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The Migrant Protection Protocols: A Death Knell for Asylum

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The federal government has slowly chipped away at U.S. asylum protections over the past several decades. Moves to expand the detention and criminalization of asylum seekers in an effort to deter asylum seekers' entry into the United States have been denounced as violations of U.S. obligations under domestic and international law.¹ Yet, in 2018, the Trump administration announced the Migrant Protection Protocols (MPP), an unprecedented policy that sends asylum seekers back to Mexico to await their U.S. immigration court hearings. The MPP presents unique challenges to the due process and nonrefoulement tenets of our asylum system and has raised urgent concerns about the devolving role of the United States as a place of refuge for those in danger. As a result of the MPP, border immigration courts are even more overloaded than before, leading to abbreviated hearings and less process. Moreover, because the MPP forces asylum seekers to wait in Mexico for their court hearing, it is almost impossible for them to find an immigration attorney, let alone meaningfully collaborate with their advocate in developing the case. Since the onset of the COVID-19 pandemic in March 2020, the asylum seekers subject to the MPP face even more severe health and safety risks as they wait in dangerous camps along the border without plumbing or sanitation. The implementation of this policy has ensured that many immigrants pursuing asylum claims will not receive the process they are due under the law and must instead risk persecution. Overall, the MPP is another alarming step the U.S. government has taken

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1. See, e.g., *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018) (“The rule barring asylum for immigrants who enter the country outside a port of entry irreconcilably conflicts with the INA and the expressed intent of Congress.”).

towards the dehumanization and brutalization of those who have fled to the United States seeking protection.

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INTRODUCTION

On a typical Saturday morning in Tijuana, Mexico, Al Otro Lado’s² client consultation room is dotted with a dozen plastic tables. A long line of families—mostly from Central America—seeking asylum in the United States but currently subject to the Migrant Protection Protocols (MPP)³ wait outside to check in for their appointments at Al Otro Lado’s pro se legal clinic. During the appointment, asylum seekers spend hours working with volunteer attorneys and law students to complete an application for asylum. Prior to the MPP, many immigrant families already lacked access to counsel due to the dearth of free or low-cost immigration attorneys in the United States.⁴ Under the MPP, families who have requested asylum from inside the United States or at a port of entry are sent back

2. Al Otro Lado is a social justice legal services organization serving indigent deportees, migrants, and refugees in Tijuana, Mexico, and throughout Southern California. *Our Story*, AL OTRO LADO, <https://alotrolado.org/who-we-are/> [<https://web.archive.org/web/20201030041600/https://alotrolado.org/who-we-are/>] (last visited Nov. 11, 2020).

3. The Migrant Protection Protocols is the name the Trump administration gave to its policy. *See* Press Release, U.S. Dep’t of Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018) [hereinafter Nielsen Press Release], <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/ZB44-VWL9>]. But commentators and advocates have rebuked this euphemistic name in light of the copious documentation of the harm those subject to the MPP face. *See, e.g.*, HUM. RTS. FIRST, A SORDID SCHEME: THE TRUMP ADMINISTRATION’S ILLEGAL RETURN OF ASYLUM SEEKERS TO MEXICO 1 (2019) (“On January 29, 2019, the Trump Administration began implementing its perversely dubbed ‘Migration Protection Protocols.’ In reality, this policy is about denying—not providing—protection to refugees, and is not a ‘protocol,’ but an attempt to circumvent the Protocol Relating to the Status of Refugees and the laws passed by Congress.”). I use the official title in this Note not as an endorsement of the name’s implicit suggestion but because it is the clearest way to identify the policy.

4. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 5, 75 (2015) (noting that during the time period investigated in this study, sixty-three percent of all immigrants appeared in court without an attorney).

to Mexico while their asylum claim is pending.⁵ They are only allowed back into the United States for the duration of their hearing and are then returned to Mexico if the hearing does not result in a final decision or is postponed.⁶ It is almost impossible for those who are stuck in Mexico subject to the MPP to access critical legal services from American immigration attorneys.⁷ Most attendees at the pro se clinic will not receive subsequent legal representation and will likely remain stranded in Mexico for months until the day they must return to the designated port of entry—as early as 3:00 a.m.—to be transported to a border immigration court and submit their asylum application at a scheduled hearing.⁸

Families from Central America subject to the MPP rarely have contacts or support networks in Mexico, and the Mexican government does not have a systematic way of providing for the basic needs of immigrants awaiting their day in U.S. immigration court.⁹ Since the MPP was announced in December 2018,¹⁰ those subject to it have become targets of robbery, extortion, rape, and assault in the

5. Press Release, U.S. Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019) [hereinafter Migrant Protection Protocols Press Release], <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/NE5A-APEZ>].

6. *Id.*

7. *Access to Attorneys Difficult for Those Required to Remain in Mexico*, TRAC IMMIGR. (July 29, 2019), <https://trac.syr.edu/immigration/reports/568/> [<https://perma.cc/63KB-PJFW>] (finding that only 1.3% of pending MPP cases were represented as of June 2019).

8. Michael Garcia Bochenek, *U.S.: 'Remain in Mexico' Program Harming Children*, HUM. RTS. WATCH (Feb. 12, 2020, 8:00 AM), <https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children#> [<https://perma.cc/S5UY-9QDC>] (“To get to court hearings in the United States, families must report to a designated border crossing point, which sometimes requires them to arrive as early as 3 a.m. in unsafe locations. Those sent to Mexicali or Piedras Negras must make journeys of 160 to 550 kilometers (100 to 340 miles) to reach their designated border crossing point.”).

9. Telephone Interview with Tania García Barajas, Legal Clinic Coordinator, Espacio Migrante (Dec. 12, 2019). This Note focuses on the MPP’s impact on asylum applicants and the U.S. immigration court system. Therefore, the history of bilateral relations between the U.S. and Mexican governments, the bilateral negotiations that produced the MPP, and the detailed terms of the MPP agreement between the United States and Mexico are outside the scope of this Note. However, both parties’ briefs on the motion requesting a stay of the Ninth Circuit’s decision affirming the preliminary injunction alluded to some of the diplomatic controversy inherent in this policy. In rendering its decision, the court considered declarations from Trump administration diplomats stating, “[The] MPP was a carefully negotiated solution with the [g]overnment of Mexico. . . . The suspension of [the] MPP undermines almost two years’ worth of diplomatic engagement with the [g]overnment of Mexico through which a coordinated and cohesive immigration control program has been developed.” *Innovation L. Lab v. Wolf*, 951 F.3d 986, 990 (9th Cir. 2020) (granting in part and denying in part a motion for stay of preliminary injunction pending decision on writ of certiorari). In contrast, the court also cited to a declaration from the former Mexican ambassador to the United States, which was submitted with the plaintiffs’ brief, stating, “The government of Mexico has consistently stated that MPP is a policy unilaterally imposed by the U.S. government. To the extent Mexico agreed to the policy, it was upon threat of heavy and unprecedented tariffs. . . . I reject the notion that this Court’s determination that MPP is likely unlawful will harm our two nations’ relationship. Rather, it is MPP itself—and the way the current administration is conducting policy towards Mexico—that is particularly detrimental to the bilateral relationship between the United States and Mexico.” *Id.* at 990–91.

10. Nielsen Press Release, *supra* note 3.

Mexican border towns where they must now wait for their immigration claims to be heard.¹¹

Under the terms of the MPP, the U.S. government returns families seeking asylum at the southern border to Mexico on a discretionary basis for the duration of their removal proceedings.¹² The applicants return to the port of entry on the day of their hearing and United States Customs and Border Protection (CBP) transports them directly to the nearest immigration court. The MPP inherently contradicts the purpose of the asylum system, which is intended as a complement to the refugee admissions process.¹³ Persons seeking to enter as refugees must apply for refugee status outside of the United States and wait to receive a decision before they may enter.¹⁴ In contrast, the asylum process is designed to address the reality that many dangers create exigencies such that affected individuals cannot wait outside the United States for relief.¹⁵ Prior to the MPP, individuals who applied for asylum, either within a U.S. territory or at a port of entry, remained in the United States for the duration of their asylum proceeding and adjudication.¹⁶ The MPP upends the intent of the asylum system by turning asylum into a process that looks more like refugee admissions. As a result, asylum seekers must now await the outcome of a lengthy immigration proceeding while outside the United States—often without regard to the dangers that caused them to flee to the United States or any new dangers they encountered en route.

While Al Otro Lado's weekly pro se clinic has become invaluable because of the near impossibility of finding attorneys who can assist individuals with a pending U.S. immigration case while stuck in Mexico, its services remain a poor substitute for full legal representation. Most clinic appointments are onetime meetings, and because of low volunteer attorney capacity and difficulties in tracking clients as they move through the U.S. immigration system, Al Otro Lado can only rarely conduct meaningful follow-up. As the government has expanded the MPP, asylum seekers are now also sent to Mexican border cities far less resourced and even more dangerous than Tijuana, like Nuevo Laredo or Matamoros, where the Department of State has issued a Level 4 (Do Not Travel) advisory.¹⁷

11. TOM K. WONG & VANESSA CECEÑA, U.S. IMMIGR. POL'Y CTR., *SEEKING ASYLUM: PART 2*, at 5 (2019), <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf> [<https://perma.cc/2Q96-7AYW>].

12. Nielsen Press Release, *supra* note 3.

13. *See infra* notes 26–34 and accompanying text.

14. *Refugees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> [<https://perma.cc/XLK6-PUZE>] (May 7, 2020).

15. *See* 8 U.S.C. § 1521 note (1980) (Congressional Declaration of Policies and Objectives).

16. *See* AM. IMMIGR. COUNCIL, *ASYLUM IN THE UNITED STATES* 6 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf [<https://perma.cc/CM9H-MQJH>] (“U.S. law provides arriving asylum seekers the right to remain in the United States while their claim for protection is pending . . .”).

17. A Level 4 travel advisory indicates the Department of State strongly recommends citizens do not travel to specific countries/regions. *Mexico Travel Advisory*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>

Besides the concerns surrounding safe return to the port of entry and securing legal representation, the humanitarian impact of this policy has been staggering. Families who must wait, unexpectedly, in Mexico for several months lack stable housing, employment, education, or the support network of friends and family members many had been counting on in the United States.¹⁸ The impact of the COVID-19 pandemic and the resulting economic and political crisis in the United States has further exacerbated the dangers of the MPP.¹⁹ Confined to border camps that are unsafe and unsanitary, asylum seekers have extremely restricted access to the health and safety infrastructure that they need.²⁰ As of December 2020, the U.S. government had returned over 70,467 immigrants to Mexico subject to the MPP.²¹

Administration officials argue that this policy is a necessary measure to address an immigration emergency.²² But with the MPP and a slew of other policies promulgated over the past several decades, the government has actually manufactured a border crisis of unprecedented proportions.²³ The MPP has also significantly deteriorated the legal system designed to assess who should be granted asylum protections according to U.S. immigration law.

