

# Walls to Protection: The Grim Reality of Trump's "Remain in Mexico" Policy

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# Contents

Background	3
Legal Challenges to MPP	6
Concerns about Implementation	8
- CBP Processing Upon Arrival	8
- Fear Screening	12
- Immigration Court Hearings for MPP Asylum Seekers	13

# Background

On December 20, 2018, the Department of Homeland Security (DHS) announced the Migrant Protection Protocols (MPP), a new policy that returns asylum seekers to Mexico for the duration of their immigration proceedings.<sup>1</sup> DHS began implementing MPP at the San Ysidro port of entry at the end of January 2019. By the end of May 2019, MPP was expanded across the entire southern border.<sup>2</sup>

During the first two weeks of MPP, single adults from El Salvador, Guatemala, and Honduras were returned to Mexico.<sup>3</sup> However, beginning as early as February 13, DHS began sending families to Mexico under MPP.<sup>4</sup> In June, the administration expanded MPP to cover anyone from a Spanish-speaking country, which has led to large numbers of Cubans, Venezuelans, and Nicaraguans, among others, being returned to Mexico.<sup>5</sup> Currently, approximately 50,000 asylum seekers have been returned to Mexico under MPP.<sup>6</sup> This includes nearly 16,000 children under 18, 4,300 children under 5 years old, and nearly 500 infants.<sup>7</sup>

DHS maintains that the measure will “address the urgent humanitarian and security crisis” on the US-Mexico border and restore the rule of law to a broken asylum system.<sup>8</sup> Yet, MPP raises a number of questions about whether the president has the authority to apply MPP to asylum seekers arriving at the southern border, whether asylum seekers will be returned to a place where their life and freedom are threatened, and whether they can meaningfully exercise their right to apply for humanitarian relief in the U.S.

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<sup>1</sup> Department of Homeland Security, Press Release, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration,” December 20, 2018, accessed February 18, 2019,

<https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>.

<sup>2</sup> US Customs and Border Protection, Memorandum, “Implementation of the Migrant Protection Protocols,” January 28, 2019, accessed February 18, 2019, <https://www.cbp.gov/document/guidance/migrant-protection-protocols>; Dara Lind, “‘Remain in Mexico’: Trump’s quietly expanding crackdown on asylum seekers, explained,” Vox, March 5, 2019, accessed March 10, 2019,

<https://www.vox.com/2019/3/5/18244995/migrant-protection-protocols-border-asylum-trump-mexico>; Joel Rose, “‘Remain in Mexico’ Immigration Policy Expands, But Slowly,” NPR, March 12, 2019, accessed October 14, 2019,

<https://www.npr.org/2019/03/12/702597006/-remain-in-mexico-immigration-policy-expands-but-slowly>; Aaron Montes, “El Paso begins Trump policy that sends migrant asylum seekers back to Mexico,” *El Paso Times*, March 26, 2019, accessed October 14, 2019,

<https://www.elpasotimes.com/story/news/immigration/2019/03/16/trump-immigration-metering-policy-migrant-protection-protocols-implemented-el-paso-juarez/3177682002/>; Human Rights First, “Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process,” August 2019, 21, accessed October 18, 2019,

<https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>.

<sup>3</sup> Human Rights First, “A Sordid Scheme: The Trump Administration’s Illegal Return of Asylum Seekers to Mexico,” February 2019, 2, accessed February 18, 2019,

<https://www.humanrightsfirst.org/resource/sordid-scheme-trump-administration-s-illegal-return-asylum-seekers-mexico>.

<sup>4</sup> Lind, “‘Remain in Mexico’: Trump’s quietly expanding crackdown.”; Complaint, *Innovation Law Lab, et al. v. Nielsen*, No. 3:19-cv-008007 (N.D. Cal. February 14, 2019), 16, accessed October 16, 2019,

<https://www.aclu.org/legal-document/innovation-law-lab-v-nielsen-complaint>; Adolfo Flores, “The Trump Administration has Sent the First Asylum-Seeking Families Back to Mexico,” BuzzFeed, February 14, 2019, accessed February 16, 2019,

<https://www.buzzfeednews.com/article/adolfoflores/the-trump-administration-has-sent-the-first-asylum-seeking>; Sarah Kinoshian, “Entire Families of Asylum Seekers are Being Returned to Mexico, Leaving them in Limbo,” *Washington Post*, February 15, 2019, accessed February 16, 2019,

[https://www.washingtonpost.com/world/entire-families-of-asylum-seekers-are-being-returned-to-mexico-leaving-them-in-limbo/2019/02/15/4079bb00-30ab-11e9-8781-763619f12cb4\\_story.html?noredirect=on&utm\\_term=.c8405a27e1cf](https://www.washingtonpost.com/world/entire-families-of-asylum-seekers-are-being-returned-to-mexico-leaving-them-in-limbo/2019/02/15/4079bb00-30ab-11e9-8781-763619f12cb4_story.html?noredirect=on&utm_term=.c8405a27e1cf).

<sup>5</sup> Jonathan Blitzer, “How the U.S. Asylum System is Keeping Migrants at Risk in Mexico,” *The New Yorker*, October 1, 2019, accessed October 16, 2019, <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico>.

<sup>6</sup> Kristina Cooke, Mica Rosenberg, and Reade Levinson, “Exclusive: U.S. migrant policy sends thousands of children, including babies, back to Mexico,” *Reuters*, October 11, 2019, accessed October 16, 2019,

<https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-babies-and-toddlers-back-to-mexico-idUSKBN1WQ1H1>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Lind, “‘Remain in Mexico’: Trump’s quietly expanding crackdown.”; Department of Homeland Security, Press Release, “Migrant Protection Protocols,” January 24, 2019, accessed February 18, 2019,

<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>; Department of Homeland Security, Press Release, December 20, 2018.

Under MPP, asylum seekers arriving at the southern border are processed by Customs and Border Protection (CBP) officials, given a “Notice to Appear” for their court hearing, and then returned to Mexico for the duration of their asylum proceedings.<sup>9</sup> In some cases, migrants are processed at one border port of entry but, due to capacity problems, are transported to neighboring ports of entry for removal to Mexico.<sup>10</sup> The decision to place someone arriving at the southern border without proper documentation into MPP is supposed to be a matter of discretion determined by DHS officials on a case-by-case basis.<sup>11</sup> Those explicitly excluded from MPP include: Mexican citizens, individuals in expedited removal proceedings, and vulnerable groups such as unaccompanied children and individuals with known physical and/or mental health issues, among others.<sup>12</sup> However, there have been reports that DHS has placed individuals into MPP who should have fit these exemptions.<sup>13</sup> For example, see the companion report to his policy brief, [Seeking Asylum: Part 2](#).

Also exempted are those who, before or after their processing for MPP, express an affirmative fear of return to Mexico. These individuals are supposed to be referred to an U.S. Citizenship and Immigration Services (USCIS) asylum officer for a fear screening. However, as research by the U.S. Immigration Policy Center (USIPC) at UC San Diego shows, many asylum seekers who have expressed fears of being returned to Mexico have not been given secondary interviews by asylum officers.<sup>14</sup> Moreover, these new MPP procedures differ in three significant ways from the expedited removal procedures DHS officials apply to asylum seekers at the border. First, MPP places the burden on the asylum seeker to express a fear of return to Mexico, while expedited removal proceedings places the burden on DHS officers to ask whether the applicant fears being returned to their home country. Second, a person in expedited removal proceedings must demonstrate only a *credible fear* of persecution if returned to their home country, defined as a significant possibility the applicant can establish an asylum claim. Under MPP, however, an applicant must meet a heightened standard of demonstrating a *reasonable fear* of persecution, defined as “more likely than not” the

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<sup>9</sup> Department of Homeland Security, Press Release, December 20, 2018. Asylum seekers arriving at the border ports of entry often have to wait months to be processed under MPP due to the CBP practice of metering, which, since 2016, has limited the number of asylum seekers admitted to the southwestern border ports each day. Robert Strauss Center, Center for U.S.-Mexican Studies, Migration Policy Centre, “Asylum Processing and Waitlists at the U.S.-Mexico Border,” December 2018, accessed October 20, 2019, [https://www.strausscenter.org/images/MSI/AsylumReport\\_MSI.pdf](https://www.strausscenter.org/images/MSI/AsylumReport_MSI.pdf).

