Case No. 19-15716

In the
United States Court of Appeals
For The
Ninth Circuit

INNOVATION LAW LAB, et al.,
Plaintiffs-Appellees,

v.

Kevin K. McAleenan, Secretary of Homeland Security, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 3:16-cv-00807-RS

BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS FIRST IN SUPPORT OF PLAINTIFFS-APPELLEES

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Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* hereby certifies that it is a non-profit entity that does not have a parent corporation. No publicly held corporation owns 10 percent or more of any stake or stock in *amicus curiae*.

Dated: June 26, 2019

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INTEREST OF *AMICUS CURIAE*

Human Rights First is a non-governmental organization established in 1978 that works to ensure the United States' leadership on human rights globally, and compliance domestically with its human rights commitments. Human Rights First operates one of the largest programs for *pro bono* legal representation of refugees in the nation, working in partnership with volunteer lawyers at leading law firms to provide legal representation, without charge, to thousands of indigent asylum applicants. Human Rights First has conducted extensive research and issued reports about the current and historical practices of, and legal framework governing, the United States' expedited removal procedures and *non-refoulement* obligations, and the forced return policy known as the Migrant Protection Protocols ("MPP"). This Court will decide issues that directly relate to Human Rights First's mission, which involves serving asylum seekers.

FRAP RULE 29 STATEMENT

Pursuant to FRAP Rule 29(a) and Circuit Rule 29-3, amicus curiae has sought the consent of the attorneys representing both parties to file this amicus brief. Counsel for both parties consent to the filing of the brief. Pursuant to FRAP Rule 29(a) and Circuit Rule 29-3, a motion for leave to file an amicus brief is not required.

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

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

SUMMARY OF ARGUMENT

The forced return policy is a violation of domestic and international law that rejects basic safeguards intended to prevent the return of refugees to danger. The United States has committed to *non-refoulement* under the Refugee Convention, the Convention Against Torture, the 1980 Refugee Act, and the Immigration and Nationality Act. Even in summary immigration proceedings, the United States has sought to comply with those obligations.

In 1996, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") codified the "expedited removal" process. Expedited removal allows low-level immigration enforcement officers to issue orders removing certain non-citizens who arrive at the border. To prevent the return of refugees to danger, the United States has established basic safeguards that apply in expedited removal. In particular, Customs and Border Patrol ("CBP") officers receive detailed instructions about questions to ask and information to provide asylum seekers; asylum seekers are held to a lower standard for the initial screening than applies in a full asylum hearing; immigration judges

review negative credible fear decisions; and asylum seekers are allowed access to counsel.

The MPP offers none of those protections. Instead, asylum seekers must affirmatively express fear of return to Mexico to obtain a fear screening. Even if they are referred for a fear screening, they must meet a significantly higher standard than required in the expedited removal context—a higher standard than required even in a full asylum hearing. And there is no access to counsel during the screening or right to have an immigration judge review a negative fear determination. Each of these departures from expedited removal procedures is arbitrary and unwarranted, particularly considering the circumstances at the border and the grave dangers refugees face in Mexico.[1]

In this brief, Human Rights First offers the stories of Elena, Rosa, Juan and Andrea to illustrate the grievous harm the MPP has caused. Countless others have been returned to danger in Mexico as a result of the MPP. They have suffered harm including kidnapping, rape, and

[1] Although not the focus of this brief, Human Rights First agrees with plaintiffs that the MPP is similarly contrary to the withholding statute. *See* Brief for Appellee at 12, *Innovation Law Lab v. McAleenan*, No. 19-15716 (June 19, 2019) (ECF No. 34).

persecution in Mexico. Some have been targeted for the same reasons they were targeted in their home countries and because of their visibility as refugees returned from the border. Against this backdrop, the MPP's failure to provide essential safeguards guaranteed in the expedited removal context is an unjustified divergence from policies specifically designed to comply with domestic and international law. To protect against further violations of the United States' treaty obligations and domestic statutes, this Court should affirm the decision below.

ARGUMENT

I. EXPEDITED REMOVAL PROVIDES PROCEDURAL SAFEGUARDS INTENDED TO SATISFY THE UNITED STATES' NON-REFOULEMENT OBLIGATIONS.

The United States has committed to *non-refoulement* under international treaties and domestic statutes. The United States has attempted to prevent the return of refugees to harm even in the context of summary immigration proceedings. In particular, the procedures required for expedited removal reflect a judgment about basic safeguards necessary to comply with the United States' obligations under international and domestic law. The MPP's arbitrary rejection of

those safeguards flies in the face of the United States' legal obligations and results in grievous *refoulement*.