[<https://perma.cc/4F5B-SEQU>] (Sept. 8, 2020); *see also* Letter from Blaine Bookey, Ctr. for Gender & Refugee Stud., U.C. Hastings Coll. of the L., Judy Rabinovitz, Immigrants' Rts. Project, Am. Civ. Liberties Union, to Chad F. Wolf, Acting Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., Mark A. Morgan, Acting Comm'r, U.S. Customs & Border Prot., Matthew T. Albence, Acting Dir., U.S. Immigr. & Customs Enf't, Mario Martínez, Chief Patrol Agent, Laredo Sector, U.S. Customs & Border Prot., and Manuel Padilla, Jr., Chief Patrol Agent, Rio Grande Valley Sector, U.S. Customs & Border Prot. 3 (Dec. 9, 2019), https://www.aclu.org/sites/default/files/field_document/letter_to_dhs_all_exhibits.pdf [<https://perma.cc/JUG6-3B6P>] (“[State Department] advisories . . . prohibit U.S. government employees from traveling between cities in Tamaulipas using interior Mexican highways and requiring them to observe a curfew between midnight and 6:00 a.m. in the cities of Matamoros and Nuevo Laredo. Notwithstanding these dangers, asylum seekers with immigration proceedings in Brownsville and Laredo are expected to be present at those ports of entry well before 6:00 a.m. in order to arrive at their court hearings on time.”).

18. Telephone Interview with Tania García Barajas, *supra* note 9.

19. *See US: COVID-19 Policies Risk Asylum Seekers' Lives*, HUM. RTS. WATCH (Apr. 2, 2020, 8:00 AM), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives> [<https://perma.cc/Y3BE-K84V>] (noting that many asylum seekers subject to the MPP lack basic necessities like clean, running water, which are necessary to follow health recommendations during the COVID-19 pandemic).

20. *Id.*

21. *Details on MPP (Remain in Mexico) Deportation Proceedings*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/mpp/> [<https://perma.cc/9HWN-7YEG>] (last visited Jan. 18, 2021).

22. *See* Nielsen Press Release, *supra* note 3 (announcing the MPP as “historic measures to bring the illegal immigration crisis under control”).

23. Many others have written about the construction of migration crises. *See, e.g.*, Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609 (2017) (discussing construction of a migration crisis through the lens of international migration law). However, I distinguish the example of the MPP because the sole reason that there are such sprawling border encampments on the U.S.-Mexico border today is that the United States has not allowed asylum seekers entry across its borders under the terms of the MPP.

In this Note, I argue that the consequences of the MPP on immigrants seeking asylum, including lacking access to counsel and remaining in danger while in Mexico, combine to create a wholesale failure of the immigration legal system, rendering the asylum adjudicative process virtually meaningless. Part I provides context for the MPP by tracing the lineage of the U.S. asylum system and the evolution of asylum policy that led to this point. Part II describes the MPP itself and the most severe consequences of the policy. Finally, Part III evaluates pushback against the MPP, discussing how legislators, humanitarians, community organizations, and legal advocates are challenging the implementation of this dangerous policy. So far, journalists, activists, and litigators have been the primary investigators exposing the dire repercussions of the MPP.²⁴ Therefore, this Note is among the first pieces of legal scholarship to explore the policy at length.²⁵

I. THE MPP CONTINUES A POLITICAL TRAJECTORY LIMITING ACCESS TO ASYLUM

The MPP was not created in a vacuum. Rather, decades of increasing restrictions on asylum have contributed to a political environment in which this policy could be tenable. I argue that a series of policy shifts throughout the last several decades have eroded asylum protections and laid the groundwork for the MPP.

A. Refugee and Asylum Framework

Under United States law, there are two primary processes through which foreign nationals can receive fear-based protection: refugee admissions and asylum.²⁶ Refugees apply for refugee status outside the United States and enter the country only after they are granted status as refugees, while asylees apply for and are granted asylum after entering the United States, regardless of the manner of entry.²⁷

24. See, e.g., Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico> [https://web.archive.org/web/20210118213848/https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico]; Wong, *supra* note 11; Complaint, Innovation L. Lab v. Nielsen, 366 F. Supp. 3d 1110 (N.D. Cal. 2019) (No. 3:19-cv-00807-RS).

25. Scholars have written short updates on the policy and its harmful impact as part of longer articles describing Trump's immigration policies; but, they have not explored the MPP in its long-term context or delved deeply into its impact on affected communities. See, e.g., Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 764–69 (2020); Sabrineh Ardalan, *Refugee Protection at Risk: Remain in Mexico and Other Efforts to Undermine the U.S. Asylum System*, HARV. L. REV. BLOG (May 26, 2019), <https://blog.harvardlawreview.org/refugee-protection-at-risk-remain-in-mexico-and-other-efforts-to-undermine-the-u-s-asylum-system/> [https://perma.cc/G8WS-72ET]; Favio Ramirez Caminatti, *Examining the Legality of the Migrant Protection Protocols (MPP)*, MITCHELL HAMLIN L. REV.: AMICUS CURIAE BLOG (Mar. 18, 2020), <https://mitchellhamline.edu/law-review/2020/03/18/legality-migrant-protection-protocols-mpp-asylum-seekers/> [https://perma.cc/R8DS-AL3H].

26. 8 U.S.C. § 1521 note (1980) (Congressional Declaration of Policies and Objectives).

27. Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102, 102–05.

With the design of these systems, the government has recognized that some crises create exigent dangers under which people cannot wait to proceed through the refugee process but must immediately seek protection within U.S. borders.²⁸ Therefore, unlike refugee admissions, there are no ceilings on grants of asylum.²⁹

United States refugee and asylum laws are derived in part from international treaty obligations.³⁰ The legal standard to qualify as either a refugee or asylee requires a showing of a well-founded fear of persecution.³¹ This standard originates from the 1951 United Nations Convention Relating to the Status of Refugees and echoes nonrefoulement, a customary principle of international law, providing “[n]o Contracting State shall 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 social group or political opinion.”³²

Every year, the President, in consultation with Congress, authorizes resettlement of a specified number of refugees, including the designated nationalities and processing priorities for each nationality.³³ However, the number of actual admissions rarely reaches these admission ceilings.³⁴ In each of the last several years, the Trump administration set the United States Annual Refugee Resettlement Ceilings at historic lows.³⁵ The cap for 2019 was 30,000 refugees, the

28. 8 U.S.C. § 1521 note (1980) (Congressional Declaration of Policies and Objectives) (“The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.”).

29. Refugee Act § 208(a).

30. *See generally* Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954), *as modified by* Article I of the 1967 Protocol; Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter 1967 Protocol Relating to the Status of Refugees].

31. 8 U.S.C. § 1101(a)(42) (“The term ‘refugee’ means . . . any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”).

32. Convention Relating to the Status of Refugees, *supra* note 30. While the United States never ratified the 1951 Convention, it did become party to the 1967 Protocol, thereby agreeing to the definition and refugee protections set forth in the 1951 treaty. 1967 Protocol Relating to the Status of Refugees, *supra* note 30.

33. 8 U.S.C. § 1157.

34. *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, MIGRATION POLY INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united#:~:text=Actual%20admissions%20for%20those%20years,annual%20ceiling%2C%20both%20at%2030%2C000> [https://perma.cc/D23K-VFQN] (last visited Jan. 18, 2021).

35. *Id.*

lowest ceiling since 1980,³⁶ while the 2020 ceiling was a mere 18,000 refugees,³⁷ of which only 11,814 were actually admitted.³⁸ The ceiling for 2021 is 15,000 refugees.³⁹ As opportunities to escape danger through the refugee system dwindle, more people are pushed into the asylum system through which they must apply for protection at a port of entry or inside U.S. borders.

The 1980 Refugee Act codified our asylum system by tasking the Attorney General with establishing a procedure allowing any person to apply for asylum who is “physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status.”⁴⁰ The right to seek asylum in the United States is available to anyone, even if they lack prior permission to enter the country and regardless of their manner of entry.⁴¹ The 1980 Refugee Act amended U.S. law, mandating immigration authorities withhold or forego deportation for noncitizens who would face persecution if they returned to a foreign country.⁴² The Act is based on the underlying principle that people seeking safety from harm require protection, and the policies affecting them should take care to avoid the dangers they have faced and may continue to face.⁴³

Prior to the MPP, there were three paths through which adults or families⁴⁴ could submit an application for asylum. Asylum could be sought (1) affirmatively through United States Customs and Immigration Services (USCIS) if a person is not currently in removal proceedings, (2) defensively if the person has already been

36. Priscilla Alvarez, *U.S. Sets a Refugee Cap of 18,000 for Next Year - a New Historic Low*, CNN (Sept. 26, 2019, 7:06 PM), <https://www.cnn.com/2019/09/26/politics/refugee-cap-historic-low/index.html> [<https://web.archive.org/web/20210118215200/https://www.cnn.com/2019/09/26/politics/refugee-cap-historic-low/index.html>].

37. *Refugee Admissions*, U.S. DEP’T ST., <https://www.state.gov/refugee-admissions/> [<https://web.archive.org/web/20200808205414/https://www.state.gov/refugee-admissions/>] (last visited Aug. 8, 2020).

38. *Admissions & Arrivals*, REFUGEE PROCESSING CTR., <https://www.wrapsnet.org/admissions-and-arrivals/> [<https://perma.cc/V4F5-JTZE>] (last visited Jan. 18, 2021).

39. Press Release, Off. of the Spokesperson, U.S. Dep’t of State, Transmission of the President’s Report to Congress on the Proposed Refugee Admissions for FY 2021 (Sept. 30, 2020), <https://www.state.gov/transmission-of-the-presidents-report-to-congress-on-the-proposed-refugee-admissions-for-fiscal-year-2021/> [<https://perma.cc/3TA5-ZMSW>]. The Biden administration has promised to reverse the Trump administration’s refugee policy and raise the admissions ceiling to 125,000, but officials are likely to initially face resource and logistical barriers to reaching this ceiling. Abigail Hauslohner, *Biden Wants More Refugees, But It Could Take Years to Rebuild the Resettlement System*, WASH. POST (Dec. 2, 2020, 5:00 AM), <https://www.washingtonpost.com/politics/2020/12/02/biden-refugees-resettlement-trump/> [<https://perma.cc/D2W2-J9R3>].

40. 8 U.S.C. § 1158(a)(1).

41. *Id.*

42. 8 U.S.C. § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”).

