed decision-making. But flawed comparisons with unreasonable or unsupported assumptions can be worse than none at all. They provide a scientific veneer to a decision without any scientific basis, as Mark Twain acknowledged in his famous quotation above.

In this case, the Department of Homeland Security ("DHS") cites several statistics to justify its implementation of the Migrant Protection Protocol ("MPP"), a policy which requires most asylum seekers from the Northern Triangle countries (*i.e.*, Guatemala, Honduras, and El Salvador) to remain in Mexico while awaiting adjudication of their asylum cases. Given DHS's reliance on statistics to justify its implementation of the MPP, it is imperative for trained statisticians to comment on the appropriateness of the conclusions that DHS has drawn.

Based upon a review of the briefs and record in this case, ASA takes exception to the improper use of asylum statistics by DHS to support its justification of the MPP. In particular, DHS relies on limited statistics based on cases that concluded in fiscal year 2018 ("FY2018") and uses these statistics to improperly suggest that most asylum claims are meritless or lack a meritorious claim of credible fear. DHS's argument regarding the lack of merit in asylum claims is improper because it repeatedly assumes, without justification or support, that most or all cases in which

asylum is not granted (or had not yet been granted in that fiscal year) are somehow meritless, yet fails to account for other known factors that affect asylum grant rates that can be unrelated to the merits of the asylum claim.

Furthermore, DHS's reliance on statistical data from FY2018 alone is also improper because such FY2018 data may not be representative of all pending cases. In other words, the asylum grant rates of cases that concluded in FY2018 may not be representative of all pending cases from the Northern Triangle countries, particularly given the increase of asylum seekers seen at the southern border in 2018 and the length of time it takes for the adjudication of the most meritorious cases, typically several years.

Finally, DHS claims victory in implementing the MPP, citing to a dramatic reduction in the number of migrants attempting to cross the southern border. In advancing this argument, however, not only does DHS rely on its flawed statistics and assumptions, but it also fails to consider whether the reduction in number of migrants was not the result of a "weeding out" of meritless asylum cases, but was rather due to other factors independent of the MPP itself or simply the substantial hardships that the MPP imposed upon asylum seekers, discouraging many meritorious asylum claims.

ARGUMENT

I. DHS RELIES ON LIMITED STATISTICS IN SUPPORT OF THE IMPLEMENTATION OF ITS MIGRANT PROTECTION PROTOCOLS.

In its opening brief, DHS relies on several statistics to defend its implementation of the MPP. In particular, DHS argues that a "surge of hundreds of

thousands of migrants" occurred in 2018 at the southern border, many from the Northern Triangle countries. Pet'rs' Br. 7. When a migrant arrives at the southern border and claims fear of persecution or torture if returned home, the migrant will be subjected to credible fear screening, a process which precedes the migrant being allowed to apply for asylum in the United States. 8 U.S.C. § 1225(b)(1); 8 C.F.R. § 208.16. DHS cites an increase in asylum seekers passing credible fear screening, noting that while about 77% passed in FY2008, up to 89% of asylum seekers passed in FY2018. J.A. 113. Rather than seek to determine whether factors taking place in the Northern Triangle countries have actually increased the risk of persecution or torture to asylum seekers, DHS instead speculates that this purported "surge" was due to an erroneous understanding by migrants that "if the migrants simply claimed fear of return to their home country once they reached the United States (especially when traveling with children), they could gain release into the United States." Pet'rs' Br. 8. Significantly, DHS's position is premised on the assumption that the large majority of those claims of credible fear "overwhelmingly lacked merit." *Id.* DHS asserts that Congress gave it authority to implement policies such as the MPP to "weed[] out [such] patently meritless claims." *Id*. at 4 (internal quotation marks omitted).

