No. 20-72071

In The United States Court Of Appeals For The Ninth Circuit

[redacted],
Petitioner-Appellant,

v.

WILLIAM BARR,
Acting Attorney General,
Respondent-Appellee.

On Appeal from the Board of Immigration Appeals,
No. BIA-1 : A203-601-133

BRIEF OF IMMIGRANT RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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INTEREST OF *AMICI CURIAE*

Catholic Legal Immigration Network, Inc. (CLINIC) is the nation's largest network of nonprofit immigration legal services providers, with almost 400 programs in 48 states and the District of Columbia. In 2019, CLINIC established the Estamos Unidos Asylum Project in Ciudad Juarez, Mexico to respond to the crisis in legal counsel created by the Migrant Protection Protocols (MPP). CLINIC has a significant interest in the outcome of this decision because it works with asylum seekers subject to MPP and knows the devastating effect that being forced to remain in Mexico has on those seeking safety in the United States.

HIAS was founded in the 1880s to support Jews fleeing pogroms in Central and Eastern Europe, and is the oldest refugee-serving organization in the United States. After over 100 years of protecting Jewish refugees, HIAS began assisting and advocating for refugees of all backgrounds in the 1980s. Today, HIAS provides services to refugees, asylum seekers and other forcibly displaced populations regardless of their national, ethnic or religious background in 15 countries, including the United States. Although most of the people we serve today are not

Jewish, serving them is an expression of Jewish values such as tikkun olam (repairing the world) and welcoming and protecting the stranger. HIAS' interest in this case stems from our work serving asylum seekers on both sides of the U.S./Mexico border. Through a robust pro bono program, and with the assistance of four offices in Mexico, HIAS provides legal support services to asylum seekers stuck in Mexico due to the MPP and refers cases to HIAS Border Fellows, located within legal service organizations in California and Texas, as well as to HIAS pro bono attorneys across the country.

Human Rights First operates one of the largest programs for pro bono legal representation of refugees in the nation, working in partnership with volunteer lawyers at leading law firms to provide legal representation, without charge, to thousands of indigent asylum applicants. Among the applicants it represents are asylum seekers subject to MPP. Human Rights First also conducts extensive research and issues reports about the current and historical practices of, and legal framework governing, the United States' expedited removal procedures

and non-refoulement obligations,[1] including as they pertain to MPP. This Court will decide issues that directly relate to Human Rights First's mission and its representation, and advocacy on behalf, of asylum seekers subject to MPP who will be affected by the outcome of this case.

Immigrant Defenders Law Center (ImmDef) is a non-profit law firm dedicated to advancing social justice for Southern California's most marginalized immigrant and refugee communities through legal services, community empowerment, and advocacy for adults and children in federal immigration custody. ImmDef represents approximately 1,400 non-citizens annually in their removal proceeding. ImmDef's Cross Border Initiative (CBI) advocates for migrants at the border who are subject to MPP. ImmDef's CBI team focuses on assisting the most vulnerable, including families with minor children, survivors of violence, and individuals with serious physical or mental health disabilities. ImmDef represents individuals before the San Diego Immigration Court who are in MPP proceedings.

[1] Non-refoulement is a human rights principal that guarantees that no one should be returned to a country where they would face torture.

Jewish Family Service of San Diego (JFSSD) was founded and began its work providing humanitarian assistance at the border, when members of the Jewish community were facing existential challenges to their survival in the countries from which they were forced to flee. Today, as a large social service provider in the San Diego border region, JFSSD's humanitarian work includes legal representation and support for immigrants, refugees, and asylum seekers regardless of race, ethnicity, or religious belief. JFSSD provides holistic, culturally competent, trauma-informed, quality legal and other supportive services to the immigrant community-at-large, with a particular focus on those populations along the United States' Southern border. JFSSD represents many asylum seekers who are subject to MPP and has seen first-hand the effects of the due process violations that stem from this program, including (as seen in this case) the harmful impact caused by the Department of Homeland Security's practice of misclassifying or neglecting to classify a migrant's initial entry properly on the Notice to Appear.

Public Counsel, based in Los Angeles, California, is the largest pro bono law firm in the nation. Its Immigrants' Rights Project provides

direct representation to individuals seeking asylum, including those subject to MPP. Immigrants' Rights Project attorneys co-taught a clinic representing asylum seekers at UCLA School of Law for over a decade, and they currently conduct trainings, litigate, and advocate for protections for asylum seekers.

