No. 19-1212

IN THE

Supreme Court of the United States

CHAD WOLF,
ACTING SECRETARY OF HOMELAND SECURITY, *et al.*,

Petitioners,

—v.—

INNOVATION LAW LAB, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the government's return-to-Mexico policy, known as the "Migrant Protection Protocols" ("MPP"), violate 8 U.S.C. § 1225(b), by forcing asylum seekers who lack proper documents and thus are subject to § (b)(1), to return to Mexico pending removal proceedings, when the statute establishes two distinct categories of applicants for admission, § (b)(1) and § (b)(2); authorizes return pending proceedings only of applicants under § (b)(2); and specifically exempts from § (b)(2) those applicants to whom § (b)(1) "applies"?
2. Do the procedures implementing MPP violate the United States' nonrefoulement obligation under the withholding-of-removal statute, 8 U.S.C. § 1231(b)(3), because they do not inform the individual of the right to request a fear interview, and even where such interviews are held, they are cursory and require that the applicant meet the same more-likely-than-not standard required for an ultimate grant of withholding at the conclusion of full removal proceedings?
3. Are the new procedures the Department of Homeland Security ("DHS") created to ensure that MPP is consistent with the government's nonrefoulement obligation arbitrary and capricious under the Administrative Procedure Act ("APA") where they are less protective than established procedures implementing the same obligation, and where the agency failed to acknowledge or explain its departure from these existing procedures?
4. Did the government violate the APA when it established entirely new procedures to meet its

mandatory nonrefoulement obligation under MPP but failed to comply with the APA's notice-and-comment requirement?

5. Is the district court's injunction overbroad, where the court correctly held that MPP violates federal statutes and directly impedes the organizational plaintiffs' missions; where the only way to redress those injuries is to enjoin MPP as a whole; and where such relief is consistent with 5 U.S.C. § 706(2)(A), which directs courts to "set aside" unlawful agency action?

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INTRODUCTION

This case concerns the government's unprecedented policy of returning thousands of asylum seekers to highly dangerous conditions in Mexico and forcing them to remain there pending the conclusion of their removal proceedings. Since implementing the "Migrant Protection Protocols" ("MPP") in January 2019, the Department of Homeland Security ("DHS") has placed the lives of thousands of returnees at risk, while making it nearly impossible for them to pursue their claims for asylum and other forms of protection. The State Department has issued Level 4 travel warnings, the same level it applies to war zones in Iraq, for the very border areas where the government is returning individuals under MPP.

Certiorari is not warranted for three reasons. First, intervening events since the government filed this petition—namely the COVID-19 pandemic and measures taken in response—have reduced the urgency of this Court resolving the questions raised in the petition, as well as any burden on the government, were the preliminary injunction to take effect. On March 20, 2020, the Centers for Disease Control and Prevention ("CDC") issued an order closing the border to the same population of asylum seekers previously subjected to MPP. The order, which is intended to remain in effect for as long as the public health concerns raised by COVID-19 persist, renders MPP effectively superfluous as a border enforcement tool, and the government has largely abandoned its use for the processing of new arrivals. At the same time, the government has indefinitely suspended removal

proceedings for the MPP returnees still in Mexico, essentially stranding them there.

Accordingly, denying certiorari would have little practical effect on the government, as the injunction does not require the government to bring back those returned to Mexico, except for the 11 individual plaintiffs. Moreover, should circumstances change, the lower courts and this Court will have additional opportunities to address MPP's legality, especially given the preliminary injunction posture of this case. In addition, other cases challenging MPP are already in the pipeline, and would provide better vehicles for this Court to resolve MPP's legality, because they raise additional challenges to MPP not presented here.

Second, the court of appeals' decision is correct, and conflicts with no decisions of this Court or any other circuit. The statute does not authorize subjecting Respondents to MPP, and the procedures employed are manifestly inadequate. Finally, the injunction can be sustained on alternative grounds not addressed by the court of appeals.

STATEMENT

A. Legal Framework

1. Removal proceedings are generally governed by 8 U.S.C. § 1229a, which provides that "[u]nless otherwise specified . . . a proceeding under [§ 1229a] shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3). Individuals placed in proceedings under

this section "may be charged with any applicable ground of inadmissibility [or] deportability[.]" *Id.* § 1229a(a)(2). Removal proceedings under 1229a include evidentiary hearings, *see id.* §§ 1229a(b)(1), (b)(4), and administrative and judicial review, *id.*§ 1229a(c)(5).

2. 8 U.S.C. § 1225 establishes procedures for inspecting and processing applicants for admission at the border, and others who are present in the United States without having been admitted. *See id.* § 1225(a)(1). It divides applicants for admission into two distinct groups—§ (b)(1) and § (b)(2)—based on their grounds of inadmissibility, and provides distinct procedures for each category.

Section (b)(1) applies to applicants who are inadmissible for lack of valid entry documents, fraud, or misrepresentation. 8 U.S.C. §§ 1182(a)(6)(C), (a)(7). Subsection (b)(1)(A)(i) authorizes placement of such applicants into "expedited removal" proceedings through which they can be "removed from the United States without further hearing or review." *Id.* § 1225(b)(1)(A)(i). Those § (b)(1) applicants who establish a "credible fear of persecution" in an initial interview with an asylum officer are entitled to "further consideration of the[ir] application for asylum," *id.* § 1225(b)(1)(B)(ii), and are placed in full removal proceedings "under section 240 of the Act [8 U.S.C. § 1229a]." 8 C.F.R. § 208.30(f). DHS can also exercise its prosecutorial discretion to place § (b)(1) applicants directly into full § 1229a removal proceedings without a "credible fear" finding. *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011).

Section 1225(b)(2), titled "Inspection of other aliens," applies to all "other" applicants for admission inadmissible on grounds "not covered by § 1225(b)(1),"

Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018). Section 1225(b)(2) applicants are entitled to full removal proceedings under § 1229a. *See* 8 U.S.C. § 1225(b)(2)(A). Subparagraph (B) provides that § 1225(b)(2)(A) "shall not apply" to a noncitizen "to whom subparagraph [b](1) applies." *Id.* § 1225(b)(2)(B).

Section 1225(b)(2) authorizes DHS to return certain § (b)(2) applicants to Mexico or Canada pending the outcome of their § 1229a removal proceedings:

> In the case of an alien described in subparagraph [1225(b)(2)](A) who is arriving on land . . . from a foreign territory contiguous to the United States, the Attorney General[1] may return the alien to that territory pending a proceeding under section 1229a[.]

8 U.S.C. § 1225(b)(2)(C). This provision applies only to individuals "described in subparagraph [1225(b)(2)](A)"—a paragraph from which § (b)(1) applicants are expressly excluded. 8 U.S.C. § 1225(b)(2)(B). It therefore does not authorize the return of § (b)(1) applicants, namely, those who are inadmissible for lack of proper entry documents, fraud, or misrepresentation.

3. Immigration law establishes a nonrefoulement obligation to avoid returning noncitizens seeking protection in the United States to

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[1] Under the Homeland Security Act of 2002, the Secretary of Homeland Security exercises this authority originally delegated to the Attorney General. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

a risk of persecution or torture abroad. This obligation stems from Article 33 of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention")[2] and Article 3 of the Convention Against Torture ("CAT").[3] Congress enacted the withholding-of-removal statute, 8 U.S.C. § 1231(b)(3), to implement the Refugee Convention, including its guarantee that the United States not "expel or return" noncitizens to any place where they face the likelihood of persecution. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178–79 (1993). And Congress implemented Article 3 of CAT in the Immigration and Nationality Act ("INA"), providing that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), § 2242(a), Pub. L. No. 105-277, Div. G., Title XXI, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note). Protection under the withholding-of-removal statute and CAT are both mandatory entitlements. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

In full removal proceedings under § 1229a, noncitizens seeking nonrefoulement must show a more-likely-than-not chance that they face persecution or torture. 8 C.F.R. §§ 208.16(b), (c); *see also INS v. Stevic*, 467 U.S. 408, 429–30 (1984). They are entitled to a full evidentiary hearing before an immigration

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[2] Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (binding the United States to comply with Article 33 of the Refugee Convention).

[3] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 114.

judge, as well as notice of their rights, access to counsel, time to prepare, and administrative and judicial review. *See* 8 U.S.C. § 1362; *id.* §§ 1229a(b)(4)(A), (B), (b)(5); *id.* § 1252(a); 8 C.F.R. §§ 1240.3, 1240.15.

In expedited removal proceedings under 8 U.S.C. § 1225(b)(1), the government implements its nonrefoulement obligation by providing individuals with threshold screenings that require them to show only a "credible fear" of persecution, namely, a "significant possibility" that they can meet the ultimate standard for relief in full removal proceedings. 8 U.S.C. §§ 1225(b)(1)(A)(ii), (b)(1)(B)(v). Those who show a credible fear are entitled to present their claims for relief in full removal proceedings, with all the attendant procedural protections described above. *See* 8 C.F.R. § 208.30(f). Before a noncitizen is subjected to expedited removal under § 1225(b)(1), an immigration officer must ask whether he or she has "any fear or concern about being returned to [their] home country or being removed from the United States." Supp. App. 1a–4a. (Form I-867AB); 8 C.F.R. § 235.3(b)(2)(i) (requiring immigration officers to use Form I-867AB in expedited removal). Individuals may consult with and bring an attorney. *See* 8 C.F.R. § 208.30(d)(4). The asylum officer must summarize the material facts stated by the applicant, review that summary with the applicant for any corrections, and create a written record of his or her decision. 8 U.S.C. § 1225(b)(1)(B)(iii)(II); 8 C.F.R. §§ 208.30(d)(6), (e)(1). Individuals are entitled to review by an immigration

judge of negative credible fear determinations. 8 C.F.R. § 208.30(g).[4]

B. Factual Background

1. Until recently, asylum seekers at the southern border were placed either in expedited removal proceedings, or directly into full removal proceedings. Both categories of asylum seekers were allowed to remain in the United States pending completion of their proceedings.

On December 20, 2018, DHS announced a "historic" change to this policy. App. 179a. Beginning January 2019, the new policy, dubbed the Migrant Protection Protocols ("MPP"), authorized the government to return certain non-Mexican asylum seekers to Mexico, "for the duration of their immigration proceedings[.]" App. 173a. Invoking the contiguous-territory-return provision, § 1225(b)(2)(C), the government began putting asylum seekers in § 1229a proceedings, returning them to Mexico, and requiring them to repeatedly return to the border over a period of months for their immigration hearings. App. 167a. Although initially MPP was applied only to individuals presenting at ports of entry, it was expanded to include individuals who were

[4] The nonrefoulement obligation is implemented across summary removal proceedings, including administrative removal and reinstatement of removal proceedings. In these contexts, applicants must show a "reasonable fear" of persecution or torture, 8 C.F.R. § 208.31(c). *See Bartolome v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018) (reasonable fear is a "ten percent" chance of persecution). Reasonable fear proceedings are accompanied by procedural protections including notice, reliance on counsel, interpretation, a written decision, and review by an immigration judge. *See, e.g.*, 8 C.F.R. §§ 238.1(b)(2)(i), 208.31(c), (g).

apprehended after having crossed the southern border. App. 3a.

2. Pursuant to MPP, the government returns asylum seekers to some of the most dangerous parts of Mexico—and the world. The State Department has designated parts of the border where MPP is applied as "Level 4: Do Not Travel To"—the same threat level assigned to active-combat zones such as Syria and Iraq. U.S. Dep't of State, *Mexico Travel Advisory*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (last visited July 12, 2020). "Organized crime activity – including gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault" are common in many of these areas, and "local law enforcement has limited capability to respond to crime incidents." *Id.*

Respondents have been targets of violence in Mexico. Respondent Howard Doe was kidnapped and held for 15 days by the Los Zetas cartel in Chiapas, Mexico. Supp. App. 10a. His captors told him they would "kill [him] and burn [his] bod[y] so that no one could find [it]," but he managed to escape. *Id.* After DHS returned him to Mexico, he was "attacked and robbed by two young Mexican men [who] pulled a gun on [him] from behind and told [him] not to turn around." *Id.* Other Respondents have been robbed at gunpoint, Supp. App. 26a, chased by violent mobs, Supp. App. 21a, and threatened with arrest in exchange for bribes, Supp. App. 37a. Independent reporting confirms a pattern of "kidnappings, extortion, and even death" faced by asylum seekers in MPP. Amnesty International USA, et. al. Amicus Br.

at 18, *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019) (No. 19-15716).

