

No. 19-15716

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

v.

KEVIN K. MCALEENAN,  
Acting Secretary of Homeland Security, *et al.*,  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Northern District of California, No. 19-cv-00807-RS (Seeborg, J.)

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**BRIEF FOR AMICI CURIAE FORMER U.S. GOVERNMENT  
OFFICIALS IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae are former immigration, national security, foreign policy, and other public officials who have worked on security and diplomatic matters at the senior-most levels of the United States government. Amici have dedicated their careers—collectively, hundreds of years of government and public service—to addressing the intractable problems posed at the U.S.-Mexico border and improving relationships between the United States and Central American countries. A number of them have served in leadership roles in the administrations of Presidents from both major political parties. Amici write to offer the Court their perspective on the many substantial immigration, diplomatic, and foreign policy issues raised by this case.

### **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

The Migration Protection Protocols (“MPP”) requires certain asylum seekers to be returned to Mexico while their claims are being processed. The policy seeks to overhaul the United States’ long-held practice of permitting asylum seekers to await their hearings in the United States. The government claims that these policies

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<sup>1</sup> Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

are justified by the immigration, security, and foreign policy interests arising from the increased number of asylum seekers at the southern border. Based on our collective hundreds of years of service in the departments and agencies of the U.S. government responsible for immigration and diplomatic relations, we believe the government's purported justifications for the MPP do not pass muster—and indeed believe that the MPP actively harms the United States' foreign and security interests.

*First*, the government's argument that the MPP is needed to address a security crisis of an increased number of asylum seekers is simply belied by the facts at the border. While the number of asylum seekers at the border has increased, this increase has been driven in large part by rising violence in the Northern Triangle countries. Many of these migrants, fleeing human rights abuses and endemic gang violence, have well-founded and legitimate fears of persecution. Indeed, migration at the southern border has generally shifted from individual men seeking work to family units fleeing for safety for precisely this reason. They are anything but the dangerous criminals the government claims they are, and there is no justification to summarily remove them from the United States before hearing their claims. Moreover, in light of the unabating violence in the Northern Triangle countries, the MPP is unlikely to have any measurable impact on decreasing the number of asylum seekers at the border.

Rather than marshal evidence in favor of the MPP, the government relies on characterizations of asylum seekers as “culpable” migrants whose claims “lack merit.” But denial of a migrant’s asylum petition or failure to enter the United States possessing lawful documentation says nothing about her criminality or dangerousness. It is well-established that procedural hurdles including insufficient access to counsel, the limited availability of hard-to-obtain documentation, and difficulty receiving notice are often fatal to asylum claims. And a migrant’s lack of documentation can evidence the very persecution for which she claims asylum.

*Second*, the MPP undermines the core U.S. interest in a well-functioning international refugee system. This interest is fundamental: the United States was founded by those fleeing religious persecution in Europe and has been a global leader in welcoming refugees ever since. This stance serves U.S. foreign policy and security interests because a functioning refugee system prevents migrant flows from destabilizing already-fragile countries and allows the United States to make good on its international commitments. Without it, refugee crises could easily spiral into chaos and turn countries hosting refugees into breeding grounds for violence and extremism.

The MPP stands in stark contrast to this history and commitment to the international refugee system. Under the policy, asylum seekers are sent back to Mexico, to some of the most violent cities in the world. These cities lack the

infrastructure to house these refugees, forcing them into overcrowded shelters or onto the streets. Sending migrants back to Mexico makes it difficult or impossible for them to obtain adequate legal counsel and impedes their lawyers' ability to serve them from across the border, jeopardizing even the most well-founded asylum claims. These chaotic, violent conditions compound the difficulty the asylum seekers face in receiving notice of their hearings, showing up in court, and obtaining the legal process to which they are entitled. The U.S. and Mexican asylum systems are buckling under the weight of these challenges.

Moreover, the MPP violates the United States' non-refoulement obligations not to send asylum seekers back to territories where they will be persecuted. Migrants from the Northern Triangle are at risk of persecution and violence in Mexico. Violating this obligation does more than place these particular migrants in harm's way—it threatens the foundation of the international refugee system, which depends on cooperation between countries that cannot be sustained in the face of flagrant violations under the MPP.

*Third*, the MPP damages our cooperative relationship with Mexico by placing Mexico in an untenable situation of hosting an unsustainable number of migrants, which undermines the very cooperation necessary to resolve the countries' common migration issues. The United States and Mexico share the southern border and inevitably have to cooperate to handle the growing number of asylum seekers from

the Northern Triangle. But the MPP was initially imposed over open opposition from Mexico, which regarded it as a unilateral, adversarial policy imposed by the United States. And even when Mexico agreed to expand the MPP, it did so facing the coercive threat of tariffs. Forcing Mexico to accept the MPP creates a potentially combustible situation, as the growing number of migrants to be housed may be too much for Mexico to accommodate in humane conditions. As an increasing number of migrants strain Mexico's resources, Mexico may ultimately take unilateral actions—such as deporting migrants back to the Northern Triangle countries from which they fled and allowing deterioration of the conditions provided for the migrants—that will only exacerbate the crisis the MPP is meant to solve. As a result, the MPP undermines the very cooperation that is ultimately necessary for the alleged “crisis” to be resolved. Finally, an injunction will not harm our diplomatic efforts with Mexico because the context in which Mexico agreed to the MPP—punitive tariff negotiations—does not suggest that Mexico willingly agreed to the policy.