<sup>10</sup> Rafael Carranza, “How Trump’s ‘Remain in Mexico’ program affects Arizona border despite no formal policy,” AZ Central, October 10, 2019, accessed October 19, 2019, <https://www.azcentral.com/story/news/politics/immigration/2019/10/10/remain-mexico-program-affects-arizona-border-despite-no-formal-policy/3866006002/>.

<sup>11</sup> US Customs and Border Protection, Guiding Principles for Migrant Protection Protocols, January 28, 2019, accessed February 18, 2019, [https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP\\_Guiding\\_Principles\\_1-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP_Guiding_Principles_1-28-19.pdf).

<sup>12</sup> The complete list of those not subject to MPP is as follows:

- Unaccompanied children,
- Persons or nationals of Mexico,
- Persons processed for expedited removal,
- Persons in special circumstances:
  - Returning LPRs seeking admission (subject to INA § 212)
  - Persons with an advance parole document or in parole status
  - Known physical/mental health issues
  - Criminals/history of violence
  - Government of Mexico or USG interest,

- Any person who is more likely than not to face persecution or torture in Mexico, or
  - Other persons at the discretion of the Port Director
- US Customs and Border Protection, Guiding Principles, 1.

<sup>13</sup> Joel Rose, “‘Vulnerable’ Migrants Should Be Exempt From ‘Remain in Mexico,’ But Many Are Not,” NPR, July 17, 2019, accessed October 19, 2019,

<https://www.npr.org/2019/07/17/742271139/vulnerable-migrants-should-be-exempt-from-remain-in-mexico-but-many-are-not>; Human Rights First, “Delivered to Danger,” 2, 8-10.

<sup>14</sup> U.S. Immigration Policy Center (USIPC), “Seeking Asylum: Part 2,” October 29, 2019.

individual will be persecuted or tortured if returned to Mexico. Thus, an asylum seeker must express an even greater fear of harm in Mexico than in their home country to stay in the U.S. to pursue their asylum claim. Finally, DHS will not allow an attorney to be present when an individual is screened for fear of persecution in Mexico.<sup>15</sup>

DHS asserts that Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) (8 U.S.C. §1225(b)(2)(C)) authorizes the return of asylum seekers to Mexico for the duration of their immigration proceedings. The statute specifically states: “In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under section 1229a of this title.” Although legal advocates argue that this statute cannot be applied to asylum seekers who arrive at the border and lack proper documents to enter the United States,<sup>16</sup> DHS argues that they fall under its purview because the statute applies to those “not clearly entitled to admission, including those who apply for asylum.”<sup>17</sup> DHS further claims that the return of asylum seekers to Mexico does not violate domestic and international law prohibitions against returning a refugee to a place where their life or freedom is threatened on account of a protected ground (non-refoulement) because individuals who express a fear of return to Mexico are ostensibly exempted from MPP.<sup>18</sup>

In December 2018, the government of Mexico rebuked MPP as a “unilateral” action by the U.S. government yet, in practice, Mexico has cooperated with the United States in the implementation of MPP.<sup>19</sup> Although Mexico and the U.S. have stated that MPP does not create a Safe Third Country<sup>20</sup> agreement whereby migrants would be required to apply for asylum in Mexico, both nations have asserted that upon their return to Mexico, asylum seekers would enjoy the rights and freedoms

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<sup>15</sup> Human Rights First, “A Sordid Scheme,” 9; US Customs and Border Protection, Guiding Principles, 2.

<sup>16</sup> Ben Harrington and Hillel R. Smith, “Migrant Protection Protocols: Legal Issues Related to DHS’s Plan to Require Arriving Asylum Seekers to Wait in Mexico,” Congressional Research Service, February 1, 2019, 3-5, accessed February 18, 2019, <https://fas.org/sqp/crs/homesecl/LSB10251.pdf>; Complaint, *Innovation Law Lab, et al. v. Nielsen*, 17.

<sup>17</sup> Department of Homeland Security, Press Release, January 24, 2019.

<sup>18</sup> Department of Homeland Security, “Policy Guidance for Implementation of the Migrant Protection Protocols,” January 25, 2019, 3, accessed February 18, 2019, <https://www.dhs.gov/publication/policy-guidance-implementation-migrant-protection-protocols>.

<sup>19</sup> Secretaría de Relaciones Exteriores, “Position of Mexico on the Decision of the U.S. Government to Invoke Section 235(b)(2)(C) of its Immigration and Nationality Act,” December 20, 2018, accessed February 18, 2019,

<https://www.gob.mx/sre/en/articulos/position-of-mexico-on-the-decision-of-the-u-s-government-to-invoke-section-235-b-2-c-of-its-immigration-and-nationality-act-185795?idiom=en>. On the Mexican rebuke of MPP, see Maya Averbuch, “Mexico rebukes – but accepts – ‘unilateral’ U.S. move to return asylum seekers pending hearing,” *Washington Post*, January 25, 2019, accessed February 22, 2019, [https://www.washingtonpost.com/world/the\\_americas/mexico-rebukes--but-accepts--unilateral-us-move-to-return-asylum-seekers-pending-hearing/2019/01/25/52062470-202b-11e9-a759-2b8541bbbe20\\_story.html?noredirect=on&utm\\_term=.45fb7b853fa8](https://www.washingtonpost.com/world/the_americas/mexico-rebukes--but-accepts--unilateral-us-move-to-return-asylum-seekers-pending-hearing/2019/01/25/52062470-202b-11e9-a759-2b8541bbbe20_story.html?noredirect=on&utm_term=.45fb7b853fa8). On the debates within the Mexican government with respect to MPP, see Adam Isacson, Maureen Meyer, and Adeline Hite, “New ‘Migrant Protection Protocols’ Ignore U.S. Legal Obligations to Asylum Seekers and Exacerbate Humanitarian Border Crisis,” *Washington Office on Latin America*, January 25, 2019, accessed February 18, 2019, <https://www.wola.org/analysis/trump-asylum-seekers-wait-in-mexico-border-crisis/>. On the collaboration between the US and Mexican governments, see Lind, “‘Remain in Mexico’: Trump’s quietly expanding crackdown.”