3. In recognition of its nonrefoulement obligation, DHS specifically exempted from MPP individuals who were "more likely than not to face persecution or torture in Mexico." App. 156a. However, the MPP screening procedures are unlike any others implementing this obligation.

MPP requires potential returnees to meet in summary proceedings the same "more likely than not" standard that applies to a final grant of protection in full removal proceedings. App. 185a. But the summary proceedings lack the safeguards available in either full or expedited removal proceedings. App. 187a–90a (explaining MPP screening procedures). The government does not notify individuals that they can request a nonrefoulement interview if they fear return to Mexico. App. 108a–09a. Only individuals who spontaneously express a fear are referred to an asylum officer for a nonrefoulement interview. App. 157a. Even then, they do not even receive the safeguards afforded to asylum seekers in expedited proceedings, including right to counsel, and immigration judge review of a negative determination. *See* 8 U.S.C. § 1225(b)(1)(B).

As a result, few individuals have received nonrefoulement protection from MPP. The government reports that, as of October 2019, only about 7,400 out of 55,000 noncitizens put into MPP had even received fear screenings—and of those only 13% (fewer than a thousand) had received positive fear determinations resulting in their being removed from MPP. App. 212a, 205a.

4. Thousands subjected to MPP currently remain in Mexico waiting for their removal proceedings. Virtually all are seeking protection in the United States and were placed in MPP solely because they lack proper documents. The dangers they face in Mexico, along with the difficulties they face obtaining lawyers to assist in their cases and delays in the scheduling of their removal proceedings, have led some returnees to abandon bona fide claims for protection.

Only about 7% of noncitizens in MPP are represented, *see* TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, https://trac.syr.edu/phptools/immigration/mpp/ (last visited July 12, 2020) (hereinafter "TRAC, *Details on MPP*")[5] (noting 4,364 of a total 65,246 cases are represented) compared to 63% of those in the United States, Executive Office for Immigration Review ("EOIR") Adjudication Statistics, *Current Representation Rates* (Apr. 15, 2020), https://www.justice.gov/eoir/page/file/1062991/download (last visited July 12, 2020). About half have been ordered removed, over 80% pursuant to in absentia orders. TRAC, *Details on MPP* (noting that of 32,583 removal orders, 27,830 were issued when the noncitizen was not present at last hearing). Only about 545 of over 65,000 cases have been granted relief, *id.,* representing a 0.8% grant rate, compared to a 19%–20% grant rate for asylum seekers who pursue their cases inside the country,

[5] The Transactional Record Access Clearinghouse ("TRAC") is a data research organization at Syracuse University that compiles government data on "how our nation's immigration laws are enforced in administrative and criminal courts by a wide variety of agencies." TRAC, *About Us*, https://trac.syr.edu/about TRACgeneral.html (last visited July 12, 2020). Data provided by TRAC is current as of May 2020.

EOIR Adjudication Statistics, *Asylum Decision Rates* (Apr. 15, 2020), https://www.justice.gov/eoir/page/file/1248491/download (last visited July 12, 2020).

In light of the COVID-19 pandemic, all MPP hearings have been suspended. U.S. Dep't of Justice, EOIR Operational Status During Coronavirus Pandemic, https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic#MPP (last visited July 12, 2020). And MPP itself has been effectively superseded as a border enforcement tool by the Centers for Disease Control and Prevention ("CDC") order barring entry at the border of all individuals who lack authorization for admission. *See* Order Under Sections 362 and 365 of the Public Health Service Act (42 U.S.C. §§ 265, 268) Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060 (Mar. 26, 2020) (effective date Mar. 20, 2020). Since the order was first issued, the government has largely discontinued its use of MPP to process newly arriving migrants.

C. Procedural History

Respondents are 11 asylum seekers fleeing situations of extreme violence in Central America. After seeking refuge in the United States, all were returned to dangerous parts of Mexico under MPP. Respondents also include six legal service providers who represent asylum seekers.

Respondents brought this suit in February 2019, and moved for a preliminary injunction on five grounds. App. 48a. First, MPP illegally applies to asylum seekers who are not subject to 8 U.S.C. § 1225(b)(2)(C). App. 76a–77a. Second, MPP violates the

nonrefoulement obligation as codified in the INA's withholding-of-removal provision, 8 U.S.C. § 1231(b)(3), by failing to provide minimally adequate procedures. App. 73a. Third, MPP's nonrefoulement provisions violate the APA because of their unexplained departure from longstanding procedures used to comply with the agency's nonrefoulement obligation. App. 77a–78a. Fourth, DHS violated the APA's rulemaking requirements by failing to comply with notice-and-comment obligations when it implemented new mandatory nonrefoulement procedures. App. 77a. Finally, MPP is arbitrary and capricious because the agency's asserted justifications, mainly deterring illegal migration and fraudulent asylum claims, were not rationally connected to the policy's design. App. 78a.

The district court granted the preliminary injunction on April 8, 2019, and "enjoined and restrained [the government] from continuing to implement or expand the 'Migrant Protection Protocols.'" App. 83a. A motions panel of the Ninth Circuit granted the government's request to stay the injunction pending appeal. App. 107a.

On February 28, 2020, the court of appeals upheld the district court injunction. App. 2a. The court held it was likely that DHS exceeded its statutory authority under § 1225(b)(2)(C) by applying the contiguous-territory-return provision to asylum seekers described in § 1225(b)(1). App. 18a. Based on a "plain-meaning reading of § 1225(b)—as well as the Government's longstanding and consistent practice"—the court held that § (b)(1) applicants may not be subjected to contiguous-territory return, which is statutorily limited to § (b)(2) applicants. App. 18a.

The court also held that Respondents "have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States' anti-refoulement obligations under [8 U.S.C.] § 1231(b)." App. 38a. It noted that DHS implemented its nonrefoulement obligation in MPP with far fewer procedural protections than in other contexts, including expedited removal and full removal proceedings. App. 28a. The court also noted that the MPP forces asylum seekers, "unprompted and untutored in the law of refoulement, [to] volunteer that they fear returning to Mexico[.]" App. 30a–31a. The court did not reach Respondents' other claims because they were unnecessary to support the preliminary injunction. App. 38a.

Pursuant to the APA, the court held that "the offending agency action should be set aside in its entirety rather than only in limited geographical areas." *Id.* For that reason, recognizing the "need for uniformity in immigration policy," the court upheld the injunction's application across the southern border. App. 41a.

Judge Fernandez dissented, but noted the "dearth of support for the government's unique rule that an alien processed under the MPP must spontaneously proclaim his fear of persecution of torture in Mexico." App. 46a–47a.

The government moved to stay the merits decision, which the merits panel granted in part, limiting the injunction's effect to the Ninth Circuit. App. 84a. This Court then granted the government's motion to stay the injunction in full. *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (Mar. 11, 2020).

REASONS TO DENY THE PETITION

I. INTERVENING EVENTS MAKE THE QUESTIONS PRESENTED HERE LESS URGENT, BECAUSE MPP'S ROLE AS A BORDER ENFORCEMENT TOOL HAS LARGELY BEEN SUPERSEDED BY THE CDC ORDER CLOSING THE SOUTHERN BORDER.

The Court should deny certiorari because, since the government filed its petition, intervening developments have reduced the need to resolve the legal questions the petition presents, as well as the harm to the government of allowing the preliminary injunction to take effect.

First, in response to the COVID-19 pandemic, the government has adopted other measures that have largely replaced its asserted need for MPP. On March 20, the CDC issued an order closing the border to asylum seekers who lack a basis for admission—the very population the government had been subjecting to MPP. Since then, the government has largely abandoned its use of MPP. While the CDC order gives DHS discretion to allow individual migrants into the country and to place them in MPP, for the most part DHS has opted not to place new migrants into MPP.

At the same time, DHS has suspended all removal proceedings for individuals who were already returned to Mexico pursuant to MPP. U.S. Dep't of Justice, EOIR Operational Status During Coronavirus Pandemic, https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic#MPP (last visited July 12, 2020). The preliminary injunction does not require the government to return these individuals to

the United States—it specifically requires return of only the 11 individual plaintiffs. App. 82a n.14. Accordingly, if the stay of the injunction were lifted, it would impose no real burden on the government. The government's claim that allowing the decision to take effect would unleash a surge of migrants at the border, "severely burden[ing] the government as it strives to process [them]," Pet. 33, has no basis in light of the CDC's categorical entry bar.

Moreover, as the order on appeal is only a preliminary injunction, the government will have opportunity to seek further relief should it seek to resume using MPP. These new circumstances render this Court's intervention unnecessary at this time. The lower courts are better suited to addressing the impact of these changes than is this Court on a cold appellate record.

In addition, other challenges to MPP, already in the pipeline, would provide a better vehicle to resolve the legality of MPP. A district court in Massachusetts recently invalidated MPP not only on the statutory grounds presented here, but on an additional statutory ground that, if upheld by this Court, would bar MPP's application to the overwhelming majority of individuals who have been subjected to the policy. *Bollat Vasquez v. Wolf*, No. 1:20-CV-10566-IT, 2020 WL 2490040, at *12 (D. Mass. May 14, 2020). Expedited briefing to the First Circuit is currently scheduled to be completed in mid-August. The additional claim in that case is that the government is violating both the contiguous-territory-return statute and its own regulations by applying MPP to individuals apprehended after crossing the border. That claim is not presented here because, when this

litigation was brought, the government was applying MPP only to individuals who presented at ports of entry. Thus, even if this Court were to reject all of the challenges to MPP presented in this petition, the policy could be invalidated in most of its applications on this other ground. Because the government is no longer relying on MPP as part of its border enforcement strategy, the prudent course is to await a better vehicle if and when resolution of the legal issues proves necessary.

II. THE COURT OF APPEALS' DECISION WAS CORRECT.

Certiorari is also unwarranted because the decision below is correct, and not in conflict with decisions of this Court or other circuits.

A. MPP Violates the Plain Language of 8 U.S.C. § 1225(b).

1. MPP violates the plain language of § 1225(b) by authorizing application of the contiguous-territory-return provision, § 1225(b)(2)(C), to applicants for admission who fall under § 1225(b)(1). Section 1225(b)(2)(C) authorizes contiguous-territory return only of applicants for admission under § (b)(2). It does not apply to applicants for admission under § (b)(1).

Section 1225(b), which governs the inspection of applicants for admission, creates two distinct classes of applicants under § (b)(1) and § (b)(2). The plain language of § 1225(b)(2) makes clear that § (b)(1) and § (b)(2) applicants are distinct. First, the heading of § 1225(b)(2), which follows immediately after the sections of the statute pertaining to inspection of applicants under § (b)(1), is "Inspection of *other*

aliens." 8 U.S.C. § 1225(b)(2) (emphasis added). Second, § 1225(b)(2)(B), titled "Exception," specifically exempts § (b)(1) applicants from coverage under § (b)(2). *See* 8 U.S.C. § 1225(b)(2)(B)(ii) ("Subparagraph (A) shall not apply" to an applicant "to whom paragraph [(b)](1) applies."). In *Jennings v. Rodriguez,* this Court confirmed that § (b)(1) and § (b)(2) describe two mutually exclusive categories of applicants for admission: "Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation [the grounds specified in (b)(1)][.] Section 1225(b)(2) . . . applies to all applicants for admission *not covered by § 1225(b)(1)*." 138 S. Ct. at 837 (emphasis added) (citations omitted).

The two provisions set forth different procedures for inspecting and processing § (b)(1) and § (b)(2) applicants. Applicants under § (b)(2) are entitled to full removal proceedings. 8 U.S.C. § 1225(b)(2)(A). In contrast, § (b)(1) applicants can be removed pursuant to expedited removal proceedings, which do not provide a hearing before an immigration judge. *Id.* § 1225(b)(1)(i). Section (b)(1) applicants receive a full removal hearing in only two circumstances: (1) if they are determined by an asylum officer to have a "credible fear of persecution" in their home country, *id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f), or (2) if DHS exercises its prosecutorial discretion to place them in full removal proceedings in lieu of the expedited removal proceedings authorized by § (b)(1). *See Matter of E-R-M-*, 25 I. & N. Dec. at 523; *Matter of M-S-*, 27 I. & N. Dec. 509, 510 (A.G. 2019).

