No. 19-1212

IN THE

Supreme Court of the United States

CHAD 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 IN SUPPORT OF RESPONDENTS FOR *AMICUS CURIAE* NATIONAL CITIZENSHIP AND IMMIGRATION SERVICES COUNCIL 119

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INTEREST OF *AMICI CURIAE*[1]

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

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

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel represent that they have authored the entirety of this brief, and that no person other than the *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief.

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

SUMMARY OF ARGUMENT

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

This promise has been reinforced by our nation's laws, which, over the course of several decades and consistent with our international treaty obligations, have established a standardized and agile system for identifying, vetting, and protecting refugees. That system endured for decades across multiple presidential administrations, ensuring that refugees would not be returned to territories where they would be persecuted or tortured.

But, in the last four years, the Executive Branch of our government has sought to dismantle our carefully

crafted system of vetting asylum claims, and with it, America's position as a global leader in refugee protection. The MPP is part of that dismantling. It fundamentally changed our nation's procedures for the processing of asylum applicants who enter the United States through our nation's southern border with Mexico. Prior to the MPP, our country's processing of asylum applicants ensured—as required by our international treaty obligations and statutory law—that migrants fleeing persecution would not be returned to a territory where they may face further persecution or the threat of torture. The MPP upended that process, purportedly to address the challenges faced by our immigration system as a result of increased migration from Guatemala, Honduras, and El Salvador (referred to as the "Northern Triangle") to the United States.

Under the MPP, thousands of asylum seekers entering the United States through the southern border or apprehended within the United States near the southern border have been forced to return to Mexico, where they must remain until their asylum applications are adjudicated. Many face persecution in Mexico due to their nationality or another protected ground. By forcing a vulnerable population to return to a country where their lives and freedom are threatened on protected grounds, the MPP abandons our tradition of providing a safe haven to the persecuted and violates our international legal obligations. It also violates statutory law: the asylum statute—as understood and interpreted by those charged with administering it daily—does not allow the Administration to return noncitizens who are

inadmissible under 8 U.S.C. §§ 1182(a)(6)(C) or 1182(a)(7) to a contiguous country.

Finally, the MPP is unnecessary and ineffective. Our immigration system has the foundation and agility necessary to deal with the flow of migrants through our southern border. The system has been tested time and again, and it is fully capable—with additional resources where appropriate—of efficiently processing valid asylum claims while removing those who are not entitled to protection. Contrary to the Administration's claim, the MPP does not streamline the process, but instead overburdens our immigration courts and diverts asylum officers from their primary tasks of defensive asylum screenings and affirmative asylum adjudications.

Council 119's members are steadfast in their commitment to serving our country by continuing its proud tradition as a refuge for the persecuted while ensuring the safety and security of American citizens. The MPP betrays this tradition and compels Council 119's members to violate their duty to uphold our nation's immigration laws. Accordingly, *amicus curiae* urges the Court to affirm the decision below.

ARGUMENT

I. The MPP Is Contrary to America's Longstanding Tradition of Providing Safe Haven to People Fleeing Persecution

The American asylum system has evolved over decades to ensure that there that our nation does not send vulnerable migrants back to territories where they would face persecution or torture. This was by design. Not only is the promise of safe haven for the persecuted a core American ideal, the United States is obligated under statute and treaty not to commit such "refoulement" of refugees. By requiring the return of Central American migrants to Mexico without adequate safeguards against refoulement, the MPP violates America's asylum traditions and the laws enacted to meet our nation's non-refoulement obligations.

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

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

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

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

Thereafter, the mid-19th century brought millions of refugees to America's doorstep, including those escaping the Great Famine in Ireland and German political refugees, known as the "Forty-Eighters," fleeing reactionary reprisals in the wake of the 1848 Revolution.[4]

Despite the promise of American ideals, our nation's treatment of refugees is not unblemished. Our country's policy towards Jewish refugees during World War II is a tragic example.[5] Although the United States accepted around 250,000 refugees fleeing Nazi persecution prior to the country's entry into World War II, it refused to accept more as Nazi Germany increased its atrocities.[6] This indifference

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

[4] *See* Philip A. Holman, *Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook* 3, 5 (David W. Haines ed., 1996); Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005); *see also generally* William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees*, 1845-1851 (Margaret M. Mulrooney ed., 2003); Adolf Eduard Zucker, *The Forty-Eighters: Political Refugees of the German Revolution of 1848* (1967).

