



**STATEMENT OF LAURA PEÑA
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to the

**SUBCOMMITTEE ON BORDER SECURITY, FACILITATION, AND OPERATIONS
COMMITTEE ON HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES**

for the hearing on

**“Examining the Human Rights and Legal Implications of DHS’
‘Remain in Mexico’ Policy”**

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Chairwoman Rice, Ranking Member Higgins, and members of the Subcommittee:

My name is Laura Peña and I am Pro Bono Counsel for the American Bar Association Commission on Immigration. Thank you for the opportunity to participate in this hearing on “Examining the Human Rights and Legal Implications of DHS’ ‘Remain in Mexico’ Policy.”

Prior to my current position, I have worked at the Department of State on issues relating to Latin America, human rights, and human trafficking; as well as a trial attorney for the Department of Homeland Security, Immigration and Customs Enforcement; at a private law firm specializing in business immigration; and as a visiting attorney at the Texas Civil Rights Project leading family reunification efforts. I also am a native of the Rio Grande Valley of South Texas.

The American Bar Association (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The ABA’s Commission on Immigration develops recommendations for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and assists in the operation of pro bono legal representation programs.

The ABA is deeply concerned that the Migrant Protection Protocols (MPP), also known as the “Remain in Mexico” policy, discriminate against Spanish-speaking asylum seekers and deprive them of full and fair access to the American justice system, including meaningful access to counsel. We also are concerned about the personal safety of the more than 55,000 individuals who have been subjected to this policy. This concern is not theoretical. We have seen the practical effects of this policy first-hand.

The ABA has two pro bono representation projects – the South Texas Pro Bono Asylum Representation Project in Harlingen, Texas and the Immigration Justice Project in San Diego, California -- that provide legal assistance to detained adult migrants and unaccompanied children. When MPP began in the Rio Grande Valley this past summer, we initiated an assessment of the issues surrounding the rendering of immigration legal services to this vulnerable population. Based on that assessment, we recently expanded our services to include legal assistance to asylum seekers living in Matamoros, Mexico while their U.S. immigration proceedings are pending.

Traditionally, asylum seekers who entered the United States via the Southern border, whether at or between official ports of entry, were apprehended by Customs & Border Protection (CBP) and subsequently detained by Immigration & Customs Enforcement (ICE). The asylum seekers remained in detention while presenting their claims for relief or, alternatively, were released into the United States to pursue their claims in regular immigration court.

The establishment of MPP was announced on December 20, 2018 and the Department of Homeland Security began implementation of the policy on January 25, 2019.¹ Under MPP, CBP officials return Spanish-speaking nationals from non-contiguous countries back to Mexico after they seek to enter the United States unlawfully or without proper documentation. In the Rio Grande Valley, DHS returns the great majority of non-Mexican, Spanish-speaking adults and family units who do not have criminal records or immigration histories to Mexico. This includes pregnant women, and members of other vulnerable groups – such as individuals with mental and physical disabilities, and LGBTQ+ individuals – who are supposed to be given special consideration under the program.

Individuals processed under MPP are issued a Notice to Appear (“NTA”) in an immigration court in the United States at a future date, and returned to Mexico until that time, unless they affirmatively express a fear of return to Mexico. If an individual expresses a fear of return to Mexico, an asylum officer conducts a *non-refoulement* interview² to determine whether she is more likely than not to be persecuted or tortured in Mexico. The policy does not allow attorney representation during these interviews, but at least one federal court has issued an injunction instructing DHS to allow attorneys access during this critical interview.³ If the asylum officer determines the individual does not show she is more likely than not to be persecuted or tortured in Mexico, the asylum seeker must wait in Mexico during her immigration proceedings, a process that is likely to take months.