Section 1225(b)(2)(C) authorizes return to a contiguous territory pending removal proceedings only

"[i]n the case of an alien described in subparagraph (A)" of § 1225(b)(2). But § (b)(1) applicants are *not* "described in subparagraph (A)." *See* 8 U.S.C. § 1225(b)(2)(B)(ii) ("Subparagraph (A) shall not apply to an alien . . . (ii) to whom paragraph (1) [§ 1225(b)](1) applies"). Thus, the court of appeals concluded, "no plausible" reading of § 1225(b) authorizes application of the contiguous-territory-return provision to § (b)(1) applicants. App. 20a.

2. The government's attempt to avoid the plain language and impose contiguous-territory return on people who fall outside of § (b)(2), rests on two flawed premises: (1) that § (b)(1) applicants are merely a subset of § (b)(2) applicants, Pet. 18, and (2) that the only authority for placing applicants for admission into full removal proceedings comes from § 1225(b)(2)(A), *id.* at 18–19. According to the government, when DHS exercises prosecutorial discretion to place a § (b)(1) applicant into full removal proceedings, it does so pursuant to § 1225(b)(2)(A) and the applicant is therefore subject to contiguous-territory return. *Id.* at 4, 16. The government's arguments are contrary to the plain language of § 1225(b), this Court's decision in *Jennings,* the Attorney General's decision in *Matter of M-S-*, and the BIA's decision in *Matter of E-R-M-*. App. 15a–17a.

a. The government argues that § (b)(1) applicants are a subset of § (b)(2) applicants, because § 1225(b)(2)(A) applies to "any applicant for admission who is 'not clearly and beyond a doubt entitled to be admitted'—a class that by its terms includes aliens who can be removed pursuant to the expedited procedure under Section 1225(b)(1)." Pet. 19 (citation omitted). Because, on this view, § (b)(1) applicants fall

under § (b)(2)(A), they are subject to contiguous-territory return under § (b)(2)(C). *Id.* at 18–19. But this argument ignores the plain language of § 1225(b)(2)(B), which expressly exempts from § (b)(2)(A) individuals "to whom [(b)](1) applies." 8 U.S.C. § 1225(b)(2)(B)(ii). It is also contrary to *Jennings*, which states that § (b)(1) and § (b)(2) apply to distinct classes, 138 S. Ct. at 837, and to *Matter of M-S-*, where the Attorney General described the different procedures to which applicants are subjected depending on whether they are § (b)(1) or § (b)(2) applicants, 27 I. & N. Dec. at 510.

The government's reading of § 1225(b)(2)(B)(ii) is contrary to its plain language, and syntactically unsupportable. According to the government, the provision exempts not those applicants "to whom [(b)](1) applies," as the statute provides, but only those who are "actually placed into expedited removal" proceedings. Pet. 19. In the government's view, applicants for admission who are inadmissible on the grounds specified in § (b)(1), but whom DHS chooses to place in full removal proceedings, are "not . . . aliens to whom Section 1225(b)(1) applies, even though DHS *could have* used the expedited removal procedure in their cases." Pet. 18 (citations omitted). Rather, § 1225(b)(1) "applies only when an immigration officer *both* determines that an alien is eligible *and* concludes that he should be processed through expedited removal." *Id.* at 20.

But this is not what the statute says. Section 1225(b)(2)(B)—which is entitled "Exception"—clearly states: "Subparagraph (A) *shall not apply* to an alien . . . (ii) to whom paragraph [(b)](1) *applies*." 8 U.S.C. § 1225(b)(2)(B)(ii) (emphasis added). Congress thus

exempted from § (b)(2)(A) individuals to whom § (b)(1) "applies," not individuals who are "placed into" or "processed through expedited removal." The government's reading of § (b)(2)(B) ignores the plain language of the provision. The government's reading "allows DHS, in its discretion, to 'apply,' or not apply, § (b)(2)(A) to a § (b)(1) applicant," depending on whether the agency chooses to place the applicant in expedited or full removal proceedings. App. 21a.

The government's interpretation of § (b)(2)(B) suffers from "a fatal syntactical problem":

> "Apply" is used twice in the same sentence in § (b)(2)(B)(ii). The first time the word is used, in the lead-in to the section, it refers to the application of a statutory section [§ 1225(b)(2)(A).] ("Subparagraph (A) shall not apply"). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section ("to whom paragraph [(b)](1) applies").

App. 22a. The government does not explain how the same word can be used in the first instance to refer to whether a statute, by its terms, applies to an individual, but in the next instance to whether DHS has decided to exercise, or forbear from exercising, its statutory power. *Id.* Whether a statute "applies" is, in common usage, a question of statutory interpretation.

The statute is unambiguous. Regardless of whether the government has discretion to place a § (b)(1) applicant into full removal proceedings, it does not have discretion to subject that applicant to contiguous-territory return.

b. The government asserts that when DHS chooses to place a § (b)(1) applicant into full removal proceedings, it does so pursuant to § 1225(b)(2)(A), Pet. 18–19, 20, and that therefore these individuals are subject to the contiguous-territory-return provision. *Id.* at 19.

The government is wrong. First, by its plain terms § 1225(b)(2)(A) does not authorize full removal proceedings; rather, it mandates detention of certain § (b)(2) applicants during the pendency of such proceedings. However, even if the statute were properly viewed as authorizing full removal proceedings for § (b)(2) applicants, that would not make it the *only* authority for placing an applicant for admission into such proceedings. Indeed, § (b)(1) applicants who pass a credible fear screening are placed in full removal proceedings. *See* 8 C.F.R. § 208.30(f) (implementing 8 U.S.C. § 1225(b)(1)(B)(ii)). Yet neither the regulation, nor the statute it implements, suggest that the authority for doing so comes from § (b)(2)(A). Moreover, as this Court recognized in *Jennings,* such applicants continue to be treated as § (b)(1) applicants. *See Jennings*, 138 S. Ct. at 844 (describing such individuals as "detained under § 1225(b)(1)"). Their placement into full removal proceedings does not magically transform them into § (b)(2) applicants. The government does not explain why it should be any different for those § (b)(1) applicants who DHS chooses to place in full removal proceedings without going through the credible fear process.

Section 1229a itself provides sufficient authority for DHS to place § (b)(1) applicants in full removal proceedings, without recourse to § 1225(b)(2)(A).

Section 1229a provides that full removal proceedings before an immigration judge are available to adjudicate *any* charges of inadmissibility or deportability. 8 U.S.C. § 1229a(a)(2). It further states that "unless otherwise specified," proceedings under this section are the "sole and exclusive means" for adjudicating admission and removal, *id.* § 1229a(a)(3), making clear that full removal proceedings are the default. The government does not explain why DHS needs any additional statutory basis to place an individual in full removal proceedings.

The government misleadingly cites the Attorney General's 2019 decision in *Matter of M-S-* as support for its position. *See* Pet. 20 ("The Attorney General expressly endorsed DHS's discretion not to apply Section 1225(b)(1) to an alien who is eligible for expedited removal, and instead to place that alien in a full removal proceeding *as authorized in Section 1225(b)(2)(A). See M-S-,* 27 I. & N. Dec. at 510.") (emphasis added). But *Matter of M-S-* says nothing about this authority stemming from § 1225(b)(2)(A). The decision merely states that individuals who are "inadmissible on one of the two specified grounds" in § 1225(b)(1) may be placed "in either expedited or full proceedings." 27 I. & N. Dec. at 510. As support for this proposition, the decision cites § 1225(b)(1)(A)(i) and *Matter of E-R-M-*, which upheld DHS's prosecutorial discretion to place individuals inadmissible on the grounds specified in § (b)(1) into full removal proceedings rather than expedited removal. *Id.*; *see Matter of E-R-M-*, 25 I. & N. Dec. at 523. It makes no reference to § 1225(b)(2)(A) as the source of this authority.

Nor does the BIA's decision in *Matter of E-R-M-* look to § 1225(b)(2)(A). The BIA held that DHS has discretion to place § (b)(1) applicants into full removal proceedings rather than expedited removal. It did *not* cite as authority for doing so § 1225(b)(2)(A), but only § 1229a. *Matter of E-R-M-*, 25 I. & N. Dec. at 520, 523. The government's claim that "respondents have conceded this point," Pet. 19, is similarly misleading. Respondents conceded no more than what the BIA held—that DHS has discretion to place applicants for admission who are inadmissible on the grounds specified in § (b)(1) into full removal proceedings instead of expedited removal. *Matter of E-R-M-*, 25 I. & N. Dec. at 523. Respondents have never suggested, let alone conceded, that the authority for doing so comes from § 1225(b)(2)(A).

The BIA did not hold that such applicants are no longer individuals "to whom Section 1225(b)(1) applies." *See* Pet. 18. In fact, *Matter of E-R-M-* suggests the opposite. The Board actually refers to the respondents in that case, who were put into full removal proceedings as an exercise of DHS's prosecutorial discretion, as individuals "to whom (b)(1) 'applies.'" *Matter of E-R-M-*, 25 I. & N. Dec. at 523 (quoting 8 U.S.C. § 1225(b)(2)(B)) ("[S]ection 235(b)(2)(B) . . . states that section 235(b)(2)(A) 'shall not apply' to . . . *aliens 'to whom paragraph (1) applies,' namely, . . . aliens such as the respondents in this case*.") (emphasis added).

3. Finally, the government argues that the court of appeals' decision "makes no practical sense," because it would exclude "a massive class among inadmissible aliens." Pet. 21. But the government offers no evidence that Congress intended contiguous-

territory return to apply to such a massive class. Indeed, had Congress intended the provision to have such sweeping effect, one would expect that Congress would have made some mention of this in its legislative history. But the government cites nothing.

The government also attacks the court of appeals' decision for positing that Congress exempted § (b)(1) applicants from contiguous-territory return because many of them are asylum seekers and for suggesting that those in removal proceedings under § (b)(2) were more "undesirable." Pet. 22. It is true that § (b)(2) applicants can also seek asylum, and some § (b)(1) applicants may have engaged in the kind of conduct that makes § (b)(2) applicants "undesirable." *Id.* But the court of appeals was on firm ground in concluding that MPP, by targeting those applicants for admission without documents or with false documents, is targeting the population that is overwhelmingly likely to have asylum claims. App. 24a.

B. The Ninth Circuit Correctly Held That MPP Violates the Withholding-of-Removal Statute, Which Implements the Government's Nonrefoulement Obligation.

The court of appeals correctly held that MPP violates our treaty-based nonrefoulement obligation, codified at 8 U.S.C. § 1231(b)(3)(A), by providing patently inadequate procedures to determine who would face persecution if returned to Mexico. App. 25a–38a.

The nonrefoulement obligation requires the United States not to send someone to any territory where she would be at risk of persecution or torture. It

is the cornerstone of the United States' commitment to refugees.

1. Congress enacted the withholding-of-removal statute to "implement the principles agreed to" in the Refugee Convention, including that the United States not "expel or return" noncitizens to any place where they face the likelihood of persecution. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (quotations omitted). MPP purportedly implements this obligation. But, as the court of appeals correctly held, the government's procedures for assessing whether potential returnees will face persecution in Mexico are so inadequate that they violate the withholding statute. App. 25a–38a. Indeed, five of the six judges who reviewed the legality of MPP in this case (the district court judge and four court of appeals judges), expressed serious doubt about the legality of MPP's nonrefoulement procedures. *See, e.g.*, App. 108a–110a. (Watford, J., joining motion panel's per curiam stay decision), (while describing as a "glaring deficiency" that "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country" and concluding MPP was "virtually guaranteed to result in . . . applicants being returned to Mexico in violation of the United States' non-refoulement obligations"); App 46a–47a (Fernandez, J., dissenting) (noting the "the dearth of support for the government's unique rule that an alien processed under the MPP must spontaneously proclaim his fear of persecution or torture in Mexico").

Applicants for withholding in ordinary removal proceedings must show that they are "more likely than not" to face persecution in the country to which they would be removed. They are entitled to a full hearing

before an immigration judge with multiple safeguards, including notice of their right to seek withholding, access to counsel, time to prepare, and a right to administrative and judicial review. *See* 8 U.S.C. § 1362; *id.* §§ 1229a(b)(4)(A), (B), (b)(5); *id.* § 1252(a); 8 C.F.R. §§ 1240.3, 1240.15.

