

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 FOR *AMICUS CURIAE*
AMERICAN BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF THE *AMICUS CURIAE*¹

The American Bar Association (ABA) is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.²

Since its founding in 1878, the ABA has worked to improve the justice system, with a particular emphasis on issues related to access to justice. In February 2020, the ABA House of Delegates adopted Resolution 117, which opposed the Migrant Protection Protocols (MPP) at issue, and urged “the federal government to maintain an asylum system that affords all persons seeking protection from persecution or torture access to counsel, due process, and a full and fair adjudication that comports with U.S. and international law.”

¹ No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

² Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

In the Report accompanying Resolution 117, the ABA Commission on Immigration challenged MPP and related “government policies [that] have operated together to severely restrict the ability of asylum seekers to access the asylum system and to receive the due process protections to which they are entitled.” ABA Commission on Immigration Report, at 1. The ABA Commission on Immigration specifically identified the following due process concerns: (1) asylum seekers’ inability to meet with their attorneys, other than for one hour preceding their scheduled hearings in temporary tent courts placed near the Mexican border; and (2) the danger posed to asylum seekers forced to await their hearings in notoriously dangerous Mexican border cities, where they have limited opportunities to hold confidential meetings or otherwise communicate with their attorneys or to gather the documentation needed to support their claims. Report, at 9-13.

In January 2021, the ABA reasserted these concerns in *Achieving America’s Immigration Promise: ABA Recommendations to Advance Justice, Fairness, and Efficiency*,³ which reflects the ABA’s real-world experience with MPP through its South Texas Pro Bono Asylum Representation Project (ProBAR). The ABA recommends that the government “rescind” policies like MPP that “impede meaningful access to counsel for noncitizens in removal proceedings.” *Id.* at 9. The report identifies MPP as a program that “subject[s]

³ Available at: <https://www.americanbar.org/content/dam/aba/administrative/government-affairs-office/achieving-americas-immigration-promis-full-doc.pdf> (last visited Jan. 11, 2021).

asylum seekers to conditions and locations which make it very difficult, if not impossible, for them to secure and consult with counsel,” including “restrictive rules on pre-and post-hearing attorney-client meetings,” which “serve to prevent lawyers from consulting with their clients” and further “impede meaningful exercise of the statutory right to counsel.” *Id.* at 13. “There are numerous due process concerns inherent in the MPP program. It is impossible for the vast majority of MPP asylum seekers to exercise their statutory right to counsel in removal proceedings because counsel must either travel to dangerous border cities in Mexico or meet with clients virtually, or in immigration court immediately before a scheduled hearing.” *See also id.* at 29. “Moreover, MPP places asylum seekers in grave personal danger by forcing them to fend for themselves in dangerous Mexican border cities where many have been subjected to extortion, kidnapping, trafficking, and other forms of violence.” *Id.* Indeed, the ABA observed: “The lack of access to counsel negatively impacts all aspects of a detained noncitizen’s case, with unrepresented respondents less likely to gain release from detention and half as likely to secure protection from removal.” *Id.* at 21.

The ABA is also a legal ethics leader. “For more than ninety years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession.” ABA Model Rules of Professional Conduct, Preface (2020). “The Model

Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983.” *Id.* “The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.” ABA Model Rules of Professional Conduct, Scope (2020) (“The Rules simply provide a framework for the ethical practice of law.”). “The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.” *Id.* “The Standing Committee on Ethics and Professional Responsibility, charged with interpreting the professional standards of the Association and recommending appropriate amendments and clarifications, issues opinions interpreting the Model Rules of Professional Conduct and the Code of Judicial Conduct.” ABA Model Rules of Professional Conduct, Preface (2020).

All U.S. jurisdictions, with some jurisdictional variances, have adopted enforceable rules of professional conduct based on the ABA’s Model Rules. *See American Bar Association, Alphabetical List of Jurisdictions Adopting Model Rules*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited Jan. 7, 2021).