As support for its belief that asylum claims overwhelmingly lack merit, DHS looks to select statistics regarding Northern Triangle asylum seekers in FY2018:

> [A]mong the Northern Triangle aliens who claimed fear and were referred for Section 1229a proceedings and whose cases were

> completed in fiscal year 2018, only 54% filed an asylum application, and only 9% were granted asylum. J.A. 116-117. In 38% of cases, the aliens did not even appear for immigration proceedings. *Ibid.*

Id. at 8; *see also* J.A. 116 (describing these limited statistics as "particularly illuminating"). Notably, these numbers include only data from cases *closed* in FY2018, many of which, DHS admits, may have been pending for months or years. J.A. 113, 116. And the underlying source for the statistics relied on by DHS is its own Federal Register notice: Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (J.A. 61-146) ("Interim Final Rule").

Based on these statistics, DHS argues that the MPP has been "enormously effective." Pet'rs' Br. 20 ("DHS has reported that MPP has enabled the agency to avoid detaining or releasing into the United States approximately 66,700 migrants during their removal proceedings, and has contributed to a dramatic reduction in the number of aliens approaching or attempting to cross the southern border."). As described below, the data relied on by DHS is insufficient to support its assumptions. The statistics cannot support DHS's conclusions regarding the merits of asylum claims or the effectiveness of the MPP.

II. DHS MAKES UNSUPPORTED ASSUMP-TIONS CONCERNING THE ASYLUM PRO-CESS, WHICH LIMIT THE VALID CONCLU-SIONS ONE CAN DRAW FROM THE STATIS-TICAL DATA.

As discussed above, DHS cites to certain statistics in its opening brief as purported justification for its implementation of the MPP at the southern border. These statistics are premised upon unsupported assumptions by DHS, which make it impossible to draw the conclusions that DHS argues in its brief and asks the Court to adopt.

A. DHS Erroneously Suggests That Nearly Half Of Northern Triangle Asylum Seekers Who Pass Credible Fear Screening Lack Meritorious Asylum Claims.

In FY2018, immigration judges adjudicated 20,784 cases involving asylum seekers from the Northern Triangle countries. J.A. 116. Based upon only these resolved cases (which may have been filed months or years earlier, and which ignore cases commenced in FY2018 which had not yet been resolved), DHS reports that only 54% of asylum seekers even filed asylum applications, despite claiming credible fear at the start of the process. *Id.*; Pet'rs' Br. 8. In its Interim Final Rule, DHS presumes that most or all of the balance of cases—46%—must have lacked meritorious claims or, otherwise, the asylum seekers would have filed asylum applications: "Given that those aliens asserted a fear of persecution and progressed through credible-fear screening, those aliens *presumably* would have had the greatest reason to then pursue an asylum application. Yet in only about 54% of those cases did the alien file an asylum application." J.A.

116 (emphasis added). But DHS's presumption that the 54% statistic represents the most meritorious cases is not valid, as there is no basis, by logical deduction or based upon the data, for DHS's conclusion that many or all of the other 46% of cases must have been less meritorious.

There are many other known impediments to filing asylum applications which make the DHS presumption invalid. For example, lack of legal counsel, illiteracy, and/or lack of English language fluency can all significantly impact an asylum seeker's ability to submit an asylum application, let alone to actually obtain asylum. *See, e.g.*, Transactional Records Access Clearinghouse – Immigration, Syracuse University, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates* tbl.2 (Nov. 28, 2017), *available at* https://trac.syr.edu/immigration/reports/491/ (comparing denial of asylum rates for asylum seekers with and without legal representation by nationality in FY2012-FY2017); J.A. 492 ¶ 30 (asylum seeker could not read or understand paperwork related to asylum claim because, *inter alia*, it was in English); J.A. 512-513 ¶ 21 ("The officer told me to sign several papers. They were in English and I did not understand them."). DHS's 54% statistic—and the false presumption that most or all of the other 46% of cases are somehow less meritorious—is therefore misleading at best, and wholly unsupported. It is therefore improper to suggest that most or all of the remaining 46% of asylum seekers who had passed credible fear screening would have had meritless asylum claims.