43. See Convention Relating to the Status of Refugees, *supra* note 30.

44. Unaccompanied minors can also apply for asylum through USCIS even if they are already in removal proceedings. 8 U.S.C. § 1158(b)(3)(C).

served with a Notice to Appear⁴⁵ and is in removal proceedings, or (3) defensively if they are placed in expedited removal but receive a positive credible fear determination and are scheduled for a hearing before an immigration judge.⁴⁶ In the latter two options, the asylum application is eventually considered and decided upon by an immigration judge following a hearing in immigration court.⁴⁷

Despite these statutory provisions and constitutional standards requiring minimum due process in immigration court hearings, procedural inequities persist. Even before implementation of the MPP, immigration courts struggled to live up to the foundational U.S. legal principles that cases be adjudicated “by reference to standardized norms rather than by arbitrary factors, particularly the personal biases, attitudes, policies, or ideologies of government adjudicators.”⁴⁸ In addition, substantive complexity and heavy caseloads have led immigration judges themselves to remark that they are “holding death penalty cases in traffic court.”⁴⁹ Despite the high stakes of immigration proceedings, the significant weight placed on judicial discretion in immigration court decisions translates into wide variation across jurisdictions, and decisions about immigration relief are often relatively arbitrary.⁵⁰ In light of these realities, advocates have increasingly questioned the accuracy of outcomes in the modern immigration legal system.⁵¹

B. Modern Evolution of Asylum Policy

The MPP is among the latest in a succession of immigration policies since the 1990s placing more and more restrictions on the asylum system, making it increasingly difficult to secure asylum protections in the United States. These

45. *Notice to Appear Policy Memorandum*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/laws-and-policy/other-resources/notice-to-appear-policy-memorandum> [<https://perma.cc/Q4PE-HJDK>] (Feb. 26, 2019) (“An NTA is a document that instructs an individual to appear before an immigration judge. This is the first step in starting removal proceedings against them.”).

46. 8 C.F.R. § 208.2(b) (2020).

47. *Id.*

48. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 299–300 (2007).

49. Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES (Feb. 8, 2010), <https://www.nytimes.com/2010/02/09/us/09immig.html> [<https://perma.cc/S2YT-F835>].

50. Nogales et al., *supra* note 48 at 373 (“A Colombian asylum seeker might be assigned to a judge who granted asylum in 5% of his 426 cases during the period of our study or to another who granted asylum in 88% of his 334 cases.”).

51. *See, e.g.*, Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 7 (2018) (discussing the impact of executive branch decisions on the “individual fairness, democratic accountability, accuracy, efficiency, and fidelity to separation-of-powers principles” in the immigration court system). In addition, a study of immigration court outcomes found that IJs were more likely to order removal under the Trump administration than in prior administrations, irrespective of which President appointed the IJ. Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 585 (2020) (analyzing data about the outcomes of immigration proceedings which suggests that the sitting President may assert some influence over immigration judges’ removal decisions).

policies were established through executive orders, by statute, in agency rules, or as part of enforcement practices.

In 1996, amid a wave of anti-immigrant sentiment, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Key provisions in the IIRIRA significantly reduced the availability of asylum protections for vulnerable people knocking at the gates to the United States. Some of the most dramatic changes that the IIRIRA introduced included expedited removal, mandatory detention for some asylum seekers without a case-by-case analysis, the one-year asylum application filing deadline, and additional limitations on judicial review for asylum applications.⁵² Many of these provisions deviated significantly from the international law norms that U.S. refugee and asylum law had reflected until that point.⁵³

One example of the procedures instituted at this time was expedited removal, a formal removal process that occurs without a hearing in immigration court.⁵⁴ When a noncitizen seeks to enter the United States without valid entry documents,⁵⁵ the inspecting officer “shall order the alien removed without further hearing or review.”⁵⁶ IIRIRA created a system in which most asylum seekers, before the advent of the MPP, were presumptively part of the expedited removal process until and unless they could show a reasonable possibility of credible fear; only then would they receive a hearing before an immigration judge. This assessment, known as the credible fear interview (CFI), is the primary defense to expedited removal, but it is still a limited one.⁵⁷ A positive credible fear determination allows asylum applicants targeted for expedited removal to instead present their asylum claim at a hearing presided over by an immigration judge.⁵⁸ Expedited removal in general has had a tremendous effect on U.S. immigration enforcement: in 2017, about thirty-five percent of all noncitizens the Department of Homeland Security (DHS) apprehended were removed through this process.⁵⁹ Consequently, expedited removal has been widely criticized as presenting one of the greatest risks of

52. Ava C. Benach, Feature, *The Border: How We Got Here*, 34 CRIM. JUST. 27, 28–30 (2019); Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Ban to Asylum*, 31 HASTINGS INT'L & COMPAR. L. REV. 693, 693 (2008).

53. See Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 118 (2001).

54. See 8 U.S.C. § 1225(b)(1)(A)(i).

55. See 8 U.S.C. § 1182(a)(7)(A)(i) (describing documentation requirements at the time of application for admission).

56. § 1225(b)(1)(A)(i).

57. Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 53 (2020) [hereinafter Koh, *Barricading*].

58. § 1225(b)(1)(B)(ii) (“If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.”).

59. OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2017, at 9, 12 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [<https://perma.cc/F4ZJ-J57X>].

refoulement because it lacks robust procedural safeguards to effectively determine whether someone with a genuine fear of persecution may be expelled.⁶⁰

In addition, the rise of mandatory detention for asylum seekers has severely compromised any hope for the asylum system to offer safe and humane adjudication. IIRIRA authorized any asylum seeker to be locked up for some period of time—a carceral regime that has grown to detain over 400,000 people every year.⁶¹ In addition, detention centers are usually located far outside urban areas, making them less accessible to attorneys and families.⁶² Immigration and Customs Enforcement (ICE) often moves detainees from one detention center to another without notifying the counsel of record and without regard for the detention center’s distance from the detainees’ support network.⁶³

As gang violence in Central America escalated, in part due to U.S. foreign policy, children and families fled to the United States in even greater numbers.⁶⁴ The U.S. government’s response to that influx was to expand detention.⁶⁵ Children and families in detention are usually pursuing claims for asylum, so the expansion of the detention system created a new status quo in which families seeking asylum would often be automatically detained in deplorable conditions and deported soon thereafter.⁶⁶ The conditions of immigrant detention, especially family detention, have been widely criticized for failing to offer adequate food, heating, sanitation, or medical care.⁶⁷ Further, prominent legal scholars and activists have recently amplified the call for the abolition of immigrant detention in the United States, arguing that detention is not an essential ingredient of immigration enforcement

60. See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 198–99 (2019) [hereinafter Koh, *Removal in Shadows*].

61. See 8 U.S.C. § 1226; CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 82 (2019).

62. Darlene C. Goring, *Freedom from Detention: The Constitutionality of Mandatory Detention for Criminal Aliens Seeking to Challenge Grounds for Removal*, 69 ARK. L. REV. 911, 912 (2017) (“Detention facilities are secure, prison-like facilities that are usually located in remote, rural areas.”).

63. GARCÍA HERNÁNDEZ, *supra* note 61, at 140.

64. See Julian Borger, *Fleeing a Hell the U.S. Helped Create: Why Central Americans Journey North*, *GUARDIAN* (Dec. 19, 2018, 3:00 AM), <https://www.theguardian.com/us-news/2018/dec/19/central-america-migrants-us-foreign-policy> [https://perma.cc/A32S-JRLQ] (“Jakelin Amei Rosmery Caal Maquín, who died of septic shock and cardiac arrest in US border patrol custody, came from Alta Verapaz, in the northern Guatemala highlands, where small-scale farmers are being driven off their land to make way for agro-industry producing sugar and biofuels. . . . The MS-13 gang, frequently referred to by Donald Trump in justification of his hardline immigration policies, was formed in Los Angeles, and introduced into El Salvador when its members were deported – often to a country they barely knew . . .”).

65. Benach, *supra* note 52, at 29.

66. Kristina M. Campbell, *Dreamers Deferred: The Broken Promise of Immigration Reform in the Obama Years*, 25 *TEX. HISP. J.L. & POL’Y* 1, 20–23 (2018).

67. See LUTHERAN IMMIGR. & REFUGEE SERV. & WOMEN’S REFUGEE COMM’N, *LOCKING UP FAMILY VALUES, AGAIN: THE CONTINUED FAILURE OF IMMIGRATION FAMILY DETENTION 2* (2014) (finding that “[f]amily detention cannot be carried out humanely,” “families are detained arbitrarily,” and “[f]amily detention inherently denies due process and impedes migrants’ ability to access the immigration legal system”).

and that the immigration detention status quo fails to respect the humanity of immigrants who have sought refuge here.⁶⁸

In 2001, the U.S. government took steps to further erode the rights and protections of asylum seekers—not through the immigration court system, but through the criminal courts. The Bush administration initiated the now infamous Operation Streamline, a partnership between DHS and the Department of Justice to facilitate the large-scale criminal prosecution of immigrants for the federal crimes of illegal entry and reentry.⁶⁹ Operation Streamline included asylum seekers as part of its larger project to criminalize migration.⁷⁰ Asylum seekers are still regularly prosecuted for illegal entry and reentry despite domestic and international law forbidding the government from penalizing asylum seekers for their presence within U.S. territory without authorization.⁷¹ During the Bush and Obama administrations, Operation Streamline operated in eight district courts along the U.S.-Mexico border and peaked at nearly 98,000 prosecutions in 2013.⁷²

By the end of the Obama administration, the detention and criminal prosecution of asylum seekers was standard government practice.⁷³ The increasing use of expedited removal, detention, and criminal prosecution as tools to restrict and penalize entry of asylum seekers in the early 2000s already evidenced a disregard for due process and for the safety and humanity of these immigrants.⁷⁴ Such policies set the stage for the Trump administration to further undermine the fairness of the asylum process.

C. *The Trump Administration's Attacks on Asylum*

As he promised throughout his campaign, former President Trump wielded his executive power to curtail the rights of immigrants, including asylum seekers.⁷⁵ President Trump consistently tried to paint asylum seekers as criminals and

68. See, e.g., GARCÍA HERNÁNDEZ, *supra* note 61, at 156–57 (“Forcing migrants to live under the constant threat of imprisonment tied to their immigration status means treating them as if they are workers and threats before they are people.”).

69. See Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 484 (2010); 8 U.S.C. §§ 1325–1326.

70. Lydgate, *supra* note 69, at 495–96.

71. Natasha Arnpriester, *Trumping Asylum: Criminal Prosecutions for “Illegal” Entry and Reentry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L.Q. 3, 7 (2017) (noting that Article 31 of the 1951 Convention states that parties to the treaty “shall not impose penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization”).

72. *Id.* at 13.

73. Michael Tan, *President Obama Wants to Continue Imprisoning Immigrant Families*, ACLU (Aug. 10, 2015, 5:00 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/president-obama-wants-continue-imprisoning-immigrant-families> [<https://perma.cc/6XXL-YYWK>].

74. See *id.*; Lydgate, *supra* note 69, at 487; Koh, *Removal in Shadows*, *supra* note 60, at 198–99.

75. William Finnegan, Comment, *Trump and the Refugees*, NEW YORKER (Oct. 2, 2015), <https://www.newyorker.com/news/daily-comment/trump-and-the-refugees> [<https://perma.cc/5KZN-9RF6>].