The MPP program subjects migrants and asylum seekers to extremely dangerous conditions in Mexican border cities. The Department of State advises U.S. citizens not to travel to Tamaulipas state, where Matamoros and Nuevo Laredo are located, due to “crime and kidnapping.” It has assigned Tamaulipas the highest travel advisory level, Level 4 – the same level assigned to countries such as Syria and Yemen.⁴

¹ See Kirstjen M. Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols* 1 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf (“Nielsen Policy Guidance”).

² Generally, a *non-refoulement* interview is DHS’ procedural attempt to comply with international obligations to refrain from sending refugees back to dangerous countries where they could suffer persecution or torture. See *infra* at page 3 for a legal assessment of *non-refoulement* interviews.

³ The ACLU Foundation of San Diego & Imperial Counties recently filed a class-action lawsuit demanding that MPP asylum seekers who have expressed a fear of return be given access to retained counsel before and during these screening interviews. See *Doe et al. v. McAleenan*, 3:19cv2119-DMS-AGS (S.D. Cal.). On November 12, 2019, U.S. District Judge Dana Sabraw granted the individual plaintiffs’ request for a temporary restraining order, but he has not ruled on the class claims. See Order Granting Motion for Temporary Restraining Order, *Doe et al. v. McAleenan*, 3:19cv2119-DMS-AGS (S.D. Cal. Nov. 12, 2019).

⁴ U.S. Dep’t of State, Mexico Travel Advisory, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (“Violent crime, such as murder, armed robbery, carjacking, kidnapping, extortion, and sexual assault, is common. Gang activity, including gun battles and blockades, is widespread. Armed criminal groups target public and private passenger buses as well as private automobiles traveling through Tamaulipas, often taking passengers hostage and demanding ransom payments. Federal and state security forces have limited capability to respond to violence in many parts of the state.”) (last visited Nov. 17, 2019).

ABA staff, including myself, have provided legal assistance to MPP asylum seekers, observed MPP hearings, and appeared on behalf of MPP clients. The ABA is committed to ensuring that all individuals are afforded due process rights guaranteed by U.S. law. Based on our experience and observations, the MPP/Remain in Mexico policy fails to comport with fundamental legal protections required under the law.

Non-Refoulement

The ABA is concerned that DHS' efforts to comply with its *non-refoulement* obligations do not adequately protect the legal rights of MPP asylum seekers who fear that they will be subjected to persecution or torture in Mexico. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the 1951 Convention Relating to the Status of Refugees.⁵ Article 33 of the 1951 Convention provides that “[n]o contracting state shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁶ The United States is also bound by Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), which provides that “No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷ Congress subsequently codified these obligations into law.⁸

Despite widespread danger faced by asylum seekers in Mexico,⁹ DHS does not affirmatively ask individuals subjected to MPP whether they fear persecution or torture if returned there.

⁵ [Nielsen](#) Policy Guidance at 3 n3.

⁶ Protocol Relating to the Status of Refugees, art. I, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 6276.

⁷ CAT art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

⁸ *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (noting that one of the primary purposes in enacting the Refugee Act of 1980 was to implement the principles agreed to in the 1967 Protocol, and that the withholding of removal statute, now codified at 8 U.S.C. § 1231(b)(3), mirrors Article 33); Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) § 2242(a), Pub. L. No. 105-277, Div. G Title XXII, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note) (“It 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, regardless of whether the person is physically present in the United States.”).

⁹ Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* 3-8 (Oct. 2019), available at <https://www.humanrightsfirst.org/resource/orders-above-massive-human-rights-abuses-under-trump-administration-return-mexico-policy> (“*Orders from Above*”) (discussing violence suffered by hundreds of asylum seekers living in Mexican border cities, including rape, kidnapping, and assault); U.S. Immigration Policy Ctr., *Seeking Asylum: Part 2* 3-5, 9-10 (Oct. 29, 2019) (“*Seeking Asylum*”) (based on interviews with more than 600 asylum seekers subjected to MPP, finding that approximately 1 out of 4 had been threatened with physical violence, and that over half of those who had been threatened with physical violence had experienced physical violence). The numbers reported by the U.S. Immigration Policy Center likely underestimate the dangers faced by asylum seekers subjected to MPP because security conditions in Tijuana and Mexicali, Mexico, where the interviews were conducted, are less dangerous than other parts of the border. *Seeking Asylum* at 9.