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

[6] Holman, *supra* note 4, at 5 (citing Joyce Vialet, Cong. Rsch. Serv. 80-223, *Brief History of United States Immigration Policy* CRS-18 (1980)).

is reflected in the United States' denial of entry in 1939 to the *St. Louis*, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.[7] The ship returned to Europe where many of its occupants met their fate—254 would die in the Holocaust.[8]

In many ways, our nation's refugee policy since World War II has sought to rectify our humanitarian failures during the most devastating of international conflicts. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, both of which provide support for refugees and displaced persons.[9]

In response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Truman directed the issuance of 40,000 visas to resettle survivors in the United States.[10] Congress also took action by enacting the Displaced Persons Act of 1948—the first major refugee legislation in American history—that

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

[8] *Id.*

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

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

allowed for the admission of 415,000 displaced persons by the end of 1952.[11] In 1952, Congress passed the Immigration and Nationality Act ("INA"), placing immigration and nationality laws under the same statute for the first time.[12]

American compassion toward refugees following the Second World War was not limited to Holocaust survivors. In the 1950s, the United States took sweeping legislative and administrative measures to authorize admission of hundreds of thousands of refugees fleeing persecution in Communist and Middle Eastern countries.[13] And after the Cuban Revolution in 1959, the United States began admitting Cubans fleeing the persecution of Fidel Castro's regime.[14]

Importantly, the United States also began to codify international treaty obligations related to refugee protection into domestic law.[15] In 1968, the United States ratified the 1967 Protocol Relating to the

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[11] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; *see also* Holman, *supra* note 4, at 5.

[12] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline (last visited Jan. 20, 2021).

[13] *See* Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 70-73 (2008); Mark Gibney, *Global Refugee Crisis* 91-92 (2d ed. 2010); Holman, *supra* note 4, at 5.

[14] *See* USCIS, *Refugee Timeline*, *supra* note 12.

[15] Gibney, *supra* note 13, at 8-13.

Status of Refugees, a treaty drafted by the United Nations High Commissioner for Refugees ("UNHCR").[16] The 1967 Protocol removed the geographic and temporal limits to the refugee definition contained in the 1951 Convention Relating to the Status of Refugees, which had limited protection to European refugees displaced prior to 1951.[17] By ratifying the 1967 Protocol, the United States also became bound by substantive provisions of the 1951 Convention,[18] and agreed not to, among other things: (i) discriminate against refugees on the basis of their race, religion, or nationality; (ii) penalize refugees for their illegal entry or stay in the country; or (iii) engage in "refoulement"—*i.e.*, to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion."[19]

To uphold these asylum principles, in 1972, the Immigration and Naturalization Service (the "INS") began granting asylum to foreign nationals already in the United States. The INS used existing procedures, such as parole, stays of deportation, and adjustment of status, to allow foreign nationals who feared

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

[17] *Compare* United Nations Convention Relating to the Status of Refugees, Art.1A-B, July 28, 1951, 189 U.N.T.S. 137, *with* 1967 Protocol, *supra* note 16, Art. I.

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

[19] *Id.* at 2.

persecution in their homelands to remain in the United States.[20] In 1977, the INS created a special Office of Refugee and Parole to address global refugee crises and implement refugee policies.[21]

Meanwhile, the end of the Vietnam War created another significant flow of refugees to the United States. This influx was again met with administrative and legislative measures that facilitated the resettlement of hundreds of thousands of Southeast Asians in the country.[22]

In 1980, Congress enacted the Refugee Act, which sought to convert the existing *ad hoc* approach to refugee resettlement to a more permanent and standardized system.[23] The Refugee Act provided the first statutory basis for asylum in the United States[24] and aligned United States refugee law with our country's international treaty obligations under the 1967 Protocol implementing the 1951 Convention.[25] It did so, for example, by adopting the definition of "refugee" contained in Article 1 of the 1951

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[20] *See* USCIS, *Refugee Timeline*, *supra* note 12.

[21] *Id.*

[22] *Id.*

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

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

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

Convention[26] and—consistent with Article 33 of the Convention—prohibiting the removal of an alien to any country where "the alien's life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[27] This landmark legislation codified into domestic law the non-refoulement principle that the MPP undermines today.

In 1990, the INS promulgated a rule that mandated the establishment of a corps of professional asylum officers (the "Asylum Corps") trained in international law and with access to human rights information.[28] The designers of the 1990 asylum rule aimed to achieve twin goals of compassion (through the prompt approval of meritorious cases) and control (by discouraging spurious claims).[29] *See infra* § I.B.

In 1994, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the "CAT"), which it had signed in 1988.[30] Article

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[26] *Compare* 1951 Convention, *supra* note 17, at art. 1A(2), *with* Refugee Act of 1980, Pub. L. 96-212, § 201(a), 94 Stat. 102, 102 (codified at 8 U.S.C. § 1101(a)(42)(A)).