“denounced international standards on refugee protection as legal ‘loopholes’ and ‘magic words’ that the administration [] professed its intention to abolish.”⁷⁶

Immediately after assuming office, former President Trump issued an executive order that further limited the ability of asylum seekers to access legal protection in the United States.⁷⁷ This order continued criminal prosecutions against asylum seekers for illegal reentry and foreshadowed the implementation of the MPP by increasing immigrant detention and issuing new policy guidance to the Department of Homeland Security regarding “the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as ‘catch and release.’”⁷⁸

In the summer of 2018, the Trump administration quietly rolled out the “metering” or “turnback” policy through which CBP severely limits the number of people allowed to request asylum at an official port of entry.⁷⁹ This policy requires asylum seekers to register on an informal paper list and wait months until their number is called before their request for asylum will be processed.⁸⁰ In light of the total absence of any statutory, regulatory, or subregulatory written authority for the policy, advocates had to sue the Trump administration before officials would even admit they were operating a metering system.⁸¹ Metering violates the principle of nonrefoulement because it does not allow individuals to seek asylum immediately in order to escape the danger they are facing.⁸² Transforming U.S. asylum procedure in this way ignores the exigencies of violence and fear that cause people to request asylum in the first place. Unlike refugee admissions, the asylum system has no numerical limitation on the number of asylum seekers entering the United States.⁸³ Nevertheless, CBP and DHS officials have repeatedly suggested that metering is necessary because there is “not enough space,” likely referring to the lack of space in detention centers.⁸⁴

76. U.S.A: “*You Don’t Have Any Rights Here*,” AMNESTY INT’L, <http://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/> [https://perma.cc/9SPT-8JCH] (last visited Jan. 18, 2021).

77. Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 30, 2017).

78. *Id.* The Trump administration has repeatedly described the MPP as replacing “catch and release” with “catch and return.” Nielsen Press Release, *supra* note 3.

79. Dara Lind, *The US Has Made Migrants at the Border Wait Months to Apply for Asylum. Now the Dam Is Breaking.*, VOX (Nov. 28, 2018, 7:00 AM), <https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports> [https://web.archive.org/web/20210114232846/https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports].

80. *Id.*; see also Koh, *Barricading*, *supra* note 57, at 56–58 (explaining how the metering policy prevents immigrants from accessing immigration courts).

81. Koh, *Barricading*, *supra* note 57, at 57–58.

82. See 8 U.S.C. § 1157; *supra* note 34 and accompanying text.

83. See Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105.

84. OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-19-65, INVESTIGATION OF ALLEGED VIOLATIONS OF IMMIGRATION LAWS AT THE TECATE, CALIFORNIA, PORT OF ENTRY BY U.S. CUSTOMS AND BORDER PROTECTION PERSONNEL 6 (2019) (“[O]fficers and management

The Trump administration has since attempted to issue wholesale bans on asylum for the majority of applicants. The first ban was swiftly struck down in court,⁸⁵ but a new iteration was rolled out in the summer of 2019 that forbade access to asylum for people who both passed through other countries before reaching the United States and did not first seek protection in those countries.⁸⁶ This “third country” asylum ban was enjoined by a California district court, a decision that the Ninth Circuit Court of Appeals affirmed in July 2020.⁸⁷

The Trump administration has also limited access to asylum through less visible yet insidious means like transforming the CFI guidance and bureaucracy in the process of expedited removal. In the last few years, the Trump administration released internal guidance encouraging asylum officers to issue more negative credible fear determinations, arguing that the asylum system is overwhelmed and cannot handle so many claims.⁸⁸ This guidance has contributed to fewer positive credible fear findings.⁸⁹ CFIs are required by regulation to be conducted by USCIS asylum officers who have extensive experience and training in assessing claims for asylum relief.⁹⁰ But throughout the summer of 2019, more and more CBP officers were deputized to conduct these interviews.⁹¹ Like the internal credible fear guidance, the use of more CBP officers to conduct CFIs as opposed to asylum officers also resulted in fewer positive credible fear determinations.⁹²

In November 2019, USCIS proposed a rule that would prevent asylum seekers from receiving work authorization pending the adjudication of their asylum application.⁹³ This proposed change expressly seeks to “deter aliens from illegally entering the United States and from filing frivolous, fraudulent or otherwise non-meritorious asylum applications in order to obtain employment

cited [Tecate] Port’s lack of holding space and personnel trained in processing asylum claims, and the challenges with transferring individuals when the Port closed at the end of the day.”)

85. See *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018).

86. 8 C.F.R. § 208.13(c)(4) (2020) (“[A]ny alien who enters, attempts to enter, or arrives in the United States across the southern land border on or after July 16, 2019, after transiting through at least one country outside the alien’s country of citizenship, nationality, or last lawful habitual residence en route to the United States, shall be found ineligible.”).

87. *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020).

88. See Koh, *Barricading*, *supra* note 57, at 65.

89. Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 739 (2019) (noting that from February 2017 to June 2017, positive CFIs decreased from seventy-eight percent to sixty-eight percent).

90. 8 C.F.R. § 208.2(a) (2020) (vesting jurisdiction over credible fear interviews with Refugee, Asylum, and International Operations); see also 8 U.S.C. § 1225(b)(1)(B)(i) (stating that “asylum officer[s] shall conduct” credible fear interviews).

91. Molly O’Toole, *Border Patrol Agents, Rather than Asylum Officers, Interviewing Families for ‘Credible Fear,’* L.A. TIMES (Sept. 19, 2019, 5:50 AM), <https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear> [<https://web.archive.org/web/20201114042644/https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear>].

92. *Id.*

93. Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532, 38,533 (June 26, 2020) (to be codified at 8 C.F.R. pts. 208, 274a).

authorization.”⁹⁴ Without the ability to work legally, applicants may be unable to support themselves and their families and are pushed into even more vulnerability. While the explicit goal of this rule may be to discourage fraudulent asylum applications, the effect of many deterrence-based policies is that, rather than remaining in their home countries where they face almost certain torture, kidnapping, or death, people who fear for their lives are simply taking more dangerous routes into the United States and seeking informal employment or unsafe housing.⁹⁵

On June 15, 2020, the Trump administration proposed another rule that further chipped away at due process in the asylum system by allowing immigration judges to deny asylum claims based solely on the asylum application without providing an opportunity for asylum seekers to present their case at a hearing.⁹⁶ Seizing on the COVID-19 pandemic as an excuse to further eliminate asylum protections, the government proposed an additional rule on July 9, 2020, permitting immigration judges and DHS officials to “categorically bar from eligibility for asylum . . . as dangers to the security of the United States, aliens who potentially risk bringing in deadly infectious disease to, or facilitating its spread within, the United States.”⁹⁷ Considering the tremendous discretionary power that immigration judges already wield, such broad rules permit even greater variation, bias, and discrimination to proliferate in asylum adjudication.

The MPP was introduced in a context of increasing restrictions on the ability of asylum seekers to enter the United States throughout the last few decades. The Trump administration has accelerated this troubling trend by instituting harmful new procedures with alarming speed and ferocity. Many of these policies were direct executive actions, bypassing even limited administrative law procedural checks like notice and comment.⁹⁸ Thus, the impact of the MPP has been exponentially more

94. Press Release, U.S. Citizenship & Immgr. Servs., USCIS to Deter Frivolous or Fraudulent Asylum Seekers from Obtaining Work Authorizations (Nov. 13, 2019), <https://www.uscis.gov/news/news-releases/uscis-to-deter-frivolous-or-fraudulent-asylum-seekers-from-obtaining-work-authorizations> [<https://web.archive.org/web/20201201142842/https://www.uscis.gov/news/news-releases/uscis-to-deter-frivolous-or-fraudulent-asylum-seekers-from-obtaining-work-authorizations>].

95. For instance, because the metering policy creates such long wait times for those on the list, approximately thirteen times the number of people who are on the list instead find their way across the border because they cannot afford to wait in Mexico. James Fredrick, *'Metering' at the Border*, NPR (June 29, 2019, 8:03 AM), <https://www.npr.org/2019/06/29/737268856/metering-at-the-border> [<https://perma.cc/DR3Y-DT9W>].

96. Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,277 (June 15, 2020) (to be codified at 8 C.F.R. pts. 1003, 1208, 1235); Michael Breen, *Michael Breen on the Proposed June 15th Asylum Regulation*, HUM. RTS. FIRST (July 9, 2020), <https://www.humanrightsfirst.org/resource/michael-breen-proposed-june-15th-asylum-regulation> [<https://perma.cc/S5CE-KYZ9>].

97. Security Bars and Processing, 85 Fed. Reg. 41,201, 41,208 (proposed July 9, 2020) (to be codified at 8 C.F.R. pts. 208, 1208).

98. A court has already held that the MPP procedures for addressing an individual's risk of persecution if returned to Mexico violated 5 U.S.C. § 553(b) and (c) because DHS had adopted a rule without providing notice and an opportunity for comment. *Innovation L. Lab v. Nielsen*, 366

damaging because of the slew of coinciding policies that together hinder the potential for the United States to offer safe haven through its asylum system.

II. THE MPP AND ITS DEVASTATING IMPACT

The Department of Homeland Security first announced the MPP on December 20, 2018.⁹⁹ DHS relied on the statutory authority in section 235(b)(2)(C) of the Immigration and Nationality Act (INA), which states:

In the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.¹⁰⁰

Using its interpretation of this statute, the government argues that individuals entering the United States from Mexico “may be returned to Mexico for the duration of their immigration proceedings.”¹⁰¹ Immigrants placed under the MPP are not subject to expedited removal but rather receive full hearings on their claims before an immigration judge.¹⁰² As the program has expanded, shelters in larger border towns and cities like Tijuana, Mexicali, and Ciudad Juarez have been completely overwhelmed, and the thousands stuck at the border subject to the MPP have instead been relegated to sprawling, makeshift camps.¹⁰³ These tent camps are easy targets for criminal organizations and are overrun with vermin and disease.¹⁰⁴ The MPP exemplifies the cruel shift in immigration law and policy that the executive branch has spearheaded in recent years.

A. Dangers of Refoulement

The MPP presents an unprecedented violation of the domestic and international legal principle of nonrefoulement because asylum applicants subject to this policy are often forcibly returned to a country in which they face danger.¹⁰⁵

F. Supp. 3d 1110, 1128 (N.D. Cal. 2019), *aff'd sub nom.* Innovation L. Lab v. Wolf, 951 F.3d 1073 (9th Cir.), *and cert. granted*, 141 S. Ct. 617 (2020).

99. Nielsen Press Release, *supra* note 3.

100. 8 U.S.C. § 1225(b)(2)(C); Migrant Protection Protocols Press Release, *supra* note 5.