<sup>20</sup> If Mexico had signed a safe third country agreement with the United States, asylum seekers who pass through Mexico would be required to apply for relief in Mexico and would not be eligible for relief in the United States. Safe third country agreements are codified in statute and are a way for countries to share the responsibility for refugees. Under the Immigration and Nationality Act, safe third country agreements can be signed when (1) an immigrant’s life or freedom would not be threatened on account of a protected ground and (2) they will have “access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection” in the third country. 8 U.S.C. § 1158(A). The only safe third country agreement the United States has is with Canada. But, the United States has recently signed agreements with Guatemala, El Salvador, and Honduras that appear to allow the administration to transfer asylum seekers to those countries. It is not clear if these are safe third country agreements under the statute. Nicole Narea, “Trump’s agreements in Central America could dismantle the asylum system as we know it,” *Vox*, September 26, 2019, accessed October 22, 2019, <https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained>; Rafael Bernal, “What is a safe third country agreement?” *The Hill*, June 6, 2019, accessed October 22, 2019, <https://thehill.com/latino/447325-what-is-a-safe-third-country-agreement>.

guaranteed by domestic and international law.<sup>21</sup> They would also be eligible to apply for work permits and asylum in Mexico and be offered healthcare and education.<sup>22</sup> Yet, observers have noted that despite these assurances, Mexico has not granted work authorization to asylum seekers in MPP and has failed to provide them with adequate food, shelter, healthcare, safety, and access to asylum in Mexico.<sup>23</sup> Instead, Mexico has adopted an enforcement approach to asylum seekers returned to Mexico under MPP by busing them to interior locations, sometimes more than 1,000 miles away from the US-Mexico border, or deporting them to their home countries in possible violation of the government's commitment to non-refoulement.<sup>24</sup> Mexican officials also appear to be compelling asylum seekers to accept voluntary return under a U.S.-funded program run by the International Organization for Migration (IOM). Concerns have arisen as to whether these returns are truly voluntary or are merely a way for the Mexican government to assist the "Trump administration's effort to get asylum seekers to give up on their cases."<sup>25</sup> Finally, after the expansion of MPP to the entire southern border, Mexico deployed 21,000 members of its National Guard to patrol its side of the U.S.-Mexico border.<sup>26</sup>

## Legal Challenges to MPP

On February 14, 2019, the American Civil Liberties Union (ACLU), Southern Poverty Law Center, and Center for Gender and Refugee Studies filed a federal lawsuit challenging the legality of MPP.<sup>27</sup> Plaintiffs argued that MPP is unlawful because: (1) the executive branch does not have the authority to forcibly return these types of asylum seekers to Mexico, and (2) MPP lacks necessary procedures to ensure that the U.S. government is not returning a refugee to a place where their life or freedom will be threatened (non-refoulement).<sup>28</sup>

On April 8, 2019, Judge Richard Seeborg of the U.S. District Court, Northern District of California, issued an order granting the plaintiffs' motion for a preliminary injunction.<sup>29</sup> On April 11, 2019, the Trump administration filed an emergency motion with the Ninth Circuit requesting the court

<sup>21</sup> Human Rights First, "A Sordid Scheme," 3.

<sup>22</sup> Department of State, "U.S.-Mexico Joint Declaration," June 7, 2019, accessed October 20, 2019, <https://www.state.gov/u-s-mexico-joint-declaration/>; Secretaría de Relaciones Exteriores, "Position of Mexico."

<sup>23</sup> Human Rights Watch, "'We Can't Help You Here,' US Returns of Asylum Seekers to Mexico," July 2, 2019, accessed October 19, 2019, <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>; Nicole Narea, "The Trump Administration will start sending most immigrant families arrested at the border back to Mexico," Vox, September 24, 2019, accessed October 22, 2019, <https://www.vox.com/2019/9/24/20882070/immigrant-families-mexico-catch-release>.

<sup>24</sup> Human Rights First, "Delivered to Danger," 10-11, 14.

<sup>25</sup> Wendy Fry, "Thousands of migrants taking free U.S.-government funded trips home may not be able to re-enter Mexico," The San Diego Union Tribune, September 8, 2019, accessed October 20, 2019,

<https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-09-06/thousands-of-migrants-taking-free-u-s-government-funded-trips-home-may-not-be-able-to-re-enter-mexico>; Molly O'Toole, "Trump administration appears to violate law in forcing asylum seekers back to Mexico, officials warn," Los Angeles Times, August 28, 2019, accessed October 14, 2019,

<https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases>.  
<sup>26</sup> Human Rights First, "Delivered to Danger," 10; Anthony Esposito, "Mexico's new National Guard was created to fight crime, but now it's in a face-off with migrants," Reuters, July 7, 2019, accessed October 20, 2019,

<https://www.reuters.com/article/us-usa-immigration-mexico-security/mexicos-new-national-guard-was-created-to-fight-crime-but-now-its-in-a-face-off-with-migrants-idUSKCN1U20HU>.

<sup>27</sup> Complaint, Innovation Law Lab, et al. v. Nielsen.

<sup>28</sup> Consequently, plaintiffs argued, MPP violates the Immigration and Nationality Act (INA), the Administrative Procedures Act (APA), and the United States' obligations under the withholding statute and international human rights law to not return people to a place where their life or freedom will be threatened. Complaint, Innovation Law Lab, et al. v. Nielsen.

<sup>29</sup> The order further stated that the administration must halt implementation of MPP by 5 pm on April 12, 2019, and that within two days, the 11 named migrant plaintiffs must be allowed to enter the United States. Order Granting Motion for Preliminary Injunction, Innovation Law Lab, et al. v. Nielsen, No. 3:19-cv-008007 (N.D. Cal. April 8, 2019), accessed October 16, 2019,

<https://www.aclu.org/legal-document/innovation-law-lab-v-nielsen-order-granting-motion-preliminary-injunction>.

allow the federal government to continue MPP and to expedite its appeal of the district court's decision.<sup>30</sup> The next day the Ninth Circuit issued an order that prevented the district court's order to halt MPP. Thus, the administration could continue implementing MPP until the Ninth Circuit ruled on the government's emergency stay motion.<sup>31</sup> On May 7, 2019, the Ninth Circuit issued a per curiam order<sup>32</sup> staying the district court's preliminary injunction until the Ninth Circuit could fully decide the issues. Notably, two judges wrote separately to express (1) serious doubts that MPP has the necessary procedures to ensure the United States is not violating its obligations of non-refoulement, thereby rendering the policy arbitrary and capricious under the Administrative Procedures Act (APA), and (2) strong disagreement with the determination that Section 1225(b)(2)(C) gives the administration authority for MPP.<sup>33</sup>

Numerous amicus curiae briefs have been filed with the Ninth Circuit in support of the district court's preliminary injunction, including the United Nations High Commissioner for Refugees,<sup>34</sup> Human Rights First,<sup>35</sup> Amnesty International USA, Washington Office of Latin America, Latin America Working Group, Institute for Women in Migration,<sup>36</sup> former immigration, national security, foreign policy, and other public officials who have worked on security and diplomatic matters for the United States government,<sup>37</sup> and Local 1924, the labor union of federal asylum officers who are charged with implementing the reasonable fear screenings under MPP.<sup>38</sup> The union urged the appeals court to uphold the preliminary injunction because MPP is "fundamentally contrary to the moral fabric of our Nation and our international domestic legal obligations."<sup>39</sup> Importantly, they asserted that MPP does not provide adequate safeguards against returning those who face persecution in Mexico because (1) those placed in MPP are not asked whether they fear harm if sent to Mexico, and (2) those who do express harm are subjected to an unreasonably heightened standard of "more likely than not" traditionally reserved for full-scale removal proceedings administered by an immigration judge with a full evidentiary hearing, notice of rights, access to

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<sup>30</sup> Emergency Motion Under Circuit Rule 27-3 For Administrative Stay And Motion For Stay Pending Appeal, *Innovation Law Lab, et al. v. Nielsen*, No. 19-15716 (9<sup>th</sup> Cir. April 11, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/04/13/Emergency%20Motion.pdf>.