[27] *Compare* 1951 Convention, *supra* note 17, at art. 33(1), *with* Refugee Act § 203(e) (codified as amended at 8 U.S.C. § 1231(b)(3)(A)).

[28] Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 Am. U. J. Int'l L. & Pol'y 43, 44 (1994).

[29] *Id.*

[30] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty

3(1) of the CAT provides: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[31] Thus, with like the Refugee Act before it, the legislation and regulations adopting the CAT codify our nation's non-refoulement obligations into domestic law.[32]

Following the terrorist attacks of September 11, 2001 and the creation of DHS, USCIS became the primary agency to oversee refugee and asylum affairs, in cooperation with other agencies. In 2005, USCIS formed the Refugee Corps, which is composed of specially trained refugee officers who travel around the world to interview refugee applicants seeking resettlement in the United States.[33]

As to asylum affairs, USCIS set up an Asylum Division to focus on three main areas. First, it is tasked with administering the "affirmative asylum" process, which involves an asylum application by an individual who is not in removal proceedings and who files a Form I-589 with USCIS.[34] Second, it determines whether individuals subject to expedited

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Doc. No. 100-20; *see also* U.S. Dep't of State Treaties and Other Int'l Acts Series, 94-1120.1 (noting 1994 ratification).

[31] CAT, *supra* note 30, at art. 3(1).

[32] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, § 2242, 112 Stat. 2681, 2822 (1998); 28 C.F.R. § 200.1.

[33] *See* USCIS, *Refugee Timeline*, *supra* note 12.

[34] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 89-236, § 208, 79 Stat. 911 (codified at 8 U.S.C. § 1158); *see also* 8 CFR § 208.

removal who indicate an intention to apply for asylum or a fear of return to their home country have a "credible fear" of persecution or torture.[35] Individuals found to have a "credible fear" are placed in formal removal proceedings and may apply for asylum, withholding of removal, or other relief before an immigration judge. Third, the Asylum Division evaluates whether an individual who is ordered removed by an immigration judge or convicted of certain crimes, but expresses a fear of return to his or her home country, has a "reasonable fear" of persecution or torture.[36] Those found to have a "reasonable fear" are referred to an immigration judge for further proceedings in which they may seek withholding of removal under INA § 241(b)(3) or under regulations implementing the CAT.

B. Our Modern Asylum System Was Designed to Honor Our Legal Obligations While Guarding Against Non-meritorious Claims

The Asylum Corps was created in 1990 to bring fairness to an asylum process that had struggled to live up to the nation's non-refoulement obligations over the previous decade while at the same time prevent against non-meritorious claims. Within a year of the passage Refugee Act, the Select Commission on Immigration and Refugee Policy counseled in its *Final Report* that asylum claims are "'so complex that special expertise is needed to

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[35] INA § 235 (codified at 8 U.S.C. § 1225); *see also* 8 C.F.R. §§ 208.30, 235.3.

[36] *See* 8 C.F.R. §§ 208.31, 238.1(f)(3), 241.8(e).

determine the validity of the claims.'"[37] The Commission thus concluded that "expeditious, equitable and uniform decisions on asylum petitions require special training for those officers who must make asylum determinations."[38]

It took a decade—and major litigation—for this recommendation to be enacted. In the meantime, the United States did not consistently meet its obligations of non-refoulement, particularly with respect to refugees from Central America. In *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982), a federal court found that INS officers used "outright threats and misrepresentations" to convince Salvadoran refugees to leave the United States without exercising their asylum rights. *Id.* at 360. The court enjoined INS from employing "threats, misrepresentations, subterfuge, or other forms of coercion, or in any other way attempt to persuade" recently apprehended Salvadoran refugees to voluntarily depart the United States. *Id.* at 386.

Even when Central American refugees persisted in the face of coercion from INS officers, their asylum claims were denied in nearly all cases. In the mid-1980s, fewer than 3% of asylum claims by

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[37] Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4(4) Int'l J. Refugee L. 455, 460 n.41 (1992) (quoting United States Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest* 173-174 (1981)).