A. The United States Has *Non-Refoulement* Obligations Under International and Domestic Law.

The United States is bound by both international and domestic law not to return refugees to danger. In particular, the United States is bound by Article 33 of the Refugee Convention, which states: "No 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."[2] The United States is also bound by the Convention Against Torture ("CAT"), which includes similar commitments.[3] Together, these international agreements commit the United States to "*non-*

[2] Protocol Relating to the Status of Refugees, art. 33(1), Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276 (binding United States to comply with Article 33).

[3] "No State Party shall expel, return ('Refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987).

refoulement," an obligation not to return refugees to harm or persecution.

The United States' commitment to *non-refoulement* is also codified in domestic statutes. For example, The Refugee Act of 1980 was intended to "implement the principles agreed to" in the Refugee Convention. *I.N.S v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). The Act includes language that specifically "parallels" the language in Article 33 committing the United States not to "expel or return" refugees to danger. *Id.* Similarly, the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") was adopted to implement Article 3 of CAT.[4]

The United States has recognized that it cannot ignore these commitments. As a result, even summary immigration proceedings provide some basic safeguards intended to satisfy the United States' *non-refoulement* obligations.

[4] *See* FARRA § 2242(a), Pub. L. No. 105-107, Div. G., Title XXI, 112 Stat. 2681, codified as note to 8 U.S.C. § 1231).

B. Expedited Removal Procedures Reflect an Effort to Prevent the Return of Refugees to Harm in Summary Proceedings.

The MPP is not the first policy to establish summary proceedings to address the claims of asylum seekers. In 1996, AEDPA and IIRIRA codified the "expedited removal" process, which allows low-level immigration officers to quickly remove non-citizens who arrive at the border without valid documentation unless they express a fear of return and pass a "credible fear" screening.[5]

Expedited removal limited access to immigration court hearings for some non-citizens lacking valid entry documents. A CBP officer makes the initial determination about whether a non-citizen arriving or

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[5] The expedited removal process is itself fraught with problems and can also result in *refoulement*, as courts and scholars have long recognized. *See, e.g.*, *Kahn v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010) (characterizing expedited removal as "fraught with risk of arbitrary, mistaken, or discriminatory behavior"); *see also* Elizabeth Cassidy & Tiffany Lynch, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, U.S. Comm'n on Int'l Religious Freedom (undated), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf ("*Barriers to Protection*"); Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. Rev. L. & Soc. Change 213 (1999). Affording any less protection to asylum seekers than the United States provides in expedited removal violates *non-refoulment* obligations and constitutes an arbitrary divergence from established policies.

crossing at the border could be subject to expedited removal. Before removing someone, the CBP officer must conduct an interview to assess whether the person has a fear of persecution or torture. The interview process requires CBP officers to ask a scripted list of questions. The script requires officers to explain the expedited removal process and inform interviewees that they must state immediately any reason they fear being returned to their home country. Those who express fear are referred to an asylum officer who is responsible for assessing whether the person's fear is "credible." A negative fear determination may then be reviewed by an immigration judge.[6]

Before the expedited removal policy became law, Congress engaged in extensive legislative study and discussion about the risk of *refoulement* in summary proceedings.[7] From these deliberations, a set of procedures has evolved to provide basic protections within the

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[6] *See, generally*, *Barriers to Protection*.

[7] *See, e.g.*, Amendment No. 3780 to Amendment No. 3743 to the Immigration Control and Financial Responsibility Act of 1996, which begins with the subheading "Purpose: To provide minimum safeguards in expedited exclusion procedure to prevent returning bona fide refugees to their persecutors," and re-emphasized the right to judicial review of credible fear determinations, 142 Cong. Rec. S4457-01 (daily ed. May 1, 1996), 1996 WL 217943 (Passed).

expedited removal process. Because the MPP abandons these basic protections, it marks an arbitrary departure from established policies that protect against *refoulement* in summary proceedings.

II. THE MPP'S ARBITRARY REJECTION OF BASIC SAFEGUARDS IN EXPEDITED REMOVAL VIOLATES THE UNITED STATES' NON-REFOULEMENT OBLIGATIONS.

The MPP diverges from expedited removal procedures designed to comply with the United States' *non-refoulement* obligations. Four expedited removal procedures are particularly relevant here: (1) questioning about fear of return and notice of related rights; (2) application of the "significant possibility" standard for establishing fear in a preliminary screening; (3) access to counsel; and (4) review by an immigration judge of negative credible fear determinations. Each of these protections is at least as important in the context of the MPP as in expedited removal. The MPP's rejection of basic safeguards offered in expedited removal is an arbitrary departure from policies established to protect against *refoulement* in summary proceedings.