Tahirih Justice Center (Tahirih) is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. In five cities across the country, Tahirih offers legal and social services to women and girls fleeing all forms of gender-based violence, including human trafficking, forced labor, domestic violence, rape and sexual assault, and female genital cutting/mutilation. Since its inception in 1997, Tahirih has provided free legal assistance to more than 25,000 individuals, many of whom have experienced the significant psychological and neurobiological effects caused by the trauma of gender-based violence. Through direct legal and social services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity.

FRAP RULE 29 STATEMENT

Amici curiae have sought from both parties to the appeal their consent to file this amicus brief, which both parties have granted. Accordingly, pursuant to FRAP Rule 29(a) and Circuit Rule 29-3, a motion for leave to file this amicus brief is not required.

No counsel for any party authored this brief in whole or in part.

No party, person or entity other than *amici curiae*, their members, and their undersigned counsel contributed money that was intended to fund the preparing or submitting of the brief.

SUMMARY OF ARGUMENT

In this case, the government seeks to impermissibly expand the reach of its Migrant Protection Protocols (MPP).[2] Even assuming that policy is itself lawful, which *amici curiae* do not concede, the government's application of it here by labeling asylum seekers who have already entered the United States as "arriving aliens" is not.[3] This

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[2] *See Migrant Protection Protocols (MPP)*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 13, 2019), https://www.ice.gov/factsheets/migrant-protection-protocols-mpp. Prior to MPP, asylum seekers who entered the country at the southern border port of entry remained in the United States pending their removal proceedings. *Policies Affecting Asylum Seekers at the Border*, AM. IMMIGR. COUNCIL (Jan. 29, 2020), https://www.americanimmigrationcouncil.org/research/policiesaffecting-asylum-seekers-border. After the Trump administration implemented MPP, however, non-citizens who present at a port of entry are generally not permitted to stay in the United States while their immigration court proceedings are pending. *See id.* Instead, they are now subject to removal to Mexico pursuant to MPP for the pendency of their immigration proceedings.

[3] The *amici curiae* strongly believe MPP is unlawful. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1093 (9th Cir. 2020) ("There is a significant likelihood that the individual plaintiffs will suffer irreparable harm if the MPP is not enjoined. Uncontested evidence in the record establishes that non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum."). Nevertheless, given the Supreme Court's recent stay of the decision, we argue based on the narrower issues presented in this case that the Department of Homeland Security's (DHS) current enforcement of MPP against individuals who enter without inspection is unlawful. *See generally Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020).

practice fundamentally violates 8 U.S.C. § 1225(b)(2)(C) by ignoring and obscuring the longstanding distinction between non-citizens who have already entered the country by land without inspection by immigration officials (historically classified as non-citizens who have "entered without inspection") and those who present themselves at a port of entry (historically classified as "arriving aliens").[4]

DHS ignores this critical distinction and wrongly forces asylum seekers who have already entered the US into MPP. It does so by creating a fiction. Specifically, it files an initial charging document (known as a Notice to Appear) without actually specifying in that Notice whether the individual is being charged as "entering without inspection" or as an "arriving alien." At that time, DHS forces the person to leave the United States and return to Mexico under MPP to await removal proceedings. Thereafter, when the asylum seeker presents at the port of

[4] The term "arriving alien" is defined as "an applicant for admission *coming or attempting to come into the United States at a port-of-entry*, **or** an alien *seeking transit through the United States at a port-of-entry*, **or** an alien *interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry*, and regardless of the means of transport. 8 C.F.R. § 1001.1(q) (emphasis in original); *see also* 8 C.F.R. § 1.2 (adopts a similar definition for "arriving alien").

entry to pursue the asylum process, DHS amends the Notice to Appear to allege, falsely, that the non-citizen is now an "arriving alien." *See Matter of M-D-C-V-*, 28 I. & N. Dec. 18, 19 (BIA 2020). But that result is contrary to the plain language of 8 U.S.C. § 1225(b)(2)(C), the statute the government claims provides legal authority for MPP, which applies on its face only to individuals who are "arriving."

DHS's fictitious application of the "arriving alien" label to those already on U.S. soil fails to acknowledge the statutory distinction between people who have already entered and people who are seeking to enter. Yet, Congress made this distinction explicit in the Immigration and Nationality Act, and the distinction is also reflected in and reinforced by governing regulations and case law. These two categories are not just arbitrary distinctions. To the contrary, they are characterized by different and specific conditions. When asylum seekers who have already entered are wrongly classified as "arriving aliens" and forcibly returned to Mexico under MPP, they suffer consequences. They are stripped of their legal right to obtain a bond hearing before an immigration judge and seek release in the United States, and in Mexico, many face physical

and sexual violence, as well as medical hardship. These conditions have only worsened because of the COVID-19 global pandemic.