<sup>31</sup> Order, *Innovation Law Lab, et al. v. Nielsen*, No. 19-15716 (9<sup>th</sup> Cir. April 12, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/04/13/Order.pdf>.

<sup>32</sup> A per curiam court opinion is issued in the name of the court, not specified judges on the panel. "Per Curiam" Legal Information Institute at Cornell Law School, accessed October 22, 2019, [https://www.law.cornell.edu/wex/per\\_curiam](https://www.law.cornell.edu/wex/per_curiam).

<sup>33</sup> *Innovation Law Lab, et al. v. McAleenan*, No. 19-15716 (opinion) (9<sup>th</sup> Cir. May 7, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/05/07/19-15716%20opinion.pdf>.

<sup>34</sup> The United Nation High Commissioner for Refugees' Amicus Curiae Brief in Support of Appellee's Answering Brief, *Innovation Law Lab, et al. v. McAleenan*, No. 19-15716 (9<sup>th</sup> Cir. April 12, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/08/13/19-15716%20-%20006-26-2019%20-%20UNCHR%20Amicus%20Brief.pdf>.

<sup>35</sup> Brief of Amicus Curiae Human Rights First in Support of Plaintiffs-Appellees, *Innovation Law Lab, et al. v. McAleenan*, No. 19-15716 (9<sup>th</sup> Cir. April 12, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/08/13/19-15716%20-%20006-26-2019%20-%20Human%20Rights%20First%20Amicus%20Brief.pdf>.

<sup>36</sup> Brief of Amnesty International USA, Washington Office of Latin America, Latin America Working Group, & IMUMI as Amici Curiae in Support of Plaintiffs-Appellees, *Innovation Law Lab, et al. v. McAleenan*, No. 19-15716 (9<sup>th</sup> Cir. April 12, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/08/13/19-15716%20-%20006-26-2019%20-%20Amnesty%20International%20Amicus%20Brief.pdf>.

<sup>37</sup> Brief for Amici Curiae Former U.S. Government Officials in Support of Appellees and Affirmance, *Innovation Law Lab, et al. v. McAleenan*, No. 19-15716 (9<sup>th</sup> Cir. April 12, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/08/13/19-15716%20-%20006-26-2019%20-%20Former%20US%20Government%20Officials%20Amicus%20Brief.pdf>.

<sup>38</sup> Brief of Amicus Curiae Local 1924 in Support of Plaintiffs-Appellees' Answering Brief and Affirmance of the District Court's Decision, *Innovation Law Lab, et al. v. McAleenan*, No. 19-15716 (9<sup>th</sup> Cir. April 12, 2019), accessed October 16, 2019, <http://cdn.ca9.uscourts.gov/datastore/general/2019/08/13/19-15716%20-%20006-26-2019%20-%20Local%201924%20Amicus%20Brief.pdf>.

<sup>39</sup> *Ibid.*

counsel, time to prepare, and the right to administrative and judicial review.<sup>40</sup>

The appeal is currently pending before the Ninth Circuit, which held oral arguments for the case on October 1, 2019.<sup>41</sup>

## Concerns about Implementation

Multiple investigations conducted by advocacy organizations and the media, as well as research conducted by the USIPC at UC San Diego based on over 600 interviews with asylum seekers who have been returned to Mexico, have found that MPP has been implemented in ways that effectively block access to asylum for migrants at the U.S.-Mexico border. At nearly every stage of MPP—including CBP processing upon arrival, reasonable fear interviews conducted by USCIS asylum officers or the immigration courts, and immigration court hearings under MPP— asylum seekers placed in MPP face considerable barriers to making their claims for humanitarian relief.

### CBP Processing Upon Arrival

Several reports from advocacy organizations and the media raise concerns about the approach of CBP officials in their implementation of MPP at the San Ysidro port of entry. For example, Human Rights First found that in determining migrants' "amenability"<sup>42</sup> for MPP, CBP conducted interviews that were "cursory" and administered by officers with limited Spanish.<sup>43</sup> Several asylum seekers who were returned to Mexico reported that they signed English-language forms that "they did not understand and that were not explained to them."<sup>44</sup>

In addition, there have been numerous reports of consequential errors by CBP on the Notice to Appear, which is the charging document filed by DHS that is legally required to include information about the immigrant's first court hearing, as well as an address where the applicant can be contacted if the time, date, or location of the hearing changes.<sup>45</sup> In an August report, Human Rights First found that CBP officials recorded erroneous addresses, which means that migrants returned to Mexico under MPP would not receive adequate notice of their hearing dates and other documents pertaining to their cases. Some have addresses listed simply as the city and state in Mexico where they were returned, such as "Tijuana, Baja California, Mexico," or simply "Baja California."<sup>46</sup> Other

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<sup>40</sup> Ibid. See also Bobby Allyn, "Federal Asylum Officers: Trump's Remain in Mexico' Policy is Against 'Moral Fabric' of U.S.," NPR, June 27, 2019, accessed October 16, 2019, <https://www.npr.org/2019/06/27/736461700/asylum-officers-trumps-remain-in-mexico-policy-is-against-moral-fabric-of-u-s>; Dara Lind, "Exclusive: Civil Servants Say They're Being Used as Pawns in a Dangerous Asylum Program," Vox, May 2, 2019, accessed October 16, 2019, <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit>.

<sup>41</sup> Ninth Circuit Public Docket, *Innovation Law Lab, et al. v. Nielsen* (10-15716), accessed October 16, 2019, [https://www.ca9.uscourts.gov/content/view.php?pk\\_id=000000988](https://www.ca9.uscourts.gov/content/view.php?pk_id=000000988); Camilo Montoya-Galvez, "Judge Grills Government Lawyer on Potential Violations of International Refugee Law," CBS News, October 1, 2019, accessed October 16, 2019, <https://www.cbsnews.com/news/trump-immigration-policy-judge-grills-government-lawyer-on-potential-violations-of-international-refugee-law/>.

<sup>42</sup> US Customs and Border Protection, "Guiding Principles," January 28, 2019.

<sup>43</sup> Complaint, *Innovation Law Lab, et al. v. Nielsen*, 20-21.

<sup>44</sup> Ibid., 21.

<sup>45</sup> Adolfo Flores, "Border Patrol Agents Are Writing 'Facebook' As A Street Address For Asylum Seekers Forced to Wait in Mexico," BuzzFeed News, September 27, 2019, accessed October 18, 2019, <https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico>.

<sup>46</sup> Micah Rosenberg, Kristina Cooke, Reade Levinson, "Hasty Rollout of Trump Immigration Policy has 'Broken' Border Courts," Reuters, September 10, 2019, accessed October 18, 2019.

incorrect addresses have included social media platforms such as Facebook and shelters where migrants have never stayed. In many other cases, CBP failed to supply any address or listed “domicilio conocido” (known address).<sup>47</sup> Research conducted by the USIPC at UC San Diego corroborates these findings.

In some cases, the Notice to Appear contained additional defects, including the absence of required information regarding the grounds for inadmissibility or removability or facts that failed to support the listed grounds for inadmissibility.<sup>48</sup> The consequences of these faulty Notices to Appear are severe, sometimes leading to a removal order or termination of proceedings that prevent asylum seekers from gaining asylum in the future or accessing U.S. immigration courts.