A. The MPP Arbitrarily Departs from Fear Screening Procedures Deemed Critical for Expedited Removal.

The MPP fails to provide essential procedures for fear screenings deliberately built into the expedited removal process to reduce the risk

that legitimate asylum seekers could be removed to danger.[8] In the expedited removal context, CBP officers must inform non-citizens of their rights and ask about their fear of return during the initial interview. The statute specifically requires the Department of Homeland Security ("DHS") to "provide information concerning the asylum interview . . . to aliens who may be eligible." 8 U.S.C. § 1225(b)(1)(B)(iv).

Specific procedures have evolved to satisfy this requirement. See 8 C.F.R. § 235.3(b)(4). For example, the CBP officer must read the full text of Form I-867A, which incorporates questions focused not only on an applicant's fear of return to her country of origin, but also fear of removal to other countries. The form asks: "Do you have any fear or concern about being returned to your home country or being removed from the United States?" It also asks: "Would you be harmed if you returned to your home country or last country of residence?" If individuals express fear of return or intention to apply for asylum, they are referred to an asylum officer for a credible fear interview. 8 C.F.R. §

[8] *See* 142 Cong. Rec. S11491-02 (daily ed. Sept. 27, 1996), 1996 WL 565553 (statement of Sen. Hatch).

235.3(b)(4). In any scenario, the CBP officer must create a record of the facts of the case and statements made by the applicant before recommending removal or referral for a credible fear interview. 8 C.F.R. § 235.3(b)(2)(1).

Federal regulations provide an extensive list of what must be disclosed to an asylum applicant after she expresses a fear of return and before the credible fear interview takes place. The list is meant to inform the applicant about the asylum process and her rights:

> The referring officer shall provide the alien with a written disclosure on Form M-444, Information About Credible Fear Interview,[9] describing: (A) The purpose of the referral and description of the credible fear interview process; (B) The right to consult with other persons prior to the interview and any review thereof at no expense to the United States Government; (C) The right to request a review by an immigration judge of the asylum officer's credible fear determination; and (D) The consequences of failure to establish a credible fear of persecution or torture.

8 C.F.R § 235.3(b)(4)(i).

In contrast to the expedited removal process, the MPP provides for a fear screening only if the applicant *affirmatively* expresses a fear of

[9] *See* USCIS, Form M-444.

being returned to Mexico specifically.[10] But CBP officers are not required to—and routinely do not—inform asylum seekers that they need to affirmatively express a fear of return to Mexico to trigger a screening. In some instances, CBP officers failed to refer asylum seekers for screening even when they affirmatively expressed a fear of return to Mexico.[11]

The MPP's divergence from the expedited removal process is arbitrary because the importance of explaining the fear assessment process in the MPP context is at least equal to that in the typical expedited removal situation. Many asylum seekers who arrive at the southern border have crossed multiple borders and are unlikely to know that they must offer specific evidence of dangers they face in Mexico, or have enough specific knowledge of the circumstances in a country that

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[10] USCIS, Policy Memorandum on Guidance for Implementing Section 235 (b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols at 3 (Jan. 28, 2019), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf ("Jan. 28, 2019 Policy Memorandum").

[11] Dara Lind, *Exclusive: Civil servants say they're being used as pawns in a dangerous asylum Program*, Vox (May 2, 2019), https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit ("Vox").

is not their home. And there are many other reasons why asylum seekers may not disclose their fear of returning to Mexico, including fear of reprisal, trauma and prior persecution at the hands of government officials. Also, many may not know that return to Mexico is even a possibility.

As Judge Watford observed, "[m]any of these individuals will be unaware that their fear of persecution in Mexico is a relevant factor in determining whether they may lawfully be returned to Mexico, and hence is information they should volunteer to an immigration officer.[12]" That means DHS's present policy "is virtually guaranteed to result in some number of applicants being returned to Mexico in violation of the United States' non-refoulement obligations."[13]

The contrast between the "refusal to ask" policy and the expedited removal process is particularly stark. As Judge Watford explained:

> This policy of refusing to ask seems particularly irrational when contrasted with how DHS attempts to uphold the United States' non-refoulement obligations in expedited removal proceedings . . . Since the same

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[12] *Innovation Law Lab v. McAleenan*, No. 19-15716, slip op. at 17 (9th Cir. May 7, 2019) http://cdn.ca9.uscourts.gov/datastore/opinions/2019/05/07/19-15716.pdf (Watford concurring) ("Watford concurrence").

[13] *Id.*

> non-refoulement principles apply to removal and return alike, DHS must explain why it affirmatively asks about fear or persecution in the removal context but refrains from asking that question when applying the MPP. . . . DHS has not, thus far, offered any rational explanation for this glaring deficiency in its procedures. (One suspects the agency is not asking an important question during the interview process simply because it would prefer not to hear the answer.).[14]

The unjustified divergence from the fear screening procedures established for expedited removal confirms the arbitrariness of the MPP.