Because DHS's actions are contrary to the plain language of Section 1225 of the U.S. Code, as well as governing regulations and case law, and in light of the harm those subject to this unlawful practice experience by being improperly removed to Mexico, *amici curiae* respectfully request that this Court hold that DHS's practice of classifying asylum-seekers, like Petitioner, who have entered the United States without inspection as "arriving aliens" is unlawful, and violates their statutory right to a full and fair immigration hearing.[5]

[5] *See* 8 U.S.C. § 1229a(b)(4) (describing statutory rights of "aliens" in proceedings); *see also Turcios et al. v. Wolf*, No. 1:20-cv-00093, at *5 (S.D. Tex. Oct. 16, 2020) (holding a "plain reading of the statute confirms a (b)(1) applicant [asylum seekers who enter without inspection] should not be 'returned' outside the U.S.").

ARGUMENT

I. DHS's Classification Of Asylum Seekers Who Have Entered The United States Without Inspection As "Arriving Aliens" Violates 8 U.S.C. § 1225.

A. Asylum Seekers Who Enter Without Inspection Are Not "Arriving Aliens" Under 8 U.S.C. § 1225.

Statutory language makes clear that non-citizens already in the United States are differently situated than non-citizens who arrive at a port of entry[6] and surrender themselves to immigration officials.[7] This well-established distinction between those who "enter without inspection" and "arriving aliens" is enshrined in the immigration statute

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[6] A port of entry is "also known as a border station" and "is the facility that provides controlled entry into or departure from the United States for persons or materials." *See Land Ports of Entry Overview*, U.S. GEN. SERV'S. ADMIN., https://www.gsa.gov/real-estate/gsa-properties/land-ports-of-entry-overview. According to the U.S. General Services Administration, ports of entry "house[] the U.S. Customs and Border Protection, and other federal inspection agencies responsible for the enforcement of federal laws pertaining to such activities." *Id.*

[7] 8 U.S.C. § 1225(b)(2)(C), titled "Treatment of aliens arriving from contiguous territory" provides that "aliens" who are arriving in the United States from a foreign contiguous country may be returned to that country pending removal proceedings. Specifically, the language of the statute states: "in the case of an alien . . . who is arriving . . . from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding . . . ." 8 U.S.C. § 1225(b)(2)(C). *Amici* does not believe that this section was intended to apply to asylum seekers, but even assuming *arguendo*, that it was, it clearly was not intended to apply to those on U.S. soil.

at 8 U.S.C. § 1225, its implementing regulations at 8 C.F.R. § 1001.1(q), and governing case law. First, Congress treated the two groups separately in setting the terms for inadmissibility. *See* H.R. Rep. No. 104-828, at 208, 209 (1996) (Conf. Rep.) (observing that Section 1182(a)(6) would apply where non-citizens had already "made an entry without inspection," and Section 1182(a)(7) would apply where the "examining immigration officer determines that an arriving alien" lacks valid documents). *See, e.g.*, *Torres v. Barr*, No. 13-70653, 2020 U.S. App. LEXIS 30502, at *30 (9th Cir. 2020) (reversing removal order under 8 U.S.C. § 1182(a)(7) for a non-citizen already in the country). Longstanding regulations are in accord: in 8 CFR § 1001.1(q), an "arriving alien" is "an applicant for admission coming or attempting to come into the United States *at a port-of-entry* . . ." whereas a non-citizen who has entered without inspection is an individual who has entered the United States without inspection. And governing case law reinforces this distinction. *See e.g.*, *United States v. Martin-Plascencia*, 532 F.2d 1316 (9th Cir. 1976) (ruling that a non-citizen did not meet the definition of "arriving alien" because he made an entry into the United States without inspection when he "did not present himself to the officials at the Port of

Entry"); *Matter of Phelisna*, 18 I. & N. Dec. 272, 274 (BIA 1982) (reiterating the standard definition of entering without inspection as having been physically present in the United States and holding that the non-citizen in question had actually, constructively, or intentionally evaded inspection).