B. DHS Cannot Draw Valid Conclusions Regarding Meritorious Asylum Cases Using *In Absentia* Rates.

To further support its implementation and application of the MPP, DHS reports that 38% of Northern Triangle asylum applicants did not appear for their immigration proceedings in FY2018. Pet'rs' Br. 8. According to the underlying source information, FY2018 statistics showed that "about 38% of aliens from Northern Triangle countries who were referred for credible-fear interviews and passed to section 240 proceedings did not appear, and were ordered removed in absentia. Put differently: . . . over a third [of aliens from Northern Triangle countries who claimed a fear of persecution and passed threshold screening] did not appear at section 240 proceedings." J.A. 116-117. The import of this statement is to suggest that many or all of these failures to appear are tacit admissions of a lack of merit.

But this statistic, like the 54% application rate, is also misleading because it makes an erroneous assumption: it fails to consider the reasons why asylum seekers may miss their hearing, including "lack of notice; government errors in providing notice; physical, geographical and language obstacles; trauma and mental health; and lack of legal representation." *See, e.g.*, American Immigration Council, *Immigrants and Families Appear in Court: Setting the Record Straight* (July 30, 2019), *available at* https://www.americanimmigrationcouncil.org/research/immigrants-and-families-appear-court.

Moreover, the 38% statistic also fails to account for ongoing cases, many of which remain unresolved. DHS's source data explains that its statistics,

including the 38% rate, "reflect initial case completions by an immigration judge during the fiscal year . . . ." J.A. 114 n.9. But because the figures only consider initial case completions, they do not account for asylum seekers who have appeared in court in ongoing cases that have not yet been completed. This problem is particularly noteworthy given DHS's reliance on FY2018 data—a year in which an increase of migrants caused a disproportionate increase in new immigration cases and asylum claims. Pet'rs' Br. 7; Executive Office for Immigration Review ("EOIR"), U.S. Dep't of Justice, FY2018 Yearbook 9 fig.5, *available at* https://www.justice.gov/eoir/file/1198896/download (reproduced *infra* p. 18). As discussed in detail below (*see infra* pp. 13-21), a fundamental statistical failure called selection bias appears to taint DHS's use of data limited to FY2018.[3] As a result, the *in absentia* rate cited by DHS does not support a conclusion that many (or all) asylum seekers who failed to appear had meritless cases.

C. DHS's 9% Asylum Grant Rate Is Misleading And Does Not Reflect The Merits Of Unadjudicated Asylum Claims.

DHS's brief also relies on its statistic that in FY2018 only 9% of asylum seekers from Northern Triangle countries who passed a credible fear screening and had their asylum applications adjudicated were actually granted asylum. Pet'rs' Br. 8. By relying on this statistic, the clear import of DHS's argument is to suggest that most or all of the other 91% of cases lack meritorious asylum claims. *See* Pet'rs' Br. 8-9, 19-20.

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[3] Selection bias occurs when a nonrepresentative sample is erroneously selected to represent the entire population. *See infra* pp. 13-15.

But this conclusion is based on the same erroneous logic regarding the 54% asylum application rate and the 38% *in absentia* rate discussed above. DHS's underlying data for the 9% grant rate presumes that this rate exclusively represents asylum seekers with the strongest asylum claims, and incorrectly assumes that the other 91% of cases have little (and perhaps no) merit: "Even among those aliens who received a credible-fear interview, filed for asylum, and appeared in section 240 proceedings to resolve their asylum claims—a category that would logically include the aliens with the greatest confidence in the merits of their claims—only a very small percentage received asylum." J.A. 115. But as discussed above, many other factors apart from the merits play a crucial role in whether or not a migrant is successful in his or her asylum petition, which DHS's data fails to consider. Thus, DHS's reliance on a 9% grant rate as justification for its argument that implementation of the MPP "weeds out" meritless asylum cases is misleading and lacks underlying statistical support.