B. The MPP's Screening Standard Is Arbitrarily Inconsistent with the Standard Designed to Protect Against Returning Refugees to Harm in Expedited Removal.

The MPP arbitrarily rejects the standard of proof deemed appropriate for expedited removal. By statute, a non-citizen can establish a credible fear of persecution or torture by demonstrating to an asylum officer a "significant possibility" that she could be eligible for asylum.[15] The standard is deliberately set lower than the "well-founded

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[14] *Id.* at 18.

[15] *See* 8 U.S.C. § 1225(b)(1)(B)(v) ("For purposes of this subparagraph, the term 'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are

fear of persecution" standard used to establish eligibility for asylum in a hearing before an immigration judge. And the well-founded fear standard only requires demonstrating a 10 percent likelihood of persecution.[16]

The adoption of a "significant possibility" test in the expedited removal context was no accident. The statute deliberately established this standard to ensure meaningful access to the asylum process.[17] It reflects recognition of the particular circumstances in which credible fear interviews often occur, including: (1) the close proximity of the interview to a long, exhausting and frequently traumatic journey, (2) the inherently intimidating environments of detention centers and processing facilities where most interviews occur, (3) difficulty obtaining effective legal representation on a short timeline, and (4)

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known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.").

[16] *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) ("There is simply no room . . . for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening.").

[17] 142 Cong Rec. S11491-02 ("The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.").

asylum seekers' lack of access to and opportunity to secure evidence that would allow them to meet a higher burden.[18] Application of this standard also reflects that the United States recognizes its commitment to *non-refoulement* and access to the asylum system even in summary immigration proceedings.

The MPP abandons the standard that expedited removal policies mandate for credible fear interviews. Instead, it implements a standard higher than that used in final evidentiary asylum hearings before an immigration judge. DHS policy guidance specifies that a third-country national should not be involuntarily returned to Mexico under the MPP "if the alien would *more likely than not* be persecuted on account of [membership in a protected group] . . . or would *more likely than not* be tortured."[19] In other words, in order to prevent a return to Mexico, an asylum seeker must prove that there is a more than 50 percent chance

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[18] Vox, *supra* note 11 (Quoting an asylum officer as saying: "The legal standard requires such specific and persuasive testimony that it leaves virtually no doubt — not 'could,' 'would,' or 'might,' but 'will be'… [n]o one can satisfy that burden."

[19] USHS, Policy Guidance for Implementation of the Migrant Protection Protocols at 3-4 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf ("Jan. 25, 2019 Policy Guidance").

that she will suffer persecution or torture if returned. That standard is entirely inconsistent with the "significant possibility" standard that applies in the expedited removal context.

Under the MPP, an applicant is expected to meet this standard mere hours or days after arriving in the United States, while detained in often harsh conditions in a border processing facility, and without a hearing before an immigration judge, which would ordinarily include the possibility of representation by counsel as well as the opportunity to offer evidence, cross-examine witnesses and seek administrative or judicial review. Under the MPP, asylum seekers are expected to meet this standard without being told what they are required to prove.

The MPP's rejection of the expedited removal standard of proof is arbitrary. All the reasons for establishing a lower standard of proof in the expedited removal context apply with equal or greater force in the MPP context. Returned asylum seekers are third-country nationals who generally know little about Mexico and may have difficulty assembling proof as to the dangers they face there. They often face challenges including exhaustion, hunger, trauma and stress that may prevent them from adequately communicating their fears of return.

Divergence from the ordinary expedited removal procedures exacerbates these problems. For example, plaintiffs in this case were denied the 48-hour rest period normally allotted to asylum seekers to recover before a credible fear interview.[20] And it is common for dozens of migrants to be packed together into a locked holding cell known as a "hielera," or "ice box" for hours or days before their MPP interviews. These cells are crowded, noisy, freezing, and perpetually brightly lit, effectively ensuring that asylum seekers are unable to rest.[21] These conditions warrant application of the "significant possibility" standard of proof previously determined necessary in the expedited removal context. The deviation from the expedited removal procedures

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[20] USCIS, Questions and Answers: Credible Fear Screening (Last updated July 15, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening ("After you are detained, you will be given: An orientation to the credible fear process[;] A list of free or low cost legal service providers[;] At least 48 hours after your arrival at the detention site before taking part in the interview[.]").

[21] John V. Kelly, *Management Alert – DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing* Center, DHS Office of Inspector Gen. (May 30, 2019) https://www.oig.dhs.gov/sites/default/files/assets/2019-05/OIG-19-46-May19.pdf.

constitutes an unwarranted rejection of procedures designed to protect against *refoulement*.