Unsurprisingly, 8 U.S.C. § 1225—the statute the government claims authorizes MPP—likewise relies on this distinction between non-citizens who enter the country without inspection and those who are "arriving." Certain parts of Section 1225 apply to all non-citizens while other parts of the statute only apply to those classified as "arriving aliens." For example, Section 1225(a) applies to both "[a]n alien present in the United States who has not been admitted *or* who arrives in the United States," making it clear that there is a difference between these categories, but that this subsection of the statute applies to both. *See* § 1225(a) (emphasis added). By contrast, Section 1225(b)(2)(C)—the statutory authority upon which MPP purports to rest—is quite clearly limited to only one of those categories: "in the case of an alien . . . *who is arriving* . . . from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a

proceeding . . . ." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Absent from that provision is any reference to non-citizens who have already entered, including those who have entered without inspection.

This omission is critical, as has been recognized in court holdings. In *Vasquez v. Wolf,*[8] the District Court in Massachusetts recently considered this issue and concluded that "the plain language of the contiguous return provision, and, indeed, all of 8 U.S.C. § 1225 is consistent with [the] longstanding distinction between non-citizens who have entered the United States and those who remain at the threshold." *Vasquez*, 2020 U.S. Dist. LEXIS 85059 at *19. Specifically, the court noted:

> [I]dentical words used in different parts of the same act are intended to have the same meaning. Where 'arriving' noncitizens are distinguished from those 'present' for less than two years in § 1225(b)(1), the term 'arriving' cannot be understood to include noncitizens 'present' for less than two years in § 1225(b)(2)(C).

Id. Likewise, the District Court for the Southern District of Texas recently also held that 8 U.S.C. §§ 1225(b)(1) and 1225(b)(2) "describe two

[8] *See Vasquez v. Wolf*, No. 1:20-cv-10566-IT, 2020 U.S. Dist. LEXIS 85059, at *19 (D. Mass. May 14, 2020); *see generally Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020).

distinct categories of applicants and two distinct procedures for removal." *See Turcios et al.*, No. 1:20-cv-00093 (S.D. Tex. Oct. 16, 2020), *stay issued*, No. 1:20-cv-093 (S.D. Tex. Oct. 22, 2020). Citing to *Innovation Law Lab*, 951 F.3d 1073, 1084, the court held that "[b]eing an applicant in removal proceedings *does not change the applicant's underlying category*." *See id.* at *5.

To be clear: this is a distinction *with a difference*. It impacts access to key statutory rights, including the right to counsel and bond hearings, for those subject to the immigration laws. *See, e.g.*, *Matter of X-K-*, 23 I. & N. Dec. 731, 735 (BIA 2005) (explaining how non-citizens classified as "arriving aliens" receive different treatment under U.S. law). Asylum seekers who have entered the United States are entitled to a bond hearing before the immigration court.[9] In contrast, non-citizens who arrive at a port of entry are not entitled to a bond hearing, and they may lack other constitutional protections afforded to those on U.S. soil. *See* 8 U.S.C. § 1225(b)(1)(B)(ii); *see also Matter of M-S-*, 27 I. & N. Dec. 509,

[9] This right to a bond hearing before the immigration court arises out of 8 U.S.C. § 1226(a).

509-10 (BIA 2019).[10] Similarly, while both groups have a right to counsel in removal proceedings under the immigration statute (*see* 8 U.S.C. § 1229a(b)(4)(A); 8 U.S.C. § 1362) individuals charged as "arriving"—particularly those subject to MPP—have meaningfully less ability to realize this right because they cannot be released by an immigration judge into the United States where they would have far greater access to counsel.

Despite this clear legal authority, in Petitioner's case—and the cases of thousands of others—DHS has improperly classified those who have already entered without inspection as "arriving" for the specific purpose of subjecting them to MPP. Petitioner's case demonstrates how this policy has worked: when DHS apprehended Petitioner after she had entered the country without inspection, it sent her back to Mexico purportedly pursuant to MPP. To initiate removal proceedings, DHS

[10] *Compare* 8 U.S.C. § 1226(a) *with* 8 U.S.C. § 1225(b)(1). *See also* 8 C.F.R. § 1001.1(q) "An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked." A person who is charged with being an "arriving alien" cannot raise statutory claims that are available to a person in the country and charged with entering without inspection. *See also* 8 U.S.C. § 1182(a)(6)(A)(ii).

filed a charging document with the immigration court that failed to classify her as either an "arriving alien" or someone who entered without inspection. *See Matter of M-D-C-V-*, 28 I. & N. Dec. at 19.[11] Roughly three months after filing the incomplete Notice to Appear, DHS then filed an I-261 (Additional Charges of Inadmissibility/Deportability) classifying Petitioner as an "arriving alien" even though she had already entered the country without inspection before the charges were drafted. *See id.* This misclassification wrongly subjected Petitioner to MPP and prevented her from, among other things, accessing legal counsel and being considered for bond by an immigration judge at the outset of her removal proceedings—both rights are enshrined in the Immigration and Nationality Act. *See, e.g.*, 8 U.S.C. § 1362 (right to counsel); 8 U.S.C. § 1226(a) (bond hearings).