The United States Attorney General, too, has modeled on the ABA Model Rules the standards of professional conduct for immigration practitioners who appear before the Board, the Immigration Courts, and the Service. *See Professional Conduct for Practitioners – Rules and Procedures*, 65 Fed. Reg. 39,513, 39,517 (June 27, 2000) (to be codified at 8 C.F.R. pts. 3, 292);

Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 76,914, 76,915 (Dec. 18, 2008) (to be codified at 8 C.F.R. pts. 1001, 1003, 1292) (sanctions rules “modeled on the [ABA] Model Rules of Professional Conduct (2006)”). These standards elaborate on the statutory privilege to legal representation in certain immigration proceedings, including asylum proceedings. *See* 8 U.S.C. § 1362.

Among the Model Rules implicated by MPP are: Model Rule 1.1, including Comment 5, on competency, adequate preparation, and the need for inquiry and analysis into the factual and legal elements of a legal problem (which is heightened in complex cases); Model Rule 1.4(a)(1)-(4) and (b) concerning a lawyer’s duty to meaningfully consult with a client; and Model Rule 1.6 (a) and (c) and the accompanying comment governing confidentiality and a lawyer’s obligation to prevent the inadvertent or unauthorized disclosure of information related to representation of a client.

The ABA therefore has an interest in MPP and its impact on due process and applicants’ access to asylum proceedings, as well as the ethical problems MPP poses for counsel representing asylum applicants who have been returned to Mexico pending their asylum hearings.



SUMMARY OF ARGUMENT

Respondents have explained how MPP is an unlawful implementation of statutory authority and violates international non-refoulement obligations. We do not repeat those arguments. Rather, we supplement the arguments related to Question 1 in the Petition – whether MPP is a lawful implementation of statutory authority – to explain how the MPP frustrates and undermines the statutory privilege to counsel (*see* 8 U.S.C. §§ 1229a(b)(4)(A) and 1362), due process, and the ethical standards under the ABA Model Rules. This impacts an asylum seeker’s ability to obtain legal representation at all. According to government data, only 7 percent of respondents placed in MPP are represented by counsel. In contrast, 60 percent of all immigrants in the United States were represented by counsel.⁴

As we will explain, and the record shows, zealous asylum advocacy requires significant time to develop the record, meet with clients, identify witnesses, and gather evidence. MPP prevents this from occurring, by placing unreasonable barriers to counsel’s access and the ability to confidentially communicate with their clients. At two MPP tent hearing facilities in South Texas, for example, border officials limited access to

⁴ *Compare* Transactional Records Access Clearinghouse (TRAC) Report: Immigration Details on MPP (Remain in Mexico) Deportation Proceedings, <https://trac.syr.edu/phptools/immigration/mpp/> (last visited Jan. 20, 2021) (noting 5,285 of a total 70,467 cases are represented) *with* Executive Office for Immigration Review Adjudication Statistics, Current Representation Rates, <https://www.justice.gov/eoir/page/file/1062991/download> (last visited Jan. 20, 2021) (noting 60 percent of immigrant represented overall in removal proceedings).

counsel to one hour or less before commencement of asylum proceedings. Required to remain in dangerous border cities by MPP, asylum applicants also face difficulties communicating confidentially (or at all) with their U.S.-based lawyers; both lawyers and their clients also face challenges to their safety.

In short, MPP prevents asylum seekers from accessing a full and fair adjudication of their asylum claims by limiting meaningful access to counsel and frustrating attorneys' ability to safely and ethically represent MPP asylum seekers. MPP cannot be found to be authorized by one federal statute when, by doing so, this Court would be trampling on another federal statute, the Constitution, and lawyers' ethical obligations.

◆

ARGUMENT

I. Asylum applicants have a statutory privilege to counsel and a constitutional right to due process. MPP, which imperils both rights, and thereby undermines both another federal statute and the Constitution, cannot stand.

To find MPP to be authorized by one federal statute, as the Government urges, would render ineffectual another federal statute (8 U.S.C. § 1362) and undermine the Constitution.

Statutory privilege to counsel. Non-citizens, including those seeking humanitarian protection, have a statutory right to counsel in removal proceedings. *See*

8 U.S.C. § 1362 (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”); 8 U.S.C. § 1229a(b)(4)(A) (in removal proceedings, the non-citizen “shall have the privilege of being represented, at no expense to the Government, by counsel of the [non-citizen’s] choosing who is authorized to practice in such proceedings”).