C. The MPP Arbitrarily Denies Access to Counsel in Initial Screenings that Expedited Removal Permits.

The MPP rejects the basic protection of access to counsel permitted in expedited removal. By statute, expedited removal provides that "[a]n alien who is eligible for [a credible fear interview] may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General," as long as "[s]uch a consultation shall be at no expense to the Government and shall not unreasonably delay the process." 8 U.S.C. § 1225(b)(1)(B)(iv). Federal regulations also direct that "[a]ny person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview." 8 C.F.R. § 208.30(d)(4). These provisions reflect both a recognition of the vital role that attorneys perform in helping often-traumatized asylum seekers articulate what they have experienced, and also a legal commitment to removing only those applicants whose

claims lack merit, not people fleeing genuine persecution who are unable to adequately communicate their fears.

In contrast, the MPP does not offer asylum seekers access to counsel in their preliminary fear interviews before return to Mexico. In fact, the MPP explicitly limits access to counsel. USCIS policy guidance states: "DHS is currently unable to provide access to counsel during the assessments given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals."[22] It also establishes that the fear screening should be conducted in private, without counsel present.[23]

Rejecting access to counsel in the MPP context is arbitrary because the need for counsel in the MPP process is at least equal to the need in the typical expedited removal case. When asylum seekers are denied counsel, it undermines their ability to prepare for interviews and present evidence that could demonstrate the dangers they face in Mexico. This is especially true in the MPP context where asylum

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[22] Jan. 28 Policy Memorandum at 3.

[23] *Id.*; Vox, supra note 11 ("[Asylum Officers'] union members said they were instructed to tell asylum seekers that there would be 'no room' for a lawyer during their interview (though lawyers have been able to observe MPP screenings in rare cases.")).

seekers must meet such a high standard and may be required to discuss in great detail complicated issues such as the targeting of migrants, lack of state protection,[24] or fear of local authorities in a country that is not their home.

Lack of counsel contributes to the chaos of the MPP process and impedes access to the asylum system generally. USCIS policy guidance directs an officer conducting an MPP fear interview to consider whether "residing in another region of Mexico to which the alien would have reasonable access could mitigate against the alleged harm."[25] Relocation to a different part of Mexico can make delivery of court paperwork virtually impossible, and travel back to the United States to

[24] Asylum seekers in Mexico receive virtually no state protection from criminal activity. "[A]ccording to official figures for the 2014-2016 period, of 5,824 crimes against migrants reported in Chiapas, Oaxaca, Tabasco, Sonora, Coahuila, and at the federal level, there is evidence of only 49 sentences, leaving 99 percent of the cases in impunity." Ximena Suarez, Andres Diaz, Jose Knippen & Maureen Meyer, *Access to Justice for Migrants in Mexico: A Right that Exists only on the Books*, Red Migrante Sonora *et al.*, 4 (July 2017), https://www.wola.org/wp-content/uploads/2017/07/Access-to-Justice-for-Migrants_July-2017.pdf.

[25] January 28, 2019 Policy Memorandum at 4.

attend a hearing even more dangerous and difficult. These factors only increase the need for an attorney intermediary.[26]

D. The MPP Arbitrarily Rejects Review by an Immigration Judge Considered Essential in Expedited Removal.

The MPP denies review by an immigration judge even though that basic safeguard has been deemed necessary in the expedited removal context. The expedited removal statute directs: "The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination . . . that the alien does not have a credible fear of persecution." 8 U.S.C § 1225(b)(1)(B)(iii). This provision reflects the view that "immigration judges will provide independent review that will serve as an important though expedited check on the initial decisions of asylum officers."[27]

In contrast, the MPP does not provide for an immigration judge to review an asylum officer's negative determination of a non-citizen's fear

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[26] Julia Love & Kristina Cook, *Asylum seekers say U.S. officials returned them to Mexico but kept their IDs*, Reuters (May 31, 2019) ("Reuters") ("Returned migrants also say they struggle to find work, immigration lawyers and a permanent address where they can receive notice of their court hearings.").

[27] 142 Cong. Rec. S11491-02.

of harm in Mexico. Asylum applicants whose fear claims are rejected may be reviewed by a "supervisory asylum officer," but there appears to be no established process for review. The limited public information available indicates that very few asylum seekers receive positive determinations that prevent return to Mexico.[28] This is not surprising because screenings under the MPP have been described as "pro forma."[29] And asylum officers have reported: "[D]ecisions to let an asylum seeker stay are often reviewed – and blocked or overturned – by asylum headquarters."[30]

Decisions to send an asylum seeker back to Mexico do not appear to be reviewed at all.[31] Asylum officers report receiving instructions not to issue any positive fear decisions without first checking with headquarters because "the front office" had been "complaining about [them] granting people."[32] Many asylum seekers referred for fear screenings under the MPP also reported that they did not receive any

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[28] Vox, *supra* note 11.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

oral or written explanation of the asylum officer's decision.[33] Others who did receive written notice of denial were given a boilerplate form—in English—with checked boxes and no indicia of individualized review. These practices preclude the possibility of meaningful review at any level of authority.