Tellingly, when DHS limits itself to cases "adjudicated on the merits," *i.e.*, cases where an asylum application has been filed and the applicant appeared at the hearing, the grant rate rose to "about 23%," over 2.5 times higher than the 9% statistic relied on in DHS's brief. *Compare* J.A. 117 ("And only 1,889 aliens from Northern Triangle countries were granted asylum, or . . . about 23% of cases where such aliens' asylum claims were adjudicated on the merits.") *with* Pet'rs' Br. 8 ("[A]mong the Northern Triangle aliens who claimed fear and were referred for Section 1229a proceedings and whose cases were completed in fiscal year 2018 . . . only 9% were granted asylum.").

Furthermore, even that 23% grant rate for asylum applications is artificially low, because DHS admits that its statistics do not capture denials that were due to lack of merit, *i.e.*, where the applicant was unable to show a significant possibility of persecution if returned home, as opposed to any other reason DHS is permitted to deny an application: "Because there may be multiple bases for denying an asylum application and immigration judges often make alternative findings for consideration of issues on appeal, EOIR does not track reasons for asylum denials by immigration judges at a granular level." J.A. 116. In order to plug this obvious hole in its statistics, DHS speculates that "[n]evertheless, *experience indicates* that the vast majority of those asylum denials reflect a conclusion that the alien failed to establish a significant possibility of persecution, rather than the effect of a bar to asylum eligibility or a discretionary decision by an immigration judge to deny asylum to an alien who qualifies as a refugee." *Id*. (emphasis added). But this conclusion is pure conjecture with no statistical support. At a minimum, it means that there is no way to determine whether such denials were due to lack of merit as opposed to any other reason. As a result, the 23% statistic is artificially low, as it is not based upon asylum grants versus denials on the merits, but rather asylum grants versus denial on *any* ground, including denials not on merit. Thus, even DHS's 23% statistic lacks underlying statistical support.

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Thus, the three FY2018 statistics relied upon by DHS in its brief do not support its assumption that the vast majority of asylum claims by migrants from the Northern Triangle countries "overwhelmingly lacked merit." Pet'rs' Br. 8. Its argument attempts to

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provide a scientific veneer of statistical support without any scientific basis.

III. DHS ASYLUM STATISTICS ARE TAINTED BY SELECTION BIAS.

In the field of statistics, it is not uncommon to select a subset of all potential cases (called a "sample") in an attempt to draw conclusions regarding the entire group of cases (called the "population"). To properly do so, it is imperative to select a sample that is representative of the entire population. The gold standard technique used to do so is called random sampling, which means every case within the population has an equal chance of being selected for inclusion in the sample. By doing so, a statistician can be confident that measurements made on a sample properly represents the entire population. If a sample is not representative, however, then measurements based on the sample cannot be generalized to the entire population. Making this mistake is a well-known pitfall in statistics known as selection bias, and is one of the most pervasive and insidious statistical problems. *See* Sharon L. Lohr, *Sampling: Design and Analysis* 1-18 (2d ed. 2010).

By way of an analogy to explain the potential impact of selection bias, imagine having to administer an exam to students seeking entry into college. Of course, the most accurate way to determine the overall passage rate of such an exam would be to uniformly grade each exam and calculate the percentage of all test takers. There would be no selection bias in this process because all exams would have been graded (*i.e.*, the entire population was considered). Alternatively, a random sample of all test takers could be obtained, and the passage rate of this set of exams could

be viewed as representative of the population. Again, no selection bias exists by constructing the sample through random selection.

But imagine that the number of students seeking a college education is increasing, and the college administration has requested that you provide an estimate of the passage rate before all of the exams have been graded. The college is interested in an estimate so that it can consider changes to admission policies that may be necessary to address the increase of applications. Thus, the problem before you is to devise a method to estimate the passage rate using a sample of exams.

As your solution, you decide to grade the exams in the order that they were submitted. When you reach the deadline to provide your estimate to college administration, you report only the passage rate of the exams graded so far, even though many more exams have not yet been submitted or graded.

By grading the exams in the order submitted, and cutting off consideration of exams submitted later, you introduced selection bias. There may be many reasons why students submit exams early, including that they simply gave up, or, conversely, that they found the exam very easy to complete. These reasons may skew (or bias) the estimate and must be accounted for in order to draw a proper conclusion. In other words, a sample of the pass rates of students who finished the exam early may not be representative of the entire population of students who took the exam, and a conclusion regarding the overall pass rate cannot be drawn.