The weakness of the government's justifications, risks to the international refugee system, and damage to U.S.-Mexico relations threatened by this unwanted, unilateral policy all highlight the wisdom of setting it aside.

## ARGUMENT

### **I. THE MPP CANNOT BE JUSTIFIED BY THE INCREASED NUMBER OF ASYLUM SEEKERS AT THE BORDER**

The government seeks to justify the MPP by claiming (at 3) that the increased number of noncitizens seeking asylum is creating a “crisis on the southern border.” The MPP, the government argues, must be employed to stanch the flow of migrants and protect U.S. security and foreign policy interests. But the increased number of asylum seekers on the border is driven by the conditions the migrants are fleeing, which are unlikely to respond to the Administration’s policies. Moreover, the “crisis on the southern border” is largely one of the Administration’s own making. Viewed in light of these facts, the Administration’s justifications for the MPP cannot justify the policy.

#### **A. The MPP Does Not Effectively Deal With The Increased Number Of Asylum Seekers At The Border**

##### **1. The rise in migrants seeking asylum is fueled by meritorious claims based on well-founded fears of persecution in the Northern Triangle**

The government claims (at 1) that “hundreds of thousands” of noncitizens are arriving at the U.S.-Mexico border to “assert asylum claims that largely lack merit.” There is no basis for that assertion. The rise in asylum seekers is fueled by deteriorating security and economic conditions in the Northern Triangle countries, which

have given rise to legitimate asylum claims that are not likely to abate in response to the Administration's policies.

Over the last decade, the countries that comprise the Northern Triangle—Guatemala, Honduras, and El Salvador—have been among the most violent in the world. Labrador & Renwick, *Central America's Violent Northern Triangle*, Council on Foreign Relations (June 26, 2018). In 2015, El Salvador became the most violent country in the world that was not at war, with a homicide rate of 103 per hundred thousand. *Id.*; compare World Bank Databank, *Intentional Homicides* (in 2015 the global average homicide rate was 5.3 per hundred thousand). All three Northern Triangle countries have markedly higher homicide rates than neighboring nations. Labrador & Renwick, *supra*.

Gangs and cartels perpetuate much of this violence. See Seelke, *Gangs in Central America* 5-6, Cong. Research Serv., 7-5700 (Aug. 29, 2016). “[MS-13] and its main rival, the ‘18th Street’ gang [also known as M-18] continue to undermine citizen security and subvert government authority in Central America.” *Id.* It has been estimated that there may be over 85,000 gang members in the Northern Triangle. *Id.* at 3. MS-13 and M-18 often subject civilians to forcible recruitment, which typically involves beatings for men and sexual assault for women. See *id.* at 6. Gangs also frequently employ sexual violence against women and children to control members or retaliate against rivals. See *id.* In addition to the threat of physical



violence, Northern Triangle residents face rampant extortion; each year, Salvadorans and Hondurans pay hundreds of millions of dollars in extortion fees just to go about their daily lives. *See* Labrador & Renwick, *supra*. If residents do not give in to a gang's financial demands, they are attacked. *Id.*

The governments of these countries have been unable to curb the violence or punish the perpetrators. Endemic corruption, weak institutions, and a serious lack of public funding prevents the Northern Triangle governments from protecting their citizens. Labrador & Renwick, *supra*. A stunning 95 percent of crimes go unpunished in the region. *Id.* The governments' previous attempts to crack down through expanded police powers and harsher punishments failed to reduce crime and may have led to increases in gang membership. *Id.*

The United States has contributed to the spread of this violence through the steady deportation of gang members, initially without identifying them as such to the governments of the Northern Triangle. *See* Seelke, *supra*, at 9. In fact, ICE does not provide a complete criminal history for deportees nor indicate gang affiliation unless it was the primary reason for deportation. *Id.* at 9-10. ICE only recently responded to longstanding pleas from Central American officials to share criminal records, when in 2014 it agreed to "expand" its Criminal History Sharing program with Honduras, Guatemala, and El Salvador. *Id.* at 10. Moreover, the United States has provided little or no assistance to the Northern Triangle governments to absorb

and retrain deportees for productive work, leaving them largely reliant on nongovernmental organizations to support the few shelters and programs that exist. *Id.*

Given these dire conditions, many Northern Triangle residents, including women and children, have no choice but to flee, making the treacherous journey through Mexico to seek asylum in the United States. *See* Labrador & Renwick, *supra*. The MPP is particularly callous because, due to the increased attacks on civilians, there has been a well-documented shift in migration at the southern border from individual Mexican men looking for work to families fleeing extreme violence and persecution in the Northern Triangle. *See, e.g.,* Krogstad et al., *Children 12 and Under Are Fastest Growing Group of Unaccompanied Minors at U.S. Border*, Pew Research Center Fact Tank (July 22, 2014). Thousands of unaccompanied children have been part of this shift in the demographics. *See* Meyer et al., *Unaccompanied Children from Central America: Foreign Policy Considerations*, Cong. Research Serv., 7-5700, 1-2 (Apr. 11, 2016). The dire conditions in the Northern Triangle make clear that many of the noncitizens arriving at the southern border have fled dangerous conditions and have meritorious asylum claims that deserve to be heard.