In contrast, MPP authorizes "return" to persecution unless applicants can meet in a summary screening interview the same more-likely-than-not standard they would have to meet to win their case on the merits. App. 171a. But they receive only a single interview with an asylum officer, without notice of the opportunity to seek protection, access to counsel, an opportunity to gather evidence, or a guaranteed interpreter, and without the ability to present evidence concerning country conditions in Mexico. App. 187a–89a. Moreover, this interview is sometimes held just days, if not hours, after the migrant has arrived in the United States—and only if the individual spontaneously expresses a fear of return to Mexico. App. 186a. There is no right to review by an immigration judge or any neutral adjudicator, not to mention an Article III court.

By requiring potential returnees to meet the ultimate more-likely-than-not standard, while denying them commensurate procedures to meet that burden, MPP violates § 1231(b)(3).

2. The government contends that § 1231(b)(3)'s nonrefoulement obligation does not apply to MPP because it "pertains to permanent *removal* of an alien, not temporary *return*." Pet. 24. (emphasis in original). But if one faces persecution in a country, it hardly matters whether one is "removed" or "returned" there. Congress' unequivocal, mandatory

directive that the "Attorney General may not remove" refugees to persecution, 8 U.S.C. § 1231(b)(3), would be hollow if the government could circumvent it by choosing to "return" a person to persecution before a decision is made on whether they can be "removed" there. *See King v. Burwell*, 135 S. Ct. 2480, 2493 (2015) ("We cannot interpret federal statutes to negate their own stated purposes.") (quotation omitted).

The government's position that the withholding statute does not apply to "returns" is also at odds with statutory history and legislative intent. Article 33 of the Refugee Convention "is a general anti-refoulement provision, applicable whenever an alien might be *returned* to a country where his or her life or freedom might be threatened on account of a protected ground." App. 29a–30a (emphasis added). Through the Refugee Act of 1980, Congress sought to harmonize domestic law with treaty obligations by forbidding the government from "deport[ing] or *return[ing]*" an individual to persecution. Pub. L. No. 96-212, 94 Stat. 107 (codified at 8 U.S.C. § 1253(h) (1980)) (emphasis added); *see also Cardoza-Fonseca*, 480 U.S. at 436.

In 1996, Congress amended the withholding provision to substitute the word "remove," for "deport or return." But this was simply part of a general statutory revision under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-589, in which "removal" became the new all-purpose word to encompass both deportation and exclusion proceedings. *See Judulang v. Holder*, 565 U.S. 42, 46 (2011). Congress gave no indication that by this purely semantic change it intended to alter the scope of

withholding relief to allow for return to persecution absent the same protections that accompany removals.

3. The government attempts to justify the procedural deficit by claiming that "DHS reasonably determined that [] temporary return . . . implicates appreciably less risk of persecution on account of a protected ground or torture than does the permanent removal of an alien to the home country from which he fled." Pet. 25.

The court of appeals properly rejected this argument as wholly speculative. App. 30a–31a. Respondents' uncontested declarations clearly establish their violent targeting in Mexico, by both private parties and government officials, on account of their nationality and other protected grounds. *See, e.g.*, App. 31a–32a. (tear gas thrown into shelters holding asylum seekers and threats directed to Hondurans); *id.* at 32a–33a (Christopher Doe threatened with arrest by Mexican police and assaulted and robbed because of his Honduran nationality); *id.* at 33a (Howard Doe robbed at gun point by men who identified him as Honduran).[6] Moreover, whether the harm resulting from "returns" is "appreciably less" than the harm resulting from

[6] For the first time in these proceedings, the government claims that 8 U.S.C. § 1231(h) "precludes any private right of action" over withholding claims. Pet. 23. This argument is incorrect, in addition to being waived. Section 1231(h) "simply forbids courts to construe *that section* 'to create any . . . procedural right or benefit that is legally enforceable.'" *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) (emphasis added). It does not deprive an individual of the right to rely on the APA to challenge agency action that exceeds statutory authority. Section 1231(h) makes no distinction between the detention statute at issue in *Zadvydas* and the withholding statute here.

removal is immaterial. *See* Pet. 25. Even if it were true, the government cannot comply with its nonrefoulement obligation without an accurate and adequate screening mechanism to identify those in MPP who do face a likelihood of persecution if returned to Mexico.

The government argues that the withholding statute is silent as to the required procedures and that therefore MPP's procedures cannot be inadequate. Pet. 26. But "the protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated." *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). The agency itself has consistently recognized the need for adequate procedures, and has calibrated the necessary procedures to the ultimate burden an applicant must meet. *See* 8 C.F.R. §§ 208.1, 208.3(b), 208.10(e)–(f) (1980); 208.2(b), 208.3(b) (1990); 208.2(b), 208.3(b) (1994); 208.2(b)(1), 208.3(b) (1997); 208.2(b)(1), 208.3(b), 208.16 (1999). The consistent regulatory interpretation of the procedures necessary to assess withholding claims is "persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quotation omitted).

The MPP procedures are far less protective even than those applicable in expedited removal proceedings. *Compare* 8 C.F.R. §§ 208.30(d)–(g) (providing asylum seekers in expedited removal proceedings with right to consult with counsel and review of an asylum officer's negative credible fear determination by an immigration judge), *with* App. 187a–90a (no right to consult with counsel and no review of an asylum officer's negative fear

determination, even though applicants must meet higher "more likely than not" standard).

The government resists even the bare minimum procedure that the district court and four judges in the court of appeals deemed necessary: that immigration officers ask as to fear in Mexico before return. This requirement is consistently applied across full and summary removal contexts and the government "points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico." App. 30a–31a.

C. The District Court's Injunction Is Not Overbroad.

Enjoining MPP in its entirety was the only way to afford meaningful relief to the organizational plaintiffs.

The government asserts that the APA "does not authorize" the district court's injunction. Pet. 31. But 5 U.S.C. § 705 authorizes relief pending review as "necessary to prevent irreparable injury." And § 706(2) directs courts to "hold unlawful and set aside agency action" not in accordance with law. Courts regularly enter both preliminary and final relief to enjoin a challenged agency action in its entirety under the APA, and this Court has granted or affirmed such relief in multiple cases. *See Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, No. 19-431, slip op. at 22 n. 28 (U.S. July 8, 2020) (Ginsburg, J., dissenting); *West Virginia v. EPA*, 136 S. Ct. 1000 (2016); *Brown & Williamson*, 529 U.S. 120 (2000); *Federal Reserve System v. Dimension Financial Corp.*,

474 U.S. 361 (1986); *see also Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (affirming nationwide preliminary injunction of agency action).

As the district court found, MPP "directly impedes [the organizational plaintiffs'] mission, in that it is manifestly more difficult to represent clients who are returned to Mexico, as opposed to being held or released into the United States." App. 63a.[7] An injunction against the operation of MPP generally was therefore necessary to provisionally redress these injuries. Moreover, the injunction is narrowly tailored: it does not order the government to bring back from Mexico individuals already returned, apart from the 11 individual plaintiffs. *Id.* 83a. Nor, with respect to these plaintiffs, does it order the government to parole them out of detention. *Id.* 82a n.14.

The government attacks the court of appeals' reasoning that the injunction is consistent with the need for uniformity in immigration matters. Pet. 30–31. But its argument fails to account for the organizations' injuries here. *Id.* 31.

[7] The organizational plaintiffs have a "legally protected interest" in the application of the MPP to their potential clients. Pet 31. The harms to the organizations are sufficient to establish injury under this Court's precedents. App. 63a; *see E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765–67 (9th Cir. 2018) (citing *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)).

III. THIS CASE IS NOT APPROPRIATE FOR CERTIORARI BECAUSE THE INJUNCTION BELOW CAN BE AFFIRMED ON ADDITIONAL GROUNDS.

Even if the Court were to agree with the government regarding the specific claims on which the court of appeals ruled, there are other grounds, not addressed by the court of appeals, to affirm the decision below.

A. MPP's Inadequate Nonrefoulement Process is Arbitrary and Capricious.

The district court held, on alternative grounds, that the nonrefoulement procedures are arbitrary and capricious. App. 78a–79a. The court of appeals did not reach this ground, but it provides an alternate basis for affirmance.

The MPP's nonrefoulement process is a dramatic departure from established practices that the government previously deemed necessary to satisfy the same obligation. MPP deprives applicants of the procedures that accompany both full removal proceedings, and summary removal proceedings, without any acknowledgement of the departure.

The failure to acknowledge, let alone provide "good reasons" for this departure violates the APA's requirement of reasoned and reasonable policy-making under 5 U.S.C. § 706(2)(A). *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The procedures also violate the APA because they are not "reasonably related" to the agency's stated goal of complying with its nonrefoulement obligation. *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 663 (D.C. Cir. 1996) (internal citation omitted).

B. The Nonrefoulement Procedures Are Subject to Notice-and-Comment Rulemaking.

The district court was correct that the forced return policy's nonrefoulement protections are a substantive rule not promulgated through notice-and-comment procedures. App. 78a. The government contends that MPP as a whole is a "general statement of policy," 5 U.S.C. § 553(b)(A), and frames the implementation of its nonrefoulement obligation as an exercise of discretion, Pet. 11. But both the withholding statute and FARRA are mandatory legislative prohibitions on the sending of individuals to persecution and torture that have consistently been implemented through rulemaking procedures. *See, e.g.*, 62 Fed. Reg. 444, 461–463 (1997); 62 Fed. Reg. 10312, 10337–13046 (1997); 63 Fed. Reg. 31945, 31949–31950 (1998); 64 Fed. Reg. 8478, 8487–92 (1999).

The key distinction between a substantive rule and a policy statement is whether the rule is "binding." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). A rule is binding if it either (1) does not "genuinely leave[] the agency and its decisionmakers free to exercise discretion," or (2) creates "rights and obligations." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (quotation omitted). MPP's nonrefoulement procedures do both: They strip the government of discretion to return to Mexico any individual who demonstrates a likelihood of persecution there. And there is no room for discretion in the nonrefoulement decision itself. Whether an individual is more likely than not to face persecution in Mexico involves

application of a legal mandate to fact. It does not involve discretion. For these same reasons, MPP's nonrefoulement procedures create "rights and obligations" and are a "binding" rule on this ground as well. *Id.*[8]

CONCLUSION

For the reasons set forth above, this Court should deny the government's petition for a writ of certiorari.

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[8] Two additional claims that were not raised in the preliminary injunction proceedings provide a basis for upholding the injunction on remand. *First*, MPP's nonrefoulement procedures violate § 2242(a) of FARRA. That provision provides that the government may not return "any person to a county in which there are substantial grounds for believing the person would be in danger of being subjected to torture." 8 U.S.C. § 1231 note. The procedures used to implement that obligation in MPP violate the domestic implementation of CAT for the same reasons they violate the withholding-of-removal guarantee. *Second*, MPP violates the contiguous-territory-return provision by applying the return authority to noncitizens from countries other than Mexico or Canada—a claim raised in the complaint but not pursued in the preliminary injunction. By its own terms, the contiguous-territory-return provision applies only to "an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States." 8 U.S.C. § 1225(b)(2)(C). Under the government's reading, "from a foreign territory contiguous" modifies "arriving." Thus, any noncitizen who is "arriving . . . from a foreign territory contiguous to the United States" is subject to the return authority. But because any noncitizen "arriving on land" necessarily does so "from a foreign territory contiguous to the United States," the latter phrase is rendered superfluous. To give the phrase meaning, it must be read to modify "an alien"—meaning that the provision applies only to "an alien . . . from a foreign contiguous territory." Any contrary interpretation renders the phrase "from a foreign territory contiguous" either duplicative or meaningless and should be rejected. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018).

Respectfully Submitted,

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Dated: July 15, 2020

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

Excerpts from the Record Below

Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act

Office: _____ File No.: _____

Statement by: _____

In the case of:_____

Date of Birth: _____ Gender (circle one): Male Female

At: _____ Date: _____

Before: _____
(Name and Title)

In the _____ language. Interpreter _____

Employed by _____

I am an officer of the United States Department of Homeland Security. I am authorized to administer the immigration laws and to take sworn statements. I want to take your sworn statement regarding your application for admission to the United States. Before I take your statement, I also want to explain your rights, and the purpose and consequences of this interview.

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, you may be barred from reentry for a period or 5 years or longer.

This may be your only opportunity to present information to me and the Department of Homeland Security to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

Except as I will explain to you, you are not entitled to a hearing or review.

> U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.

Until a decision is reached in your case, you will remain in the custody of the Department of Homeland Security.