[11] Notices to Appear *must* contain certain information so that the Notice may officially initiate removal proceedings. *See* 8 U.S.C. § 1229(a)(1) (specifying that a Notice to Appear must contain the following information: "[t]he nature of the proceedings against the alien[,] [t]he legal authority under which the proceedings are conducted[,] [t]he acts or conduct alleged to be in violation of law[,] [and t]he charges against the alien and the statutory provisions alleged to have been violated. Additionally, 8 C.F.R. § 1003.15(B)(1) requires a Notice to Appear to contain "the nature of the proceedings against the alien." *See* 8 C.F.R. § 1003.15(B)(1).

The *amici curiae* have seen this pattern repeated over and over again. DHS takes custody of asylum seekers who have entered the United States without inspection seeking asylum, and improperly forces them into MPP, returning them to Mexico to await removal proceedings. As in Petitioner's case, DHS files the initial charging documents (i.e., Notices to Appear) without specifying whether the asylum seeker is being charged for "entering without inspection" or as an "arriving alien." Thereafter, the government acts as if the asylum seeker's appearance at the port of entry to attend his or her initial court hearing suddenly turns the asylum seeker into an "arriving alien." DHS then amends the Notice to Appear to charge the asylum seeker as an "arriving alien," instead of correctly charging them as having entered without inspection. *See Matter of M-D-C-V-*, 28 I. & N. Dec. 18, 19 (BIA 2020); *see also*, *Matter of Herrera-Vasquez*, 27 I. & N. Dec. 825, 829 (BIA 2020).

As explained *supra*, DHS's omissions and misclassifications are not a minor paperwork issue. To the contrary, DHS's unlawful practices directly contravene the requirements of U.S. immigration laws as applied to those who enter without inspection, wrongly subject ineligible people to MPP without any authorization to do so, and deprive them of critical

rights afforded by the immigration statute that directly impact their liberty (i.e., access to a bond hearing) and the fairness of their removal proceedings (i.e., access to counsel). This Court should hold that DHS's actions with respect to Petitioner, and those similarly situated, are contrary to the statute and unlawful.

II. DHS's Practice Of Sweeping Exempt Asylum Seekers Into MPP Is Harmful.

Asylum seekers who enter the United States without inspection suffer significant harms when DHS intentionally and wrongly classifies them as "arriving aliens" for the sole purpose of forcing them into MPP. First, as discussed above, these individuals are denied their statutory right to a bond hearing before the immigration court.[12] Without a bond hearing, asylum seekers stand little chance of being permitted to remain in the United States pending the completion of their removal proceedings.[13] Second, once a person is removed to Mexico under MPP,

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[12] Those who are subject to MPP are considered detained according to 8 C.F.R. § 235.3(d) (a person required to "remain" in Mexico or Canada pending a removal hearing "*shall be considered detained* for a proceeding within the meaning of section 235(b) of the [Immigration and Nationality] Act and may be removed *in absentia* by an immigration judge if [he or she] fails to appear for the hearing.") (emphasis added).

[13] Currently, there are only two ways out of MPP: passing a *Non-Refoulement* Interview (NRI) or receiving a grant of humanitarian parole.

they are much less likely to be able to contact a lawyer or receive legal assistance in their immigration proceedings. Finally, individuals are often subject to unimaginable violence, disease, and other harm while in Mexico.[14]