The denial of review by an immigration judge is arbitrary, particularly for the fear determination under the MPP. The MPP has suffered from a lack of transparency from the start. The absence of immigration judge review has permitted the return of refugees to danger with no written notice of the reasons for their return despite detailed accounts of recent and likely harm.[34] Also, there is no established process for revisiting a negative determination when an asylum seeker faces new dangers in Mexico.[35] Just as immigration

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[33] Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico*, 11 (Feb. 13, 2019), https://www.humanrightsfirst.org/resource/sordid-scheme-trump-administration-s-illegal-return-asylum-seekers-mexico (" *A Sordid Scheme*").

[34] *A Sordid Scheme* at 11.

[35] Under the MPP, the United States may return asylum seekers to Mexico without conducting a fear screening, and later re-admit them briefly for the purpose of a hearing before an immigration judge. In some circumstances, the judge might refer the applicant for a fear

judges are required to provide an "important though expedited check" on initial decisions in expedited removal context, they are equally important in the MPP context.

III. The MPP's Arbitrary Rejection of Basic Safeguards Results in *Refoulement*.

To illustrate how the MPP's lack of basic safeguards impacts real people, Human Rights First will describe just a few examples in this brief: Elena, a lesbian who fled persecution in Guatemala and was also attacked in Mexico; Rosa, a political activist who fled Honduras and was kidnapped and held for ransom in Mexico; Juan who fled to escape corruption in Honduras and was kidnapped with his pregnant wife in Mexico; and Andrea who fled gang threats in Honduras and was sexually abused in the only place she could find to live in Mexico while awaiting her hearing. For each of these stories, there are countless

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screening with an asylum officer. This scenario exposes asylum seekers to months of danger in Mexico that could be avoided with a prompt fear screening of the type required in expedited removal. *See* Kate Morrissey, *San Diego immigration court 'overwhelmed' by remain in Mexico cases*, San Diego Tribune (June 3, 2019), https://www.sandiegouniontribune.com/news/immigration/story/2019-05-31/san-diego-immigration-court-overwhelmed-by-remain-in-mexico-cases.

others. In light of the significant risks of *refoulement* in Mexico, there is no excuse for the MPP's rejection of basic safeguards deemed necessary for expedited removal. The MPP's lack of essential procedures is therefore an arbitrary violation of the United States' *non-refoulement* obligations.

A. The MPP Returns Refugees to Danger in Mexico.

Asylum seekers and migrants not only face danger in Mexico, they are particularly vulnerable when they are returned to Mexico from the United States border. Asylum seekers are often returned without their identity documents[36] and with uncertain status in Mexico, making it nearly impossible to work and establish safe and stable living conditions for themselves while they await adjudication of their claims.[37] Asylum seekers are often recognized as foreign migrants

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[36] Reuters *supra* at note 26.

[37] Aaron Montes, *With U.S. hearings months away, migrants back in Juarez with no place to stay, few options*, El Paso Times (May 8, 2019), https://www.elpasotimes.com/story/news/2019/05/08/central-america-immigrants-sent-wait-juarez-mexico-have-no-place-stay-few-options/3506704002/. Although asylum seekers returned to Mexico are notionally issued renewable humanitarian visas that are good for one year, the Commissioner of the INM reportedly stated that migrants will receive only four-month visas. *See* Associated Press, *Mexico Won't Accept Minors Awaiting US Asylum Claims* (Jan. 28, 2019), https://apnews.com/8541781f26a8482ea0e35ff9102b67bc.

seeking entry into the United States and targeted specifically because of that status. Others are targeted because of their sexual orientation or gender identities, just as they were in their home countries.

Criminal actors often work in collaboration with Mexican law enforcement and migration officials to target asylum seekers. For example, a Honduran asylum seeker returned to Mexico under the MPP was recently kidnapped by federal police officers in Ciudad Juarez and passed over to a criminal group who raped her and demanded a ransom payment from the woman's family.[38]

Asylum seekers returned under the MPP are often left with no option but to remain in dangerous border regions. Tijuana, for instance, is one of the deadliest cities in the world. Homicide rates have been increasing over the last five years, reaching the record number of 2,518 in 2018.[39] The State of Baja California has also seen increasing rates of

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[38] Parker Asmann, *Mexico Police Collude With Criminals to Kidnap, Extort Migrant*, InSight Crime (June 20, 2019), https://www.insightcrime.org/news/brief/mexico-police-collude-criminals-kidnap-migrant/.