Any statement you make may be used against you in this or any subsequent administrative proceeding.

U.S. Department of Homeland Security

Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act

Q. Why did you leave your home country or country of last residence?

A.

Q. Do you have any fear or concern about being returned to your home country or being removed from the United States?

A.

Q. Would be harmed if you are returned to your home country or country of last residence?

A.

Q. Do you have any questions or is there anything else you would like to add?

A.

I have read (or have had read to me) this statement, consisting of ___ pages (including this page). I state that my answers are true and correct to the best of my knowledge and that this statement is a full, true and correct record of my interrogation on the date indicated by the above named officer of the Department of Homeland Security. I have initialed each page of this statement (and the corrections noted on page(s) _____.

Signature: _____

Sworn and subscribed before me at _____
_____ on _____.

_____
Signature of Immigration Officer

Witnessed by: _____

DECLARATION OF HOWARD DOE

I, Howard Doe, hereby declare under the penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I make this declaration based on my personal knowledge except where I have indicated otherwise. If called as a witness, I could and would testify competently and truthfully to these matters.

2. I was born in Honduras. I am 22 years old. I traveled alone to Mexico.

3. I went to the San Ysidro port of entry to seek asylum on Sunday, February 3, 2019.

4. I fled my home country because the Cartel del Atlántico threatened and tried to kill me. I worked as a refrigerator repairman, conducting home visits in Jutiapa, Atlántida. I was approached by a member of the Cartel del Atlántico who wanted me to start selling drugs in Jutiapa. I was saving money to pay for university. I told him that I did not want that kind of work and that I was happy doing the work I was already doing. The member of the cartel reacted angrily and threatened me. He told me that it was not my choice to make, that I needed to obey his orders, and that when he said to do something, I had to listen. I told him no, and I drove away.

5. That night, the same cartel member sent me a message by phone asking me whether I was going to work for him and telling me that I should keep in mind the consequences of not doing so. I said no. The next day, I was on a motorcycle returning home from work and a *sicario* (hitman) shot at me four times. I was lucky that he missed all four shots, but the next day I received another message saying that I was going to die for having said no.

6. I want to make something of myself, and my parents always encouraged me to work hard. I have never been arrested in Honduras and I have no criminal record. I have always worked honestly, and I want to do the right thing. I have no criminal record.

7. If I am sent back to Honduras, I fear that the Cartel del Atlántico will kill me. They work closely with the police in Atlántida, and they have networks in the police departments across the entire country. I know that they have connections with MS-13, and 18 because they hire members of these gangs as hitmen.

8. I do not believe my government would protect me if I were to return to Honduras because the police work with the Cartel del Atlántico. The leader of that cartel, Jorge Galeano, was arrested by the national police and military police in 2016. He was accused of trafficking drugs. Three days later, he was released without any charges.

9. I first arrived in Tijuana in November 2018. Several days later, I learned about the list from friends who had signed themselves up. I was afraid to put my name on the list because I did not know who might review it, or if it really had anything to do with requesting asylum. At the same time, I did not want to create problems with the U.S. government by trying to cross the border without inspection. I was also afraid to present myself because I had heard that Mexican immigration officials were working with U.S immigration officials to prevent people like me from seeking asylum. Feeling that I had no other option, I finally put my name on the list close to four weeks later, in December 2018.

10. I waited over a month in Tijuana before my number was called. During this time, I stayed at the home of someone I had recently met, about thirty

minutes from El Chaparral. I was afraid to leave the house because I had seen in the news that migrants like myself had been targeted. While I was in Tijuana, two young Honduran men were abducted, tortured and killed. I was also afraid I might be picked up by Mexican officials and deported because I did not have legal status.

11. In late January 2019, I started going to El Chaparral every single day to see if my number would be called. I was afraid every time I left the house, but I was also afraid of not being there when my number was called. I had to pay 40 pesos every day to get to and from El Chaparral.

12. On February 3, 2019, when my number was called, I showed my ID to Grupos Beta, and they took me with a group of about 40 people. We put our bags in the back of a Dodge Ram and then climbed into a cage in the back of a van.

13. Grupos Beta brought us to San Ysidro, where we waited for U.S. immigration officers to tell us to pass. When they did, we entered the port of entry, and U.S. immigration officers took all of our clothes and belongings. They gave each of us a zip lock bag for our documents, as well as a paper with the name and number of the person who was going to receive us in the United States. I don't know why they took this information if they were planning to return us to Mexico. Then they walked us to another room where they searched us thoroughly. I asked for a phone call, and one of the officers yelled at me and asked me what my problem was.

14. The U.S. immigration officers brought us to a room where we sat in chairs and waited to be interviewed. When I was called for my interview,

they asked me who I was, where I was going, and who was going to receive me, and they took my fingerprints. The officers took the information of the person who was going to receive me. I thought they were going to call her, but it doesn't seem like they did. We spent what felt like two hours in that room, waiting for all of the interviews to be finished. Each interview lasted about 5 minutes, and the officers gave us sandwiches while we waited.

15. From that room, we were taken to a cell around 1:00 pm. There were about 22 or 23 of us. While in the cell, a man told us that, the day before, one of the men tried to look through the window in the door. Another man told him not to do that because someone else had been taken away for 24 hours after trying to do the same thing. When the man came back, he had told the group that he'd been taken to a small, freezing cold room and left there as punishment. None of us dared to look through the window after hearing that story. I had already been trying to follow instructions, but now I was afraid I might accidentally upset the officers.

16. The CBP officers left us in the cell until around 6 pm when they came back to get us for dinner. We were given about 8 minutes to eat small hamburgers, and then we were returned to the cell. We went to sleep on the thin mats with the shiny blankets the officers had given us. One member of our group had to sleep right next to the toilet. The officers did not turn the lights off all night. They came in once during the night to take attendance. During the night, U.S. immigration officers would enter every two or three hours and shout someone's name. We didn't know where they were taking people when their names were called.

17. Early Monday morning, around 3:00 am, the officers called me from the cell and took me to an interview with a CBP officer. The CBP officer asked me why I had left Honduras and other questions. During the interview, I told him that I had been kidnapped in Mexico by Los Zetas and had managed to escape after 15 days. The entire interview lasted about an hour.

18. The officer gave me documents and explained that there was a new law that meant that I might be returned to Mexico. I read one of the documents that said that I would have to fight my case from Mexico. I told the officer that I understood the document and that I could not go back to Mexico. I had already explained that I'd been kidnapped and that I was afraid to be in Mexico. The officer told me that he wasn't going to decide whether I stayed or went back, and that I had to sign the papers. I told him I didn't want to sign them because I wasn't going to agree to be sent back to Mexico. He told me that I just had to sign them to show that I had received them. He told me that it wouldn't affect my case one way or another to sign the papers. He also said that an asylum officer would decide whether to send me back to Mexico. He kept pressuring me to sign the papers, so I finally did. Then the officer took the documents back, and I was returned to the cell.

19. I waited about six more hours for the next interview. At about 9:00 am on Monday, U.S. officials came back into the cell and called my name. I was taken to a very small room with a small table with a computer and a telephone; an interpreter was on speaker-phone. The asylum officer who was interviewing me was a woman. The

interview focused on whether I was afraid of returning to Mexico.

20. I told the asylum officer that I was afraid. I explained that I'd been kidnapped for fifteen days by Los Zetas in Tuxtla Gutierrez, Chiapas, and that I'd managed to escape. While kidnapped, they gave us very little to eat. The armed men would intimidate us with their guns and tell us that they were going to kill us and burn our bodies so that no one could find our bodies.

21. One night, our captors got very drunk. There was a nine-year-old girl who had been kidnapped with her father and was locked in the same room as her father, me, and four others. We made a plan for the girl to ask to use the bathroom and see if she could find the keys. She managed to find the keys on the way back and brought them to the room. We waited until we couldn't hear the Zetas anymore and, hoping that they were asleep, we unlocked the door. There were other rooms with other people who had been kidnapped, but we didn't have time to open those doors. If the Zetas awoke, they all had guns and we knew they would kill us. The seven of us ran away. I don't know where the father and his daughter ended up, though I believe they escaped.

22. I told the asylum officer all of this. She told me that my statement would be analyzed to decide whether I should be sent back to Mexico.

23. I asked the asylum officer if I could call the person with whom I was going to stay in Chicago. She told me that it was up to CBP. CBP came and got me and brought me back to the cell around 12:30 pm on Monday. I stayed in the cell until Tuesday, February 5, 2019. During the time I was

detained, CBP would take us out for four to eight minutes at a time for meals and so that they could clean the cells.

24. On Tuesday, February 5, 2019 at about 10:30 am, CBP officers came back to the cell and called us by name. They brought us to identify our belongings, handcuffed us with our hands behind our backs, hung our bags from our fingers, and walked us to a van while telling us not to look around. Throughout this whole process, they didn't tell us where they were taking us. I thought they were taking us to San Diego or to another detention center.

25. U.S. immigration officials walked us from the van into a processing center. They turned us over to Mexican immigration officials without explaining anything. I wanted to refuse to go back to Mexico, but I was afraid that they might punish me for speaking up. I had already said many times that I was afraid to go back to Mexico, and nobody seemed to care.

26. The Mexican officials asked us how we had been treated, told us to be calm, and informed us that we would have permission to stay in Mexico until the day of our court hearing in San Diego. They told me that if I had another hearing after the first one, they would give me another permit. They didn't tell me whether I would have permission to work. I do not have any other legal status in Mexico. They offered to take me to a shelter, but I said no, thank you.

27. I am afraid that I might be kidnapped again while I am in Tijuana. On Wednesday, January 30, 2019, I was attacked and robbed by two young Mexican men. They pulled a gun on me from behind and told me not to turn around. They took my phone

and told me that they knew I was Honduran and that if they saw me again, they would kill me. Migrants in Tijuana are always in danger and I am especially afraid because the Zetas torture people who escape them. I have seen a video of what Zetas do to people who escape them, narrated by a member of los Zetas - they put people in barrels filled with something that looks like salt and leave them there. Their bodies fall apart and at the end all that's left is a barrel full of something that looks like red salt and the body disappears completely. I am afraid that this will happen to me. They have informants all across Mexico, and I am terrified that they will find me.

28. I tried to explain my fear to the asylum officer, but she interrupted me to say that was enough and to ask me more questions.

29. I have friends in Chicago and in Philadelphia who were ready to support me and help me find an attorney. One of my friends in Chicago is a U.S. citizen.

30. In Mexico, I don't have anyone to help me with the legal process, and I don't know how I am going to find an attorney. I have about $60.00 USD left in my savings. I don't know if it will last until my hearing. I don't know what I will do if I run out of money. I was not prepared to survive in Mexico for this long and am afraid of what will happen to me if I'm forced to stay here for weeks, months, or years.

31. Given the harm I have experienced in my country, I fear that if my identity and my status as an asylum applicant are released to the public, my life and possibly that of my family will be in danger. I wish that my identity not be publicly disclosed, and I

wish to proceed with the use of a pseudonym in any federal action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and recollection. This declaration was read back to me in Spanish, a language in which I am fluent.

Executed on February 6, 2019 at Tijuana, Mexico.

/s/ Howard Doe
HOWARD DOE

CERTIFICATION

I, Juan Camilo Mendez Guzman, declare that I am fluent in the English and Spanish languages.

On February 6, 2019, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish in the presence of the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 6, 2019 at Tijuana, Mexico.

/s/ Juan Camilo Mendez Guzman
Juan Camilo Mendez Guzman

Date: February 6, 2019

DECLARATION OF ALEX DOE

I, Alex Doe, hereby declare under the penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I make this declaration based on my personal knowledge except where I have indicated otherwise. If called as a witness, I could and would testify competently and truthfully to these matters.

2. I am a citizen of Honduras. I am thirty-five years old. I have no criminal record.

3. I went to the San Ysidro port of entry to seek asylum on January 29, 2019 after waiting in Tijuana to seek asylum since December 2018.

4. I fled my home country because the gang Mara 18 tried to kill me because of my work as a youth pastor and organizer. After I survived an attempt on my life, the gang continued to target me.

5. As a pastor in Honduras, I worked with youth who are former or current gang members, or who are at risk of being forcibly recruited to join a gang. This outreach angers the Mara 18 because I discourage young people from joining them. I am also the president of a youth organization, where I worked with the U.S. Agency for International Development to organize actions for young people in my neighborhood in Tegucigalpa.