Both parole and NRI determinations are subject to DHS's sole discretion, without judicial review. *See Doe v. Wolf*, Case No.: 19-cv-2119-DMS (AGS) (S.D. Cal. Jan. 14, 2020). As shown by the experiences of *amici curiae*, a parole grant or positive NRI determination was extremely difficult to secure prior to the coronavirus pandemic, and has effectively stopped since the border closed as a result of the pandemic. The *Non-Refoulement* Interview process (which was intended to be the safeguard to protect people from return to Mexico and get them out of MPP) has effectively stopped since COVID-19. *See DHS OIG Formal Complaint Regarding 'Remain in Mexico'*, HUMAN RIGHTS WATCH (June 2, 2020), https://www.hrw.org/news/2020/06/02/dhs-oig-formal-complaint-regarding-remain-mexico#. Furthermore, while DHS has consistently taken the position—and most Immigration Judges have held—that those wrongly charged as "arriving aliens" are ineligible for bond, at least one *amicus* organization, after considerable effort, was able to secure several bond grants for those who initially entered without inspection prior to the BIA's decisions in *Matter of Herrera-Vasquez*, 27 I. & N. Dec. 825 (BIA 2020) and the present case. After those cases, no Immigration Judges in any Immigration Court have awarded jurisdiction to entertain a bond motion.

[14] *See Marking One Year of the Horrific "Remain in Mexico" Policy – Over 800 Violent Attacks on Asylum-Seekers*, HUMAN RIGHTS FIRST (Jan. 22, 2020), https://www.humanrightsfirst.org/press-release/marking-one-year-horrific-remain-mexico-policy-over-800-violent-attacks-asylum-seekers.

Asylum seekers who are wrongly classified as "arriving" for the purpose of subjecting them to MPP, therefore, suffer serious prejudice because they are stripped of not only their statutory right to a bond hearing, but also the availability of legal counsel and the relative physical safety available to those who are entitled to remain in the United States while their immigration rights are adjudicated.

A. Asylum Seekers Placed In MPP Are Highly Unlikely To Have Access To Legal Representation.

Only about 7% of persons in MPP are represented by counsel.[15] *See* Brief of respondents Innovation Law Lab, *et al*. In Opposition at 10, *Wolf v. Innovation Law Lab* (No. 19-1212) (July 15, 2020). This is in stark contrast to the 63% of non-citizens who are represented by counsel who are in the United States pending their proceedings who are represented by counsel.[16] Even if asylum seekers outside of the United States are represented by counsel, MPP imposes extraordinary obstacles to representation, with counsel and client in different countries,

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[15] *See Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/mpp.

[16] *See* U.S. DEP'T. OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS (Apr. 15, 2020); *see also* Brief of respondents Innovation Law Lab, *et al*. In Opposition at 10-11, *Wolf, et al.* (No. 19-1212).

contributing to low grant rates: "Only about 545 of over 65,000 cases have been granted relief . . . representing a 0.8% grant rate, compared to a 12%-19% grant rate for asylum seekers who pursue their cases inside the country."[17] Furthermore, representation dramatically impacts likelihood of success on bond, where "44 percent of represented respondents were released, compared to only 11 percent of unrepresented respondents."[18] Thus, wrongly classifying non-citizens who have entered without inspection denies them their rights to a bond hearing and

[17] Brief of respondents Innovation Law Lab, *et al.* In Opposition at 10-11, *Wolf, et al.* (No. 19-1212). Asylum seekers subject to MPP have increased difficulty accessing legal representation for a multitude of reasons. Among these challenges are communication issues in representing a client in a different country, lack of technology to facilitate communication (no internet access, limited phone access), limited access to confidential spaces for client/attorney communication (many clients live in shared spaces, shelters, or camps, and have no ability to "go to their attorney's office"), attorneys' difficulty in traveling to their clients due to safety concerns, and limited ability to get signatures from clients who do not have physical mailing addresses. *See US: COVID-19 Policies Risk Asylum Seekers' Lives*, HUMAN RIGHTS WATCH (Apr. 2, 2020), https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives#.

[18] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

potential release into the United States to seek asylum or other relief while in removal proceedings.[19]

B. Asylum Seekers Placed In MPP Face An Increased Risk Of Violence.

MPP authorizes DHS to send non-citizens and asylum seekers to parts of Mexico—such as Tamaulipas, a state in northeastern Mexico—that are designated as some of the most dangerous places in the world.[20] In fact, the U.S. Department of State assigns the same threat levels to many of the locations to which asylum seekers are removed as it does to Syria and Iraq, which are classified as active combat zones.[21] According

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[19] *See infra* note 22.