[39] Kate Linthicum, *Meth and murder: A new kind of drug war has made Tijuana one of the deadliest cities on Earth*, Los Angeles Times (Jan. 30, 2019), https://www.latimes.com/world/mexico-americas/la-fg-mexico-tijuana-drug-violence-20190130-htmlstory.html.

rape throughout its five municipalities. The U.S. State Department cautions that "[c]riminal activity and violence, including homicide, remain a primary concern throughout the state."[40] The U.S. State Department also cautions against travel to the State of Chihuahua, stating: "Violent crime and gang activity are widespread."[41]

The MPP's divergence from procedures required in expedited removal has resulted in violations of the United States' *non-refoulement* obligations. Human Rights First offers several examples to illustrate the point:

- **Elena***[42] is a 27-year-old Guatemalan asylum seeker who fled her home country after suffering persecution and abuse because she is a lesbian, a group that also faces serious harm and persecution in Mexico. She fled with her partner, Ana, and Ana's eight-year-old son, Sander. When they presented at the official port of entry and told CBP that they are a family, border officials told them that they do not process unmarried couples as families. Ana and Sander were released into the United States, but Elena was detained in CBP custody for 20 days and then returned to Juarez under the MPP. She feared return to Mexico but CBP officials never asked about her fear and she was not referred for a fear screening. About one and a half hours after her return to Juarez, Elena and three other returned asylum seekers were approached

[40] USDS, Mexico Travel Advisory (Apr. 9, 2019), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

[41] *Id.*

[42] Names marked with asterisks have been changed to protect the individuals' identities.

by a group of men who stole their wallets and followed the group, asking if their families had money. Several weeks later, a different group of men attacked Elena and her friends with rocks and a knife. Elena's friends suffered lacerations and other injuries. Elena is waiting for her first immigration court hearing and will ask at that time for a fear interview, which she learned of only through consultation with a legal services organization visiting asylum seekers in Mexico. She fears living in Juarez, rarely leaves her rented room and refuses to communicate with others to avoid being identified as either a migrant or a lesbian.

- **Rosa*** is a 23-year-old asylum seeker who fled Honduras with her husband, five-year-old daughter, Marisela, and seven-year-old son, Oscar, after receiving death threats due to Rosa's participation in the *Partido Nacional de Honduras* (National Party of Honduras), and the Honduran president's political campaign. In Mexico City, the family was kidnapped and extorted for money. During this kidnapping, the parents were separated from their children and the kidnappers called Rosa's mother-in-law to intimidate her, saying, "I know [Rosa] is going to be returned [to Mexico]."

  Once the kidnappers released the family, they traveled to Juarez, crossed into the United States, and were detained by CBP under the international bridge with thousands of other migrants. Rosa and Marisela were separated from Rosa's husband and Oscar when Marisela got very sick and went to the hospital. When Rosa and Marisela returned from the hospital, the other two were already released into the United States. Rosa and Marisela were returned to Mexico without ever being screened for fear of return there.

  Rosa was only screened for fear of return to Mexico following an initial court hearing in April 2019. She recounted the family's earlier kidnapping but was still returned to Juarez with Marisela. Upon their return, they were told that the shelter where they previously stayed was now full, so they went to live in a crowded hotel room with a group of other mothers and young children.

Rosa and Marisela were later kidnapped and held for ransom a second time, this time by a taxi driver and other armed men.

Rosa knows they were targeted because they were migrants; the taxi driver told her that he knew she was not from Mexico and so she had to have family in the United States who could pay for her release. The kidnappers released Rosa and Marisela once Rosa's family paid a ransom. Rosa tried to file a police report but was told, "Nothing has happened, it was just a scare."

Days later, a man armed with a knife tried to break into the hotel room they were sharing with other women and children. The women managed to block him by covering the door with furniture. They called the police but do not believe a report was filed. During her next hearing on May 17, 2019, Rosa recounted these two new instances to the immigration judge and later had a second fear screening. However, she was still returned to Mexico and fears for her young daughter, saying, "I 100 percent cannot come back to Juarez."

- **Juan** is a 23-year-old Honduran asylum seeker. He fled his home country with his common-law wife, Marisa, who is now six-months pregnant. Juan and Marisa were kidnapped in Nuevo Laredo, Mexico by the Zetas cartel and held for over two months. They were not released until Juan's family in Honduras was able to send enough money as ransom. The couple arrived in Juarez in January 2019 and after waiting for their turn to cross into the United States, they entered through the official port of entry. While Marisa was released into the United States, Juan was returned to Mexico under the MPP program. He had a fear screening and told the asylum officer about the kidnapping he and his wife suffered and his fear of return but he was still returned and separated from his wife. Juan is terrified to be living in Juarez and rarely leaves the house where he is residing for fear that he will be kidnapped again.