6. In November 2017, a member of Mara 18 pulled alongside me while I was driving my motorcycle and pointed a gun at me. This caused a car crash that cracked open my skull. I was left bleeding and unconscious in the street, and the Mara 18 member left me there for dead.

7. After I survived Mara 18's attack, I helped organize a strike after the gang killed a young man who was a member of my church. I was featured on the national television news demanding that the Honduran government increase safety measures to stop the Mara 18's violence and drug sales. The Mara 18 threatened to kill me because of this organizing work. Because of the Mara 18's past attempt to kill me and the gang's escalating threats, I fled Honduras in fear for my life.

8. If I am sent back to Honduras, I am afraid that I will be killed by the Mara 18. I do not believe the government could protect me if I were to return to Honduras. I went to the police many times to file complaints about the threats against my life and the threats the Mara 18 poses to my community, but the threats and violence continued against me personally and against others.

9. I traveled to the U.S.-Mexico border to seek asylum with the migrant caravan. I first went to the San Ysidro port of entry on or around December 15, 2018. I had been told by a friend that I could not seek asylum immediately but had to put my name on a list and wait until my number was called. I waited around six weeks in Tijuana before my number was called and I could return to the port of entry to request asylum in the United States.

10. While I waited for my number to be called, I stayed at the El Barretal migrant shelter. El Barretal is a large concrete structure full of tents of migrants waiting to seek asylum. It is located very far away from the center of Tijuana, and the neighborhood around the shelter is very dangerous and well-known as an area controlled by drug-

trafficking cartels. One night, someone threw a tear gas bomb into the shelter. Because of these factors, I was very scared while I was staying at El Barretal.

11. I also did not feel free to leave the shelter because of the presence of Grupos Beta and the Mexican federal police. All the donations that arrived at the shelter were organized and distributed by Grupos Beta, but we always lacked basic necessities like food and water. I felt like a prisoner in the shelter because of the presence of Mexican government officials and because of my lack of permanent immigration status. I saw lots of migrants who were deported from El Barretal while I was staying there. We believe they were deported because Mexican officials would make them turn over their Mexican visas and shelter identifications and take them out of the shelter, and the migrants would never return. I was afraid that I would be deported if I made any kind of mistake or came to the attention of the Mexican authorities.

12. A few days before my number on the wait list was called, Grupos Beta forced me to leave El Barretal and find somewhere else to live. That day, Grupos Beta officers were checking people's possessions and saw that I had several tents. They demanded that I give them my extra tents. I refused to turn them over, since I had purchased them and planned to send them to Honduras for a youth ministry project. Grupos Beta then told me I had two hours to leave El Barretal. I had to scramble and ask a friend if I could stay with him for a few days.

13. Luckily, I knew that it was almost time for my number to be called. I had been going in person

to El Chapparal every day for the previous few weeks because I knew my number was going to come up soon and I wanted to make sure that I did not miss my chance to request asylum. On January 29, 2019, my number finally came up. At 1:00 PM, Grupos Beta directed all of us whose numbers had been called to line up and turn in our Mexican visas. I did not have mine with me, but I saw one person in the group turn in a Mexican immigration document. Grupos Beta then drove us in a van to the port of entry.

14. At the port of entry, a U.S. immigration officer in a dark blue uniform asked who in the group was from Honduras. The officers then separated the Hondurans from the rest of the group and asked us if we were part of the caravan. There were about six of us, and we all said that yes, we had come with the caravan. The officers then told us to put our documents in plastic bags, take the shoelaces out of our shoes, and make sure we were only wearing one shirt and one jacket. We also had to turn off our cell phones and place them in our backpacks along with our wallets. We then waited in another room, where an officer asked me for my name, my nationality, and if I was traveling alone.

15. We were then moved into another room. We all placed our backpacks in a pile on the floor. An immigration officer then asked me and two other Hondurans to move all of the backpacks into storage lockers. There, U.S. immigration officers in plainclothes, but wearing badges, told us that we were in the United States and therefore had to follow U.S. law. They also told us that we had to be respectful and remain silent during processing. Then the officers made us stand against the wall so they could pat down our clothes. One officer

asked me if my tattoo meant that I am connected to a gang. I explained that my tattoo was an anchor with the initials of my wife and children, and that it has nothing to do with gangs.

16. We were taken to another waiting room. After about two hours, I was called to speak to an officer at a station at a long table. The officer took my fingerprints and my picture, and asked me my name, my age, and questions about my family. After that, I was told to wait yet again.

17. Around 7 pm, three other asylum seekers and I were taken to a hielera, where about 15 other people were already being held. I was given a thin mat and an aluminum blanket to use for sleeping. In the morning, we were taken out of the hielera and given a small breakfast. While I was eating, an officer called me over and asked me for my full name, the names of my parents, if I was married, and if I had children. Then I was taken back to the hielera.

18. About an hour later, I was called to another interview with a male immigration officer in a dark blue uniform. The officer had me raise my right hand and promise to tell the truth. The officer asked me why I had left Honduras. I told him that I left because of persecution by gangs. The officer asked me who had told me to say that. I did not know how to respond because no one had told me to say that, so I remained silent.

19. The officer then asked me why I had not immigrated to another country besides the United States, like Panama, Costa Rica, or Belize, where, according to him, people do not try to come to the United States. He said something like "you Hondurans, Salvadorans, and Guatemalans are the ones who immigrate to my country because you know

that there are better opportunities here, and look at the disaster that you have caused in Mexico by rushing the border. And now you want to come here and do the same thing to the United States, entering illegally and not respecting the laws of my country." I was very confused and hurt by the officer's statements, especially since I had waited my turn to ask for asylum. He also asked me who led the caravan. I told him that I did not know.

20. The officer then asked me why I had not brought my family with me, because they must have been danger in Honduras if I was in danger there. I tried to explain why, but he did not give me a chance to fully answer his question. When I tried to respond and explain, the officer told me something like, "you are only going to respond to the questions that I ask you, nothing more." This prevented me from providing additional information in the interview apart from the answers to the questions posed by the officer. The officer told me that I was going to lose my asylum case and be deported to Honduras.

21. After interviewing me, the officer told me I had to initial and fingerprint some papers, some of which were in English and some of which were in Spanish. The paper in Spanish said that I was being returned to Mexico. This is the first time that I realized I would be sent back to Mexico instead of staying in the United States to seek asylum. While I was reviewing this paper, the officer who interviewed me told me to read it out loud to another asylum seeker because that asylum seeker was also being returned but was illiterate.

22. I told the officer I did not want to sign documents in English because I did not know what

they said. The officer told me that the documents summarized what we had discussed and that I had to sign them. After that, he told me that I had the right to a lawyer when I went to court and that I should look for one so I could fight my case. The entire interview lasted about 45 minutes.

23. I was never asked if I was afraid to return to Mexico.

24. After this interview, I was returned to the hielera, where I waited for about an hour. Then immigration officers called me out of the hielera by name and took me to get my backpack. The backpack had been left on a table with migrants' bags. Then they put me back in the hielera. After about 15 minutes, they told me to line up with other people being returned Mexico. Immigration officers handcuffed us all with our hands behind our back, and had us carry our backpacks to the port of entry. Two immigration officers, a black man and a white woman, both in dark blue uniforms, then loaded us onto a bus.

25. The bus took us to El Chaparral, where the two officers took off our handcuffs, gave us some paperwork, and turned us over to a group of Mexican immigration officers.

26. I recognized several agencies among the group, including the National Institute of Migration (INM), Grupos Beta, and Derechos Humanos. The Mexican officers took all of us to an office. They asked where we were staying and if we needed a shelter or any transportation. They asked if we were hungry and gave us lunch.

27. An officer in plainclothes who looked like he was in charge asked us all to turn in our humanitarian visas. Most of us did not have our visas with us. The immigration officer told us that our visas were no longer valid because we had left Mexico and come back. Therefore, they were going to give us another immigration document, but this one would only be valid while we waited for our immigration court dates in the United States.

28. I am afraid of being in Mexico. I know from personal experience and from the news that migrants have a bad name here and that many Mexicans are unhappy that so many of us are here. I have frequently been insulted by Mexicans on the street. When I first arrived in Tijuana, I spent some time in the neighborhood of Playas. But other asylum seekers and I had to flee Playas in the middle of the night because a group of Mexicans threw stones at us and more people were gathering with sticks and other weapons to try to hurt us.

29. Because I am a migrant here with only temporary immigration status, I feel that I am in danger and would not be protected by the Mexican government if I had a problem. I feel very visible because I have a Honduran accent and I look different from people in Mexico because of my skin color. I also have visible scars and injuries on my head and face from when the Mara 18 tried to kill me in Honduras. These scars make it obvious that I am an asylum seeker.

30. I am afraid that Mexican immigration officials or the Mexican police will deport me while I am waiting for my court date. I have seen them deport lots of immigrants from El Barretal for very small

things. For example, I once saw Grupos Beta detain and take away a group of people when only one person in the group had started a fight.

31. I am also afraid that the Mara 18 will find me here in Mexico. I am afraid that the Mara 18 might send someone to find me or get information from someone in the caravan. The Mara 18 has networks throughout Central America, and I have heard that their power and connections in Mexico are growing.

32. I do not know how I am going to prepare for my asylum case in Tijuana. I do not have any money to pay an immigration attorney, and I'm afraid that I will not even be able to find a U.S. immigration attorney while I am in Tijuana. I don't speak English, and I can't understand the forms that U.S. immigration officials gave me.

33. Given the harm I suffered in my country, I fear that if my identity and my status as an asylum applicant are released to the public, my life and possibly that of my family will be in danger. I wish that my identity not be publicly disclosed, and I wish to proceed with the use of a pseudonym in any federal action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and recollection. This declaration was read back to me in Spanish, a language in which I am fluent.

Executed on February 12, 2019 at Tijuana, Mexico.

/s/ Alex Doe
Alex Doe

CERTIFICATION

I, Luis Guerra, declare that I am fluent in the English and Spanish languages.

On February 12, 2019, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish in the presence of the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 12, 2019 at Tijuana, Mexico.

/s/ Luis Guerra	02/12/2019
Luis Guerra	Date

DECLARATION OF CHRISTOPHER DOE

I, Christopher Doe, hereby declare under the penalty of perjury pursuant to 28 U.S.C. § 1746:

l. I make this declaration based on my personal knowledge except where I have indicated otherwise. If called as a witness, I could and would testify competently and truthfully to these matters.

2. I am a Honduran citizen. I am 39 years old.

3. I have a first-grade education and don't know how to read or write Spanish. I have a hard time remembering and learning things because of a childhood head injury. I had to repeat the first grade around 7 times because of my learning disabilities.

4. I requested asylum in the United States at the port of entry near Tijuana, Mexico on January 29, 2019.

5. I fled my home country of Honduras around October 2018 because I was threatened with death due to my support of the LIBRE party. I was also attacked and discriminated against for being Garifuna and dark-skinned.

6. If I am sent back to Honduras, I fear that I will be hurt or killed because of my political opinions and for being Garifuna and dark-skinned.

7. I do not believe that my government could protect me. I was threatened with death by someone who works for the local government in Honduras government and who is very well-connected. The government in Honduras is very corrupt and only protects people with money.

8. I traveled to the U.S. border with a large caravan of migrants ("the Caravan"). We arrived in

Tijuana, Mexico around November 2018. I wanted to seek asylum in the U.S. immediately, but I was told by Mexican authorities with Grupos Beta and other migrants in the Caravan that I had to put my name on a waiting list. I was told that to put my name on the waiting list and receive a number, I had to go to El Chaparral and show my identification. I did that and received a number.

9. While waiting for my number to be called, I stayed at various shelters. I also had to sleep on the street for a few nights when I first arrived in Tijuana.

10. Living in the shelters was extremely hard. The sanitation was poor. The portable bathrooms weren't always cleaned so I had to find public bathrooms around town. I had no privacy and had to bathe in the open. It was very, very cold. I had to sleep in a tent made out of blankets. When it rained, everything got wet. I had to huddle together with other migrants to sleep. At one point, rainwater rose up to my waist. I got very sick for about a week. My whole body hurt with a fever. I had the chills, my head hurt, and my throat hurt. I lost more than 20 pounds or so because I could barely eat.