The Attorney General has issued regulations to explain the contours of the statutory right to counsel; these regulations mirror the ABA Model Rules, including the ethical provisions from Model Rules 1.1 and 1.4 requiring competent representation and communications with the client. *See* 8 C.F.R. §§ 1003.102, 1003.16(b), 1292.3, 292.3 (2020). “In order to meaningfully effectuate the statutory and regulatory privilege of legal representation . . . [an] Immigration Judge must grant a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel.” *In re C-B-*, 25 I. & N. Dec. 888, 889 (2012).

This statutory right is intertwined with due process protections: “The [statutory] right to be represented by counsel at one’s own expense is protected as an incident of the right to a fair hearing under the Due Process Clause of the Fifth Amendment.” *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018); *see also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“a

person’s liberty is equally protected, even when the liberty itself is a statutory creation of the State”).

Due Process. “It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.” *Demore v. Hyung Joon Kim*, 538 U.S. 510, 523 (2003) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law”); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (“When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.”); *United States v. Estrada*, 876 F.3d 885, 887 (6th Cir. 2017) (“Fifth Amendment guarantees of due process extend to aliens in deportation proceedings, entitling them to a full and fair hearing.”) (quoting *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001)); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (“[t]he Constitution guarantees a fair trial through the Due Process Clauses”); compare *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (finding limited due process rights on behalf of Respondent in expedited removal proceedings under 8 U.S.C. § 1225).

Due process in the removal context requires an “opportunity to be heard upon the questions involving [the] right to be and remain in the United States.” *Japanese Immigrant Case*, 189 U.S. 86, 101 (1903). This makes sense, given that deportation is a “most serious” “penalty” (*Bridges v. Wixon*, 326 U.S. 135, 154 (1945)) – the equivalent of “banishment or exile” (*Fong Haw Tan*

v. Phelan, 333 U.S. 6, 10 (1948)) – and, where asylum is sought, can lead to the individual being tortured or killed upon return to his home country. *See also C.J.L.G. v. Barr*, 923 F.3d 622, 633 (9th Cir. 2019) (Paez, J., concurring) (“Courts have long recognized that deportation is a penalty – at times a most serious one” since “[t]he impact of deportation could be persecution, including potential police beatings, torture, and sexual assault. . . .” (Citation and internal quotations omitted)).

The majority of circuit courts have further concluded that due process guarantees a right to effective assistance of counsel in immigration proceedings. *See, e.g., Gonzalez v. Whitaker*, 908 F.3d 820, 828 (1st Cir. 2018) (“[T]his court has held that if the deportation proceeding ‘was so fundamentally unfair that the alien was prevented from reasonably presenting his case,’ that constitutes a due process violation.” (quoting *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988)); *Lin v. U.S. Dep’t of Justice*, 453 F.3d 99, 104 (2d Cir. 2006) (noting that due process requires “a full and fair opportunity to present . . . claims”); *Calderon-Rosas v. AG United States*, 957 F.3d 378, 384-85 (3d Cir. 2020) (“It is by now beyond question that the Due Process Clause guarantees aliens the right to effective assistance of counsel in removal proceedings.”); *Kia v. Barr*, 794 Fed. Appx. 403, 410 (5th Cir. 2019) (“this circuit has suggested that there may be a right to meaningful assistance of counsel grounded in the [F]ifth [A]mendment guarantee of due process.”) (alterations in original) (quoting *Mantell v. INS*, 798 F.2d 124, 127 (5th Cir. 1986)); *Paul v. INS*, 521 F.2d 194, 197 (5th Cir. 1975)

“It is clear that any right an alien may have in this regard is grounded in the [F]ifth [A]mendment guarantee of due process rather than the [S]ixth [A]mendment right to counsel.” (citation omitted); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001) (“Fifth Amendment guarantees of due process extend to aliens in deportation proceedings, entitling them to a full and fair hearing”); *Zambrano-Reyes v. Holder*, 725 F.3d 744, 750 (7th Cir. 2013) (quoting *Kay v. Ashcroft*, 387 F.3d 664, 676 (7th Cir. 2004)) (“in removal proceedings, ‘counsel’s ineffectiveness may rise to the level of a due process violation if the alleged errors likely affected the outcome of the proceeding’”); *United States v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002) (“[A]lthough there is no right to appointed counsel in deportation proceedings, a petitioner . . . can state a Fifth Amendment violation if he proves that retained counsel was ineffective and, as a result, the petitioner was denied a fundamentally fair proceeding.”); *Dakane v. U.S. Att’y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2004) (per curiam) (quotation omitted) (petitioner in removal proceedings is entitled to “effective assistance of counsel where counsel has been obtained.”).