Where asylum seekers do express a fear of return to Mexico on their own, something they should not be required to do under applicable law, they are supposed to be afforded a telephonic screening interview with an asylum officer.¹⁰ However, asylum seekers do not have the right to consult with counsel before the interview, or to have an attorney represent them in the interview itself. According to DHS only 13% of the individuals who have received these screenings have been given positive determinations.¹¹

In addition, to be removed from the MPP program and either be detained or released in the United States, an individual must demonstrate, in the screening interview, that she is more likely than not to be persecuted or tortured in Mexico. This is the same standard as the individual would be required to meet to be granted withholding of removal or relief under the Convention Against Torture by an immigration judge. It also is higher than the standard used for asylum eligibility or for initial interviews in expedited removal and reinstatement of removal proceedings, where asylum seekers are screened to determine whether they will be able to present their claim before an immigration judge.¹² And, unlike in MPP, in those summary proceedings a DHS official must affirmatively ask the individual whether she has a fear of being returned to her home country or removed from the United States.¹³ Individuals also are permitted to consult with an attorney and can be represented at the interview, and are entitled to immigration judge review of any negative determination.¹⁴ The ABA encourages DHS to implement robust procedures to ensure that asylum seekers who have a genuine fear of persecution or torture in Mexico are removed from the MPP program.

Access to Counsel and Court Proceedings

To ensure that MPP asylum seekers are afforded due process in their immigration proceedings, they must be provided with meaningful access to counsel, and a meaningful opportunity to participate in the proceedings. In our experience, the MPP program endangers these protections.

For asylum seekers returned to the Mexican border cities of Nuevo Laredo and Matamoros, hearings take place in soft-sided tent courts that are adjacent to the International Bridges that

¹⁰ The ABA is concerned by reports that, even when asylum seekers express a fear of return to Mexico, they often are not provided with the screening interviews required under MPP. See *Seeking Asylum* at 4 (Only 40% of individuals who were asked whether they feared return to Mexico and responded in the affirmative were interviewed by an asylum officer, and only 4 percent of individuals who were not asked whether they feared return to Mexico, but nevertheless expressed a fear, were interviewed); *Orders from Above* at 8-9. Reports also indicate that asylum seekers routinely fail to pass these interviews even when they already have been victims of violent crime, including rape, kidnapping, and robbery in Mexico. *Orders from Above* at 10.

¹¹ Dep't of Homeland Security, *Assessment of the Migrant Protection Protocols (MPP)* 5 (Oct. 28, 2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf.

¹² Individuals placed in expedited removal must show a "credible fear", or a significant possibility that they could establish eligibility for relief, whereas individuals in reinstatement proceedings must demonstrate a "reasonable possibility" that they are eligible for relief. 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(v); 8 C.F.R. §§ 208.30(e)(3), 208.31(c), 235.3(b)(4).

¹³ 8 C.F.R. § 235.3(b)(2)(i) (discussing form I-867B).

¹⁴ 8 C.F.R. §§ 208.30(d)(4), (g); 208.31(c), (g).

connect Laredo and Brownsville, Texas to the Mexican cities of Nuevo Laredo and Matamoros, respectively. ABA president Judy Perry Martinez, along with myself and other ABA staff, toured the tent court in Brownsville, Texas in late August, prior to its opening. To date, we are the only non-governmental organization provided with a tour of the facility. Unlike regular immigration courts, the tent courts are closed to the public, including to members of the media. This is concerning because public access to judicial proceedings helps to further public confidence in the justice system. Even immigration judges are not physically present for hearings that occur at the tent courts; in such hearings the immigration judge and government counsel appear via video conference.