[38] *Id.*

Guatemalan or Salvadoran applicants were granted.[39]

In response to the near-categorical rejection of Central American refugees' asylum claims, in 1985, a coalition of over eighty religious, refugee, and legal assistance organizations led by the American Baptist Churches ("ABC") filed suit alleging discriminatory practices in the asylum system.[40] After four years of litigation, the court certified a nationwide class of Salvadoran and Guatemalan refugees.[41]

As trial approached in the *ABC* case, the INS announced the promulgation of final regulations to implement the Refugee Act.[42] These regulations created—at long last—a specialized corps of asylum officers designated to adjudicate asylum claims.[43] A core principle that emerged from these regulations was the "nonadversarial interview" designed "to elicit all relevant and useful information bearing on the applicant's eligibility for the form of relief sought."[44]

The same principle is codified in The Illegal Immigration Reform and Immigrant Responsibility

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[39] Carolyn Patty Blum, *The Settlement of* American Baptist Churches v. Thornburgh: *Landmark Victory for Central American Asylum-Seekers*, 3 Int'l J. Refugee L. 347, 349-350 & n.18 (1991).

[40] *See id.* at 351 & n.26.

[41] *See id.* at 352 & n.31.

[42] *Id.* at 352.

[43] Asylum and Withholding Procedures, 55 Fed. Reg. 30,674, 30,680 (July 27, 1990) (codified at 8 C.F.R. § 208.1 *et seq.*).

[44] *Id.* at 30,682.

Act of 1996 ("IIRIRA"), which created the expedited removal process for immigrants inadmissible due to lack of valid documents or inauthentic documents.[45] Regulations implementing the IIRIRA's expedited removal process again mandated the use of a non-adversarial interview, specifically the "credible fear" screening, to prevent against the risk of refoulement in this context.[46]

During a credible fear interview, the asylum officer takes care to build rapport with the asylum applicant, allowing the applicant to feel comfortable enough to share sensitive information and convey the basis for his or her claim. This open communication promotes accurate factual and credibility determinations.[47] The carefully crafted procedures for credible fear interviews strike an appropriate balance between offering protection to qualified asylum seekers and guarding against non-meritorious claims.

Effective asylum screening also requires appropriate training. To prepare for their role,

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[45] *See* Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. 104-208, § 302(a), 110 Stat. 3009, 2579-581 (codified at 8 U.S.C. §§ 1225(b)(1)(A)(i), (B)(ii)).

[46] 8 C.F.R. § 208.30(f); *see also* USCIS, *Credible Fear of Persecution and Torture Determinations Lesson Plan* 10 (Apr. 30, 2019), *available at* https://www.uscis.gov/sites/default/files/document/lesson-plans/Credible_Fear_of_Persecution_and_Torture_Determinations.pdf.

[47] *See, e.g.*, USCIS, *RAIO Directorate – Officer Training: Interviewing Survivors of Torture and Other Severe Trauma Lesson Plan* (Dec. 20, 2019), *available at* https://www.uscis.gov/sites/default/files/document/foia/Interviewing_-_Survivors_of_Torture_LP_RAIO.pdf.

asylum officers undertake specialized training on how to elicit testimony in a non-adversarial manner, assess an applicant's credibility, and render a fact-based determination as to whether the applicant has a credible fear of returning to the applicant's home country.[48] Officers receive instruction on gathering sensitive information, such as details of gender-based or sexual violence.[49] They learn effective techniques for inquiring about trauma and overcoming cultural or social obstacles that may impede the flow of communication.[50] Officers are also trained to assess credibility based on various factors that impact an applicant's ability to present a claim, including, among other things, the "trauma the applicant has endured," the passage of "time since the described events occurred," and "the challenges inherent in cross-cultural communication[.]"[51] The ultimate goal is to equip asylum officers with the tools they need to obtain a complete and accurate picture of the basis for

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[48] *See, e.g.*, *id.*

[49] *See* USCIS, *RAIO Directorate – Officer Training: Interviewing – Gender-Related Claims Lesson Plan* (Dec. 20, 2019), *available at* https://www.uscis.gov/sites/default/files/document/foia/Gender_Related_Claims_LP_RAIO.pdf.

[50] *See* USCIS, *RAIO Directorate – Officer Training: Cross-Cultural Communication and Other Factors That May Impede Communication At An Interview Lesson Plan* (Dec. 20, 2019), *available at* https://www.uscis.gov/sites/default/files/document/foia/CrossCultural_Communication_LP_RAIO.pdf.

[51] *See* USCIS, *Updated Asylum Officer Training Course on Credible Fear Determinations* (AILA Doc. No. 14041846), at 19 (Feb. 28, 2014), *available at* https://www.aila.org/infonet/uscis-asylum-division-officer-training-course.

an asylum applicant's claim and prevent refoulement of vulnerable migrants.[52]

Our country's process for dealing with displaced people has served as an international model. It has been highly adaptable, and it has effectively offered protection to qualified asylum seekers while also ensuring the enforcement of laws, addressing national security concerns, and guarding against non-meritorious claims. The agility and success of the system is perhaps best reflected in the sheer number of refugees integrated into the United States since World War II: nearly five million, representing well over 70 nationalities.[53]

II. The MPP Violates Our Nation's Obligations to Not Return Asylum Seekers to Where They May Face Persecution

As demonstrated below, the MPP results in a violation of the bedrock principle of non-refoulement enshrined in international and domestic law.