Those circuits that have declined to find a due process right to effective assistance of counsel in the immigration context have done so because the ineffective assistance claim was not grounded in any state action or policy. See *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) (“we hold that there is no constitutional right under the Fifth Amendment to effective assistance of

counsel in a removal proceeding. Removal proceedings are civil; there is no constitutional right to an attorney, so an alien cannot claim constitutionally ineffective assistance of counsel. To the extent Rafiyev’s counsel was ineffective, the federal government was not accountable for her substandard performance. . . .”); *see also Afanwi v. Mukasey*, 526 F.3d 788, 799 (4th Cir. 2008), vacated on other grounds, 558 U.S. 801 (2009)⁵ (“Simply put, Afanwi’s counsel was not a state actor, nor is there a sufficient nexus between the federal government and counsel’s ineffectiveness such that the latter may fairly be treated as a governmental action. To the contrary, Afanwi’s counsel was privately retained pursuant to 8 U.S.C. § 1362, and his alleged ineffectiveness – namely his failure to check his mailbox regularly and to file a timely appeal – was a purely private act. . . . Thus, Afanwi’s counsel’s actions do not implicate the Fifth Amendment, and accordingly counsel’s alleged

⁵ The Supreme Court remanded the Fourth Circuit’s decision in *Afanwi v. Mukasey*, 526 F.3d 788 (4th Cir. 2008) “for further consideration in light of the position asserted by the Solicitor General in her brief for the respondent filed August 26, 2009.” *Afanwi v. Holder*, 558 U.S. 801 (2009). The Solicitor General had conceded that the Fourth Circuit erred in holding that the BIA did not have jurisdiction to reopen proceedings in order to adjudicate petitioner’s claim of ineffective assistance of counsel. Brief for the Respondent at 15-16, *Afanwi v. Holder*, 558 U.S. 801 (2009) (No. 08-906) (concluding that “[t]here thus appears to be some prospect that the Board would entertain his claim on the merits on remand and grant him relief from the harm he suffered as a result of his lawyer’s error.”). Attorney General guidance also confirms that the BIA may reopen immigration proceedings “based upon ineffective assistance of counsel[.]” *In re Compean*, 25 I. & N. Dec. 1, 3 (A.G. 2009).

ineffectiveness did not deprive Afanwi of due process.”). These cases are therefore distinguishable from the present one, where a government policy (MPP) itself deprives applicants of effective counsel.

Here, both the statutory privilege to counsel and due process protections are substantially eroded by the governmental policy embodied in MPP.

It simply cannot be, as the Government asserts, that MPP is authorized by one federal statute, even though it renders ineffectual another federal statute (8 U.S.C. § 1362) and undermines the Constitution. Indeed, “[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); see also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality”). Likewise, “[w]hen two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.” *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014).

II. The ABA Model Rules, which govern attorney representation in immigration cases, reveal the specific ways in which MPP compromises legal representation and attorney ethics.

A. Competent representation requires lawyer inquiry and analysis and adequate preparation.

The obligations of competence, diligence, and communication with the client apply equally to every lawyer. To begin with, lawyers must “provide competent representation to a client,” meaning that degree of “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rule 1.1. Comment 5 to Model Rule 1.1 specifies that “competent handling” requires and includes “inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners,” as well as “adequate preparation.” In fulfilling this charge, a lawyer must address the “complexity and specialized nature of the matter” (Model Rule 1.1, Comment 1); “[t]he required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence” (Model Rule 1.1, Comment 5). Competency also requires a lawyer to monitor her caseload and decline or reassign cases if she is overwhelmed. *See* ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 at 9 (May

13, 2006) (“All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently. If a lawyer’s workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients.”).