Upon careful consideration of the statistics DHS relies upon to justify the MPP, it is apparent that

selection bias is present in those statistics. In particular, DHS relies only on cases completed in FY2018, but admits that there was an increase of asylum seekers at the southern border that year and that some cases take months or years to adjudicate. As discussed below, this injects selection bias in several ways.

A. DHS's Reliance On Cases Completed In FY2018 Fails To Account For The Typical Completion Timeline In Asylum Cases.

Relying on cases where an asylum seeker claimed fear and his or her case was completed in FY2018, DHS states that only 54% filed an asylum application and only 9% were granted asylum, and then uses these numbers to suggest that most asylum claims fail and are meritless. Pet'rs' Br. 8. However, DHS failed to include cases where an asylum seeker claimed fear, but his or her case was not concluded within FY2018.[4] Due to backlogs in the system, asylum cases may take months or years to adjudicate. J.A. 113; Transactional Records Access Clearinghouse – Immigration, Syracuse University, *Immigration Court Case Completion Times Jump as Delays Lengthen* fig.1 (Dec. 21, 2020), *available at* https://trac.syr.edu/immigration/reports/634/ (reflecting an average of over 500 days for case completions

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[4] DHS states that immigration judges in section 240 proceedings adjudicated 20,784 cases involving nationals of Northern Triangle countries who were referred for credible fear interviews and then referred to section 240 proceedings. J.A. 116. As compared to the number of immigration courts cases involving nationals of Northern Triangle countries that originated with a credible fear referral that were pending as of November 2, 2018 (136,554 cases, J.A. 113), that completed case number represents only about 15% of pending cases.

in immigration court cases in FY2018). Furthermore, many cases *completed* in FY2018 did not originate in 2018, but were cases "likely referred for credible-fear screening between 2015 and 2018," which also demonstrates that it is not unusual for cases to take years to adjudicate. J.A. 114. Because the pattern of cases that concluded in FY2018 may not be representative of the entire population of cases, DHS cannot properly conclude that most claims fail, or are meritless, based on the subset of cases concluded in FY2018 alone. In fact, DHS cannot even properly base conclusions on the overall asylum rates (*i.e.*, rates of all cases, whether or not they concluded in FY2018) based on this limited subset of data alone.

In relying only on data from cases concluded in FY2018, DHS fails to consider whether cases that are resolved more quickly have a higher tendency to yield lower rates of meritorious cases and grants of asylum, as they include cases in which no asylum application was filed and cases in which removal was ordered *in absentia*. Cases in which an asylum application was filed and the asylum seeker appeared at his/her hearing generally require more time to adjudicate, and lead to significantly higher asylum grant rates. *See* J.A. 117. By relying only on data from cases that were completed within the year, the dataset may generate an artificially high failure rate. Furthermore, DHS failed to account for the increase of asylum seekers in 2018, which may have led to a greater number of quick denials for asylum in 2018 while the meritorious cases may not have been resolved in 2018. Therefore, the subset of cases that were adjudicated quickly is not a proper random subset of cases on which conclusions can be drawn regarding asylum rates of the entire population of cases.

B. DHS's Reliance On FY2018 Statistics Alone Improperly Assumes That One Fiscal Year Is Representative Of All Future Cases.

DHS cites FY2018 data alone to suggest that most asylum claims fail and most asylum claims are meritless. Pet'rs' Br. 8. However, DHS argues that in 2018, the United States experienced "a surge of hundreds of thousands of migrants, many from the Northern Triangle of Central America . . . , [who] attempted to cross through Mexico to enter the United States." *Id*. at 7. DHS's arguments based on its statistics are invalid because they do not account for this increase or address how it may affect asylum rates.