11. After the El Barretal shelter was closed, I had nowhere to go. Luckily, I met a kind person on the street who was able to provide temporary lodging. Although I had a place to stay, living in Tijuana was (and still is) hard. The Mexican police and many Mexican citizens believe that Central Americans are all criminals. They see my dark skin and hear my Honduran accent, and they automatically look down on me and label me as a criminal. I have been stopped and questioned by the Mexican police around

five or six times, just for being a Honduran migrant. During my most recent stop, the police threatened to arrest me if they saw me on the street again.

12. I have also been robbed and assaulted by Mexican citizens. On two occasions, a group of Mexicans yelled insults, threw stones, and tried to attack me and a group of other Caravan members. I had to run and hide to avoid being beaten. I was also robbed at gunpoint while I was walking to the store.

13. My number to seek asylum in the U.S. was called in January 2019. The morning of January 29, 2019, I went to El Chaparral to await further instructions. There, Grupos Beta transported me and a group of other migrants to the port of entry by van and dropped us off there. U.S. immigration officials separated the families from single adults, and the men from the women. They asked the men which of us had traveled to Mexico with the Caravan. I raised my hand, along with about 4 other men. The immigration officers separated us from the rest of the group.

14. The immigration officers gave us bags for our papers and belongings; asked each of us where we wanted to go in the United States and whether we had family there; and gave us each a ticket with the number of our belongings bag. Then they lined us up, asked us to put our hands behind our backs, and searched us. After that, they asked us for information about our identity and background, took our fingerprints, and took our photos. Finally, they gave us some food and locked us up in a cell with several other people.

15. We stayed in the cell overnight. Some people had been detained there for many days. We had to

sleep on thin plastic tarps on the floor and go to the bathroom in front of everyone else. The air in the cell was stale, and I felt like I was being choked.

16. The next morning, we were given some food and a few of us were called out to do interviews. We were brought to a room where there were several cubicles in a row, each with an immigration officer.

17. My immigration officer was female. I don't remember her name, but she appeared white, tall, blond, heavy set, and about 40-45 years old. She didn't speak Spanish well, and I had a hard time understanding her. There were some points where I didn't understand her at all. I don't think she really understood me either because she kept asking me to speak more slowly.

18. The officer interviewed me very quickly. I think my interview only lasted around 10-15 minutes. She acted impatient and angry. When I tried to answer her questions, she frequently cut me off saying "No!", like she wasn't satisfied with my answer or she didn't like what I was saying. This made me nervous, and I felt like she didn't want to listen to me. When I tried to tell her that my memory was poor due to a childhood head injury, she seemed not to care and ignored me.

19. The officer started by telling me that if I lied, I would be arrested and deported to Honduras. Then she asked me several questions, including my name, birthdate, where I was from in Honduras, when I left Honduras, whether I traveled with the Caravan, who the leaders of the Caravan were, and when I arrived in Tijuana. She briefly asked me if I was afraid of returning to Honduras and why, but she didn't let me go into detail. As I was telling my story, she would

interrupt me with her next interview question, not allowing me to finish my answer.

20. She asked me how I had been treated in Mexico while traveling with the Caravan, but when I tried to tell her that we had been attacked by people throwing stones, she cut me off and moved on to other questions.

21. The officer didn't mention that I would be returned to Mexico at any time, and I don't remember her asking if I was afraid to live in Mexico while waiting for my asylum hearing. If she had asked, I would have told her about being stopped by the Mexican police and attacked by Mexican citizens. I would also have told her I am afraid that the people who threatened me in Honduras could find me in Mexico because when I was in Mexico City, I believe I saw one of the armed men who was monitoring my house in Honduras.

22. Near the end of the interview, the officer told me to sign some papers. All of the papers were in English except for one. The officer didn't explain the English papers to me or read them to me in Spanish, so I had no idea what they said. I didn't ask her to explain because she still seemed angry, and I didn't want to make it worse. The officer just told me to sign here, here, and here. When I told the officer that I couldn't write or sign my name, she told me I should just mark down my initials.

23. The officer gave me one paper in Spanish and told me to read it. When I told her I didn't know how to read Spanish, the officer made another migrant who was being interviewed next to me read it to me. He read the paper to me, but to be honest, I didn't really understand what the paper said. They made me sign it. I often have a hard time understanding

things at first because I am a slow learner and have poor memory due to a childhood head injury. No other papers were read to me in Spanish and I didn't get a chance to read them until later, after I had been returned to Mexico.

24. Near the end of the interview, the officer told me I had a court date on March 19, 2019 and that if I didn't go, I would lose my case. She didn't say where the court was, where to present myself, or how I would get there. She had me sign some more paperwork in English and told me to find an attorney in Los Angeles. After that, I was returned to my cell.

25. While in my cell, some other migrants told me that I was going to be deported to Mexico. I didn't really believe them, though, because the officer who interviewed me didn't say anything about returning to Mexico, only that document which I couldn't read. While living in Tijuana, I had heard rumors that people seeking asylum in the United States could be deported to Mexico while fighting their cases, but again, I didn't believe it would happen to me because the officer who interviewed me didn't mention it at all.

26. Soon after, immigration officers called my name and several others. They took us out of our cells, handcuffed us to each other, and drove us in vans back to El Chaparral in Tijuana.

27. In Tijuana, Grupos Beta was waiting for us. Derechos Humanos was supposedly there too, but normally they wear white uniforms and the people present were in blue uniforms. Grupos Beta explained that our humanitarian visas from Mexico were no longer valid because we had requested asylum in the U.S. They gave us another document that they said was valid until our court date in

March. They didn't really explain what kind of status or rights this document gave us while living in Mexico.

28. I am now living in Tijuana, waiting for my court date. I don't know if I have the right to work here or not, but either way, I am too afraid to work. Other migrants have told me that Mexican employers kidnap Central American migrants and kill them or extort their families in Central America for money. I am also afraid to walk outside because two or three days before I entered the United States, I was stopped by Mexican police who told me that I will be arrested if they see me on the street again.

29. I've been told that I should get an attorney to represent me at my court hearing, but I have no idea how I'm going to be able to find one living here in Tijuana. I don't know where to find attorneys in the U.S. or how to call then, and I don't have any money to pay them. I also have no idea how to prepare my asylum case, what evidence I need to collect, or what is going to happen in my March 2019 hearing. I am terrified of being deported in March and being killed in Honduras.

30. I am also concerned because there are errors in the interview that the U.S. immigration officer wrote. I did not know about the errors at the time because no one read the transcript to me while I was in the U.S. But after I was returned to Mexico, attorneys read the interview back to me in Spanish. There were many errors and missing pieces of information in the interview transcript. For example, the U.S. officer got names, dates and details of my testimony wrong, wrote questions and answers down that she did not ask me, and wrote questions

in a way that she did not communicate to me in Spanish.

31. Given the harm I experienced in Honduras, I fear that if my identity and my status as an asylum applicant are released to the public, my life and possibly that of my family will be in danger. I wish that my identity not be publicly disclosed, and I wish to proceed with the use of a pseudonym in any federal action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and recollection. This declaration was read back to me in Spanish, a language in which I am fluent.

Executed on February 4, 2019 in Tijuana, Mexico.

/s/ "C.D."
CHRISTOPHER DOE

CERTIFICATION

I, Elana Gold, declare that I am professionally competent in the English and Spanish languages.

On February 4, 2019, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish in the presence of the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 4, 2019 in Tijuana, Mexico.

/s/ Elana Gold
Elana Gold

DECLARATION OF IAN DOE

I, Ian Doe, hereby declare under the penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I make this declaration based on my personal knowledge except where I have indicated otherwise. If called as a witness, I could and would testify competently and truthfully to these matters.

2. I was born in Honduras. I am thirty years old.

3. I went to the San Ysidro port of entry to seek asylum on February 3, 2019, after waiting in Tijuana for my number to be called since October 2018.

4. I fled my home country because of death threats from narcotraffickers. I worked as a police officer, and my undercover work thwarted drug trafficking activity. The narcotraffickers found out who I was and came looking for me. I fled in fear for my life . After I left, the narcotraffickers killed my brother thinking that he was me.

5. If I am sent back to Honduras, I fear that the narcotraffickers will kill me.

6. I do not believe the Honduran government would protect me if I were forced to return to my country because many police officers are corrupt and work with narcotraffickers. The narcotraffickers approached me before to ask me to run drugs, and I said no. They told me that many of my coworkers were already working with them. They also told me that they would order someone to murder me if I did not run their drugs.

7. I have no criminal record.

8. I traveled to the United States to seek asylum. Once we arrived in Tijuana, I was told that I had to go get a number at El Chapparal in order to seek asylum. When my number got closer to the top of the list, I went daily to see if I was going to be called.

9. My number was finally called on Sunday, February 3, 2019. From El Chapparal, Mexican officers from Grupos Beta took us to San Ysidro. U.S. immigration officers there instructed us to take off our hats, belts, and anything beyond one layer of clothing and put everything into our bags. Then they took us into another room where they took our photographs and asked us some basic questions.

10. Next, we were taken to a cell known as the hielera (icebox). The hielera was very crowded and cold. I was given an aluminum blanket. I only slept a little bit because the blankets made so much noise and because the lights were on all night long.

11. On Monday morning, I was given a small breakfast. Then an officer called my name and took me to an interview. The officer who interviewed me was a man who spoke Spanish. He was wearing a dark blue uniform. He asked me to promise to tell the truth. He started by asking me some basic questions like who I was and where I was from.

12. The interviewer asked me a few questions about my asylum case. I wanted to explain more to him about what had happened to me in Honduras and why I needed asylum. But the officer told me only to answer the questions he asked and not to say anything more.

13. The officer asked me if I could stay in Mexico to wait for my hearing, and I said no. He also asked me if any other country had offered me asylum, and I

said no. Reviewing the questions later with someone who could translate for me, I see that the officer wrote down "Mexico." That is not what I said.

14. At the end of the interview, the officer gave me a piece of paper in Spanish and told me to read it. He also told me that I would be sent back to Tijuana. The officer directed me to sign the paper, and I did. He then asked me to initial and fingerprint several pages that were written in English. I did not have a chance to review those pages because he covered up one with the other and just showed me the bottom part of the page. I also can't read in English.

15. The officer did not explain that I had a court date. Nor did he explain how I would be able to fight my asylum case while in Mexico. After I signed, initialed, and fingerprinted the pages, he told me that was all for today, and I was taken back to the cell.

16. I was in the hielera all day. Because I was traveling with evidence of the threats against me and murder of my brother, I thought that I would be able to apply for asylum immediately but they did not talk to me until that night when the officers called me for another interview.

17. I was taken to a different room this time. A Latina officer who did not speak much Spanish interviewed me. She was wearing civilian clothes. There was a translator on the phone. At the beginning of the interview, the officer asked me to promise to tell the truth. She told me that the interview would be confidential and that it was about my asylum case.

18. The officer asked me a lot of questions. I was surprised because most of them had to do with

Mexico, and I thought I would have to explain what had happened to me in Honduras. She asked me why I did not want to live in Mexico and whether I felt safe there. I tried to tell her, but she only let me answer quickly and did not let me fully explain. She told me that I could only give short answers and not talk too long.

19. I told her that there is a lot of corruption in the Mexican police force. I told her that Mexican police had detained me several times and also robbed me while I was in Tijuana. I told her that some of the friends that I had traveled with had died in Mexico because of violence against migrants. I was made aware of their deaths when I heard their names and saw pictures of their dead bodies on the news and on Facebook. The officer did not say much in response, but seemed to be writing down what I said. She did not ask me anything about Honduras or if the cartels who were looking for me there could come and find me in Mexico.

20. The interview lasted about three hours. I had only had a small dinner so I was very hungry. I was also tired because I had slept so poorly in the hielera.

21. At the end of the interview, I asked the officer what she thought about my case. The officer said that she couldn't tell me anything. I told her that I wanted to talk about what happened to me in Honduras because I was asking for asylum. She told me that I would have another interview where I could talk about that.

22. Then, another officer came and took me back to the hielera, where I spent a second night. In the morning, my name was called, and an immigration officer took me and others out to where they had stored our suitcases. The officers put us up against the wall, handcuffed our hands behind our backs, and

had us carry our own bags onto a van. We were taken to El Chaparral in handcuffs.