The regulations adopted by the Attorney General prescribing the standards of conduct applicable to practitioners who appear before the Board, the Immigration Court, and the Service mirror the language of Model Rule 1.1 and Comment 5. *See* 8 C.F.R. § 1003.102(o) (making the failure to act with competence a basis for disciplinary sanctions); *see also* Professional Conduct for Practitioners – Rules and Procedures, 65 Fed. Reg. at 39,514 (recognizing Attorney General’s authority to establish regulations necessary for implementing the laws relating to the immigration and naturalization of aliens).

In the immigration context, and in particular asylum and removal proceedings, the stakes are high, as is the level of legal and factual complexity, which is also exacerbated by language barriers and the need for interpreter access. “Competent and ethical representation of an asylum seeker is an involved and lengthy process that requires constant communication between the client and the attorney . . . [R]epresenting an asylum seeker in immigration court conservatively takes between 40-80 hours of work, with an estimated 35 hours of face-to-face communication with the client.” Letter from the American Immigration Lawyers Association’s Asylum and Refugee Liaison Committee,

to Kevin McAleenan, Acting Secretary, Dep't of Homeland Sec. at 3 (June 3, 2019) (hereafter, AILA McAleenan Letter). The real-world restrictions imposed by MPP impede an attorney's ability to engage in the complex factual analysis needed to represent a client in immigration proceedings. JA 755 (preparation requires initial consultation, multiple meetings – ideally seven – to prepare, review, and sign an asylum application, and then draft, obtain approval of, and finish the client declaration, and prepare the client for hearings).

“Representing asylum seekers involves a unique attorney-client relationship that requires face-to-face communication to build the trust of someone who has experienced trauma and suffered from psychological distress.” AILA McAleenan Letter at 2. Conditions in Mexico interfere with the ability to have face time with the client, and further traumatize a client, making it hard for attorneys to adequately investigate and prepare their cases. JA 756 (in-person meeting in safe surroundings needed to allow for communication of the “lengthy personal history” necessary for a sufficient and accurate declaration, and for examination and cross-examination preparation before hearings); 782-783 (civil society shelters have limited capacity to assist migrants; migrants' inability to access support network intensifies trauma); 783-784 (information provided to migrants on how to access help from counsel insufficient); AILA McAleenan Letter at 2. “[T]he trauma suffered by these families and the ongoing dangers they face in Mexico would make it even more difficult for survivors to relay their stories clearly and concisely

to a legal services provider in consultation. . . .” AILA McAleenan Letter at 2.

Asylum seekers returned to Mexico are forced to fend for themselves in Mexican cities for which the Department of State has issued “no travel” and “reconsider travel” advisories. “MPP also places U.S.-licensed attorneys in untenable situations. Attorneys are either forced to subject themselves to dangerous conditions in Mexican border cities, or risk compromising their professional obligations by preparing complicated asylum cases without a meaningful opportunity to consult in person with their clients.” ABA Commission on Immigration Report in support of Resolution 117, at 13.

As ABA Pro Bono Counsel Laura Peña told Congress:

“Each time I want to meet with my client, I must take precautions to ensure my personal safety while in Matamoros. I cross only during the day, and try to minimize the length of each visit. I coordinate my visits with humanitarian groups or other colleagues. During one legal visit to Matamoros, several armed convoys of the Mexican military rolled into the refugee encampment of approximately 1,500 individuals and families subjected to MPP. The military officials were heavily armed and showed surveillance equipment on their body armor. Several U.S. attorneys and humanitarian aid workers evacuated the encampment out of fear that the military would begin forcibly removing

the refugees. My legal consultation was abruptly cut short, and I returned days later to consult with my client along the narrow sidewalk of the port of entry during a heavy rainstorm.”

Congressional Testimony of Laura Peña, at 5-6.

Indeed, “Mexican border cities” are “notoriously dangerous;” “[m]ultiple organizations have documented hundreds of cases of violence suffered by asylum seekers forced to return to Mexico” to await their hearings in accordance with MPP. ABA Commission on Immigration Report in support of Resolution 117, at 11-12; *see also* JA 731-735, 763-765.