**2. The lack of successful asylum applications does not demonstrate that asylum claims at the border lack merit**

The government claims (at 51-52) that “a large majority” of persons claiming fear of persecution at the border “never file an application for asylum,” implying that their claims are not meritorious. But there is a wide range of reasons why people

with legitimate fears of persecution do not apply for asylum or will eventually be denied asylum. The predominant reason is lack of counsel.

Representation by counsel in asylum proceedings has a dramatic impact on the success of the claims. Nationally, only 37% of all immigrants are represented by counsel in their removal cases. Eagly & Shafer, *Access to Counsel in Immigration Court: Special Report*, American Immigration Council 4 (Sept. 28, 2016). But the odds of an asylee being granted asylum are three to five times higher when they are represented by counsel. See Syracuse University Transactional Records Access Clearinghouse (hereinafter “TRAC”), *Asylum Representation Rates Have Fallen Amid Rising Denial Rates* (Nov. 28, 2017); U.S. Gov’t Accountability Off., GAO-08-940, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* 30 (2008) (“For both affirmative and defensive cases, having representation was associated with more than a three-fold increase in the asylum grant rate compared to those without representation.”). These statistics demonstrate what lawyers and judges know to be true: having experienced counsel vastly improves the chances that an asylum claim will be heard.

By contrast, the 63% of immigrants who represent themselves in their asylum proceedings face barriers that can be fatal to their claims. These barriers include proceedings in a foreign language, confusion about the rules, and a lack of constant address which can result in a failure to receive court documents. See, e.g., SER 20

(“I do not know very much about the [immigration] process. . . . I also do not know how I will make arrangements to get evidence that I need to prove my case, like declarations from people who witnessed what I went through.”). Once these unrepresented asylum seekers make a single mistake in the process, they become at-risk for deportation. 28 U.S.C. § 1158(a)(2)(B), (D); *Lal v. Holder*, 312 Fed. App’x 855, 856 (9th Cir. 2009) (noncitizen ineligible for asylum due to his failure to apply for asylum within one year of arrival). Indeed, between July 2014 and November 2016, a staggering 85% of families ordered removed had their cases heard *in absentia*. Catholic Legal Immigration Network & The Asylum Seeker Advocacy Project, *Denied a Day in Court: The Government’s Use of In Absentia Removal Orders Against Families Seeking Asylum* (2018). Each of these barriers may result in denial of an asylum application for reasons unrelated to the underlying fear of persecution.

Thus, the government’s arguments about asylum claims that “lack merit” fail to account for the large number of unrepresented asylees whose claims are denied—or never aired—for reasons unrelated to the merit of the claims.

### **3. The MPP will not reduce the number of asylum seekers coming to the southern border**

The government argues (at 52) that moving asylees to Mexico “re-calibrates incentives” for noncitizens to “make the ‘dangerous journey north’” and thus dissuades Central American migrants from seeking asylum at the U.S. border. But the

evidence shows that the rate of asylum seekers coming to the United States responds to a complex interplay of “push” and “pull” factors and is unlikely to be affected by the MPP.

Despite the Administration’s claims, the evidence is conclusive that, for refugees considering asylum, the “push” factor of escaping extreme violence and poor socioeconomic conditions in one’s home country outweighs any “disincentive created by harsher enforcement policies.” See SER 480; see, e.g., Meyer et al., *supra*, at 2 (summarizing scholarly consensus “that elevated levels of migration from the region are likely to continue until policymakers in the countries of origin ... address the poor security and socioeconomic conditions in the northern triangle”). Indeed, the flow of migrants *increased* rather than decreased following implementation of the MPP. See Dickerson, *Border at ‘Breaking Point’ as More Than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. Times (Mar. 5, 2019).

Changes in the number of asylum applicants, as well as their success rates, have fluctuated over time in response to a number of factors, including conditions in the home country, resource allocations, and applicants’ ability to obtain representation. See Meyer et al., *supra*, at 1-2. For instance, although the percentage of applicants in 2017 who were denied asylum is higher than it was several years ago, it is lower than it was fifteen years ago. TRAC, *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality* (Dec. 13, 2016); see also U.S. Dep’t of

Homeland Security, *Immigration Statistics: Refugees and Asylees* (last updated June 5, 2019) (showing number of claims granted).

Given the dire conditions in the Northern Triangle countries, the government's claim that the MPP will reduce the number of asylum seekers lacks factual basis. More likely, the forced return policy will not discourage the flow of migrants arriving at the U.S. border.

**B. The MPP Cannot Be Justified By Unsupported Claims That Asylum Seekers Pose A Threat To The Security Of The United States**

In addition to ignoring the real factors that drive migrants to the border, the government conjures images (at 37-38) of asylum seekers as fraudsters and con artists, implying that they pose a security risk in the United States. The government failed to provide any evidence to support this claim. Instead, the government merely claims that asylum seekers who enter the United States without documents or with fraudulent documents are more "culpable" than other asylum seekers. Appellants' Br. in Support of Mot. for Stay 14.

But lack of lawful documentation does not imply culpable intent. For many asylum seekers, "fraudulent documents are the[] only means of fleeing persecution, even death, in their own countries." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 512 (9th Cir. 2019) (Fletcher, J., dissenting). Migrants fleeing chaotic and desperate conditions often leave without any of their belongings, including their identification documents. For example, Bianca Doe, a declarant for the plaintiffs,

faced death threats due to her sexual orientation until she “had no choice but to leave.” SER 30. She “got out of the car and walked across the border right then and there” and arrived at the border without documentation. *Id.* at 30-31. This fact does not make her any more “culpable” than migrants who arrived with their documents.

Putting stereotypes aside, there is no evidence that asylees who wait in the United States pending their adjudication pose a security risk to the United States. The government does not present any such evidence, despite repeated claims (at 1) of a “security crisis” and characterization of these migrants as fraudsters. In fact, “[t]here is no empirical evidence that immigration increases crime in the United States.” Doleac, *Are Immigrants More Likely to Commit Crimes?*, EconoFact (Feb. 14, 2017); Pérez-Peña, *Contrary to Trump’s Claims, Immigrants Are Less Likely to Commit Crimes*, N.Y. Times (Jan. 26, 2017) (summarizing data showing no support for claim that “undocumented immigrants commit a disproportionate share of crime”); Nowrasteh, *Immigration and Crime—What the Research Says*, Cato Institute: Cato at Liberty Blog (July 14, 2015) (reviewing numerous studies that fail to establish a link between immigrants, including undocumented immigrants, and increased crime).

Nor is there evidence for the government’s claim (at 54) that asylum seekers are exploited by smugglers and traffickers for human or drug trafficking. The overwhelming majority of illicit drugs that enter the United States across a land

border come through legal ports of entry in personal or commercial vehicles—not smuggled through unauthorized border crossings. DOJ Drug Enforcement Admin., *2018 National Drug Threat Assessment* 1, 99 (2018); *see also* Ward & Singhvi, *Trump Claims There Is a Crisis at the Border. What’s the Reality?*, N.Y. Times (Jan. 11, 2019). And none of the other most common methods by which illegal drugs enter the United States across the southern border—including subterranean tunnels, commercial cargo trains, passenger buses, aerial methods, and simple mail—involve asylum seekers. *2018 National Drug Threat Assessment* 99. In addition, human trafficking victims largely do not enter the United States through border crossings: most non-citizen trafficking victims arrive in the country on valid visas. Krajewski, *The Hypocrisy of Trump’s Anti-Trafficking Argument for a Border Wall*, The New Yorker (Feb. 5, 2019). There is therefore no evidence for the government’s claims that the MPP is necessary to stem drug and human trafficking, whose methods are largely peripheral to the migrant crossings at stake with the MPP.

The Administration’s efforts to stereotype, vilify, and scapegoat the entire asylum-seeker population as “con artists” are baseless and have led to misdirected policy measures that fail to address the underlying humanitarian challenge.

**C. The Crisis At The Southern Border, Which Is Largely Of The Administration’s Own Making, Does Not Justify The MPP**

The Administration has sought to narrow asylum opportunities for noncitizens at the southern border. In the process, it has created new administrative burdens and



eliminated rules designed to alleviate those burdens, contributing to the current “crisis” in processing asylum claims. The Administration’s policy decisions do not create an emergency that justifies taking punitive action against those seeking humanitarian relief.

In early 2019, the Administration announced a “zero tolerance” policy in which all border crossers between ports of entry would be criminally prosecuted. Under this policy, “DOJ prosecute[s] all adult aliens apprehended crossing the border illegally, with no exception for asylum seekers or those with minor children.” Kandel, *The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy*, Cong. Research Serv., R45266, 1 (Feb. 26, 2019). All illegal entrants are detained in federal criminal facilities under this policy, overburdening an already-stretched system and contributed to the government’s inability to process asylum claims. *Id.* at 2. In addition, the zero-tolerance policy has produced family separations, as children were not permitted to stay in criminal detention facilities with their adult parents. *Id.* The disastrous consequences of family separation—as well as the administrative burdens of caring for unsupervised children—have been well-documented. See O’Toole, *Family Separations a Year Later: The Fallout—and the Separations—Continue*, L.A. Times (Apr. 12, 2019).

In addition, the Administration has tried to limit which claims are considered eligible for asylum, increasing the uncertainty in asylum law and processing. In

2018, it mostly eliminated gang and domestic violence as grounds for asylum. The District of Columbia issued a permanent injunction against the implementation of this policy. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 105 (D.D.C. 2018), *appeal docketed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019). Later in 2018, the Administration issued a proclamation that anyone crossing the southern border without going through an official port of entry would be ineligible for asylum. *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1230-1231 (9th Cir. 2018); *Addressing Mass Migration Through the Southern Border of the United States*, Proclamation No. 9822, 83 Fed. Reg. 57,661, 57,662 (Nov. 9, 2018) (“I am tailoring the suspension to channel these aliens to ports of entry[.]”). The Ninth Circuit denied the government’s motion to stay the district court’s preliminary injunction pending appeal, finding “the Rule is likely inconsistent with existing United States law.” *East Bay Sanctuary Covenant*, 909 F.3d at 1231. The Supreme Court also denied stay of the injunction. *Trump v. East Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018). These policy changes contributed to chaos and uncertainty in asylum law, contributing to the current crisis.

Ironically, the Administration’s anti-migrant policies have been exploited by criminal groups to exacerbate the number of migrants seeking to come to the United States. Criminal groups have disseminated misinformation claiming that the U.S.

border will “close soon” and that the Trump Administration’s policies will soon prevent any migrants from coming to the United States, encouraging more civilians to make the trek north. *See* Kinosian, *The booming business for smuggling people to the US: ‘Everyone wins’*, *The Guardian* (Apr. 8, 2019).

Taken together, these policies demonstrate that the “crisis” at the border arises largely from the Administration’s own policies. The government cannot manufacture its own crisis to justify the MPP. Indeed, if the government wants to more effectively process the increased number of asylum seekers at the border, it has a number of alternative actions available. For example, the Administration could (1) increase resources and personnel for the processing of asylum claims; (2) strengthen Customs and Border Protection processing capacity at ports of entry; (3) increase the number of immigration judges who can hear cases; (4) expand alternatives to detention that have been proven to be effective; and (5) improve legal representation for asylum seekers. Each of these alternative policies would effectively deal with the increased number of asylum seekers without the downsides of the MPP.

## **II. THE MPP UNDERMINES U.S. INTERESTS IN A HUMANE AND WELL-FUNCTIONING REFUGEE SYSTEM**

The United States has a long history of protecting refugees and encouraging a humane and well-functioning refugee system. More than idealism, this well-functioning refugee system serves United States’ interests by encouraging a stable

and secure international order. But the MPP undermines this well-functioning refugee system and runs afoul of the United States' historic commitments. It sows chaos by forcing asylum seekers to navigate a transnational obstacle course to receive legal process and violates the United States' non-refoulement obligations by placing asylum seekers at risk of violence and persecution abroad. Moreover, the MPP puts the entire system at risk by flouting U.S. international obligations and opens the door to violence and instability from a breakdown of this system.

**A. The MPP Stands At Odds With The United States' Long History Of Welcoming Refugees**

The United States was founded by the descendants of those escaping religious persecution. Indeed, “[i]t was in large part to get completely away from ... systematic religious persecution that the Founders brought into being our Nation” in the first place. *Engel v. Vitale*, 370 U.S. 421, 433 (1962); *see also Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 838 (9th Cir. 2017) (Smith, J., concurring). Since its founding, the United States has welcomed successive generations of refugees and promoted the development of a stable and humane refugee system abroad, consistent with American values and strategic interests.

Since World War II, the United States has opened its borders to refugees and played a pivotal role in addressing migrant crises. *See Aleinikoff, United States Refugee Law and Policy: Past, Present, and Future*, 30 Int'l Migration Rev. 245, 245 (1996); Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the*

*United States*, 59 Foreign Aff. 21, 21 (1980). “The U.S. has historically led the world in refugee resettlement, and, since 1980, has taken in 3 million of the more than 4 million refugees resettled worldwide.” Connor & Krogstad, *For the First Time, U.S. Resettles Fewer Refugees Than the Rest of the World*, Pew Research Center (July 5, 2018). This commitment has been incorporated into law. The 1980 Refugee Act incorporated the provisions of the 1951 Convention Relating to the Status of Refugees, including the Convention’s definition of refugees and principle of non-refoulement. Pub. L. No. 96-212, 94 Stat. 102. The United States also voted for the adoption of the Universal Declaration of Human Rights, which aspirationally sets forth the rights of refugees to seek and enjoy asylum. United Nations, G.A. Resolution 217 A, Article 14.

The MPP stands in stark contrast to this history of solicitude for the oppressed. It evinces callousness for the plight of asylum seekers and disregards America’s foundational commitment to protecting those in need. The United States should not shut its eyes to the plight of migrants and abandon its longstanding moral commitments.

**B. The MPP Undermines A Well-Functioning Refugee System By Creating A Chaotic And Unsafe Asylum-Processing System**

The MPP actively damages the international refugee system by allowing asylum claims to the U.S. to be processed in unsafe and chaotic conditions. The implementation of the MPP has been chaotic at best and dangerous at worst. And

the policy leads asylum seekers to await the adjudication of their claims in unsafe conditions, undermining the purpose of asylum of providing protection to those fleeing persecution.

Under the MPP, most migrants are sent back to either Tijuana or Ciudad Juarez. *See* Hennessy-Fiske, *Pregnant Women, Other Vulnerable Asylum Seekers are Returned to Mexico to Await Hearings*, L.A. Times (May 19, 2019). These cities are among the most dangerous places in the world. Tijuana ranked as the most violent city in the world in 2018, and Ciudad Juarez is in the top five. Linthicum, *Five of the Six Most Violent Cities in the World Are in Mexico, Report Says*, L.A. Times (Mar. 14, 2019). Juarez currently has five homicides a day and is so perilous that immigrants returned there under the MPP are discouraged from even going outside their shelters. *See* Moore, *U.S. Sending Asylum Seekers to Mexico While Awaiting Court Ruling, In Some Cases Ignoring Own Protocols*, Wash. Post (May 2, 2019).

These conditions make it nearly impossible to maintain any semblance of an orderly immigration process. Asylum seekers face an omnipresent risk of murder, kidnapping, or other violence any time they venture out to obtain the legal service needed to assert their rights.

In addition to lacking basic safety, Mexico lacks the shelters and infrastructure to house asylum seekers and maintain an orderly process. According to media

reports, “migrants ... have to compete for space at 12 Juárez shelters, all of which are at capacity” and “women and children [are] sleeping on the streets.” Uribe, *Trump Administration’s ‘Remain in Mexico’ Program Tangles Legal Process*, NPR (May 9, 2019). This makes it nearly impossible to have “court notices mailed to migrants without a fixed address,” dimming asylum seekers’ hopes of receiving hearings. *Id.* Mexico lacks the infrastructure to manage the influx of migrants under the MPP or track these migrants’ whereabouts.

This disorder is compounded by the inability of asylum seekers to obtain legal counsel. Attorneys seeking to contact clients subject to the MPP cannot reach them by mail. In view of the difficulty of finding someone without an address, immigration attorneys have been forced to cross the border to provide basic legal services. *See* Uribe, *supra*; SER 9. As a result, “[a] lot of private-practice attorneys aren’t touching [the MPP] cases.” Uribe, *supra* (quoting attorney Imelda Maynard). And even those who are willing to cross the border have at times been unable to do so due to their organizations’ restrictions on serving clients abroad and barriers imposed by the American and Mexican governments. *See* Kinosian, *‘They’re Playing with Our Lives’ Say the First Migrants Returned Under New Mexico Policy*, PRI (Feb. 5, 2019). The inability to obtain adequate counsel heightens the chaos and disorder created by the MPP.

Lack of available legal counsel jeopardizes the ability of asylum seekers to make it back to the U.S. for their hearings, track changes to the courts' schedule, or even follow routine procedures. *See* SER 42-43 (“I also am worried about how I will fight my asylum case. I don’t know how I can find a U.S. immigration lawyer while I’m in Tijuana. ... I was told to present myself in El Chaparral on March 19, but I am not sure exactly where. Without more information, I am afraid that I will miss my immigration court hearing.”). The immigration and refugee system cannot function under the immense burdens imposed by this policy.

The MPP critically undermines the international refugee system by seeding chaos and insecurity into asylum processing. In doing so, the MPP seeks to pass U.S. obligations to protect asylum seekers to other countries. This damages American strategic interests. It is well-established that a functioning refugee system is needed to mitigate the risks of uncontrolled refugee crises. In the words of former U.S. Ambassador to the U.N. Samantha Power, an ineffective refugee system “puts global stability and our nation’s security at heightened risk”—“we routinely understate the likely consequences of failing to muster the global response that is needed.” Power, *The Global Refugee Crisis: Overcoming Fears and Spurring Action*, U.S. Inst. of Peace (June 29, 2016). Without a functional refugee system, the “pressure on these frontline countries could stoke sectarian tensions, fuel popular resentment of refugees, ... lead to the collapse of governments ... [and] strengthen



the hand of organized crime and terrorist groups that pose a threat to our security and prosperity.” *Id.*

Allowing the breakdown of the refugee system strains host states; heightens regional conflicts and security threats, allowing them to emanate outward; and places hundreds of thousands, if not millions, of refugees in life-threatening conditions characterized by hunger, lack of shelter, and violence. *See* Lischer, *The Global Refugee Crisis: Regional Destabilization & Humanitarian Protection*, 146 *Daedalus* 85, 86-93 (2017). “[R]efugee protection and state stability are strongly connected; undermining one factor weakens the other. Policies to protect refugees, both physically and legally, reduce potential threats.” *Id.* at 95.

The United States helped build the international refugee system to serve both humanitarian values and critical strategic interests. The MPP puts both at risk by flouting America’s international obligations and signaling disregard for the refugee system as a whole.

**C. The MPP Undermines The Principle Of Non-Refoulement And Encourages Other Countries To Send Back Refugees**

The MPP further undermines the principle of non-refoulement, which is foundational to the international refugee system. Non-refoulement prohibits a country from returning 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.”

*Khan v. Holder*, 584 F.3d 773, 782 (9th Cir. 2009) (quoting the 1951 Refugee Convention). Although the United States has long honored this obligation, enshrined in both U.S. and international law, the record demonstrates that the MPP flagrantly violates it.

Returning asylum seekers to Mexico, on its own, violates this obligation. *See, e.g.*, SER 13 (“I did not feel safe at Benito Juarez [shelter] because the neighbors kept trying to attack the migrant community. ... At El Barretal [shelter] ... someone threw a tear gas bomb into the shelter ... [and] people in passing cars would often yell insults at me like ‘get out of here, you *pinches* Hondurans.’”); SER 24 (“I heard people say that gay people like me are less than human, and that it is okay to hurt us because we don’t matter. Because of my sexual identity, I do not feel safe in Mexico.”). The gangs responsible for persecution in the Northern Triangle countries have a strong presence in Mexico and may reach asylum seekers as they are awaiting adjudication of their claims for the same persecution. *See* U.S. Dept. of State, *2018 Mexico Human Rights Report* 19. And the risk that asylum seekers may be deported from Mexico or kidnapped and taken to the countries they fled compounds this violation. *See* SER 8 (“I also feel that my life is in danger because Mexico may deport me to Guatemala.”); SER 19 (“I am also afraid that the Honduran government will find me in Mexico and harm me. Even outside the country, the Honduran government often works with gangs and criminal networks to punish those who

oppose their policies. I am afraid that they might track me down. ... I am afraid that the Mexican government will deport me to Honduras.”).

Non-refoulement is based on international cooperation. Derogation of this principle encourages a race to the bottom in which developed states seek to pass the buck, undermining the protections afforded by international law. *See Gammeltoft-Hansen & Hathaway, Non-Refoulement in a World of Cooperative Deterrence*, 53 *Colum. J. Transnat'l L.* 235, 243-257 (2015) (detailing the ways in which developing states cooperatively avoid their non-refoulement obligations). Openly flouting international refugee law would encourage “the poorer states that today do the lion’s share of work under the regime [to] follow suit—with deleterious consequences for both interstate security and economic well-being.” *Id.* at 283.

### **III. THE MPP DAMAGES OUR COOPERATIVE EFFORTS TO RESOLVE THE MIGRANT CRISIS WITH MEXICO**

In addition to harming U.S. interests on the international stage, the MPP damages the United States’ ability to cooperate with Mexico to resolve the very migration crisis the MPP is designed to address. The United States has long recognized its deep and intertwined relationship with Mexico. The two countries share \$561.3 billion in trade, a 2,000-mile border, and historic population exchanges that have affected both countries’ cultures and demographic make-up. *See Seelke & Gracia, Mexico: Background and U.S. Relations* 1, 23, Cong. Research Serv., R42917 (May 2, 2019). Critically, the United States has long recognized that

Mexico's policies and conditions have significant impacts on those of the United States, and vice versa. For example, demand for drugs in the United States fuels violent cartel wars in Mexico, which in turn reinforce the drug market in the United States. *Id.* at 6. The current increase in migrants at the southern border is the latest in a long line of issues the United States and Mexico have been able to resolve only through cooperation.

Yet despite this long history of cooperation and co-dependence, the MPP was imposed over significant opposition from Mexico, and ultimately only obtained its agreement through the coercive threat of tariffs. Shortly after the unveiling of the MPP, the Mexican Foreign Ministry announced that “it does not agree with the unilateral measure implemented by the U.S. government.” *Gobierno de México, Mexico Reiterates Its Stance on the Unilateral Migration Measures Taken by the U.S.* (Mar. 12, 2019). As early as April, the Mexican government announced that the MPP was “unilaterally announced and implemented,” “that Mexico has never agreed with this unilateral measure,” and that this is an issue “on which they do not agree.” *Gobierno de México, Position of the Mexican Government on the US Federal Judge Ruling on the Return of Non-Mexican Migrants to Mexico* (Apr. 9, 2019). Although Mexico ultimately agreed to the MPP, the agreement only came in response to the threat of punitive tariffs by the United States. *Joung, President*

*Trump Wants Asylum Seekers to Stay in Mexico. Here's How That Would Work*, Time (June 11, 2019).

Coercing Mexico into shouldering the entire burden for the increased number of asylum seekers, despite its lower resource base, may ultimately backfire. Mexico has promised to provide the asylum seekers with food, shelter, education, and jobs—but it is unclear how Mexico intends to accomplish this task while facing significant internal economic and security challenges. See Averbuch, *Mexico Can't Handle Your Tired, Poor, and Huddled Masses*, Foreign Policy (July 30, 2018). Indeed, Mexico has historically struggled to deal with refugee crises, such as the ones resulting from the civil war in El Salvador in the 1980's and natural disaster in Honduras in the 1990's. *Id.* There is no evidence that Mexico will be able to manage the skyrocketing number of migrants from the Northern Triangle, which are already placing strains on its resources.

Forcing Mexico to house an unsustainable number of migrants, while failing to share any of the burden, can only hurt both countries—not to mention the migrants caught in the middle. Faced with the daunting prospect of caring for tens of thousands of migrants, it becomes more likely that Mexico will be compelled to send some of the asylum seekers back to the countries they are fleeing, exacerbating the humanitarian crisis fueling the increase in migration. At the same time, as conditions housing migrants in Mexico deteriorate due to resource strain, it becomes more

likely that asylum seekers will decide to risk more dangerous routes into the United States—or to use smugglers—to escape the conditions in Mexico. Rather than solve the humanitarian crisis, forcing Mexico to shoulder the entire burden for asylum processing undermines efforts to cooperate to collectively solve the common migration issue.

The government claims (at 51) that an injunction against the MPP is inappropriate because it “harms efforts to address a national-security and humanitarian crisis that is the subject of ongoing diplomatic engagement.” But there is no evidence that an injunction would harm ongoing diplomatic efforts. Amici, who include longtime diplomats who have negotiated with Mexico on matters of foreign policy, security, and trade, do not believe that injunction would harm ongoing diplomatic efforts. Mexico agreed to the current version of the MPP against the threat of punitive and escalating across-the-board tariffs, which makes its consent to the agreement suspect at best. Indeed, as Mexico’s own statements demonstrate, it had initially opposed the MPP, which it described as “unilaterally announced and implemented.” *Gobierno de México, Position of the Mexican Government on the US Federal Judge Ruling on the Return of Non-Mexican Migrants to Mexico, supra.*

Moreover, the government’s argument seeks to prove too much—every asylum agreement involves relations with another country. If the mere fact of those

discussions immunized illegal action from judicial review, then the government could violate domestic and international law at will, with no repercussions.

In our experience, an injunction would also not in any way compromise our relations with Mexico. If anything, it would ease those relations by returning them to the *status quo ante*, before this Administration forced upon Mexico an action it openly protested. Mexico is following this lawsuit and is familiar with our legal system, and so will understand the implications of such a step. Any argument made by the government based on foreign policy is thus meritless.

### CONCLUSION

The district court's preliminary injunction should be affirmed.

Respectfully submitted,

/s/ Alan E. Schoenfeld

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June 26, 2019

**STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6, the undersigned state that they know of no related case pending in this Court.

/s/ Alan E. Schoenfeld

ALAN E. SCHOENFELD

June 26, 2019



# APPENDIX

## APPENDIX: LIST OF AMICI CURIAE

**James Clapper** served as U.S. Director of National Intelligence from 2010 to 2017.

**Bathsheba N. Crocker** served as Assistant Secretary of State for International Organization Affairs from 2014 to 2017.

**Nancy Ely-Raphel** served as Senior Adviser to the Secretary of State and Director of the Office to Monitor and Combat Trafficking in Persons from 2001 to 2003. She previously served as the U.S. Ambassador to Slovenia from 1998 to 2001.

**Daniel F. Feldman** served as Special Representative for Afghanistan and Pakistan at the U.S. Department of State from 2014 to 2015.

**Heather A. Higginbottom** served as Deputy Secretary of State for Management and Resources from 2013 to 2017.

**Christopher R. Hill** served as Assistant Secretary of State for East Asian and Pacific Affairs from 2005 to 2009. He also served as the U.S. Ambassador to Iraq from 2009 to 2010; the U.S. Ambassador to South Korea from 2004 to 2005; the U.S. Ambassador to Poland from 2000 to 2004; the U.S. Ambassador to Macedonia from 1996 to 1999; and the Acting U.S. Ambassador to Albania in 1991.

**Janet Napolitano** served as Secretary of Homeland Security from 2009 to 2013. She served as the Governor of Arizona from 2003 to 2009.

**James C. O'Brien** served as Special Presidential Envoy for Hostage Affairs from 2015 to 2017. He served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning and as Special Presidential Envoy for the Balkans.

**Matthew G. Olsen** served as Director of the National Counterterrorism Center from 2011 to 2014.

**Anne W. Patterson** served as Assistant Secretary of State for Near Eastern Affairs from 2013 to 2017. Previously, she served as the U.S. Ambassador to Egypt from 2011 to 2013, to Pakistan from 2007 to 2010, to Colombia from 2000 to 2003, and to El Salvador from 1997 to 2000.

**Thomas R. Pickering** served as Under Secretary of State for Political Affairs from 1997 to 2000. He previously served as Ambassador to El Salvador from 1983 to 1985, and as U.S. Permanent Representative to the United Nations from 1989 to 1992.

**Amy Pope** served as Deputy Homeland Security Advisor and Deputy Assistant to the President from 2015 to 2017.

**Jeffrey Prescott** served as Deputy National Security Advisor to the Vice President from 2013 to 2015, and as Special Assistant to the President and Senior Director for Iran, Iraq, Syria and the Gulf States from 2015 to 2017.

**Dan Restrepo** served as Special Assistant to the President and Senior Director for Western Hemisphere Affairs at the National Security Council from 2009 to 2012.

**Anne C. Richard** served as Assistant Secretary of State for Population, Refugees, and Migration from 2012 to 2017.

**David Robinson** served as Assistant Secretary of State for Conflict and Stabilization Operations and as Principal Deputy Assistant Secretary for the Bureau of Population Refugees and Migration, among other positions.

**Wendy R. Sherman** served as Under Secretary of State for Political Affairs from 2011 to 2015.

**Vikram J. Singh** served as Deputy Special Representative for Afghanistan and Pakistan from 2010 to 2011 and as Deputy Assistant Secretary of Defense for Southeast Asia from 2012 to 2014.

**Dana Shell Smith** served as U.S. Ambassador to Qatar from 2014 to 2017. Previously, she served as Principal Deputy Assistant Secretary of Public Affairs.

**Jake Sullivan** served as National Security Advisor to the Vice President from 2013 to 2014. He previously served as Director of Policy Planning at the U.S. Department of State from 2011 to 2013.

**Strobe Talbott** served as Deputy Secretary of State from 1994 to 2001.

**Arturo A. Valenzuela** served as Assistant Secretary of State for Western Hemisphere Affairs from 2009 to 2011. He previously served as Special Assistant to the President and Senior Director for Inter-American Affairs at the National Security Council from 1999 to 2000, and as Deputy Assistant Secretary of State for Mexican Affairs from 1994 to 1996.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of June, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Alan E. Schoenfeld

ALAN E. SCHOENFELD