- **Andrea** is a Honduran asylum seeker who fled her home country with her nine-year-old son after the 18th Street gang threatened them. During their journey to the United States, they suffered

> harassment from Mexican federal police, who insulted them and would not let them rest. After waiting two months at the United States–Mexican border for their turn to cross and request asylum, she and her son were returned to Mexicali, Mexico under the MPP. When she told U.S. officials that she feared return to Mexico, they said it was not their problem and she was not referred for a fear screening. Since returning to Mexico, the only place she found to live was in another man's home. After a short time, he began demanding to have sex with her and when she refused, he sexually abused her. Andrea fears remaining in Mexico with her young son but must wait until her next court hearing to express fear again.

Cases like these proliferate because of the dangerous conditions in Mexican border regions and inadequate fear screenings under the MPP.

Mexican migration authorities also routinely fail to provide humanitarian protection as required under domestic and international law. The National Migration Institute ("INM"), the Mexican immigration enforcement agency, has a well-documented history of using abusive practices to suppress asylum claims and coerce asylum seekers into accepting return to their countries of origin. A report by the independent INM Citizens' Counsel cited by the U.S. State Department described an asylum system in which "immigration agents

had been known to threaten and abuse migrants to force them to accept voluntary deportation and discourage them from seeking asylum.[43]"

A survey of five hundred asylum seekers by Amnesty International substantiated these findings.[44] It found that 75 percent of migrants detained by INM were never informed of their right to seek asylum in Mexico, despite the fact that the INM is expressly required to provide such information under Mexican law. Out of the five hundred surveyed, one hundred and twenty—or twenty-four percent—indicated that a *refoulement* had occurred. For those who had been detained, the *refoulement* rate was forty percent. The high risk of *refoulement* in Mexico demonstrates the importance of applying basic safeguards in the MPP context. The failure to do so constitutes an arbitrary violation of the United States' obligations under domestic and international law.

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[43] USDS, 2017 Country Reports on Human Rights Practices: Mexico (Apr. 20, 2018), https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/mexico/.

[44] Amnesty International, *Overlooked, Under-Protected: Mexico's Deadly Refoulement of Central Americans Seeking Asylum*, 5 (Jan. 2018), https://www.amnestyusa.org/wp-content/uploads/2018/01/AMR4176022018-ENGLISH-05.pdf.

B. DHS's Justifications for the MPP's Lack of Safeguards Do Not Withstand Scrutiny.

The MPP's abandonment of basic safeguards established in the expedited removal process is an arbitrary violation of the United States' *non-refoulement* obligations. DHS's only justification for this departure is a formalistic argument that the MPP "returns" refugees to Mexico but does not "remove" them to persecution. DHS asserts that because such "returns" fall outside the expedited removal process, the safeguards established for expedited removal are not warranted. But that argument is meritless.

The government's position ignores the United States' clear *non-refoulement* obligations under domestic and international law, as well as the spirit of those laws, which were written to prevent the return of vulnerable populations to dangerous circumstances. Article 33 of the Refugee Convention states unambiguously that contracting states "shall [not] expel or *return* ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . . ." 19 U.S.T. 6223 (emphasis added). The United States' statutes are in accord. For example, the "Attorney General may not remove an alien" subject to threat under 8 U.S.C. § 1231(b)(3)(A). The statute

means nothing, however, if DHS can simply circumvent it by choosing to "return" migrants before the decision is made to "remove" them is made.

In all events, the formalistic distinction between a "return" and a "removal" does not justify the government's abandonment of basic procedural protections in expedited removal that were intended to prevent *refoulement*. Each of the protections discussed above is at least as important in the MPP context as it is in the ordinary expedited removal context. Expedited removal already reflects a considered judgment about procedures that are essential to comply with the United States' *non-refoulement* obligations. The rejection of such basic safeguards renders the MPP an arbitrary departure from past policies that violates international and domestic law.

CONCLUSION

Expedited removal procedures include critical safeguards intended to prevent the return of refugees to persecution. The MPP's failure to abide by those procedures returns legitimate asylum seekers to dangerous conditions in Mexico in violation of domestic and international law. Because there is no valid basis for denying expedited

removal procedures in the MPP context, the MPP is also an arbitrary divergence from established policy. For the foregoing reasons, the Court should affirm the decision below.

Dated: June 26, 2019

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Pursuant to Rules 32(a)(5), 32(a)(6), and 29(a)(5) of the Federal Rules of Appellate Procedure, and Ninth Circuit Rule 32-1, I certify that the attached brief is in 14-point proportionally spaced Century Schoolbook font, and contains 6,855 words, as counted by my word processing program, exclusive of the portions of the brief excepted by Rule 32(f). Pursuant to Ninth Circuit Rule 32-1(e), a signed Form 8 also accompanies the attached brief.

By: /s/ *Naomi A. Igra*
Naomi A. Igra

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I hereby certify that on June 26, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all registered attorneys of record.

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