The United States Government knew about these and other dangers in Mexico before adopting MPP in January 2019. According to the U.S. Department of State Country Reports on Human Rights Practices, “violence against migrants by government officers and organized criminal groups” was one of “[t]he most significant human rights issues” in Mexico. U.S. Dep’t of State, *2017 Country Reports on Human Rights Practices: Mexico* at 1 (Apr. 20, 2018). The Government’s 2019 Human Rights Report shows that these issues continue, while both the 2017 and 2019 reports note that migrants had been victimized, kidnapped, and extorted by “criminal groups and in some cases by police, immigration officers, and customs officials.” U.S. Dep’t of State, *2019 Country Reports on Human Rights Practices, Mexico* at 18; 2017 U.S. Dep’t of State Human Rights Report at 1. Migrants near a port of entry are at particular risk of violence and exploitation. *See, e.g.,* J.D. Long-Garcia, *Trump’s ‘Remain*

in Mexico' policy has thousands of asylum seekers still stuck at the border, America Mag. (Sept. 27, 2020), available at <https://bit.ly/3oxCtac> (reporting extortion of asylum seekers by criminal organizations, and threats of kidnaping, torture, and sexual assault while forced to wait in Mexican border towns); Human Rights First, Report on Publicly Reported MPP Attacks (May 13, 2020), available at <https://bit.ly/3jCFu5k>.⁶

The declarations in this record from both migrants and attorneys confirm the violence they encounter in Mexico, including while they await asylum hearings. JA 764 (asylum seekers vulnerable to kidnaping and other violence), JA 767-768, 771-777 (surveyed asylum seekers describe being victims of robbery, threats, physical harm, and sexual assault, including from the government officials whose job it was to protect them), JA 779-782 (describing murder and other crimes), JA 792-800 (describing security situation in Mexico and impact on migrants), JA 790, 794-795 (migrants fleeing gang violence, “yet the very same groups they are fleeing have a presence in Mexico and particularly along the border”); *see also Nora v. Wolf*, 2020 U.S. Dist. LEXIS 111906 at *14 (D.D.C. June 25, 2020) (noting that “the State Department advises that anyone traveling to such a high-risk area should create a

⁶ *See also* Robert Strauss Center, *Organized Crime and Central American Migration In Mexico* Fall 2017-Spring 2018, at 14 (June 2018), https://www.strausscenter.org/wp-content/uploads/MSI-2017-2018_PoliciaPRP.pdf; Robert Strauss Center, *Migrant Kidnapping In Mexico: Regional Differences*, at 8 (Nov. 1, 2018), https://www.strausscenter.org/wp-content/uploads/Leutert_Kidnapping_Report_181119_Final.pdf.

will, designate a family member to negotiate with kidnappers, and establish secret questions and answers to verify that the traveler is still alive when kidnappers reach out to family”). Meanwhile, legal clinics that provide aid and assistance find the rising costs of multiple in-person meetings to be significant across all cases. JA 758-759.

All of the above circumstances not only threaten the safety of asylum seekers and their counsel; they collectively frustrate attorneys’ abilities to competently represent their clients.

B. Meaningful client communication is integral to the attorney-client relationship.

Communication is integral to the attorney-client relationship. Lawyers must be able to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” obtain the client’s informed consent concerning the conduct of the representation where required, and “promptly comply with requests for information[.]” Model Rule 1.4; *accord* 8 C.F.R. 1003.102(r) (setting out the attorney’s obligation to “reasonably consult” with the client to advance “the client’s objectives,” and dictating that the obligation includes the “duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client’s case. . . .”). MPP renders the communication required by the ethics rules nearly impossible, and legal representation illusory.