23. At El Chapparal, a Mexican officer from Grupos Beta took us over the bridge. A man in a brown uniform was waiting for us. I think he was a Mexican immigration officer. He was with a woman whom he called a "licenciada." They took us to an office where they asked us to present our documents. They asked me for my humanitarian visa, but I did not have it. Then they gave us a paper that they said would keep the police from detaining us. They said that the paper was valid only until our next court date. If they brought us back to Mexico after our next court date, they said that we would have to get another temporary paper like this one from their office. I tried to explain my asylum case to the licenciada, but she told me that the Mexican officers didn't have anything to do with that part of my case and that I would have to explain that to the U.S. government.

24. I am not safe in Mexico. I am afraid that the people who want to harm me in Honduras will find me here. I have learned from the news that there are members of Central American gangs and narcotraffickers that are present here in Mexico that could find and kill me. Honduran migrants like me are very visible because of our accents and the way that we look, and it would not be hard for them to find me here. I am also afraid of the Mexican police, who have detained me three times and also robbed me. About a month .ago, the police threatened to take me to jail unless I paid a bribe of 1500 pesos. The police always ask me for an immigration document, which makes me believe that they are targeting me because I am Honduran.

25. I do not know how I will prepare my asylum case from Mexico. I do not have the money to pay an attorney to help me. The U.S. immigration officers did not explain how I will get to my hearings in the United States or how my case will proceed while I am in Mexico.

26. Given the problems I experienced in my country, I fear that if my identity and my status as an asylum applicant are released to the public, my life and possibly that of my family will be in danger. I wish that my identity not be publicly disclosed, and I wish to proceed with the use of a pseudonym in any federal action.

I declare under penalty of perjury under the laws of the Unite States of America that the foregoing is true and correct to the best of my knowledge and recollection. This declaration was read back to me in Spanish, a language in which I am fluent.

Executed on February 7, 2019 at Tijuana, Mexico.

/s/ Ian Doe
Ian Doe

CERTIFICATION

I, Sophia DeLoretto-Chudy, declare that I am fluent in the English and Spanish languages.

On February 7, 2019, I read the foregoing declaration and orally translated it faithfully and accurately into Spanish in the presence of the declarant. After I completed translating the declaration, the declarant verified that the contents of the foregoing declaration are true and accurate.

I declare under penalty of perjury under the laws of the United States of America that the-foregoing is true and correct.

Executed on February 7, 2019 at Tijuana, Mexico.

/s/ Sophia DeLoretto-Chudy	FEB 7, 2019
Sophia DeLoretto-Chudy	Date

SUPPLEMENTAL APPENDIX B

Statutory provisions

8 U.S.C. § 1229a provides in pertinent part:

Removal proceedings

(a) Proceeding

(1) In general
An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

(2) Charges
An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 1182(a) of this title or any applicable ground of deportability under section 1227(a) of this title.

(3) Exclusive procedures
Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

(b) Conduct of proceeding

(1) Authority of immigration judge
The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have

authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.

(2) Form of proceeding

(A) In general

The proceeding may take place—

(i) in person,

(ii) where agreed to by the parties, in the absence of the alien,

(iii) through video conference, or

(iv) subject to subparagraph (B), through telephone conference.

(B) Consent required in certain cases

An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

(3) Presence of alien

If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

***

(c) Decision and burden of proof

***

(5) Notice

If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.

SUPPLEMENTAL APPENDIX C

Regulatory Provisions

8 C.F.R. § 208.30 provides in pertinent part:

Credible fear determinations involving stowaways and applicants for admission who are found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act, whose entry is limited or suspended under section 212(f) or 215(a)(1) of the Act, or who failed to apply for protection from persecution in a third country where potential relief is available while en route to the United States.

***

(d) Interview. The asylum officer, as defined in section 235(b)(1)(E) of the Act, will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture, and shall conduct the interview as follows:

(1) If the officer conducting the credible fear interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview.

(2) At the time of the interview, the asylum officer shall verify that the alien has received Form M-444, Information about Credible Fear Interview in Expedited Removal Cases. The officer shall also determine that the alien has

an understanding of the credible fear determination process.

(3) The alien may be required to register his or her identity.

(4) The alien may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, and may present other evidence, if available. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process. Any person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and on the length of the statement.

(5) If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter must be at least 18 years of age and may not be the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, a representative or employee of the applicant's country of nationality, or, if the applicant is stateless, the applicant's country of last habitual residence.

(6) The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer

shall review the summary with the alien and provide the alien with an opportunity to correct any errors therein.

(e) Determination.

(1) The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture.

(2) Subject to paragraph (e)(5) of this section, an alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other f acts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act. However, prior to January 1, 2030, in the case of an alien physically present in or arriving in the Commonwealth of the Northern Mariana Islands, the officer may only find a credible fear of persecution if there is a significant possibility that the alien can establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act.

(3) Subject to paragraph (e)(5) of this section, an alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of

removal under the Convention Against Torture, pursuant to § 208.16 or § 208.17.

(4) In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

(5)

(i) Except as provided in this paragraph (e)(5)(i) or paragraph (e)(6) of this section, if an alien is able to establish a credible fear of persecution but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to § 208.2(c)(3).

(ii) If the alien is found to be an alien described in § 208.13(c)(3), then the asylum officer shall enter a negative credible fear determination with respect to the alien's intention to apply for asylum. The Department shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim

for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture, if the alien establishes, respectively, a reasonable fear of persecution or torture. However, if an alien fails to establish, during the interview with the asylum officer, a reasonable fear of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the reasonable fear findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

(iii) If the alien is found to be an alien described as ineligible for asylum in § 208.13(c)(4), then the asylum officer shall enter a negative credible fear determination with respect to the alien's application for asylum. The Department shall nonetheless place the alien in proceedings under section 240 of the Act for consideration of the alien's claim for withholding of removal under section 241(b)(3) of the Act, or for withholding or deferral of removal under the Convention Against Torture, if the alien establishes, respectively, a reasonable fear of persecution or torture. The scope of review shall be limited to a determination of whether the alien is eligible for withholding or deferral of removal, accordingly. However, if an alien fails to establish, during the interview with

the asylum officer, a reasonable fear of either persecution or torture, the asylum officer will provide the alien with a written notice of decision, which will be subject to immigration judge review consistent with paragraph (g) of this section, except that the immigration judge will review the reasonable fear findings under the reasonable fear standard instead of the credible fear standard described in paragraph (g) and in 8 CFR 1208.30(g).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph. The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

(i) If the asylum officer, with concurrence from a supervisory asylum officer, determines that an alien does not qualify for an exception under the Agreement during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After the asylum officer's documented finding is reviewed by a supervisory asylum officer, the alien shall be advised that he or she will be removed to Canada in order to pursue his or her claims relating to a fear of persecution or torture under Canadian law. Aliens found ineligible to apply for asylum under this paragraph shall be removed to Canada.

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution or torture under paragraph (d) of this section.

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and

(A) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

(B) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been

granted asylum, refugee, or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section 101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the United States pursuant to the Visa Waiver Program;

(C) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

(D) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

(E) Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States to the alien, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

(F) The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that

it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

(iv) As used in 8 CFR 208.30(e)(6)(iii)(B), (C) and (D) only, "legal guardian" means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien's behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(7) When an immigration officer has made an initial determination that an alien, other than an alien described in paragraph (e)(6) of this section and regardless of whether the alien is arriving at a port of entry, appears to be subject to the terms of an agreement authorized by section 208(a)(2)(A) of the Act, and seeks the alien's removal consistent with this provision, prior to any determination concerning whether the alien has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether the alien is ineligible to apply for asylum in the United States and is subject to removal to a country ("receiving country") that is a signatory to the applicable agreement authorized by section 208(a)(2)(A) of the Act, other than the U.S.-Canada Agreement effectuated in 2004. In conducting this threshold screening interview, the asylum

officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, except that paragraphs (d)(2) and (4) of this section shall not apply to aliens described in this paragraph (e)(7). The asylum officer shall advise the alien of the applicable agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case. The alien shall be provided written notice that if he or she fears removal to the prospective receiving country because of the likelihood of persecution on account of a protected ground or torture in that country and wants the officer to determine whether it is more likely than not that the alien would be persecuted on account of a protected ground or tortured in that country, the alien should affirmatively state to the officer such a fear of removal. If the alien affirmatively states such a fear, the asylum officer will determine whether the individual has demonstrated that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in that country.

(i)

(A) If the asylum officer, with concurrence from a supervisory asylum officer, determines during the threshold screening interview that an alien does not qualify for an exception under the applicable agreement, and, if applicable, that the alien has not demonstrated that it is more likely than not that he or she would be persecuted on account of a protected ground or tortured in the receiving country, the alien is ineligible

to apply for asylum in the United States. Subject to paragraph (e)(7)(i)(B) of this section, after the asylum officer's documented finding is reviewed by a supervisory asylum officer, the alien shall be advised that he or she will be removed to the receiving country, as appropriate under the applicable agreement, in order to pursue his or her claims relating to a fear of persecution or torture under the law of the receiving country. Prior to removal to a receiving country under an agreement authorized by section 208(a)(2)(A), the alien shall be informed that, in the receiving country, the alien will have an opportunity to pursue the alien's claim for asylum or equivalent temporary protection.

(B) Aliens found ineligible to apply for asylum under this paragraph (e)(7) shall be removed to the receiving country, depending on the applicable agreement, unless the alien voluntarily withdraws his or her request for asylum.

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the applicable agreement, or would more likely than not be persecuted on account of a protected ground delineated in section 208(a)(2)(A) of the Act or tortured in the receiving country, the asylum officer shall make a written notation to that effect, and may then proceed to determine whether any other agreement is applicable to the alien under the procedures set forth in this

paragraph (e)(7). If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of each of the applicable agreements, or would more likely than not be persecuted on account of a protected ground or tortured in each of the prospective receiving countries, the asylum officer shall make a written notation to that effect, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution or torture under paragraph (d) of this section.

(iii) An exception to an applicable agreement is defined under the terms of the agreement itself. Each agreement, including any exceptions, will be announced in a Federal Register document. If the asylum officer determines that an alien is within one of the classes covered by a section 208(a)(2)(A) agreement, the officer shall next determine whether the alien meets any of the applicable agreement's exceptions. Regardless of whether the text of the applicable agreement provides for the following exceptions, all such agreements, by operation of section 208(a)(2)(A) of the Act, and as applicable to the United States, are deemed to contain the following provisions:

> (A) No alien may be removed, pursuant to an agreement authorized by section 208(a)(2)(A), to the alien's country of nationality, or, if the alien has no nationality, to the alien's country of last habitual residence; and

(B) No alien may be removed, pursuant to an agreement authorized by section 208(a)(2)(A), where the Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest for the alien to receive asylum in the United States, and that the alien therefore may apply for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

(iv) If the asylum officer determines the alien meets an exception under the applicable agreement, or would more likely than not be persecuted on account of a protected ground or tortured in the prospective receiving country, the officer may consider whether the alien is subject to another agreement and its exceptions or would more likely than not be persecuted on account of a protected ground or tortured in another receiving country. If another section 208(a)(2)(A) agreement may not be applied to the alien, the officer should immediately proceed to a credible fear interview.

(8) An asylum officer's determination shall not become final until reviewed by a supervisory asylum officer.

(f) Procedures for a positive credible fear finding. If an alien, other than an alien stowaway, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section 240 of

the Act. If an alien stowaway is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-863, Notice of Referral to Immigration Judge, for full consideration of the asylum claim, or the withholding of removal claim, in proceedings under § 208.2(c). Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter.

(g) Procedures for a negative credible fear finding.

(1) If an alien is found not to have a credible fear of persecution or torture, the asylum officer shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge. The alien shall indicate whether he or she desires such review on Form I-869. A refusal by the alien to make such indication shall be considered a request for review.

(i) If the alien requests such review, or refuses to either request or decline such review, the asylum officer shall arrange for detention of the alien and serve him or her with a Form I-863, Notice of Referral to Immigration Judge, for review of the credible fear determination in accordance with paragraph (f)(2) of this section.

(ii) If the alien is not a stowaway and does not request a review by an immigration judge, the officer shall order the alien removed and issue a Form I-860, Notice and

Order of Expedited Removal, after review by a supervisory asylum officer.

(iii) If the alien is a stowaway and the alien does not request a review by an immigration judge, the asylum officer shall refer the alien to the district director for completion of removal proceedings in accordance with section 235(a)(2) of the Act.

(2) Review by immigration judge of a negative credible fear finding.

(i) Immigration judges will review negative credible fear findings as provided in 8 CFR 1208.30(g)(2).

(ii) The record of the negative credible fear determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination.