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IMMIGRATION
p r o j e c t
of the National Lawyers Guild

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Via Electronic Mail

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RE: Migrant Protection Protocols Raise Severe Access to Counsel Concerns

Dear Acting Secretary Wolf, Acting Commissioner Morgan, Executive Assistant Commissioner Owen, Senior Official Cuccinelli, Acting Director Albence, and Director McHenry:

In a joint statement issued on March 23, 2020 regarding the rescheduling of Migrant Protection Protocol (MPP) hearings, DHS and EOIR affirmed that they are “deeply committed to ensuring that individuals ‘have their day in court.’”¹ We, the undersigned organizations, share this commitment, but know from experience that full and fair adjudication of asylum cases is

¹ Department of Homeland Security, “Joint DHS/EOIR Statement on MPP Rescheduling” (March 23, 2020), available at <https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling>.

impossible without access to legal representation. As of February 2020, only 6.2 percent of noncitizens forced to remain in Mexico under MPP had obtained legal representation.² In comparison, for asylum decisions issued in Fiscal Year 2019, 84 percent of non-detained asylum seekers and 54 percent of detained asylum seekers were represented in their immigration proceedings.³ Accordingly, we are writing to elaborate on the factors that currently impede such access and to recommend steps that could be taken to reduce these barriers before MPP hearings resume.

I. BACKGROUND

Under MPP, DHS forces a significant number of asylum seekers who arrive at the southern border to remain in Mexico for the duration of their immigration proceedings. Between MPP's implementation in January 2019 and October 2019, over 55,000 migrants were required to return to Mexico under MPP.⁴ Although this policy is troubling in many respects, some of which are the subject of pending litigation,⁵ we are writing to explain how implementation of MPP is depriving asylum seekers of their right to access counsel in violation of federal law.⁶

Legal representation in immigration proceedings can determine whether a noncitizen is granted asylum and allowed to remain in the United States. Represented noncitizens detained in the United States are over 10 times more likely than those appearing *pro se* to succeed in their immigration cases.⁷ The success rate for released noncitizens represented by counsel is more than five times greater than for released individuals appearing *pro se*.⁸

DHS's MPP guidance acknowledges the need for asylum seekers to be able to access counsel during the pendency of their immigration cases. On January 14, 2020, DHS component agencies issued a memorandum listing recommendations from DHS senior leadership to “reinforce the avenues by which . . . attorneys . . . can view MPP proceedings, meet with migrants (if appropriate), or visit temporary hearing locations”; “[s]tandardize and ensure the consistency of the information individuals are provided regarding ‘migrant rights’”; and facilitate access to counsel for MPP respondents.⁹ In addition, a February 2019 memorandum by U.S. Immigration and Customs Enforcement (“ICE”) states that asylum seekers subject to MPP must be allowed

² TRAC, *Details on MPP (Remain in Mexico) Deportation Proceedings* (through Feb. 2020), available at <https://trac.syr.edu/phptools/immigration/mpp/>.

³ TRAC, *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more* (Feb. 2020), available at <https://trac.syr.edu/phptools/immigration/asylum/> (filters set to “Fiscal Year of Decision,” “Custody,” and “Represented”).

⁴ U.S. Dep’t of Homeland Sec., *Assessment of the Migrant Protection Protocols (MPP)* (Oct. 28, 2019), available at https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf.

⁵ See, e.g., *Innovation Law Lab v. Wolf*, 951 F.3d 986 (9th Cir. Mar. 4, 2020), stay granted by No. 19A960, 2020 WL 1161432 (Mem) (U.S. Mar. 11, 2020).

⁶ See 8 C.F.R. §§ 208.30(d)(4), 208.31(c) & 1240.10(a)(1), 8 U.S.C. §§ 1229a(b)(4)(A), 1362.

⁷ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 9, 49 (2015).

⁸ *Id.*

⁹ Memorandum from Mark A. Morgan, Matthew T. Albence, & Mark Koumans, U.S. Dep’t of Homeland Sec., *Response to the Migration Protection Protocols Red Team Report*, at 2-4 (Jan. 14, 2020), available at <http://cdn.cnn.com/cnn/2020/images/01/23/ice.memo.pdf>.

sufficient time before an immigration hearing to afford them “the opportunity to meet in-person with [their] legal representative.”¹⁰

One court has intervened to ensure that DHS complies with its legal obligation to provide migrants with proper access to counsel in the context of MPP *non-refoulement* interviews. Initially, DHS refused to allow asylum seekers subject to MPP to communicate with their retained counsel prior to and during those interviews.¹¹ In January 2020, however, a judge in the Southern District of California issued a preliminary injunction requiring DHS to allow access to counsel to asylum seekers subject to MPP along the California-Mexico border.¹²

Access to counsel issues under MPP are not limited to *non-refoulement* interviews. These concerns are present from the moment asylum seekers are placed in MPP and throughout the duration of their immigration proceedings. As explained below, DHS and EOIR have erected nearly insurmountable hurdles for asylum seekers in MPP seeking to access legal representation. Due to conditions in Mexico, very few legal service providers are even willing to represent asylum seekers subject to MPP. With respect to those legal service providers who are willing and able to provide representation to this population, MPP makes it incredibly difficult for them to identify, screen, and advise potential clients. Finally, for the few MPP respondents who are represented by counsel, MPP makes it nearly impossible for lawyers to effectively communicate with their clients while they are in Mexico and during the brief periods they are in the United States.

II. ACCESS TO COUNSEL ISSUES ARISING FROM MPP

A. Life-Threatening Conditions in Mexico Prevent Asylum Seekers From Accessing Counsel

Asylum seekers returned to Mexico under MPP face conditions that make it virtually impossible for them to access the scarce pro bono legal resources that are available in the United States. Under MPP, asylum seekers are stuck in Mexico for months while their cases proceed through the immigration court system. While in Mexico, asylum seekers have extremely limited resources and lack access to basic necessities such as safety, shelter, food, and clean water. Barriers to these necessities are heightened for asylum seekers who are not proficient Spanish speakers. Due to language barriers, these populations are even less likely to access the limited services available to them without any support mechanisms in place.

¹⁰ Memorandum from Nathalie R. Asher, Acting Exec. Assoc. Dir., U.S. Dep’t of Homeland Sec., U.S. Immigration & Customs Enforcement. *Memorandum for ICE Field Office Directors, Enforcement and Removal Operations*, at 3 (Feb. 12, 2019), available at <https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf>.

¹¹ U.S. Dep’t of Homeland Sec., U.S. Citizen & Immigration Serv., *PM-602-0169, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, at 3 (Jan. 28, 2019), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>.

¹² *Doe v. Wolf*, 19-CV-2119-DMS (AGS), 2020 WL 209100 (S.D. Cal. Jan. 14, 2020) (granting motion for class-wide preliminary injunction).

Non-profit organizations and news media have published numerous reports detailing the shocking conditions in which asylum seekers are living while trapped in Mexico.¹³ Asylum seekers have been forced to live in makeshift camps or on the streets of Mexico's northern border cities with very limited means to support themselves and their children.¹⁴

In addition, many of the cities along Mexico's northern border where asylum seekers are forced to wait are extremely dangerous, which has led to Department of State travel warnings for many of the border areas where asylum seekers subject to MPP are returned.¹⁵ Human Rights First has documented "at least 1,001 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico by the Trump Administration" as of February 28, 2020.¹⁶ The U.S. Immigration Policy Center at the University of California at San Diego interviewed 607 asylum seekers subject to MPP and found that approximately a quarter of them had been threatened with physical violence while in Mexico and that over half of those threats had led to actual experiences of physical violence.¹⁷

Given these dire circumstances, asylum seekers subject to MPP have limited ability and are generally unable to seek out the few legal service providers who are willing to assist them. Many do not have access to a phone to contact available attorneys, most of whom are located in the United States. Those who have access to a phone often do not have reliable cell phone service, access to the internet, or even the resources to make international calls to attorneys or non-profit organizations in the United States.

With respect to the few asylum seekers who are able to connect with legal service providers, many lack access to private spaces where they can have confidential conversations with attorneys conducting screenings. During screenings, attorneys must often ask probing questions to solicit information about past harm and vulnerabilities that asylum seekers may fear disclosing in a non-private space. Furthermore, the list of low-cost legal service providers that DHS provides asylum seekers subject to MPP is not tailored for asylum seekers in Mexico.¹⁸ In fact, the majority of the organizations on DHS's list of pro bono legal service providers in the San Diego Immigration Court do not take MPP cases.

¹³ See e.g., Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process* (Aug. 2019), available at humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf.

¹⁴ Reynaldo Leañón Jr., *Mexican Official Tries To Move Asylum-Seekers Stuck In Tent Camps*, National Public Radio (Nov. 9, 2019), available at <https://www.npr.org/2019/11/09/777686672/mexican-official-tries-to-move-asylum-seekers-stuck-in-tent-camps>.

¹⁵ U.S. Department of State, *Mexico Travel Advisory*, available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (last accessed Apr. 14, 2020).

¹⁶ Human Rights First, *Delivered to Danger*, (Feb. 28, 2020), available at <https://www.humanrightsfirst.org/campaign/remain-mexico>.

¹⁷ US Immigration Policy Center, *Seeking Asylum: Part 2*, at 9 (Oct. 29, 2019), available at <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

¹⁸ Human Rights Watch, *US: 'Remain in Mexico' Program Harming Children* (Feb. 12, 2020) ("Immigration officials provided a woman who attended a hearing in Laredo a list of legal service providers – showing lawyers in Dallas, 700 kilometers (430 miles) away."), available at <https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children>.

B. Legal Services Providers Are Impeded from Identifying, Screening and Advising Potential Clients in MPP

Due to the conditions in Mexico described above, the demand for legal representation far outweighs the number of legal service providers willing and available to provide such representation. For the few legal service providers willing and available to represent this population, MPP poses significant obstacles to identifying, screening, and advising potential clients.

When asylum seekers subject to MPP are inside the United States, either during initial processing, while awaiting their immigration hearings, or after their hearings, lawyers have very few opportunities to even speak with them, let alone meet confidentially with them to screen them for representation or provide brief advice and counsel. Indeed, the American Bar Association Commission on Immigration has reported that EOIR and ICE have refused to allow immigration attorneys to meet with potential clients subject to MPP during the hour before their immigration hearings while they are present in the United States.¹⁹

Many legal service providers rely on presenting “know your rights” information to identify, screen and advise potential clients. However, EOIR has refused to grant such organizations permission to conduct “know your rights” presentations for individuals subject to MPP. For instance, EOIR has denied a request by Jewish Family Service of San Diego, one of the few organizations in the area that provides pro bono representation to MPP respondents, to conduct “know your rights” presentations at the San Diego immigration court. EOIR has also discontinued such programs in other immigration courts, including in El Paso, Texas.

Attorneys are also unable to assist noncitizens in their immigration proceedings by acting as a “Friend of the Court.” While a Friend of the Court does not formally represent a respondent, she is able to gather and convey basic information to the court on the respondent’s behalf, help the respondent navigate courtroom procedures, assist the respondent in reviewing and filling out forms, facilitate the respondent’s attendance at hearings, and serve as a liaison between the respondent and the court.²⁰ However, EOIR has reportedly barred attorneys from serving as a Friend of the Court in the MPP context.²¹

By denying legal service providers the opportunity to identify, screen and advise potential clients while they are in the United States, DHS is preventing almost all asylum seekers subject to MPP

¹⁹ Examining the Human Rights and Legal Implications of DHS’ “Remain in Mexico” Policy, Hearing before the House Committee on Homeland Security, Subcommittee on Border Security, Facilitation, and Operations, (Statement of Laura Peña, Pro Bono Counsel, American Bar Association Commission on Immigration), at 5 (Nov. 19, 2019), available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/Laura-Pena-written-testimony-nov-11-19.pdf.

²⁰ Memorandum for All Immigration Judges by The Office of the Chief Immigration Judge, *Friend of the Court Guidance*, at 3-5 (Sept. 10, 2014), available at <https://www.justice.gov/sites/default/files/pages/attachments/2016/12/21/friendofcourtaguidancememo091014.pdf>.

²¹ Human Rights Watch, *US Move Puts More Asylum Seekers at Risk* (Sept. 25, 2019), available at <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk#>.

from obtaining legal representation at all. Moreover, as explained below, it is often impossible or unsustainable for attorneys based in the United States to travel frequently to Mexico to meet with prospective or actual clients.²²

C. Legal Services Providers Are Unable to Adequately Represent Clients in MPP

MPP also presents enormous challenges for lawyers who are retained to represent asylum seekers physically located in Mexico. By forcing asylum seekers to remain in Mexico, MPP substantially impedes lawyers' ability to reliably, timely, and effectively communicate with their clients. To provide legal services to such individuals, U.S.-based attorneys must choose between costly travel to dangerous Mexican border cities to meet with their clients or preparing an asylum case without a meaningful opportunity for attorney-client consultation.

In order to provide competent representation to asylum seekers subject to MPP, lawyers must have reliable, sufficient, and confidential access to their clients. To establish eligibility for asylum, an applicant must provide a specific and detailed account of prior persecution. It is imperative for the attorney and client to build enough trust that the client feels comfortable disclosing sensitive information and traumatic past experiences. Face-to-face communication is essential for building that trust, especially given the likelihood of linguistic, cultural, and/or psychological barriers. Attorneys must understand the context of their clients' fears and experiences, requiring a number of meetings. In addition, attorneys must spend time informing and advising clients, ensuring that they understand the proceedings and various strategy options; discussing and collecting supporting evidence; confirming the accuracy and completeness of filings; obtaining their clients' signature on legal documents; and addressing collateral issues that arise as a result of clients being trapped in Mexico. Because U.S.-based attorneys often cannot afford to spend the time or resources required or risk their own safety and security to travel to Mexico to meet with clients, face-to-face conversations are often impossible, which impedes trust-building and other critical aspects of representation.

Given the immense challenges involved in communicating with clients subject to MPP, attorneys often are forced to wait until moments before a scheduled immigration court hearing to meet their clients face-to-face. The existing MPP guidance allows asylum seekers one hour before their scheduled hearings to meet with their attorneys, though practitioners have reported that DHS and EOIR regularly prevent attorney-client meetings from happening during that hour.²³ But even when DHS and EOIR allow such meetings, attorneys and their clients do not have access to confidential spaces and are thus forced to speak to each other in the gallery of the court room, often while sitting inches away from other asylum seekers. Unless the immigration judge grants the asylum seeker relief from removal, attorneys have no opportunity to confer with their clients after their hearings.

²² Monica Ortiz Uribe, *Trump Administration's "Remain In Mexico" Program Tangles Legal Process*, National Public Radio (May 9, 2019), available at <https://www.npr.org/2019/05/09/721755716/trump-administrations-remain-in-mexico-program-tangles-legal-process>.

²³ Human Rights Watch, *U.S. Move Puts More Asylum Seekers at Risk* (Sept. 25, 2019), available at <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk#>; Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, at 14 (Oct. 2019), available at <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>.

III. CONCLUSION

For the reasons explained above, DHS' implementation of MPP has effectively denied asylum seekers access to counsel. The most effective way to remedy this problem would be to end MPP and allow asylum seekers to remain inside the United States throughout the duration of their immigration court proceedings. However, if DHS and/or EOIR decide to resume MPP hearings, the agencies should immediately:

- Allow every represented asylum seeker subject to MPP access to counsel while in CBP custody and during their non-refoulement interviews;
- Permit use of courtrooms or other accessible spaces for Know Your Rights presentations before master calendar hearings involving MPP respondents, and provide additional confidential space for attorneys to screen individuals for representation;
- Ensure every represented asylum seeker subject to MPP has meaningful access to his or her legal representative by establishing a system whereby lawyers can make arrangements for their clients to be brought to ports of entry by appointment; allowing multiple opportunities for attorney-client meetings prior to, and well in advance of, hearings; and providing safe, confidential spaces with access to an international telephone line for purposes of evidence-gathering and third-party interpretation where needed;
- Provide for attorneys to meet with their clients in a confidential space with access to a telephone for third-party interpretation for *at least* one hour prior to the start of master calendar hearings and *at least* 24 hours prior to a merits hearing;
- Reinstate Friend of the Court for individuals without access to attorneys who can provide them with full-scope representation; and
- Where appropriate, allow immigration judges to grant continuances to allow for adequate attorney-client meetings, without being penalized for any resultant failure to meet the existing performance metrics for immigration judges.²⁴

If you require any additional information, please contact Amber Qureshi at aqureshi@nipnl.org or Gracie Willis at gwillis@splcenter.org.

Sincerely,

National Immigration Project of the National Lawyers Guild
Southern Poverty Law Center

²⁴ Memorandum for the Office of the Chief Immigration Judge, All Immigration Judges, All Court Administrators, and All Immigration Court Staff by James R. McHenry III, Director of EOIR, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018) (establishing EOIR's performance measures and case completion metrics for immigration judges), available at <https://www.justice.gov/eoir/page/file/1026721/download>.

Al Otro Lado
America's Voice
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Taylor Levy Law
The Black Alliance for Just Immigration (BAJI)
The Florence Immigrant & Refugee Rights Project
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Witness at the Border
Women's Refugee Commission
Young Center for Immigrant Children's Rights