A. The MPP Does Not Safeguard Those Who Fear Persecution in Mexico

The MPP has two fundamental deficiencies that all but ensure a violation of the non-refoulement obligation.

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[52] *See* 8 C.F.R. § 208.30(d).

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

First, it eliminates the non-adversarial screening element of the process, and instead requires asylum seekers to spontaneously express a fear of return to Mexico to a uniformed Customs and Border Patrol ("CBP") officer. Under the MPP, "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country."[54] Rather, "[]i]mmigration officers make inquiries into the risk of *refoulement* only if an applicant affirmatively states that he or she fears being returned to Mexico."[55] In this way, the MPP largely eliminates the non-adversarial screening process (*i.e.*, the credible fear interview) that serves as a primary guard against immediate refoulement of asylum seekers. The government obscures this fact by largely ignoring the practical details of the MPP program.

Moreover, most migrants returned to Mexico under the MPP never see an asylum officer. They are turned away at the border after CBP renders a determination to remove them to Mexico to await an appearance before a United States immigration judge. Only if the migrant *spontaneously and affirmatively* voices a fear of returning to Mexico to a CBP officer, and the CBP officer follows procedures to refer the migrant to an asylum officer, will that migrant have access to an "MPP screening" interview.

In defense of this procedure, the government argues that there is "no logical or factual reason to

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

[55] *Id.*

affirmatively ask every alien about fear of return"[56] to Mexico. This statement reflects a fundamental lack of understanding of the reality faced by asylum seekers. The expectation that most asylum seekers would spontaneously describe their fears about Mexico (or any country) to uniformed CBP personnel within hours of arriving in the United States is far-fetched to anyone with proper training and experience interacting with refugees.

In reality, there is no "logical or factual reason" that a non-Mexican asylum seeker, unprompted, would volunteer a fear of returning to Mexico to a CBP officer. First and foremost, migrants are not experts in the complexities of America's current asylum system.[57] Even those who are referred for MPP screening by an asylum officer are often deeply confused as to why they are being asked about Mexico, rather than their home countries.[58] Moreover, as Asylum Division training has long recognized, refugees often struggle to speak about traumatic

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[56] Resp'ts Br. at 36.

[57] *See*, *e.g.*, USCIS, *RAIO Directorate – Officer Training: Interviewing – Eliciting Testimony Lesson Plan* 13 (Dec. 20, 2019), *available at* https://www.uscis.gov/sites/default/files/document/foia/Interviewing__Eliciting_Testimony_LP_RAIO.pdf (noting that an "interviewee may not know what is important to disclose" and that "[t]he interviewee is not likely to be familiar with U.S. immigration laws and regulations and what is necessary to establish eligibility for a benefit. In addition, he or she will not be familiar with the interview process.").

[58] Charles Tjersland Jr., *I Became An Asylum Officer To Help People. Now I Put Them Back In Harm's Way*, Wash. Post (July 19, 2019) https://tinyurl.com/y4meqnt3 (writing in his capacity as a steward in AFGE Local 1924).

events, such as assaults or threats of violence. That struggle is amplified when the trauma occurred in an unfamiliar country. Other cultural or psychological factors, such as shame, embarrassment, fear of retribution, or the presence of family members can add to a migrant's discomfort speaking freely with a CPB officer. [59] Additionally, for most migrants, these encounters with the CBP occur while the migrants are exhausted, hungry, and dehydrated after many days of travel.

All of these reasons, which can make an asylum seeker reluctant to share information even with a trained asylum officer, are amplified by the inherently adversarial nature of the CBP officer's role. The CBP officer is often the migrant's first point of contact with American law enforcement and is likely to be an intimidating figure. This is by design. Unlike the Asylum Division, whose mission is to protect refugees in accordance with law, the mission of CBP is to secure America's border by intercepting potential threats.[60] To that end, CBP field officers are armed and authorized to use deadly force within parameters set by the agency.[61] Moreover, fear of law enforcement is pervasive among many refugees, particularly those from Northern Triangle countries

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[59] USCIS Gender-Related Claims Lesson Plan, *supra* note 49, at 25.

[60] USCIS, *About CBP*, https://www.cbp.gov/about (last accessed Jan. 14, 2021).

[61] USCIS, *Use of Force*, https://www.cbp.gov frontline/cbp-use-force (last accessed Jan. 14, 2021).

where law enforcement often acts as an extension of violent transnational gangs.[62]

It is thus unrealistic that a migrant encountering or being detained by a CBP officer will volunteer that she is afraid of returning to Mexico. Indeed, it defies reason to believe that any such interaction—often at night in open air or other fraught circumstances—could approximate the non-adversarial environment demanded by the *ABC* settlement and cultivated by the Asylum Corps' specific training and expertise.

The MPP deprives asylum officers of the opportunity to do the vital work they were trained to do: elicit information through expert interviews in a non-adversarial setting to reliably assess the risks faced by a migrant. In cutting asylum officers out of the process unless an asylum seeker spontaneously mentions a fear of returning to Mexico to a law enforcement officer, the MPP "virtually guarantee[s] . . . violation of the United States' *non-refoulement* obligations."[63]

Second, even when an asylum seeker volunteers a fear of returning to Mexico to a CBP officer, return to

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[62] *See, e.g.,* UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico* 23-24 (Oct. 2015); U.S. Dept. of State, *Guatemala 2018 Human Rights Report* 1 (2019); U.S. Dept. of State, *El Salvador 2018 Human Rights Report* 1, 16, 20 (2019); U.S. Dept. of State, *Honduras 2018 Human Rights Report* 1 (2019); Kids in Need of Defense, *Neither Security Nor Justice: Sexual and Gender-Based Violence and Gang Violence in El Salvador, Honduras, and Guatemala* 4, 7-9 (2017).

[63] *Innovation Law Lab*, 924 F.3d at 511 (Watford, J., concurring).

Mexico is nonetheless nearly guaranteed. This is because the MPP requires migrants to demonstrate that it is *more likely than not* that they will face torture or persecution on account of a protected ground upon their return to Mexico.[64] However, unlike other immigration contexts where the "more likely than not" standard is applied, the MPP interview process does not provide the protections necessary to meet the high evidentiary threshold.

Specifically, the "more likely than not" standard has traditionally been reserved for judicial removal proceedings, not summary removal processes. In summary processes, asylum officers have applied lower standards of proof: the "significant possibility" standard in the expedited removal process, or the "reasonable possibility" standard applied to determine whether a person has a "well-founded fear" of persecution in affirmative asylum proceedings.[65] In full-scale removal proceedings, asylum seekers are provided a whole host of protections such as a full evidentiary hearing, notice of rights, access to counsel, time to prepare, and a right to administrative and

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

[65] *See* 8 C.F.R. §§ 208.13(b)(2)(i)(B), 208.30(e)(2); *Bartolme v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018).

judicial review.[66] The affirmative asylum process includes additional robust procedural protections.[67]

The MPP provides none of these safeguards. Originally, counsel were barred from MPP interviews.[68] The day before filing its opening brief before the Court in this case, DHS changed this policy to allow counsel to attend, but only if it would not delay the interview.[69] The lack of the right to meaningfully prepare with counsel for an MPP interview is especially problematic because many asylum seekers do not know they will be required to produce evidence of likely persecution in Mexico, since they were only passing through Mexico *en route* to the United States, and would "be unaware that their fear of persecution in Mexico is a relevant factor in determining whether they may lawfully be returned to Mexico."[70]

The standards of proof differ across proceedings for a reason. The standard is lower in the "credible fear" and "reasonable fear" interviews conducted before asylum officers because those interviews are

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

[67] *See* 8 C.F.R. §§ 208.9, 208.14.

[68] *See* USCIS, *Guidance for Implementing Section 235(b)(2)(C)*, *supra* note 64, at 3.

[69] *See* U.S. Dep't of Homeland Sec., *Supplemental Policy Guidance for Additional Improvement of the Migrant Protection Protocols* 1-2 (Dec. 7, 2020), *available at* https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf.

[70] *Innovation Law Lab*, 924 F.3d at 511 (Watford, J., concurring).

preliminary screening assessments that efficiently dispose of facially unsupportable claims. Asylum seekers who show "credible" or "reasonable" fear in these interviews are then given the chance to make their case to an immigration judge in a full evidentiary hearing, where the "more likely than not" standard is applied and where the asylum seekers are provided the safeguards described above. By contrast, the screening interview conducted under the MPP is not an appropriate forum for the "more likely than not" standard, because it is not designed to elicit a developed case on which an asylum officer can base a reasoned determination regarding risk of persecution. Further still, the asylum officer's MPP determination is not reviewable by an immigration judge.[71]

In sum, the MPP fails to provide the basic procedural protections offered in other procedures to prevent refoulement. As the program is administered, virtually no asylum seeker can prove in a hasty interview that it is "more likely than not" they will face threats to their safety in Mexico on account of a protected ground and that the government of Mexico will be unable or unwilling to prevent it. Thus, despite the real prospect of persecution, asylum officers are left with no choice under the MPP but to routinely recommend return to Mexico, violating non-refoulement obligations in the process.

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

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

Mexico is not safe for Central American asylum seekers. As the U.S. Department of State recently noted, "impunity for human rights abuses remain[s] a problem" in Mexico.[72] In 2019, "Central American gang presence spread farther into [Mexico] and threatened migrants who had fled the same gangs in their home countries."[73] There are reports of migrants kidnapped for ransom or conscription into criminal activity.[74] And despite professing a commitment to migrant rights, the Mexican government has proven unable to provide protection. According to an NGO report relied upon by the State Department, nearly 6,000 crimes were reported against migrants in five Mexican states in 2017, and only 1% of them were resolved by Mexican authorities.[75]

The risk of persecution in Mexico is even higher for the most vulnerable asylum seekers. Many asylum seekers are members of indigenous ethnic minorities, who face persecution in Mexico similar to that faced in their home countries. Indeed, the National Human Rights Commission of Mexico recently recognized that indigenous women are among the most vulnerable

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[72] U.S. Dep't of State, *Mexico 2019 Human Rights Report* 1 (2020).

[73] *Id.* at 18.

[74] *Id.* at 18.

[75] U.S. Dep't of State, *Mexico 2018 Human Rights Report* 20 (2019).

groups in Mexican society.[76] Migrant women at large are at particular risk of sexual assault. In one study, nearly one-third of women fleeing the Northern Triangle have experienced sexual abuse during their journey through Mexico.[77] "Given the frequency of sexual and gender-based violence, many migrant women take contraceptives before migrating to avoid the risk of pregnancy from rape by armed criminal groups, locals, or their smugglers."[78]

Sexual minorities also face extraordinarily high rates of persecution and violence in Mexico. According to the UNHCR, two-thirds of LGBTI migrants from El Salvador, Guatemala, and Honduras who applied for asylum reported having been victims of sexual violence in Mexico.[79]

Tragically, asylum seekers removed to Mexico under the MPP have experienced precisely the persecution that the State Department and other sources predicted. Their experiences are chilling. In 2019, the radio series *This American Life* aired a drug cartel's telephone call to a single mother in New Jersey demanding ransom for the return of her

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[76] *Mexico 2019 Human Rights Report*, *supra* note 72, at 26.

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

[78] Anjali Fleury, *Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women*, United Nations University (May 4, 2016), https://unu.edu/publications/articles/fleeing-to-mexico-for-safety-the-perilous-journey-for-migrant-women.html; *see also* This American Life, *The Out Crowd*, Chicago Public Radio (Nov. 15, 2019), *transcript available at* https://www.thisamericanlife.org/688/transcript.

[79] *Mexico 2018 Human Rights Report, supra* note 75, at 19-20.

brother and 9-year-old nephew who had been kidnapped just hours after their return to Nuevo Laredo, Mexico under the MPP.[80] The price for her brother and nephew's freedom started at $18,000. She was able to secure their release for $1,200 after convincing the cartel that she had no more money to pay. Meanwhile, the kidnappers told her 9-year-old nephew that "his kidneys—that his organs—were good for selling."[81]

This was not an isolated case. As of December 2020, Human Rights First tracked at least 1,314 public reports of murder, torture, rape, kidnapping, and other violent attacks against asylum-seekers and migrants returned to Mexico under the MPP.[82] This includes 318 public reports of kidnapping or attempted kidnapping of children returned to Mexico.[83]

The danger faced by asylum seekers returned to Mexico is well known. According to an asylum officer who resigned in protest of the MPP, "[e]very Officer conducting MPP was aware of the situation in Mexico and danger to migrants being reported, not only in the media but in expert reports from the State

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[80] This American Life, *supra* note 78.

[81] *Id.*

[82] Human Rights First, *Delivered to Danger* (Dec. 15, 2020), https://www.humanrightsfirst.org/campaign/ remain-mexico.

[83] *Id.*

Departments and the Asylum Corps' own research unit."[84]

III. The MPP Exacerbates Rather than Alleviates the Strain on Our Asylum System

Far from promoting the efficient resolution of asylum claims, the MPP actually increases the number of asylum seekers who will appear before an immigration judge. Under the expedited removal procedure set forth in 8 U.S.C. § 1225(b)(1), asylum seekers who did not present a "credible fear" were expeditiously removed from the country, reserving the full-scale removal hearing process to those asylum seekers who passed the initial screening threshold. This process promoted efficiency and judicial economy by screening out non-viable asylum claims early in the process, while upholding our nation's non-refoulement obligation. It also reserved judicial resources for those applicants who presented a credible claim at the initial screening stage.

Under the MPP, all asylum seekers receive a full hearing. Individuals with frivolous claims who would never see an immigration judge under the expedited removal process are now added to the backlog of cases for a full hearing. This adds to the overwhelming

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[84] *Humanitarian Aspects of the United States Migratory Crisis: Hearing Before the Subcomm. on Africa, Global Health Right, and International Organizations of the H. Comm. on Foreign Affairs,* 116th Cong. (Nov. 22, 2019) (written statement of Douglas Stephens, Esq.), *available at* https://docs.house.gov/meetings/FA/FA16/20191122/110264/HHRG-116-FA16-Wstate-StephensD-20191122.pdf.

burden on our country's immigration judges and further delays hearings for asylum seekers with meritorious claims.

In addition, the MPP diverts asylum officers from their core tasks of administering the affirmative asylum process and conducting "credible fear" and "reasonable fear" interviews. These processes already faced a backlog. Now, every hour asylum officers spend administering the MPP is an hour diverted from clearing that backlog. Meanwhile, individuals with legitimate asylum claims wait longer for relief.[85] And individuals with frivolous claims defer rejection.

Finally, the MPP has devastated the morale of the Asylum Corps. Under the MPP, asylum officers "must either carry out orders . . . they reasonably believe violate the law and endanger asylum seekers or leave their jobs."[86] Asylum Officer Charles Tjersland Jr., writing in his capacity as a union representative, described the MPP as "a Kafkaesque nightmare" that forced him and his colleagues to violate the most basic tenet of their role—returning thousands of asylum seekers to Mexico to await processing of their asylum

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[85] *See* USCIS, *USCIS Response to the Citizenship and Immigration Services Ombudsman's 2020 Annual Report to Congress* 9-10 (Dec. 4, 2020), *available at* https://tinyurl.com/y448p9rn (noting "Additional DHS programs obligating USCIS Asylum Division resources" as a "factor[] that played a significant role in the agency's backlog numbers").

[86] *Examining the Human Rights and Legal Implications of DHS' Remain in Mexico Policy: Hearing Before Subcomm. on Boarder Security of the before the House Comm. on Homeland Security*, 116th Cong. 1 (Nov. 19, 2019) (statement of Michael A. Knowles, President of AFGE Local 1924 and Special Representative to AFGE National CIS Council 119).

claims "knowing all the while that they might be kidnapped, assaulted or killed."[87] As one asylum training officer recently wrote: "The U.S. hired me to protect refugees. Now it tells me to abandon them."[88]

The MPP, along with other policies implemented by the previous administration, is driving qualified officers from their positions. As Tjersland said during the first year of the MPP: "We've had colleagues quit. We're driving away some of the brightest minds, most motivated hearts."[89] Among the officers who have been driven away from the job by the MPP is Doug Stevens. Following his resignation from the Asylum Corps, he offered testimony to Congress in which he described the belief shared by "every officer [he] ha[d] spoken to":

> [U]nder MPP we are affirmatively and intentionally harming the same individuals we previously protected. In so doing, we are complicit in the persecution, torture, and other human rights abuses these individuals will face back in Mexico.[90]

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[87] Tjersland, *supra* note 58.

[88] Jason Marks, *The U.S. Hired Me to Protect Refugees. Now It Tells Me to Abandon Them*, Wash. Post (Aug. 7, 2020), https://tinyurl.com/y5kzzt2k (writing in his capacity as steward in AFGE Local 1924).

[89] Morning Edition, '*Asylum Officers Are Being Used As An Immigration Deterrent,' Tjersland Says*, NPR (Aug. 19, 2019), *transcript available at* https://www.npr.org/2019/08/16/751672742/asylum-officers-are-being-used-as-an-immigration-deterrent-tjersland-says.

[90] Stephens, *supra* note 84, at 3.

CONCLUSION

Asylum officers are duty bound to protect vulnerable migrants from persecution. Under the MPP, they face a conflict between the directives of their departmental leaders and our nation's legal and moral commitments to refugees. Asylum officers should not be made to carry out directives contrary to our nation's legal obligations and moral fabric.

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