Other statistics from FY2018 indicate that the increase in total number of cases in 2018 may well have had an impact on the numbers across the board. For example, according to EOIR's FY2018 statistics yearbook, there was an increase of 31,664 initial case completions ("ICC")[5] in FY2018 as compared to FY2017 (an increase of 21%). EOIR FY2018 Yearbook, *supra*, 9 fig.5, reproduced as Table 1 below.[6] Although the

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[5]   EOIR defines an ICC as "the first dispositive decision rendered by an immigration judge. For instance, an I-862 removal case is completed by an order of removal, relief, voluntary departure, termination, or other. An order granting a continuance, changing venue, or administratively closing a case is not a dispositive decision and, thus, does not constitute a case completion." EOIR FY2018 Yearbook, *supra*, at 5.

[6]   Figure 5 of EOIR's yearbook is misleading because although the initial case completions (represented by the dark green bars) are greater than 180,000 in FY2018, the y-axis of the chart does not go higher than 120,000. As a result, the chart's visual presentation of the number of ICCs as compared to the other categories shown is grossly misleading; by looking at the dark green bars alone, one might be misled to believe that the number of

EOIR yearbook does not indicate the reasons for the increase in ICCs in FY2018, the fact that there was a substantial increase is indicative that the numbers across the board may have been affected by the increase in migrants in 2018. Therefore, using FY2018 alone, conclusions cannot properly be drawn regarding the statistics of any other year, and cannot be indicative of the statistics of future years.
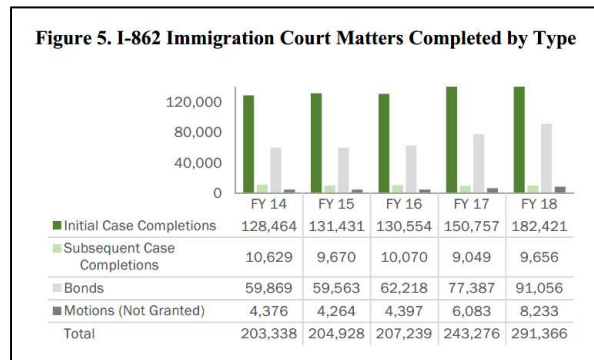

Figure 5. I-862 Immigration Court Matters Completed by Type

	FY 14	FY 15	FY 16	FY 17	FY 18
Initial Case Completions	128,464	131,431	130,554	150,757	182,421
Subsequent Case Completions	10,629	9,670	10,070	9,049	9,656
Bonds	59,869	59,563	62,218	77,387	91,056
Motions (Not Granted)	4,376	4,264	4,397	6,083	8,233
Total	203,338	204,928	207,239	243,276	291,366

TABLE 1: Figure 5 from EOIR's FY2018 Yearbook.

DHS's reliance on data from FY2018 alone is also problematic because only a small subset of cases were completed during that fiscal year, and the impact of the remaining cases on the statistics is unknown. Due to backlogs in the system, there were 136,554 total cases involving Northern Triangle migrants pending in the immigration courts that originated with a credible fear referral as of November 2, 2018. J.A. 113. In FY2018, immigration judges completed just 20,784 cases, a small number as compared to the total number of pending cases. J.A. 116. It is improper to rely

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ICCs between FY2017 and FY2018 are similar when in fact there was a 21% increase, and the growth in the number of ICCs from FY2016 to FY2018 looks relatively flat, when there was in fact an increase of approximately 40%.

on such a small subset of the population and assume that it is representative of the entire population, especially because DHS has not made any efforts to explain why it is representative.