[20] *See Mexico Travel Advisory*, U.S. DEP'T OF STATE (Sept. 8, 2020), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html. In June of this year, the U.S. District Court for the District of Columbia granted in part the motion for preliminary injunction of the plaintiffs—twenty six asylum seekers—because the court recognized the dangers the plaintiffs faced if they were removed to Tamaulipas, Mexico to await their removal proceedings. *See generally* Nora v. Wolf, No. 20-0993 (ABJ), 2020 U.S. Dist. LEXIS 111906 (D.D.C. June 24, 2020). In *Turcios, et al.*, No. 1:20-cv-00093 (S.D. Tex. Oct. 16, 2020), the court held that Plaintiffs would be harmed if they were not granted an injunction to prevent plaintiffs from being sent to Tamaulipas, Mexico. *See* No. 1:20-cv-00093, at *6. The court further explained that while in Tamaulipas, plaintiffs would have to fear "gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault." *See id.*

[21] *See Mexico Travel Advisory*, *supra* note 20.

to Human Rights Watch, non-citizens sent to Mexico under MPP face months to years in "dangerous, destitute, health and life-threatening conditions."[22] These experiences are so common that since January 29, 2020, Human Rights Watch documented at least 816 cases of kidnapping, rape, torture, assault, and other attacks on asylum seekers in MPP. *See id.* Even more troubling, as of May 13, 2020, that number jumped to at least 1,114 "publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and non-citizens forced to return to Mexico[.]"[23]

C. Asylum Seekers Placed In MPP Have Little To No Access To Public Health Resources.

In addition to the ever-present threat of violence, the COVID-19 pandemic has made the conditions even more dire for asylum seekers sent to Mexico under MPP. The novel coronavirus is currently ravaging

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[22] *See Q&A: Trump Administration's "Remain in Mexico" Program*, HUMAN RIGHTS WATCH (Jan. 29, 2020), https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program.

[23] *See Delivered to Danger*, #SAVEASYLUM (May 13, 2020), https://deliveredtodanger.org; *see also* HUMAN RIGHTS FIRST, PUBLICALLY REPORTED CASES OF VIOLENT ATTACKS ON INDIVIDUALS RETURNED TO MEXICO UNDER THE "MIGRANT PROTECTION PROTOCOLS", AS COMPILED BY HUMAN RIGHT FIRST, https://www.humanrightsfirst.org/sites/default/files/PubliclyReportedMPPAttacks5.13.2020.pdf (further documenting the violence against non-citizens subject to MPP).

Mexico, with the country facing huge spikes in infections and deaths.[24] Furthermore, these people, many of whom live in underfunded shelters or makeshift camps, have little to no access to health care. Asylum seekers face a multitude of challenges when they are forced to remain in Mexico. These challenges include difficulty attending their hearings, health concerns, and threats and acts of physical violence. DHS's practice of incorrectly classifying asylum seekers who have already entered the United States without inspection as "arriving aliens" makes it all but certain that these individuals will be forced to remain in Mexico for months, if not years—without recourse to counsel or the opportunity for bond, as the law requires—and face a substantial risk of severe bodily harm as a result.

D. Asylum Seekers Placed In MPP Face A Myriad Of Other Harms.

The *amici curiae* have been in communication with asylum seekers subject to MPP who have faced extraordinary difficulties. One critical

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[24] *See* Jude Webber, *Mexico Reports 'Catastrophic' 60,000 Covid-19 Deaths*, FIN. TIMES (Aug. 22, 2020), https://www.ft.com/content/fc83004a-769f-49b3-9f7c-9d5fd840d31f. In *Turcios, et al.*, the court agreed that while in Mexico, plaintiffs had to live in "unsanitary conditions hazardous to their health." *See* No. 1:20-cv-00093, *6 (S.D. Tex. Oct. 16, 2020).

issue is just trying to get to the points of entry to attend their hearings. Many MPP asylum seekers cannot access the port of entry because they cannot pay a toll that the port requires, or because security guards in Mexico keep them from even approaching the United States port of entry. Many cannot understand the information on the Notice to Appear and "Migrant Protocols Initial Processing Information" forms, informally known as "tear sheets," and they then miss a court date. Others are unable to find public transportation from remote rural shelters to get to the United States border hours before their scheduled hearing. Those reporting for MPP hearings must often arrive at the border before dawn. And many individuals have been victims of kidnapping, assault or extortion, which often affects their ability to be present at the port of entry at the assigned time.