101. Nielsen Press Release, *supra* note 3.

102. Migrant Protection Protocols Press Release, *supra* note 5.

103. See Alexa Liautaud, *Thousands of Migrants in Tent City Limbo After Supreme Court Keeps ‘Remain in Mexico’ in Place*, NBC NEWS (Mar. 12, 2020, 2:04 AM), <https://www.nbcnews.com/news/latino/thousands-migrants-tent-city-limbo-after-supreme-court-keeps-remain-n1155996> [<https://perma.cc/5QE4-3NH5>] (describing a tent camp of 2,500 migrants in Matamoros that grows by approximately 50 to 100 people every day).

104. See Zolan Kanno-Youngs, *‘He Turned Purple’: U.S. Overlooks Ill Asylum Seekers*, N.Y. TIMES (Feb. 22, 2020), <https://www.nytimes.com/2020/02/22/us/politics/trump-asylum-remain-in-mexico.html> [<https://perma.cc/N2XR-4RE3>]; *Delivered to Danger: Trump Administration Sending Asylum Seekers and Migrants to Danger*, DELIVERED TO DANGER [hereinafter DELIVERED TO DANGER], <https://deliveredtodanger.org/> [<https://perma.cc/YL8S-EWLB>] (last visited Jan. 18, 2021).

105. See *supra* notes 31–32 and accompanying text for definition of nonrefoulement.

The MPP theoretically has mechanisms to avoid refoulement. The program explicitly excludes the following groups: Mexican nationals, returning legal permanent residents, those with known physical and/or mental health issues, those with a history of violence, unaccompanied children, and those more likely than not to face persecution or torture in Mexico.¹⁰⁶ In order to be identified as someone in the last category and avoid being forcibly returned to Mexico, the asylum applicant must:

[a]ffirmatively stat[e] that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, [and then they] will be referred to a USCIS asylum officer for screening . . . so that the asylum officer can assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico.¹⁰⁷

This procedure demands a higher standard than the “reasonable possibility” of persecution standard applied in CFIs, the procedure used in expedited removal to safeguard against refoulement.¹⁰⁸ Even if the applicant has already been a victim of persecution in Mexico, they must also show that it is more likely than not that the violence will reoccur.¹⁰⁹ Because of this high standard and the cursory nature of the assessment, only about five percent of people subject to the MPP have been able to successfully avoid being placed in the program or are able to get removed from it.¹¹⁰ Advocates working in Mexican border towns have noted how DHS’s refoulement screening process under this program fails to safeguard against the risk of persecution for their clients subject to the MPP.¹¹¹ As of October 2019, 23.1% of respondents have been threatened with physical violence since they were

106. U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., MPP GUIDING PRINCIPLES (2019) [hereinafter MPP GUIDING PRINCIPLES], <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf> [<https://perma.cc/8LQZ-8ZTJ>].

107. *Id.*

108. Memorandum from U.S. Citizenship & Immigr. Servs. on Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, at 8 (July 11, 2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF> [<https://perma.cc/MSN9-W2HJ>]; THE OFF. OF U.S. SENATOR JEFF MERKLEY, SHATTERED REFUGE: A U.S. SENATE INVESTIGATION INTO THE TRUMP ADMINISTRATION’S GUTTING OF ASYLUM 35 (2019) [hereinafter SHATTERED REFUGE] (“The ‘more likely than not’ standard is far more stringent than the low threshold standard asylum officers were traditionally instructed to use when conducting credible fear interviews . . .”).

109. Debbie Nathan, *An Asylum Officer Speaks Out Against the Trump Administration’s “Supervillain” Attacks on Immigrants*, INTERCEPT (Sept. 13, 2019, 9:30 AM), <https://theintercept.com/2019/09/13/asylum-interview-immigration-trump/> [<https://perma.cc/6575-WY9A>].

110. *Id.* (“The scary part is that the officer doesn’t have to justify their decision [whether to place someone under the MPP]. They just check a ‘yes’ or a ‘no.’ So you can’t know what the quality of their analysis was.” (quoting an asylum officer)).

111. Telephone Interview with Tania García Barajas, *supra* note 9. Ms. García Barajas noted that organized crime throughout Central America has escalated in response to the MPP policy and the resulting presence of thousands of vulnerable immigrants stranded at the Mexican border. *See also* DELIVERED TO DANGER, *supra* note 104.

returned to Mexico to await their court dates.¹¹² Of those who received threats of physical violence, 56.5% have actually experienced physical violence, including being beaten, robbed, or extorted.¹¹³ Despite expressing a fear of return to Mexico, CBP nevertheless placed six out of ten survey respondents under the MPP without further investigating the fear they expressed.¹¹⁴

Besides guarding against refoulement, the MPP guidelines are also supposed to exempt those who have known physical health issues, mental health issues, or both.¹¹⁵ But in practice, people with serious health issues, as well as those with issues that have become exacerbated due to exposure and lack of access to healthcare and basic necessities, are often still subject to the MPP.¹¹⁶ Journalists have reported such serious violations as people with HIV, cancer, or over age seventy being subject to the MPP.¹¹⁷ One fifty-two-year-old woman subject to the MPP and waiting near Matamoros, Mexico, has been infected with a parasite while waiting in a tent camp on the border and is quickly losing her vision.¹¹⁸ Within six months of being subject to the MPP, she has become completely blind in one eye and partially blind in the other.¹¹⁹ Even with support from an attorney—an asset which most of those subject to the MPP lack—her request to temporarily enter the United States to seek medical treatment was denied four times.¹²⁰

Under the terms of the MPP, CBP retains the right to use its discretion to choose whether to process applicants for admission to the United States through the MPP, expedited removal, parole, or other processing or removal mechanisms.¹²¹ While agency discretion is broad, DHS regularly violates its own exclusions and exceptions to the MPP.¹²² For instance, the office of U.S. Senator Jeff Merkley (D-OR) documented at least seven cases of women in late-term pregnancies who were returned to Mexico in violation of DHS's own MPP physical health exclusions.¹²³ Considering the way the MPP has marginalized those individuals with isolated health conditions, it has only exacerbated the generalized health risk posed by the COVID-19 pandemic.¹²⁴

112. Wong, *supra* note 11, at 9.

113. *Id.*

114. *Id.* at 8. As of May 13, 2020, there are at least 1,114 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers forced to return to Mexico under the MPP. DELIVERED TO DANGER, *supra* note 104.

115. *See* Convention Relating to the Status of Refugees, *supra* note 30.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. MPP GUIDING PRINCIPLES, *supra* note 106.

122. SHATTERED REFUGE, *supra* note 108, at 35.

123. *Id.* at 21–22, 35. “Halting premature labor in a hospital setting and then releasing a pregnant woman with a known risk for preeclampsia so that she can give birth in a tent in a makeshift encampment next to a bridge on the Mexican side of the border clearly put the lives of both the mother and baby at risk.” *Id.* at 22.

124. *See* U.S.: COVID-19 Policies Risk Asylum Seekers’ Lives, *supra* note 19.

The global public health and economic crisis during the COVID-19 pandemic¹²⁵ has intensified existing inequalities around the world. Immigrants seeking refuge in the United States are no exception. On March 20, 2020, the United States Department of Health and Human Services and the Centers for Disease Control introduced new restrictions blocking entry to people who would “be introduced into a congregate setting in a land Port of Entry (POE) or Border Patrol station at or near the United States borders with Canada and Mexico.”¹²⁶ The order banning entry does *not* include U.S. citizens, U.S. legal permanent residents, or citizens of countries in the U.S. visa waiver program, which are primarily in Europe and Asia.¹²⁷ By contrast, those included in the order are “aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between POEs.”¹²⁸ These categories include almost all asylum seekers, based on the definition of, and process by which, people can request asylum under U.S. law.¹²⁹ As of January 2021, over 180,000 people were turned away from the U.S. border on the basis of this order.¹³⁰

A group of legal, faith-based, humanitarian, and community organizations wrote to CBP requesting that those subject to the MPP be paroled into the United States because of the difficulty of practicing physical distancing in their current locations and the increased health and safety risks they face in light of the pandemic.¹³¹ The letter highlights the fact that most Mexican migrant shelters are

125. In early March 2020, most U.S. states ordered their citizens to shelter in place to prevent the spread of the COVID-19 virus. All nonessential activities were forbidden, and most businesses shuttered. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUM. SERVS., ORDER SUSPENDING INTRODUCTION OF CERTAIN PERSONS FROM COUNTRIES WHERE A COMMUNICABLE DISEASE EXISTS 1 (2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf [<https://perma.cc/US2C-6AKJ>].

126. *Id.*

127. *Frequently Asked Questions About the Visa Waiver Program (VWP) and the Electronic System for Travel Authorization (ESTA)*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/international-visitors/frequently-asked-questions-about-visa-waiver-program-vwp-and-electronic-system-travel> [<https://perma.cc/Z9EG-CZ89>] (July 29, 2019).

128. CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 125, at 2.

129. *See* 8 U.S.C. § 1158(a)(1).

130. *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics> [<https://perma.cc/LV5T-VK33>] (Jan. 7, 2021).

131. Letter from Acción de Gracia Immigr. Assistance, Al Otro Lado, Angry Tias & Abuelas, Border Kindness, Cath. Charities of S. New Mexico, Cath. Legal Immigr. Network, Inc. (CLINIC), Centro Legal de la Raza, Diocesan Migrant & Refugee Servs., Inc., Esperanza Immigrant Rts. Project, Every Last One, Familia: Trans Queer Liberation Movement, The Florence Immigrant & Refugee Rts. Project, HIAS, HOPE Border Inst., Hum. Rts. First, Immigrant Defs. L. Ctr., Immigrant Legal Def., Innovation L. Lab, Instituto para las Mujeres en la Migración, AC (IMUMI), Jewish Fam. Serv. of San Diego, Kino Border Initiative, Las Americas Immigrant Advoc. Ctr., Nat’l Immigrant Just. Ctr., Physicians for Hum. Rts., Santa Fe Dreamers Project, Sisters of Mercy, Laredo, Texas & Sueños Sin Fronteras de Tejas, to Chad F. Wolf, Acting Sec’y, U.S. Dep’t of Homeland Sec., Matthew T. Albence, Acting Dir., U.S. Immigr. & Customs Enf’t, Mark A. Morgan, Acting Comm’r, U.S. Customs & Border Prot., and James McHenry, Dir., Exec. Off. of Immigr. Rev. 1 (Apr. 14, 2020).

not accepting new arrivals due to the pandemic; therefore, many more asylum seekers must gather in crowded, dirty, and dangerous encampments.¹³² At a minimum, the coalition of organizations requested that CBP not require those subject to the MPP “to repeatedly travel back and forth to ports [of entry] through dangerous border areas during the COVID-19 outbreak.”¹³³ A representative of CBP responded to the letter but ignored the parole request and merely reiterated the MPP hearing postponement schedule.¹³⁴ The dangerous combination of these orders has made it virtually impossible to apply for asylum in the United States during the COVID-19 pandemic.¹³⁵

Under the MPP, the United States government flagrantly disregards its legal obligations to not return those seeking safety to a place in which they are in danger and not to create situations of danger and humanitarian crisis at its border. The international legal principle of nonrefoulement was developed to safeguard against situations like this and thus forbids governments from flouting their legal and moral obligations to offer a haven to those fleeing dangers in other nations.¹³⁶ These health and safety risks further complicate any attempt to secure legal representation in preparation for a hearing in immigration court.