C. DHS's Selection Bias Is Analogous To Classic Examples Of Selection Bias In The Statistics Literature.

One classic example of selection bias in statistics is known as the "Wald's Planes" problem. *See* Abraham Wald, *A Reprint of "A Method of Estimating Plane Vulnerability Based on Damage of Survivors" by Abraham Wald* (Nov. 3, 1980), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a091073.pdf; Marc Mangel & Francisco J. Samaniego, *Abraham Wald's Work on Aircraft Survivability*, 79 J. Am. Stat. Ass'n 259, 259-267 (1984). During World War II, engineers would study planes that returned from missions riddled with bullet holes and bolster the areas where the bullet holes were concentrated, reasoning that this was where the plane was most vulnerable. However, Wald recognized that these holes were actually where the planes were *least* vulnerable, because those planes actually returned from their missions, whereas planes with bullet holes concentrated in other regions were shot down and never returned. *See* Jordan Ellenberg, *How Not to be Wrong: The Power of Mathematical Thinking* 6 (2014). The engineers' erroneous reasoning is a well-recognized example of selection bias, as the engineers only examined planes that returned from their mission, which were not representative of all planes.

As in the Wald's Planes example, DHS's brief focuses on cases that may not be representative of the entire universe of asylum cases. Just as engineers

focused incorrectly on the surviving planes to determine where to bolster the planes, DHS incorrectly excludes cases that are not yet complete to reach its conclusion that most asylum claims are meritless.

Another well-known example of selection bias is known as the "healthy worker" effect. *See* A.J. McMichael, R. Spirtas & L. L. Kupper, *An Epidemiological Study of Mortality within a Cohort of Rubber Workers, 1964-72*, 16 J. Occupational Med. 458, 462 (1974); N.E. Breslow & N.E. Day, Int'l Agency for Rsch. on Cancer, World Health Org., *Statistical Methods In Cancer Research: Volume II—The Design and Analysis of Cohort Studies* 17-18 (1987). Since the industrial revolution, business owners have studied occupational hazards, initially by comparing the health of factory workers to the health of the general population who lived nearby. From these comparisons, it was found that workers in industrial towns with notorious occupational hazards were generally healthier than residents of the nearby town. On this basis, businesses argued that workers were not disproportionally at risk and dismissed concerns about occupational hazards. However, this is another example of selection bias: the studies failed to account for the fact that businesses generally hired workers who were healthy enough to begin working and remained healthy enough to continue working, whereas nearby towns included people who were not healthy enough to work and/or whose health had deteriorated as a result of the work. Thus, the current workers were not representative of their proximate counterparts because a study of the workers was inherently more likely to yield a healthy result.

Similarly, DHS is improperly focusing on a particular subset of the population that is more likely to yield

a particular result and does not take other potential factors into account. Just as a comparison of the health of workers to non-workers alone cannot be used to conclude that workers do not face disproportionate health risks, a sample of cases that ended in FY2018 cannot be used to conclude that most cases do not have merit. Both scenarios fail to consider other factors. The healthy worker example fails to consider that healthy individuals are more likely to work, whereas DHS fails to consider that the cases that are quickly resolved are more likely to result in a denial of asylum. This problem is compounded by the purported "surge" of Northern Triangle migrants in 2018. Pet'rs' Br. 7.

IV. THE REDUCTION IN MIGRANTS ARRIVING AT THE SOUTHERN BORDER CANNOT PROPERLY BE CLAIMED TO REFLECT A REDUCTION IN MERITLESS ASYLUM CLAIMS UNDER THE MPP.

In its brief, DHS argues that the MPP has been "enormously effective," citing a "dramatic reduction" in the number of migrants attempting to cross the southern border and the purported reduction of 66,700 migrants detained or released into the United States. *Id.* at 20. While the MPP may have reduced the actual number of migrants approaching the border and detained/released into the United States, this cannot be properly claimed to be the result of the MPP "weed[ing] out" meritless asylum claims. *Id.* at 4 (internal quotation marks omitted). Such a conclusion is scientifically untenable as it erroneously assumes, without any evidence, that the migrants deterred from reaching the border and/or those who were not

detained or released into the United States did not have meritorious asylum claims.