In addition to these common problems affecting most people in MPP, the *amici curiae* have provided the following particular descriptions of experiences from asylum seekers who, like Petitioner, had already entered the U.S. without inspection but were then improperly charged as "arriving" and subject to MPP:

Difficulty Attending Hearings

- Y.G.M.C. is a 21-year-old from Guatemala who fled persecution in her home country with her mother, minor sister, and then 2-year-old daughter. Y.G.M.C. and her family entered the United States seeking asylum on or about May 12, 2019 at or near San Ysidro, California. Border Patrol officers detained the family within the United States, subjected them to MPP, and made them wait in Tijuana for their court hearings. Y.G.M.C attended two court hearings with her family and without counsel. At one of those hearings, DHS filed a Form I-261 classifying Y.G.M.C as an "arriving alien" despite the fact that she entered the United States without inspection. During the third hearing, however, Y.G.M.C., who was the sole financial provider for her entire family, was unable to attend her court hearing because her employer would not allow her to take the day off. Y.G.M.C. sent her daughter, mother, and sister to the court hearing and they came back with another hearing date. Y.G.M.C. prepared to attend the next court hearing with the rest of her family but immigration officers at the port of entry did not allow her to attend her hearing with her daughter,

mother, and sister because the immigration judge had issued an in absentia removal order for her at the family's previous hearing. Immigration officers subsequently sent her back to Mexico. Y.G.M.C. was and continues to be prejudiced by the misclassification on her Notice to Appear because she has not been able to have a bond hearing. Due to the misclassification, a written motion for a bond hearing was filed, but the immigration judge has not ruled on such motion. Y.G.M.C. has been separated from her now 3-year-old daughter for more than 10 months.

Violence Against Non-Citizens In MPP

- In December 2019, a family—mother (M.C.), father (J.C.), and two-year-old child (V.C.)—fleeing multiple attempts on their lives in Honduras, entered the United States without inspection and requested asylum. As in the Petitioner's case, DHS amended the family's charging documents on the date of their first court hearing to label them as "arriving aliens" in order to prevent their access to bond and other protections. The family was subsequently entered into MPP and was sent to Mexico to await their court proceedings. In September 2020, still awaiting their final day in court, a man

assaulted and attempted to rape M.C. in front of her two-year-old child. The man subsequently threatened the entire family with a gun. The Mexican police have failed to protect them. The family was forced to flee their temporary home in Mexico and continues to live in fear. This ongoing violence has exacerbated their pre-existing trauma caused by the events underlying their asylum claim. Despite having close relatives in the United States willing to take them into their home, the family remains in peril in Mexico due to DHS's misclassification and refusal to permit them to enter the United States to lawfully pursue their strong claims of relief.

- D.T.M. and her husband were placed in MPP in July 2019 after crossing into the United States without inspection. While in Mexico, on three separate occasions, D.T.M. has been attacked by unknown assailants and both D.T.M. and her husband have been threatened with kidnapping, assault, and murder. On one occasion, two Mexican police officers asked D.T.M. about her immigration status and proceeded to shove her to the ground and steal her purse. Another time, when she was two months pregnant, an unknown man chased D.T.M., threw her to the ground, beat her, and dragged

her to an abandoned house nearby. D.T.M. responded by scratching and kicking her assailant, but the man kicked her twice in the stomach. D.T.M. was able to escape to a nearby house and seek assistance, but ultimately suffered a miscarriage resulting from blunt trauma to her abdomen.

Health Concerns Of Non-Citizens In MPP

- J.M.C.X., along with his wife and two children, entered the United States without inspection in August 2019, and when approached by a border patrol agent, expressed their fear of returning to Guatemala. J.M.C.X.'s six-year-old daughter, E.C.X., was taken to El Paso Children's Hospital emergency room where she was diagnosed with cystitis. E.C.X. has a history of urinary tract infections and according to the doctor, was in need of immediate medical attention by a pediatric urologist for further diagnostic work-up and possible surgical intervention. Despite E.C.X.'s serious medical condition, DHS charged the family as "arriving aliens," subjected the family to MPP, and returned them to Mexico. In November 2019, E.C.X. was diagnosed with vesicoureteral reflux, a condition where urine flows backwards into the bladder

> and into the kidneys causing infections and kidney damage. J.M.C.X. and his family have been unable to procure the appropriate care for E.C.X. or maintain healthy living conditions in Mexico.

These testimonials provide just a few examples of the daily suffering endured by those subject to MPP.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner's Brief, the *amici curiae* respectfully request that the Court order DHS to cease its practice of misclassifying asylum seekers who enter without inspection as "arriving aliens" to ensure that they are not improperly subject to MPP, and are afforded the rights to which they are statutorily entitled.

Dated: October 26, 2020

Respectfully submitted,

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I hereby certify that:

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Respectfully submitted,

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October 26, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all registered attorneys of record.

Respectfully submitted,

/s/ Adam B. Korn
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