At times, MPP proceedings held at tent hearing facilities along the border provide for a one-hour or less consultation period right before a hearing; there is no other mechanism for in-person access to counsel. One hour is not enough time to gain client trust about very delicate matters, and to assemble the documentation and testimony necessary to prove an asylum claim. *See* JA 755. Telephonic and electronic communications, if they are available, cannot bridge that gap. *See Arroyo v. U.S. Dep’t of Homeland Sec.*, No. SACV-19-815 JGB (SHKx), 2019 WL 2912848 at *17 (C.D. Cal. June 20, 2019) (finding telephonic access to attorneys insufficient as “a healthy counsel relationship in the immigration context requires confidential in-person visitation, especially where an immigrant must be forthcoming about sensitive matters such as past trauma, mental health issues, and criminal history”).⁷

Moreover, by forcing asylum seekers to remain in Mexico, far from U.S.-based counsel and in dangerous living situations in which their safety and that of their counsel is jeopardized, MPP further impedes the communication required by the ethics rules. *Access Motion, supra*, at 34 (convoy of Mexican military enters migrant camp, forcing humanitarian workers and lawyers to evacuate). Indeed, attorney-client meetings frequently take place on street corners and on bridges at

⁷ *See also In re* the matter of: XXXX In Removal Proceedings, File No. A213-288-426; A213-288-425: Motion for Increased Access to Counsel, Brownsville Tent Court (Nov. 6, 2019) (“Access Motion”) at 31-32 (including counsel declarations detailing inadequacy of Voice Over Internet Protocols due to lack of adequate WiFi signals: dropped calls, insecure connections).

the international border,⁸ places that fail to ensure confidentiality or privacy, let alone safety. MPP, which drives these situations, cannot stand.

C. Client confidentiality is a cornerstone of legal representation.

An established cornerstone of an attorney's duty to a client is the duty of confidentiality. Model Rule 1.6 (lawyer "shall not reveal information relating to the representation of a client" absent informed consent and must make all "reasonable efforts to prevent the inadvertent or unauthorized disclosure" of client confidences). A lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client." Model Rule 1.6(c), Comment 18.

In her November 19, 2019 testimony on behalf of the ABA before the U.S. House of Representatives Subcommittee on Border Security, ABA Pro Bono Counsel Laura Peña testified about the inability to communicate confidentially and safely with her clients. She

⁸ See, e.g., November 19, 2019 testimony by Laura Peña, Pro Bono Counsel, ABA Commission on Immigration, before the U.S. House of Representatives Subcommittee on Border Security (<https://homeland.house.gov/imo/media/doc/Testimony-Pena.pdf>) at 6.

described a tour of the tent court facility in Brownsville, which is reported to have 60 small rooms for lawyers to use. But the rooms are unavailable, other than just before a client’s asylum hearing. Attorneys are not permitted access to the tent courts except to appear at hearings for clients they represent. *See* Testimony of Laura Pena, available at <https://homeland.house.gov/imo/media/doc/Testimony-Pena.pdf>, at 6 (last visited Jan. 11, 2021).

Moreover, “[b]y marooning asylum seekers in Mexico, the MPP makes it significantly more difficult for attorneys to communicate with their clients: face-to-face meetings are expensive and thus either rare or impossible; video conferencing is rare, as is the internet speeds needed to support it; a client may not have regular access to a phone, and if they are able to find one, do not have space where they can have a confidential conversation; and international phone calls are expensive and phone coverage can be spotty.” AILA McAleenan Letter at 3. The situation in Mexican border cities forces those lawyers who can cross the border to meet with their asylum clients “to work in conditions that are not conducive to confidential communications.” ABA Commission on Immigration Report in support of Resolution 117 at 12. Attorneys, too, have “struggled to do the most basic parts of their jobs in foreign cities – for instance, finding places to securely print confidential documents.” Jack Herrera, *Lawyers Struggle to Remotely Represent Asylum Seekers in ‘Remain in Mexico’ Program*, THE WORLD (Mar. 2,

2020), available at <https://www.pri.org/stories/2020-03-02/lawyers-struggle-to-remotely-represent-asylum-seekers-remain-in-mexico-program> (last visited Jan. 11, 2021).

The conditions described here show that MPP deprives both the attorney and client of sufficient time and space for confidential meetings in secure locations, or even in private. This directly frustrates attorneys' ability to satisfy their duty to maintain confidentiality under the Model Rules.

◆

CONCLUSION

For these reasons and for those expressed in the Respondents' merits brief, the decision of the Ninth Circuit should be affirmed.

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Respectfully submitted,
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