It is well known in statistics that mere correlation does not equal causation. What this means is that observing two statistics moving together does not mean that an increase in one is *causing* an increase in the other. A well-known example of this principle is the correlation between increased ice cream consumption and increased physical assault rates. Susan Carol Losh, *Dependent and Independent Variables*, The Wiley Blackwell Encyclopedia of Social Theory 2 (2017). While it would be absurd to conclude that an increased consumption of ice cream was *causing* more physical assaults, the data do correlate, maybe even strongly. But using statistics in this manner is incorrect as the analysis is not designed to prove causation. *Id.* ("This spurious correlation does not happen because some mysterious ingredient in ice cream provokes violence. Rather, it occurs because soaring temperatures increase both ice-cream consumption *and* assaults, an example of how *correlation does not imply causation*.").

This fundamental principle is also well-known in the law. For example, courts have held in several situations that mere correlation is insufficient to prove causation. *See, e.g.*, *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 800 (2011) (rejecting numerous studies that purport to show that exposure to violent video games causes harmful effects on children, because "[n]early all of the research is based on correlation, not evidence of causation" and "[t]hey show at best some correlation" (internal quotation marks omitted)); *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 980 F.3d 157, 199-200 (1st Cir. 2020) (finding that although statistical evidence that a

personal rating used in college admission was correlated with race, it did not show it was influenced by race); *Verisign, Inc.* v. *XYZ.COM LLC*, 848 F.3d 292, 300 (4th Cir. 2017) (affirming district court's decision to exclude an expert report because it failed to distinguish between correlation and causation).

Applying this fundamental principle to the implementation of the MPP, it is incorrect for DHS to conclude that the MPP reduced meritless asylum claims based solely on the reduction of migrants approaching the border and the reduction of migrants detained or released into the United States after the MPP was implemented. Pet'rs' Br. 20. Without an appropriate statistical analysis using reasonable assumptions, DHS cannot support its conclusion, as it ignores all other factors which may have influenced the reduction in asylum seekers. For example, DHS failed to consider whether asylum seekers with meritorious asylum claims may have been dissuaded from even applying for asylum as a result of harsh conditions created by the MPP. Resp. Br. 7-8 ("The dangers [asylum seekers] face in Mexico, the challenges of obtaining legal assistance from Mexico, and the delays in the scheduling of their removal proceedings, have led many to abandon altogether *bona fide* claims for protection."); *id.* at 8 ("Independent reporting confirms that asylum seekers face a pattern of kidnappings, extortion, and death—and that many persons subject to MPP are forced to abandon their claims as a result."); *id.* at 36-37 (detailing numerous "grave risks that migrants face in Mexico" while awaiting their hearing date). Similarly, DHS failed to consider whether the social or economic reasons that precipitated the purported "surge" seen in 2018 may have changed, thereby reducing the number of migrants who felt

compelled to seek asylum. Thus, absent a proper statistical study, the fact that the number of migrants has been reduced after implementation of the MPP cannot properly be claimed to demonstrate the "weeding out" of meritless asylum claims.

V. STATISTICAL DATA GENERATED AFTER THE MPP'S IMPLEMENTATION CANNOT BE USED TO JUSTIFY THE MPP.

Finally, DHS cites the reduction of 66,700 migrants detained or released into the United States after the implementation of the MPP to support its conclusion that the MPP was "enormously effective." Pet'rs' Br. 20. But this conclusion ignores the fact that any data collected after the January 28, 2019 implementation date of the MPP may well have been influenced by instituting the policy itself. In fact, the mere implementation of the MPP itself complicates (and potentially confounds) the statistical problem of determining the rate of meritless asylum cases emanating from the Northern Triangle countries as it adds an additional factor to the analysis. To simply (and erroneously) assume that a reduction in asylum seekers is due to a "weeding out" of meritless asylum claims, relying on a reduction in the data caused by implementing the MPP is a self-fulfilling prophecy that is not scientifically sound. As a result, reliance on later data collected after the January 28, 2019 implementation of the MPP does not answer the core question of what percentage of asylum cases from the Northern Triangle countries are, in fact, meritless.

CONCLUSION

For the foregoing reasons, while ASA takes no position on the wisdom or legality of the immigration policies at issue in this case, DHS's use of statistics to

justify its adoption and implementation of the MPP is
improper and should not be used to support its valid-
ity.

Respectfully submitted,

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