B. Obstructing Access to Counsel

Respondents in immigration court have a right to counsel but only at their own expense.¹³⁷ Securing a universal right to government-appointed legal representation, or even a right for some classes of respondents, has been a subject of debate and advocacy for years.¹³⁸ Respondents with legal representation have a

[hereinafter Letter from Acción de Gracia Immigration Assistance et al.], https://www.humanrightsfirst.org/sites/default/files/LetterfromMPPServiceProvidersonCOVID19_Update.pdf [<https://perma.cc/J2RC-FY64>].

132. *Id.* at 1–2.

133. *Id.* at 1.

134. Letter from James W. McCament, Senior Off. Performing the Duties of Under Sec’y, U.S. Dep’t of Homeland Sec., to Kennji Kizuka, Senior Researcher & Pol’y Analyst, Hum. Rts. First (May 14, 2020), <https://www.humanrightsfirst.org/sites/default/files/DHSResponseToMPPLetter05.14.20.pdf> [<https://perma.cc/383Y-VTIX>].

135. Bill Ong Hing, *Trump Has Achieved His Goal of Abolishing Asylum*, SLATE (Apr. 10, 2020, 11:33 AM), <https://slate.com/news-and-politics/2020/04/trump-asylum-coronavirus.html> [<https://perma.cc/V7QV-SK2J>].

136. *See* Convention Relating to the Status of Refugees, *supra* note 30, at 176.

137. *See* 8 U.S.C. § 1229a(b)(4)(A) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”).

138. *See generally* Ingrid V. Eagly, Gideon’s *Migration*, 122 YALE L.J. 2282 (2013) (explaining the growth of a system combining civil immigration legal service providers with criminal defense lawyers to try to fill the void in representation and evaluating alternative approaches to immigration defense services). So far, only one court decision has recognized a right to government-appointed counsel for a certain class of respondents. *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1058 (C.D. Cal. 2010) (holding that immigration judges must appoint counsel for detained, indigent immigrants with serious mental impairments). In response to this decision, the government began a new nationwide policy to provide appointed counsel. Press Release, U.S. Dep’t of Just., Department of

statistically much higher chance of securing favorable outcomes in their immigration proceedings.¹³⁹ Yet, even counting those who can afford to pay for legal representation, only thirty-seven percent of all immigrants in the pre-MPP system were represented by an attorney in their immigration proceedings.¹⁴⁰

Prior to the MPP, families requesting asylum in the United States after presenting at a port of entry or entering without inspection were almost always either detained or paroled after their initial CBP processing.¹⁴¹ Accordingly, the immigration legal service providers developed models to operate within this system. While detained immigrants are certainly underserved, in most jurisdictions there are some legal services in detention facilities and some attorneys who work almost exclusively with detained clients.¹⁴²

However, the vast majority of U.S. immigration legal service providers are ill equipped to shift their practices to serve clients located in Mexico. Trying to represent a client who is not physically present in the same vicinity, let alone the same country, severely constrains an attorney's time and financial resources. To build an asylum case, an attorney must work directly with the client, discussing the history of their life and their fear of persecution in great detail, as well as create a

Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented> [<https://perma.cc/BM2S-8YAM>].

139. See JENNIFER STAVE, PETER MARKOWITZ, KAREN BERBERICH, TAMMY CHO, DANNY DUBBANEH, LAURA SIMICH, NINA SIULC & NOELLE SMART, VERA INST. OF JUST., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY (2017), <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf> [<https://perma.cc/D5XW-ANZD>]; see also Eagly & Shafer, *supra* note 4, at 9 (“[D]etained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts.”).

140. *Id.* at 7.

141. *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019); Nicole Narea, *The Demise of America's Asylum System Under Trump, Explained*, VOX (Nov. 5, 2019, 12:00 PM), <https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp> [<https://web.archive.org/web/20201117080745/https://www.vox.com/2019/11/5/20947938/asylum-system-trump-demise-mexico-el-salvador-honduras-guatemala-immigration-court-border-ice-cbp>].

142. See, e.g., *Detained Adult Program*, CAP. AREA IMMIGRANTS' RTS. COAL., <https://www.caircoalition.org/what-we-do/detained-adult-program> [<https://perma.cc/7YZP-U5KG>] (last visited Jan. 18, 2021) (noting this organization is the only one “in the Washington, D.C. area with a legal services program focused exclusively on assisting detained immigrant men, women, and children”); *Community Education for Detained Adults*, ESPERANZA IMMIGRANT RTS. PROJECT, <https://www.esperanza-la.org/programs-ce-detained-adults> [<https://perma.cc/WFU5-H5C4>] (last visited Jan. 18, 2021). Local government and philanthropic donors in New York City established the “New York Immigrant Family Unity Project,” the first program of its kind in the United States to provide universal representation to detained immigrants. See *New York Immigrant Family Unity Project*, BRONX DEFS., <https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> [<https://perma.cc/89GT-THHH>] (last visited Jan. 18, 2021).

record with any documents that the client has brought or can obtain.¹⁴³ Most nonprofit legal service providers cannot afford the extra time or expense for regular trips to Mexico to meet with their clients and must attempt to build the case over the phone.¹⁴⁴ After waiting in Mexico for their hearing for two months, only 0.4% of people subject to the MPP had retained an attorney, compared with 18.1% for those who waited the same amount of time in the United States.¹⁴⁵

Even relatively fortunate immigrants who have sought out help at well-connected shelters or legal service organizations still struggle to secure legal representation in their asylum cases.¹⁴⁶ Access to counsel was already one of the greatest factors that contributed to less fair and less equal immigration outcomes in court.¹⁴⁷ The MPP has severely exacerbated these existing inequalities by excluding vulnerable asylum seekers from the legal infrastructure they need to successfully present their claim for asylum in the United States.

C. Due Process Violations in Immigration Court

In theory, procedural due process applies to removal proceedings.¹⁴⁸ The immigration courts are housed within the executive branch, and immigration judges are employees of the Department of Justice's Executive Office for Immigration

143. See Letter from a coalition of organizations and academics to Jerrold Nadler, Chair of House Comm. on the Judiciary, U.S. House of Reps., Bennie G. Thompson, Chair of House Comm. on Homeland Sec., U.S. House of Reps., Jamie Raskin, Chair of House Subcomm. on C.R. & C.L., U.S. House of Reps., Zoe Lofgren, Chair of House Judiciary Immigr. & Citizenship Subcomm., U.S. House of Reps., and Kathleen Rice, Chair of House Subcomm. on Border Sec., Facilitation & Operations, U.S. House of Reps. 4 (Nov. 18, 2019) [hereinafter Letter to Jerrold Nadler et al.], https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2019-11/NGOs_and_academics_letter_to_Congress_to_End_Remain_in_Mexico-Nov_2019.pdf [<https://perma.cc/7N3Y-5X5J>] (“[G]iven the complex legal standards and the trauma experienced by asylum-seekers, meaningful representation requires many hours of client interviews and preparation. . . . U.S.-based immigration attorneys hesitate to take cases if they cannot meet face-to-face with their clients to discuss sensitive facts in their asylum cases.” (footnote omitted)).

144. Jack Herrera, *Lawyers Struggle to Remotely Represent Asylum-Seekers in ‘Remain in Mexico’ Program*, WORLD (Mar. 2, 2020, 12:00 PM), <https://www.pri.org/stories/2020-03-02/lawyers-struggle-remotely-represent-asylum-seekers-remain-mexico-program> [<https://perma.cc/N7QL-4Y9X>].

145. *Access to Attorneys Difficult for Those Required to Remain in Mexico*, *supra* note 7.

146. A Mexican attorney who runs the legal clinic at Espacio Migrante, an immigrant shelter in Tijuana, recounted her extreme difficulties in trying to find American immigration attorneys for MPP clients who she says have been rendered “invisible” by the MPP policy. Telephone Interview with Tania García Barajas, *supra* note 9.

147. *Id.*; Eagly & Shafer, *supra* note 4, at 9.

148. *Yamataya v. Fisher* (Japanese Immigrant Case), 189 U.S. 86, 100–01 (1903) (“[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends . . .”).

Review (EOIR).¹⁴⁹ The statutory requirements of immigration court exist to ensure immigrants have the opportunity to present evidence in support of their case, cross-examine witnesses, receive a transcript of the proceedings, and be heard before a judge who has a duty to develop the record.¹⁵⁰ But the MPP has significantly eroded the due process protections immigrants receive in court.

The critiques of expedited removal and other forms of summary removal do not apply in the same way to MPP proceedings because those subject to the MPP have the opportunity to present their claim for relief before an immigration judge.¹⁵¹ Yet, hearings for asylum applicants subject to the MPP still violate some of the most basic protections of immigration court. According to data available as of November 2020, fewer than one percent of respondents in MPP immigration proceedings were granted relief.¹⁵² This rate contrasts dramatically with the historic asylum grant rate of about twenty percent.¹⁵³ Such results can hardly be the product of a meaningful and fair adjudicative process.

Most MPP cases are concentrated in immigration courts in border districts¹⁵⁴ so respondents can be ferried from the port of entry to a nearby court.¹⁵⁵ The huge concentration of cases on border-jurisdiction dockets means proceedings have been extremely backlogged.¹⁵⁶ Immigration courts across the country have had overloaded dockets for years,¹⁵⁷ but the MPP has pushed older cases in border jurisdictions farther back in line to prioritize the asylum cases of those subject to the MPP.¹⁵⁸ The President of the National Association of Immigration Judges,

149. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., STATISTICS YEARBOOK: FISCAL YEAR 2018, at 4 (2019), <https://www.justice.gov/eoir/file/1198896/download> [<https://perma.cc/ZVP6-SE6Z>].

150. 8 U.S.C. § 1229a(b)(4)(A)–(C), (1).

151. Compare Koh, *Removal in Shadows*, *supra* note 60, at 193, 198–99 (describing expansions in the use of removals that bypass the immigration courts, namely expedited removal, reinstatement, and administrative removal), with Nielsen Press Release, *supra* note 3 (outlining how MPP proceedings operate).

152. *Details on MPP (Remain in Mexico) Deportation Proceedings*, *supra* note 21 (showing that only 615 cases out of 69,333 were granted relief).

153. Gustavo Solis, *Asylum Grant Rates Under Remain in Mexico Are Far Below Historic Average*, SAN DIEGO UNION-TRIB. (Dec. 26, 2019, 2:15 PM), <https://www.sandiegouniontribune.com/news/immigration/story/2019-12-26/asylum-grant-rates-under-remain-in-mexico-are-far-below-historic-average> [<https://perma.cc/58DA-VTG2>].