Further, numerous reports raise significant concerns about the adequacy of MPP’s fear screening. In compliance with the policy, CBP officials have not been asking asylum seekers whether they fear harm if returned to Mexico.<sup>49</sup> Indeed, DHS officials have reportedly “instructed [CBP officers] not to ask” asylum seekers whether they fear return to Mexico.<sup>50</sup> Yet, placing the burden of expressing a fear of return to Mexico on the asylum seekers is problematic because asylum seekers are often unaware that they have the right to request a fear screening under MPP. Others may not be prepared to effectively express their fear of return to Mexico during CBP processing because of the hardships endured in their flight from their home countries and the conditions under which CBP has interviewed migrants to determine their eligibility for MPP. Asylum seekers have recounted how CBP officers held interviews “in the middle of the night,”<sup>51</sup> after an overnight detention in a cold, brightly lit, overcrowded holding cell, or while suffering from a lack of rest and food.<sup>52</sup>

Several instances have been reported where CBP officials prevented asylum seekers from expressing a fear of return to Mexico. According to the lawsuit challenging MPP, one asylum seeker was cut off by CBP as he tried to explain his fear of return to Mexico. Another individual, after stating that “he did not feel safe in Mexico,” was told that “it was too bad . . . Honduras wasn’t safe, Mexico wasn’t safe, and the U.S. isn’t safe either . . . He told me I’d have to figure out how to survive in Tijuana.”<sup>53</sup> Human Rights First reported that when a Cuban woman attempted to explain her fear of return to Mexico, a CBP officer replied that whatever had happened to her “did not matter,” that she “had no rights,” and that “It’s better to give Cubans \$20 and send them back to Cuba.”<sup>54</sup>

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<https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115>; Kate Morrissey, “San Diego Immigration Court ‘Overwhelmed’ by Remain in Mexico Cases,” *The San Diego Union Tribune*, June 3, 2019, accessed October 18, 2019,

<https://www.sandiegouniontribune.com/news/immigration/story/2019-05-31/san-diego-immigration-court-overwhelmed-by-remain-in-mexico-cases>.

<sup>47</sup> Human Rights First, “Delivered to Danger,” 18-19.

<sup>48</sup> *Ibid.*

<sup>49</sup> Human Rights First came to this conclusion on the basis of its review of CBP interview records (specifically Form I-877, Record of Sworn Statement in Administrative Proceedings) under MPP. Its review also revealed that rather than inform migrants of the fear screening or inquire about their fears of returning to Mexico, CBP officers “focused on whether the asylum seekers had hired smugglers or knew the names and contact information of the individuals who organize migrant caravans.” Human Rights First, “A Sordid Scheme,” 8.

<sup>50</sup> Human Rights First, “Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy,” October 2019, 5, accessed October 15, 2019,

<https://www.humanrightsfirst.org/resource/orders-above-massive-human-rights-abuses-under-trump-administration-return-mexico-policy>.

<sup>51</sup> Human Rights First, “A Sordid Scheme,” 2.

<sup>52</sup> Complaint, *Innovation Law Lab, et al. v. Nielsen*, 19.

<sup>53</sup> *Ibid.*, 20.

<sup>54</sup> Human Rights First, “Delivered to Danger,” 4.

Reports further indicate that even when asylum seekers have affirmatively expressed a fear of return to Mexico, CBP has refused to refer them for an asylum interview and, in contravention of its own mandate under MPP, has returned them to Mexico. For example, according to research by the USIPC at UC San Diego, approximately 6 out of every 10 of the asylum seekers interviewed were placed into the Remain in Mexico policy without any further investigation into the fears that they expressed about being returned to Mexico.<sup>55</sup> Moreover, Human Rights First reported, “A woman kidnapped in Mexico with her three children was told by a CBP officer, ‘we have orders from above to return all’”; a CBP officer told a man kidnapped with his son in Mexico that if he insisted on claiming a fear of return, he would be separated from his son.<sup>56</sup> Many asylum seekers have been returned to Mexico even though they have been threatened with or endured harms including assault, robbery, extortion, kidnapping, rape, and torture, among others. Nearly 2 out of every 3 of the asylum seekers interviewed by the USIPC at UC San Diego who expressed fear of being returned to Mexico and were given a secondary interview by an asylum officer reported that their persecutor(s) can find and have access to them in Mexico, but were returned to Mexico anyway.<sup>57</sup>

When an asylum seeker has failed to affirmatively express a fear of being returned to Mexico or CBP has not provided the necessary fear screening, immigration judges can instruct DHS attorneys to provide the required fear screening to individuals who express a fear of return in court. However, Human Rights First found that only 25 percent of the immigration judges it observed in the San Diego and El Paso courts in June and July affirmatively asked MPP asylum seekers about their fear of return to Mexico.<sup>58</sup>

CBP has returned to Mexico not only migrants who have affirmatively expressed a fear of harm but also Mexican nationals and vulnerable groups, despite their exemption from MPP. According to the Syracuse University Transactional Records Access Clearinghouse (TRAC), approximately fifty Mexican nationals have been returned to Mexico, in clear violation of MPP.<sup>59</sup> At the same time, CBP returned LGBTQ persons who experienced persecution in their home countries and Mexico, unaccompanied children, adults and children with serious medical conditions and mental health issues, and pregnant women.<sup>60</sup>

Through MPP, CBP has separated children from their families, including children separated from their biological parents and adults with proof of legal guardianship. Human Rights First reported that a Guatemalan asylum seeker had been separated from a younger brother, over whom he had gained custody after their father had been murdered.<sup>61</sup> CBP also has separated children from adults, including grandparents, aunts and uncles, and older siblings, who served as their caretakers in their home countries. Little is known about the numbers and location of these children since DHS has failed to document these cases.<sup>62</sup>

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<sup>55</sup> USIPC, “Seeking Asylum: Part 2,” 8.

<sup>56</sup> Human Rights First, “Orders from Above,” 2.

<sup>57</sup> USIPC, “Seeking Asylum: Part 2,” 7-8. See also, Human Rights First, “Delivered to Danger,” 7.

<sup>58</sup> Human Rights First, “Delivered to Danger,” 5-6.

<sup>59</sup> Details on MPP (Remain in Mexico) Deportation Proceedings, TRAC Immigration, through August 2019, accessed October 19, 2019, <https://trac.syr.edu/phptools/immigration/mpp/>

<sup>60</sup> Human Rights First, “Delivered to Danger, 2, 8, 9; “US sends pregnant migrant having contractions back to Mexico,” *The Guardian*, September 6, 2019, accessed October 19, 2019,

<https://www.theguardian.com/us-news/2019/sep/06/us-immigration-pregnant-woman-mexico-trump-policy>.

<sup>61</sup> Human Rights First, “Delivered to Danger,” 8.

<sup>62</sup> Joel Rose, “Fear, Confusion and Separation as Trump Administration Sends Migrants Back to Mexico,” *NPR*, July 1, 2019, accessed

The DHS Office of the Inspector General (OIG), as well as numerous advocacy organizations and media outlets, reported the inhumane conditions and abusive treatment faced by asylum seekers held in CBP custody while being processed under MPP. In five of the six facilities it visited, the OIG found dangerous overcrowding; some migrants were held in standing-room only conditions for days or weeks while others had no choice but stand and even sleep on toilets due to the lack of space.<sup>63</sup> Without access to showers, clean clothing, soap, and toothbrushes, migrants were forced to live in unsanitary conditions for days or weeks. In violation of CBPs own Transport, Escort, Detention, and Search (TEDS) standards, children failed to receive hot meals. Finally, while DHS regulations stipulate a maximum 72-hour detention period, OIG reported that migrants had been held in excess of this limit; thus, for example, in May 2019, it found that 66 percent of detainees at El Paso Del Norte were held for longer than 72 hours while four percent were held for more than two weeks.<sup>64</sup> When CBP ran out of detention space, it held migrants in outdoor camps, where they were forced to sleep on the concrete pavement and were given very little to eat.<sup>65</sup>

Finally, the OIG and immigrant rights organizations have found that Border Patrol agents have taken asylum seekers' personal property, including handbags, suitcases, photographs, and government-issued identification. The loss of the latter creates numerous difficulties for asylum seekers needing to prove legal guardianship of their children, receiving money transferred by wire, obtaining work authorization in Mexico, and traveling freely and thereby seeking asylum in another country.<sup>66</sup>

According to research conducted by the USIPC at UC San Diego, 85.7% of the asylum seekers they interviewed reported issues related to food while in U.S. immigration detention, including not being fed, not being given enough to eat, or being fed spoiled food; 85.2% reported issues related to water, including not being given water, not being given enough to drink, or having to drink dirty or foul-tasting water; 85.1% reported issues related to sleep, including not being able to sleep, not getting enough sleep, having to sleep on the floor, or having to sleep with the lights on; only 20.3% reported being able to shower, get clean, or brush their teeth; just over half reported experiencing verbal abuse in immigration detention; 6.7% reported experiencing physical abuse in immigration detention; and approximately 1 out of every 4 reported having their property taken away from them and not returned after they were released from immigration detention.<sup>67</sup>

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October 15, 2019,

<https://www.npr.org/2019/07/01/736908483/fear-confusion-and-separation-as-trump-administration-sends-migrants-back-to-mex>

<sup>63</sup> Human Rights First, "Delivered to Danger," 18-20.

<sup>64</sup> Memorandum from John V. Kelly, acting inspector general, Office of the Inspector General, Department of Homeland Security, to Kevin McAleenan, acting secretary, Department of Homeland Security, "Management Alert – DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center," May 30, 2019, 5, accessed October 19, 2019, <https://www.oig.dhs.gov/sites/default/files/assets/2019-05/OIG-19-46-May19.pdf>.

<sup>65</sup> Human Rights First, "Delivered to Danger," 19.

<sup>66</sup> Human Rights Watch, "We Can't Help You Here" 39-42; Memorandum from John V. Kelly, "Management Alert."

<sup>67</sup> USIPC, "Seeking Asylum: Part 2," 11-12.

## Fear Screening

Reasonable fear interviews conducted under MPP have returned asylum seekers to Mexico even after expressing serious fears of harm if sent to Mexico. One USCIS asylum officer admitted that asylum seekers were returned to Mexico in 99% of the cases in which they expressed a fear of persecution. Indeed, in the amicus brief filed by their union in the lawsuit challenging MPP, USCIS asylum officers asserted that “MPP fails to provide even the basic procedural protections available to asylum applicants subject to [expedited removal].”<sup>68</sup> Human Rights First has said that “fear screening interviews conducted by asylum officers have become increasingly farcical.”<sup>69</sup>

During the screening interview itself, DHS has refused to allow migrants access to attorneys in person or by telephone. MPP asylum seekers have been given no time to rest prior to their interview, nor an opportunity to appeal negative decisions. While the fear interviews normally would take several hours, they now are being conducted in “ten minutes or less and consist only of yes-or-no questions.”<sup>70</sup> In one reported case, the migrant was interviewed while in handcuffs, a predicament that may have hindered his ability to express his fear of return to Mexico.<sup>71</sup>

Human Rights First has reported on the case of a lesbian asylum seeker from Cuba where CBP appears to have played an undue role in the interview when CBP officers “entered the room during her telephonic fear screening, spoke to the asylum officer conducting the interview, and appeared to instruct the asylum officer to alter the line of questioning.”<sup>72</sup> The asylum seeker did not pass her fear interview and was returned to Mexico. More broadly, DHS has reserved the right to overrule the decisions of asylum officers and has returned to Mexico even those migrants who the individual asylum officer has determined met the higher standards for fear under MPP.<sup>73</sup>

In August, some members of the asylum officers union told the *Los Angeles Times* that they were refusing to implement MPP at the “risk of being fired.”<sup>74</sup> Meanwhile, several asylum officers have quit while one asks herself, “How long can I do this and live with myself . . . I think about these people all the time . . . the ones that I sent back. I hope they’re alive.”<sup>75</sup>

In its amicus brief in the lawsuit challenging MPP, the UNHCR concluded that the fear screening lacked the “protections required by international law” insofar as “applicants do not have access to counsel in the screening procedure; a decision is not appealable by the applicant; and applicants cannot meaningfully prepare their refugee status determination claims by meeting with lawyers and/or receive notice of upcoming court dates, or otherwise be assured of due process in their full asylum hearings.”<sup>76</sup>

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<sup>68</sup> Brief of Amicus Curiae Local 1924, *Innovation Law Lab, et al. v. McAleenan*, 21.

<sup>69</sup> Human Rights First, “Orders from Above,” 9.

<sup>70</sup> *Ibid.*, 9.

<sup>71</sup> Human Rights First, “Delivered to Danger,” 6.

<sup>72</sup> Human Rights First, “Orders from Above,” 8.

<sup>73</sup> Human Rights First, “Delivered to Danger,” 6.

<sup>74</sup> O’Toole, “Trump administration appears to violate law.”

<sup>75</sup> *Ibid.*

<sup>76</sup> The United Nation High Commissioner for Refugees’ Amicus Curiae Brief, *Innovation Law Lab, et al., v. McAleenan*, 20.

## Immigration Court Hearings for MPP Asylum Seekers

Implementation of MPP immigration proceedings has revealed a number of troubling issues: the flooding of immigration court dockets near the southern border with MPP cases, tent immigration courts that raise serious due process concerns, defective notice of immigration court hearings, the issuance of in absentia removal orders or termination of proceedings when MPP asylum seekers do not attend court hearings, and the effective denial of access to counsel.

The immigration courts tasked with adjudicating MPP cases have been overwhelmed with the incredible number of MPP cases.<sup>77</sup> A U.S. immigration official told a group of congressional staffers that the program had “broken the courts,” and that the El Paso court was close to running out of space for paper files.<sup>78</sup> In San Diego, three of the seven immigration judges generally had full afternoon calendars of MPP cases.<sup>79</sup> A Reuters analysis of immigration court data revealed that immigration judges with an MPP docket were scheduled for an average of 32 cases per day between January and July, and one judge had 174 cases in one day.<sup>80</sup> Regular asylum cases have had to be rescheduled, as MPP cases have been prioritized.<sup>81</sup> “These numbers are unrealistic, and they are not sustainable on a long-term basis,” said Ashley Tabaddor, head of the national immigration judge’s union.<sup>82</sup> Of the 33,564 MPP cases filed in the immigration courts up to August 2019, 29,843 were still waiting for their first hearing.<sup>83</sup>

To address these court capacity challenges, the administration announced it would shift \$155 million from disaster relief to expand facilities for MPP hearings and would need \$4.8 million more for transportation costs.<sup>84</sup> In early September, the administration opened two tent courts in Laredo and Brownsville, Texas.<sup>85</sup> These tent courts have heard as many as 420 cases per day in Laredo and 720 in Brownsville.<sup>86</sup> Cases are conducted by video conference with immigration judges and DHS attorneys appearing virtually from immigration courts.<sup>87</sup> A number of groups, including the American Immigration Lawyers Association (AILA) and congressional Democrats led by Hispanic Caucus chair Joaquin Castro, have raised concerns that these tent facilities violate asylum seekers’ due process rights.<sup>88</sup> These concerns are based on: reports that members of the public, including

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<sup>77</sup> Alicia A. Caldwell, “Trump’s Return-to-Mexico Policy Overwhelms Immigration Courts,” *The Wall Street Journal*, September 5, 2019, accessed October 19, 2019,

<https://www.wsi.com/articles/trumps-return-to-mexico-policy-overwhelms-immigration-courts-1156768480>; Morrissey, “San Diego Immigration Court ‘Overwhelmed.’”

<sup>78</sup> Rosenberg, Cooke, and Levinson, “Hasty Rollout of Trump Immigration Policy.”

<sup>79</sup> Morrissey, “San Diego Immigration Court ‘Overwhelmed.’”

<sup>80</sup> Rosenberg, Cooke, and Levinson, “Hasty Rollout of Trump Immigration Policy.”

<sup>81</sup> Max Rivlin-Nadler, “Asylum Hearings Rescheduled As Judges Prioritize ‘Remain-In-Mexico’ Program,” KPBS, accessed October 18, 2019, <https://www.kpbs.org/news/2019/aug/23/asylum-hearings-rescheduled-judges-prioritize-remain/>.

<sup>82</sup> Rosenberg, Cooke, and Levinson, “Hasty Rollout of Trump Immigration Policy.”

<sup>83</sup> Details on MPP (Remain in Mexico) Deportation Proceedings, TRAC Immigration, through August 2019, accessed October 18, 2019, <https://trac.syr.edu/phptools/immigration/mpp/>

<sup>84</sup> “Rollout of ‘Soul Crushing’ Trump Immigration Policy has ‘Broken the Courts,’” NBC News, September 10, 2019, accessed October 18, 2019, <https://www.nbcnews.com/news/latino/rollout-soul-crushing-trump-immigration-policy-has-broken-courts-n1051926>; Claudia Grisales, “As Puerto Rico Braces for Storm, DHS, FEMA to Move \$271 Million to Border Operations,” NPR, August 27, 2019, accessed October 18, 2019,

<https://www.npr.org/2019/08/27/754838143/as-puerto-rico-braces-for-storm-dhs-fema-to-move-271-million-to-border-operation>.

<sup>85</sup> Nicole Narea, “House Democrats Say Migrants Aren’t Getting Fair Hearings at Tent Courts on the Border,” Vox, October 18, 2019, accessed October 18, 2019,

<https://www.vox.com/policy-and-politics/2019/10/18/20920000/house-democrats-investigation-tent-courts-border-port>

<sup>86</sup> *Ibid.*

<sup>87</sup> Morrissey, “San Diego Immigration Court ‘Overwhelmed.’”

<sup>88</sup> “AILA Sends Letter Requesting Information and Access to Port Courts,” AILA, September 26, 2019, accessed September 26, 2019, <https://www.aila.org/advo-media/aila-correspondence/2019/aila-sends-letter-on-legal-access-to-port-courts>; Narea, “House Democrats

attorneys from AILA, National Immigrant Justice Center, Amnesty International, and the Women's Refugee Commission, have been prevented from viewing the proceedings; arguments that video conferencing does not facilitate a full and fair hearing; and the complicated logistics of reaching the tent courts, such as arriving at the hearings as early as 4:30 in the morning, putting MPP asylum seekers at increased risk of harm as they travel to these courts from the Mexican side of the border and creating additional barriers to legal representation.<sup>89</sup>

In addition, as stated above, there have been reports of errors and notable defects in the Notice to Appear and hearing paperwork for MPP asylum seekers, and instances when the government has not filed the initial paperwork to begin immigration court proceedings.<sup>90</sup> Further, there have been reports that the dates on documents explaining when to come back to the port of entry for their hearing do not match the dates listed on their hearing notice. In immigration court, judges and attorneys have raised concerns that MPP asylum seekers have not been given proper notice of their hearings and that individuals may have missed their court hearings because of scheduling and document errors that led to confusion about hearing dates.<sup>91</sup>

The accuracy of the information on the documents provided to MPP asylum seekers as well as their ability to attend their hearings is critically important because if they fail to appear for their hearings an immigration judge can order them removed in absentia. In its August 2019 report, Human Rights First described how some MPP asylum seekers were ordered removed in absentia when they had missed their hearings for reasons that included being kidnapped and held for ransom, not being able to reach the port of entry when Mexican immigration officials refused to allow them to reach the port to attend their hearing, and fear of leaving their shelter.<sup>92</sup> Of the MPP cases filed in the immigration courts up to August 2019, 3,287 were ordered removed in absentia.<sup>93</sup> Alternatively, immigration judges may terminate proceedings when they determine that there was not legally sufficient notice of the proceedings. As of August 2019, immigration judges had terminated proceedings in 2,535 cases.<sup>94</sup> Termination of proceedings does not help MPP asylum seekers who want to pursue their asylum case because their access to the U.S. immigration system has been cut off.<sup>95</sup>

In addition, immigration attorneys have expressed serious concerns that MPP effectively denies asylum seekers access to counsel in violation of their due process rights.<sup>96</sup> In June 2019, AILA sent a

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Say Migrants Aren't Getting Fair Hearings"; Camilo Montoya-Galvez, "'Farce of due process': Lawyers denounce new border tent courts for migrants," CBS News, September 19, 2019, accessed October 18, 2019, <https://www.cbsnews.com/news/asylum-seeker-tent-courts-at-border-denounced-by-attorneys-as-farce-of-due-process/>; Nick Mirroff, "Along Texas Border, Trump Administration Sets Up Tent Courts for Virtual Asylum Hearings," *The Washington Post*, September 18, 2019, accessed October 18, 2019, [https://www.washingtonpost.com/immigration/along-texas-border-trump-administration-sets-up-tent-courts-for-virtual-asylum-hearings/2019/09/18/f29d1326-d9bc-11e9-adff-79254db7f766\\_story.html](https://www.washingtonpost.com/immigration/along-texas-border-trump-administration-sets-up-tent-courts-for-virtual-asylum-hearings/2019/09/18/f29d1326-d9bc-11e9-adff-79254db7f766_story.html), Gus Bova, "Immigration Judge Slams 'Remain in Mexico' Tent Courts," *Texas Observer*, September 24, 2019, accessed October 18, 2019, <https://www.texasobserver.org/tent-courts-ashley-tabaddor-border-laredo-asylum-immigration/>

<sup>89</sup> Ibid.

<sup>90</sup> Morrissey, "San Diego Immigration Court 'Overwhelmed!'"

<sup>91</sup> Flores, "Border Patrol Agents Are Writing 'Facebook'"; Human Rights First, "Delivered to Danger," 16; Morrissey, "San Diego Immigration Court 'Overwhelmed!'"

<sup>92</sup> Human Rights First, "Delivered to Danger," 15-16, .

<sup>93</sup> Details on MPP (Remain in Mexico) Deportation Proceedings, TRAC Immigration, through August 2019, accessed October 18, 2019, <https://trac.syr.edu/phptools/immigration/mpp/>

<sup>94</sup> Ibid.

<sup>95</sup> Morrissey, "San Diego Immigration Court 'Overwhelmed!'"