154. *Details on MPP (Remain in Mexico) Deportation Proceedings*, *supra* note 21.

155. MPP GUIDING PRINCIPLES, *supra* note 106 (“[Ports of entry] will coordinate with ICE [Enforcement and Removal Operations] to establish transfer of custody and expeditious transportation from the [port of entry] to the hearing.”).

156. Mica Rosenberg, Kristina Cooke & Reade Levinson, *Hasty Rollout of Trump Immigration Policy Has ‘Broken’ Border Courts*, REUTERS (Sept. 10, 2019, 3:04 AM), <https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115> [<https://perma.cc/X5AP-3ZSN>] (“39% of the backlog in the San Diego court and 44% of the backlog in the El Paso court was due to MPP case loads [sic] . . .”).

157. “At the end of FY2018, the backlog of open cases remaining to be processed was 319,302 . . .” SHATTERED REFUGE, *supra* note 108, at 49.

158. Farida Jhabvala Romero, *San Diego Judges Told to Speed Up Cases Under Controversial Immigration Policy*, KQED (Aug. 28, 2019), <https://www.kqed.org/news/11770865/san-diego->

Judge Ashley Tabaddor, has been outspoken about the unprecedented pressure on immigration judges at the southern border who are forced to cope with the MPP cases added to their dockets.¹⁵⁹ Immigration judges must now conduct initial proceedings with dozens of MPP cases scheduled for the same time slot, allocating only a few minutes to each case.¹⁶⁰ Considering that receiving a grant of asylum usually requires presenting evidence and examining witnesses, this truncated timeline is wholly insufficient for applicants to make their cases.¹⁶¹

Requiring asylum applicants to check in for their hearings in the middle of the night, make an exhausting journey across the border, wait for several hours, and then spend only a few minutes presenting their case—usually without the benefit of an attorney—severely undermines the fairness and efficiency of immigration adjudication. Since the COVID-19 pandemic, it has gotten much worse. The government postponed all MPP hearings for the duration of the COVID-19 pandemic, thus indefinitely stranding immigrants at the border who are already in danger and without safe or sanitary living conditions.¹⁶²

Another way the Trump administration addressed the new logistical challenges that the MPP presents was to open “tent courts” in some Texas border towns, including Laredo and Brownsville.¹⁶³ These tent courts have “capacity” to hold as many as 720 hearings per day.¹⁶⁴ The immigrants and their attorneys, for the few who have attorneys, appear in the tent courts in border cities, while the judges and DHS attorneys appear by video conference from brick-and-mortar courts hundreds of miles away.¹⁶⁵ There is no clear policy as to the procedure these tent courts should follow or who is responsible for their oversight.¹⁶⁶ The tent courts have regularly been closed to members of the public, including to translators, journalists, and other

judges-told-to-speed-up-cases-under-controversial-immigration-policy [https://perma.cc/KQQ6-9VA2]. “As of June 30, 2019, 430 immigration judges were [tasked with] more than 1.3 million active and backlogged cases.” SHATTERED REFUGE, *supra* note 108, at 9.

159. Romero, *supra* note 158 (“The judges are frankly experiencing very high levels of anxiety and stress and frustration. They are working at rates that are unsustainable.”).

160. *Id.*

161. *See supra* note 150 and accompanying text.

162. Press Release, Dep’t. of Justice, Dep’t of Justice and Dep’t of Homeland Sec. Announce Plan to Restart MPP Hearings (July 17, 2020), <https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings> [https://perma.cc/LZL5-L4T5]. This plan requires several public health criteria to be met in border states in both the U.S. and Mexico, as well as globally, before MPP hearings will resume.

163. Nicole Narea, *House Democrats Say Migrants Aren’t Getting Fair Hearings in Tent Courts on the Border*, VOX (Oct. 18, 2019, 10:30 AM), <https://www.vox.com/policy-and-politics/2019/10/18/20920000/house-democrats-investigation-tent-courts-border-port> [https://web.archive.org/web/20201125025315/https://www.vox.com/policy-and-politics/2019/10/18/20920000/house-democrats-investigation-tent-courts-border-port].

164. *Id.*

165. *Id.*; *see also* Koh, *Removal in Shadows*, *supra* note 60, at 225 (noting that scholars and advocates have long disparaged the ways that videoconferencing in immigration court procedures “leads to immigrants’ decreased engagement with the legal process”).

166. *See* Narea, *supra* note 163.

advocates.¹⁶⁷ Holding immigration court without the due process protections required in these kinds of proceedings erodes any aspiration for a meaningful immigration court process.

The multifaceted impact of the MPP makes it particularly fatal to the efficacy and fairness of the U.S. asylum system. The policy contradicts the purpose of asylum as a system that allows people in danger to seek refuge by increasing the risk of refoulement. The MPP has also prevented those in the asylum system from connecting to legal advocates and social networks that are essential to navigating the byzantine U.S. asylum application process.¹⁶⁸ Finally, the implementation of the MPP has reduced the capacity of the immigration legal process by overloading the asylum dockets and pushing these proceedings even farther out of the public eye.¹⁶⁹ For many families, seeking refuge in the United States is their last hope for survival after escaping dangers in their countries of origin. But the implementation of the MPP has largely extinguished this hope for thousands fleeing to U.S. borders from across the globe.

The effect of the MPP is even more severe because the timeline of its implementation has coincided with so many other policies restricting asylum.¹⁷⁰ This trend raises alarm about the unbridled power of the executive branch to remake our immigration legal system.¹⁷¹ Advocates, scholars, and legislators rightfully consider this amalgamation of policies as a coordinated, large-scale attack on the asylum pillar of the U.S. immigration legal system.¹⁷²

III. CHALLENGES TO THE MPP

In light of the devastating impact of the MPP, immigrants, advocates, and service providers immediately made legal and nonlegal challenges to its implementation. This Part discusses the challenges to the policy, including the primary case enjoining the entire MPP, as well as other cases that have challenged component procedures, like access to counsel during the nonrefoulement interview.

167. *Id.* (“Officials have since allowed translators into the hearing rooms, . . . but neither DHS nor the DOJ have issued any formal clarification of their policy.”); *see also* Rekha Sharma-Crawford, *Justice Denied: My Journey Inside the Secret Tent Courts Where Refugees Are Being Denied Dignity and Due Process*, 89 J. KAN. BAR ASS’N, Feb. 2020, at 6, 6–7 (stating that access to the tent “‘courthouse’ is inaccessible except to the limited few” and how attorneys and their migrant clients are escorted everywhere they go).

168. *See* Letter to Jerrold Nadler et al., *supra* note 143, at 4.

169. *See* Romero, *supra* note 158; Narea, *supra* note 163.

170. SHATTERED REFUGE, *supra* note 108, at 4–5.

171. *See* Marouf, *supra* note 89, at 760–76 (discussing metering, the criminal prosecution of asylum seekers, and family separation practices as executive branch strategies for preventing immigration adjudication).

172. *Id.* at 785; SHATTERED REFUGE, *supra* note 108, at 3; Isaac Chotiner, *How the Trump Administration Uses the “Hidden Weapons” of Immigration Law*, NEW YORKER (Feb. 13, 2020), <https://www.newyorker.com/news/q-and-a/how-the-trump-administration-uses-the-hidden-weapons-of-immigration-law> [https://perma.cc/FD7U-US9C].

A. Legislative and Grassroots Challenges

While the MPP has not garnered the media buzz of some of former President Trump's other immigration policies,¹⁷³ public pressure to end the MPP has been mounting as awareness about its horrific impact on asylum seekers grows. In February 2019, the American Immigration Lawyers Association submitted a letter demanding an end to the MPP,¹⁷⁴ and a coalition of immigration, human rights, and civil rights organizations and academics wrote to Congress in November 2019 with the same request.¹⁷⁵ Former Senator and Vice President Kamala Harris (D-CA) and Senator Elizabeth Warren (D-MA), signed on to a letter demanding that DHS release the results of an internal report conducted to assess the efficacy and impact of the MPP.¹⁷⁶ On January 14, 2020, the House Committee on the Judiciary opened a formal investigation into the MPP and requested extensive documentation from DHS about the impact of the policy.¹⁷⁷ Yet, these efforts have not significantly affected the implementation of the policy.

Some of the most valuable resources in the fight against the MPP have been provided by those documenting the abuses the policy has precipitated, including tracking how many individuals are subject to the MPP, how their court cases proceed, and how their lives unfold at the border.¹⁷⁸ The other unsung heroes are the grassroots, community organizations based in border communities who overcome tremendous obstacles every day to offer food, shelter, healthcare, and legal services to vulnerable immigrants subject to the MPP.¹⁷⁹ These advocates,

173. Narea, *supra* note 141 (“[C]hanges [like the MPP] have been made quietly and have never been able to inspire the kind of public outrage sparked by Trump’s travel ban in January 2017 . . . or the outrage toward the ‘zero tolerance’ policy that led to family separation in spring 2018.”).

174. Letter from The Am. Immigr. Council, The Am. Immigr. Laws. Ass’n, and the Cath. Legal Immigr. Network, Inc., to Kirstjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec. (Feb. 6, 2019) [hereinafter Letter to Kirstjen M. Nielsen], <https://www.aila.org/advo-media/aila-correspondence/2019/aila-and-advocates-send-letter-urging-secretary> [https://perma.cc/JT26-35LF].

175. Letter to Jerrold Nadler et al., *supra* note 143, at 1, 5.

176. Letter from Jeffrey A. Merkley, Charles E. Schumer, Kamala D. Harris, and Elizabeth Warren, U.S. Sens., to Chad Wolf, Acting Sec’y, U.S. Dep’t of Homeland Sec. (Nov. 19, 2019), <https://www.merkley.senate.gov/imo/media/doc/19.11.19%20DHS%20MPP%20Report%20Request%20Letter.pdf> [https://perma.cc/4RD9-MK3M].

177. Letter from Jerrold Nadler, Chairman of House Comm. on the Judiciary, U.S. House of Reps., Zoe Lofgren, Chair of Subcomm. on Immigr. & Citizenship, U.S. House of Reps., Pramila Jayapal, Vice Chair of Subcomm. on Immigr. & Citizenship, U.S. House of Reps., J. Luis Correa, U.S. House of Reps., Sylvia R. Garcia, U.S. House of Reps., Joe Neguse, U.S. House of Reps., Debbie Mucarsel-Powell, U.S. House of Reps., and Veronica Escobar, U.S. House of Reps., to Chad Wolf, Acting Sec’y, U.S. Dep’t of Homeland Sec. (Jan. 14, 2020), https://judiciary.house.gov/uploadedfiles/judiciary_objections_to_mpp.pdf?utm_campaign=349-519 [https://perma.cc/6XPX-Q9SZ].