<sup>96</sup> CBP provides asylum seekers with a list of pro-bono legal service providers but does not permit them to return to the United States to find

letter to DHS Acting Secretary McAleenan expressing “grave concerns” about MPP asylum seekers’ ability to get necessary legal services because of harsh conditions in Mexico, scarce legal service providers who can represent asylum seekers in Mexico in their immigration court proceedings in the United States, questions about whether lawyers licensed in the United States and physically present in Mexico can advise or represent asylum seekers physically in Mexico, the time and costs of international travel for essential face-to-face communications, and obstacles to sufficient communications between the asylum seekers and their attorneys.<sup>97</sup> Similarly, the August 2019 Human Rights First report and September 2019 Human Rights Watch report chronicled significant barriers to legal representation for those in MPP.<sup>98</sup> Access to counsel is critical to an asylum seeker’s ability to win their case. Studies have shown that asylum seekers with attorneys are “four times more likely to be granted asylum than those without legal counsel.”<sup>99</sup> At the end of August 2019, only 1.5 percent of all MPP cases were represented by counsel.<sup>100</sup> Representation increases slightly as individuals have more time to find attorneys, but the analogous statistics for MPP cases are far below those of regular court cases. June 2019 data reveals that after three months of pending court cases only 4.1 percent of MPP cases had representation compared to 23.6 percent of regular cases.<sup>101</sup>

Further, the government has prevented organizations from providing free legal services to MPP asylum seekers the day of their immigration proceedings. In San Diego, lawyers from Jewish Family Service requested the Department of Justice allow it to provide “Know Your Rights” presentations to those in MPP at immigration court, but the request was denied.<sup>102</sup> Nevertheless, Jewish Family Service staged an informal “Attorney of the Day” program.<sup>103</sup> A similar request was denied in El Paso.<sup>104</sup>

Since MPP began at the end of January, few MPP asylum seekers have been granted immigration relief to stay in the United States. In August 2019, the first person in MPP won his asylum case, but the government has appealed that decision to the Board of Immigration Appeals.<sup>105</sup>

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and work with an attorney. Instead, CBP advises that they may be represented by counsel “by “telephone, email, video conference, or any other remote communication method”; “in person at a location in Mexico”; or on the day of their hearing at their assigned courthouse. Human Rights First, “A Sordid Scheme,” 7 (citing CBP, “Initial Processing” information sheet).

<sup>97</sup> “AILA Sends Letter to DHS Acting Secretary Detailing MPP’s Barriers to Counsel,” AILA, June 3, 2019, accessed October 17, 2019, [https://aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp?utm\\_source=Recent%20Postings%20Alert&utm\\_medium=Email&utm\\_campaign=RP%20Daily](https://aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily)

<sup>98</sup> Human Rights Watch, “US Move Puts More Asylum Seekers at Risk,” September 25, 2019, accessed October 18, 2019, <https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk#>; Human Rights First, “Delivered to Danger,” 12-15. See also Miriam Jordan, “In Court Without a Lawyer: The Consequences of Trump’s ‘Remain in Mexico’ Plan,” *The New York Times*, August 3, 2019, accessed October 18, 2019, <https://www.nytimes.com/2019/08/03/us/migrants-court-remain-in-mexico.html>.

<sup>99</sup> Emphasis in original. *Ibid.*

<sup>100</sup> Details on MPP, TRAC Immigration.

<sup>101</sup> “Access to Attorneys Difficult for Those Required to Remain in Mexico,” TRAC Immigration, July 29, 2019, accessed October 18, 2019, <https://trac.syr.edu/immigration/reports/568/>

<sup>102</sup> Kate Morrissey, “San Diego attorneys push back on denial of orientation program for ‘Remain in Mexico’ asylum seekers,” *The San Diego Union Tribune*, September 30, 2019, accessed October 18, 2019, <https://www.sandiegouniontribune.com/news/immigration/story/2019-09-30/san-diego-attorneys-push-back-on-denial-of-orientation-program-for-remain-in-mexico-asylum-seekers?fbclid=IwAR2wu1vUCEoOq47n-W7qICfEeihYKICXwFKvPa1YptUWqhKPOYLL3HLLKq>.

<sup>103</sup> *Ibid.*

<sup>104</sup> Max Rivlin-Nadler, “Volunteer Lawyers Help Asylum-Seekers, Sent Back to Mexico, To ‘Know Their Rights,’” *KPBS*, October 4, 2019, accessed October 18, 2019, <https://www.kpbs.org/news/2019/oct/04/volunteer-lawyers-aim-help-asylum-seekers-sent-back/>.

<sup>105</sup> Kate Morrissey, “First person from ‘Remain in Mexico’ to win asylum released into US after day in detention,” *The San Diego Union Tribune*, August 7, 2019, accessed October 18, 2019, <https://www.sandiegouniontribune.com/news/immigration/story/2019-08-07/despite-asylum-win-government-may-return-migrant-to-mexico-again>; “Government to Appeal Asylum of First Remain in Mexico Refugee,” Human Rights First, September 6, 2019, accessed September 6, 2019, <https://www.humanrightsfirst.org/press-release/government-appeal-asylum-first-remain-mexico-refugee>.

According to government data, up to August 2019, only two people in MPP had been granted relief.<sup>106</sup> There have been additional reports of asylum seekers in MPP gaining relief.<sup>107</sup> But even when MPP asylum seekers have won their cases, there have been delays or lack of clarity regarding their admittance to the United States.<sup>108</sup>

Additional questions remain as to whether those placed in MPP are still eligible for asylum after the Trump administration issued a regulation in July that banned asylum for non-Mexican asylum seekers who enter the U.S. from Mexico after July 16, 2019. Asylum seekers in MPP prior to that date have initially entered the U.S. to ask for asylum but then enter the U.S. again for subsequent hearings. While officials from DHS and the Department of Justice said at the time the regulation went into effect that this asylum ban would not apply to those already in MPP, the issue remains an open question in at least one immigration courtroom.<sup>109</sup>

Collectively, the concerns raised about MPP reveal a grim reality for those fleeing persecution and seeking safety at the United States' southern border. Legal challenges to the policy are ongoing and researchers continue to fill in the gaps about the impact of MPP. What's at stake is not simply a policy or political question, but the lives of tens of thousands of people who have left everything behind in search of protection from persecution.

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<sup>106</sup> Details on MPP, TRAC Immigration.

<sup>107</sup> Maya Srikrishnan, "An Asylum-Seeker Scored a Rare Win Under 'Remain in Mexico.' So Why Wasn't She Released?," *Voices of San Diego*, September 19, 2019, accessed October 18, 2019, <https://www.voiceofsandiego.org/topics/news/an-asylum-seeker-scored-a-rare-win-under-remain-in-mexico-so-why-wasnt-she-released/>.

<sup>108</sup> Morrissey, "First Person from 'Remain in Mexico.'"

<sup>109</sup> Dara Lind, "Trump's Asylum Ban Could Apply Retroactively to Thousands of Migrants Even Though Officials Promised It Wouldn't," *ProPublica*, October 22, 2019, accessed October 22, 2019, <https://www.propublica.org/article/trumps-asylum-ban-could-apply-retroactively-to-thousands-of-migrants-even-though-officials-promised-it-wouldnt>. There is ongoing litigation challenging this new regulation (known as the asylum ban 2.0) and oral arguments were heard before the same Ninth Circuit panel on the same day as the MPP case. See Ninth Circuit Public Docket, *East Bay Sanctuary Covenant v. Trump*, Nos. 18-17274, 18-17436, (9<sup>th</sup> Cir. 2019), accessed October 22, 2019, [https://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000962](https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000962); *Barr, et al. v. East Bay Sanctuary Covenant, et al.*, 588 U.S. \_\_\_\_ (2019), accessed October 22, 2019, [https://www.supremecourt.gov/opinions/18pdf/19a230\\_k53l.pdf](https://www.supremecourt.gov/opinions/18pdf/19a230_k53l.pdf).



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