178. See, e.g., *Details on MPP (Remain in Mexico) Deportation Proceedings*, *supra* note 21.

179. While this Note began with a vignette from the author’s experience volunteering with *Al Otro Lado*, it is certainly not the only organization delivering essential services to immigrants and border communities affected by the MPP. See *Border Advocacy Groups*, NAT’L NETWORK FOR IMMIGRANT & REFUGEE RTS., <https://www.niirr.org/drupal/border-groups> [https://perma.cc/5SDH-C2SF] (last visited Jan. 18, 2021) (listing groups active along the U.S.-Mexico border offering free legal services, education, healthcare, shelter, food, and more); see also Letter from Acción de Gracia

social workers, healthcare workers, organizers, and students challenge the MPP by enabling more asylum seekers to reach the United States. Their work has equipped families subject to the MPP with more resources and tools to survive these harrowing proceedings and find refuge in the United States. While the resilience and determination of immigrants and their tireless advocates has been the backbone of this movement, the earliest victories against the MPP came through the courts.

B. Legal Challenges

Immigrants' rights and civil rights groups immediately sued the government demanding termination of the MPP. On February 14, 2019, the American Civil Liberties Union (ACLU) filed *Innovation Law Lab v. Wolf*, arguing that the MPP deprives affected individuals of a meaningful opportunity to apply for asylum and that the process for assessing who is subject to the policy is insufficient.¹⁸⁰ The district court ruled in favor of the plaintiffs, granting a preliminary injunction to stop implementation of the MPP.¹⁸¹ However, the Ninth Circuit granted a stay of the injunction pending their consideration of the merits of the case.¹⁸²

While the *Innovation Law Lab v. Wolf* case was pending on appeal, the ACLU of San Diego and Imperial Counties filed a separate lawsuit contesting a narrower issue of the MPP: that those subject to the policy have been denied access to their already retained counsel with regard to preparation for and representation during the nonrefoulement interview.¹⁸³ In January 2020, a district court granted class-wide injunctive relief requiring DHS to allow those subject to the MPP to meet with retained counsel in private before the nonrefoulement interview and for the attorney to be present during the interview.¹⁸⁴ The San Diego court found sections 555(b) and 559 of the Administrative Procedures Act (APA) authorized the presence of an attorney before and during such interviews; failure to access that attorney would result in irreparable harm to the plaintiffs.¹⁸⁵ The court further noted that “[g]iven the stakes of a non-*refoulement* interview—the return to a country in which one may face persecution and torture—and the interview’s fact-intensive nature, it is undeniable that access to counsel is important.”¹⁸⁶ This legal victory added a significant safeguard in the MPP process but still only applies to a small subset of asylum applicants—those with retained counsel.

Immigration Assistance et al., *supra* note 131, at 3 (noting signatories are community organizations working on the border).

180. Complaint at 2, *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019) (No. 3:19-cv-00807-RS).

181. *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1130 (N.D. Cal. 2019), *aff'd sub nom.* *Innovation L. Lab v. Wolf*, 951 F.3d 1073 (9th Cir.), *and cert. granted*, 141 S. Ct. 617 (2020).

182. *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

183. *Doe v. Wolf*, 432 F. Supp. 3d 1200, 1203–04 (S.D. Cal. 2020).

184. *Id.* at 1204.

185. *Id.* at 1212–13; 5 U.S.C. § 555(b).

186. *Doe*, 432 F. Supp. 3d at 1213.

On February 28, 2020, the Ninth Circuit affirmed the district court's ruling in *Innovation Law Lab v. Wolf*, enjoining the MPP policy overall.¹⁸⁷ Judge William A. Fletcher authored the appellate panel's decision and cited to his concurrence from the earlier decision granting the government's motion to stay the preliminary injunction stating, "I am hopeful that the regular argument panel that will ultimately hear the appeal . . . will be able to see the Government's arguments for what they are—baseless arguments in support of an illegal policy[.]"¹⁸⁸ The court held that those subject to the MPP fall under section 1225(b)(1) of the United States Code and therefore cannot be subjected to the contiguous territory return provision that only applies to those who qualify as "other aliens" under section 1225(b)(2).¹⁸⁹ On these grounds, the court held that the MPP was invalid because the government's interpretation of section 1225(b), which the government cited as the statutory authority for the MPP, is an interpretation inconsistent with the statute itself.¹⁹⁰

The court also ruled on one of the plaintiffs' alternative arguments, holding the MPP is invalid in part because it violates the United States's nonrefoulement obligations in section 1231(b)(3)(A) of the United States Code.¹⁹¹ The court held that Congress intended section 1231(b)(3)(A) as "a general anti-refoulement provision, applicable whenever an alien might be returned to a country where his or her life or freedom might be threatened on account of a protected ground."¹⁹² The court dedicated several pages of its opinion to quotations from plaintiff declarations detailing dangerous experiences and fears of persecution as support for its holding that requiring asylum seekers to *affirmatively* assert their fear of returning to Mexico is a legally insufficient safeguard against refoulement.¹⁹³ The court further cited to amicus briefs from human rights advocacy organizations documenting the dangers faced by asylum seekers subject to the MPP.¹⁹⁴ The court also referenced the amicus brief written by the union of asylum officers, which stated that asylum officers operating under the MPP "face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our Nation's legal commitment to not returning the persecuted to a territory where they will face persecution."¹⁹⁵ Ultimately, the court held that the plaintiffs had also shown a likelihood of success on their claim that the MPP does not comply with nonrefoulement obligations under section 1231(b).¹⁹⁶

187. *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1077 (9th Cir.), *cert. granted*, 141 S. Ct. 617 (2020).

188. *Id.* at 1080 (quoting *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 518 (9th Cir. 2019) (Fletcher, J., concurring)) (alteration in original).

189. *Id.* at 1083–84, 1087 ("The structure of § (b)(1), which contains detailed provisions for processing asylum seekers, demonstrates that Congress recognized that § (b)(1) applicants may have valid asylum claims and should therefore receive the procedures specified in § (b)(1).").

190. *Id.* at 1084, 1087.

191. *Id.* at 1087, 1093.

192. *Id.* at 1089.

193. *Id.* at 1090–92.

194. *Id.* at 1092–93.

195. *Id.* at 1093.

196. *Id.*

In response to the Ninth Circuit's decision, the government immediately filed a motion to stay the preliminary injunction.¹⁹⁷ The court denied the motion to stay with respect to ports of entry in California and Arizona but granted the motion along the rest of the border due to jurisdictional concerns about the scope of the injunction.¹⁹⁸ The Ninth Circuit also granted the government's request that, notwithstanding the decision on the merits, the court extend the previous stay for one week until the Supreme Court could decide whether to intervene.¹⁹⁹ The Supreme Court did intervene, and, on March 11, 2020, granted an emergency stay of the Ninth Circuit's decision, permitting the government to continue its implementation of the MPP until the Justices decided whether to hear the case.²⁰⁰

On April 9, 2020, the government filed a petition for a writ of certiorari requesting that the Supreme Court reverse the Ninth Circuit's decision in *Innovation Law Lab v. Wolf*.²⁰¹ Although the Supreme Court did agree to hear the case, the Biden administration intervened before oral argument and the Justices granted the new administration's petition to remove the case from the argument calendar.²⁰² This was a significant step to eliminate the risk that a Supreme Court ruling may set precedent permitting future presidential administrations to revive the MPP.

CONCLUSION

On January 20, 2021, almost exactly two years after the initial implementation of the MPP, the Biden administration announced it would "cease adding individuals into the program."²⁰³ Yet this announcement left open the question of when and how the thousands of people still waiting in Mexico will be admitted to the United States.²⁰⁴ Since March 2020, DHS had largely stopped subjecting immigrants to the MPP and refused to process new applicants, citing the ongoing public health emergency.²⁰⁵ But the COVID-19 pandemic has severely exacerbated risks to health and safety for those languishing in border camps and already subject to the MPP.²⁰⁶

197. *Innovation L. Lab v. Wolf*, 951 F.3d 986, 987 (9th Cir. 2020).

198. *Id.* at 990.

199. *Id.* at 991.

200. *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020) (granting temporary stay of preliminary injunction).

201. Petition for a Writ of Certiorari at 1, *Wolf v. Innovation L. Lab*, No. 19-01212 (U.S. Apr. 10, 2020).

202. See Order List: 592 U.S. (Feb. 3, 2021), https://www.supremecourt.gov/orders/courtorders/020321zr_6jfl.pdf [<https://perma.cc/3WS2-PS42>].

203. Press Release, U.S. Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> [<https://perma.cc/XEY4-RLN3>].

204. *Id.*

205. Brief in Opposition at 1, *Wolf v. Innovation L. Lab*, No. 19-1212 (Apr. 10, 2020) ("The order, which is intended to remain in effect for as long as the public health concerns raised by COVID-19 persist, renders [the] MPP effectively superfluous as a border enforcement tool, and the government has largely abandoned its use of the processing of new arrivals.").

206. Letter from Acción de Gracia Immigration Assistance et al., *supra* note 131, at 1–2.

The MPP has created a humanitarian crisis at the U.S.-Mexico border and a logistical and procedural nightmare in the U.S. immigration court system. The impact of the other asylum policies discussed in this Note mean that asylum seekers' current chances of success in immigration court, even if they can wait in the United States, are still very slim.²⁰⁷ The border immigration courts whose dockets were already overloaded, and are doubly burdened by the inundation of MPP cases, will likely take years to recover from this extreme backlog.²⁰⁸ The immigrant families whose children have endured malnutrition, disease, and the trauma of violence and persecution while they wait in Mexico may never be the same.²⁰⁹ The reality of reversing policies like the MPP is likely to be far more challenging than the way it is described in campaign promises. Those committed to immigrant justice and the integrity of the immigration legal system must chart a new way forward.

This Note invites future discussion about the potential for creative and courageous advocacy in the courts, legislature, and at the United States-Mexico border in opposition to this and many other policies restricting access to asylum.²¹⁰ The legacy of the MPP in an era of deteriorating asylum protections demands greater government accountability for past and ongoing harms as well as a national reckoning with the political conditions that led us here.

207. Julia Preston, *'Wreckage Everywhere': Can Biden Undo Trump's Harsh Immigration Policies?*, THE GUARDIAN (Nov. 23, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/nov/23/can-biden-undo-trumps-harsh-immigration-policies> [<https://perma.cc/7UT2-BAVV>] (“During the coronavirus pandemic, [the MPP] program has stalled. But once those cases start moving in the courts, under the current asylum standards many are doomed to fail and end in deportation orders.”).

208. See Rosenberg et al., *supra* note 156.

209. Bochenek, *supra* note 8 (“The conditions, threats to safety, and sense of uncertainty asylum seekers face while waiting in Mexico creates chronic and severe psychological stress for children and families We know that these forms of pervasive, unresolved complex trauma can lead to significant long-term negative consequences for child development and family functioning.”); see also Letter to Kirstjen M. Nielsen, *supra* note 174 (providing first-hand accounts of the violence that families subject to the MPP experience).

210. See generally Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407 (2018) (describing the use of technology to offer representation despite limitations in geography and the availability of lawyers in the immediate vicinity).