Meaningful access to legal counsel is an essential component of due process, and noncitizens, including those seeking humanitarian protection, have a statutory right to counsel in immigration proceedings.¹⁵ But for MPP asylum seekers, it is nearly impossible to exercise this right from Mexico. During our tour of the tent court facility in Brownsville, we were told that the facility had 60 small rooms for lawyers to meet with their clients; but, in my personal experience, these rooms are not able to be utilized. Attorneys may enter the tent courts only to appear at a hearing for an asylum seeker the attorney already represents. Attorneys are not permitted to enter the tent courts to screen potential clients or provide general legal information about the very hearings in which the asylum seeker will participate. Nor are asylum seekers permitted to enter the United States to consult with their attorneys, other than for one hour preceding their scheduled hearings. When I tried to challenge these restrictions in one of my cases, the immigration judge ruled that he did not have jurisdiction to consider my request because the facility is controlled by DHS. On another occasion, I sought access for a legal team to enter the facility to observe a hearing. I was told CBP controls all access to the tent facility. It is troubling that CBP, which is charged with apprehending, detaining, and removing noncitizens, controls when lawyers can access their clients in immigration court. On yet another occasion, members of the ABA Commission on Immigration attempted to observe MPP hearings from where the immigration judges sat at the Port Isabel Detention Center. First, the courts told us DHS had to approve the request. DHS then told us the courts had to approve the request. Only after escalating the issue was the group permitted to observe the hearings.

To render legal services to MPP asylum seekers, U.S.-licensed attorneys either must travel into Mexican border cities, or try to fulfill their professional obligations by preparing complicated asylum cases without a meaningful opportunity to consult in person with their clients. I have faced this dilemma myself. Each time I want to meet with my client, I must take precautions to ensure my personal safety while in Matamoros. I cross only during the day, and try to minimize the length of each visit. I coordinate my visits with humanitarian groups or other colleagues. During one legal visit into Matamoros, several armed convoys of the Mexican

¹⁵ 8 USC § 1362 (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”); 8 USC § 1229a(b)(4)(A) (in removal proceedings, the noncitizen “shall have the privilege of being represented, at no expense to the Government, by counsel of the [non-citizen’s] choosing who is authorized to practice in such proceedings”).

military rolled into the refugee encampment of approximately 1,500 individuals and families subjected to MPP. The military officials were heavily armed and showed surveillance equipment on their body armor. Several U.S. attorneys and humanitarian aid workers evacuated the encampment out of fear that the military would begin forcibly removing the refugees. My legal consultation was abruptly cut short, and I returned days later to consult with my client along the narrow sidewalk of the port of entry during a heavy rainstorm. This is not meaningful access to counsel, and attorneys should not have to risk their lives or liberty to fulfill their professional responsibilities. The limited ability to access counsel under these conditions delivers a further harm: individuals and families subject to MPP may decline to seek legal assistance even when offered because they now fear that they will be singled out or fear for their own safety if they do so.

In Matamoros and other border cities, private attorneys and non-profit organizations have formed groups of volunteers to provide pro se assistance to asylum seekers, but they can only help a small portion of the individuals who need assistance. They face persistent logistical challenges when helping asylum seekers to fill out applications for relief and translate supporting evidence into English. The data confirms that the barriers MPP places on meaningful access to counsel are nearly insurmountable. As of September 2019, only 2 percent of asylum seekers subjected to MPP had secured legal representation.¹⁶

Barriers to Meaningful Participation

The hearing process for MPP asylum seekers also does not comport with fundamental notions of due process. MPP asylum seekers are handed notices to appear while in CBP custody in the United States before being returned to Mexico. But because most do not have stable shelter in Mexico, the government is not able to reliably serve them with notice if their hearing date changes or is cancelled. Notices to appear served on MPP asylum seekers often contain addresses of shelters that asylum seekers never access, or no address at all. Paperwork that accompanies the notices to appear instructs MPP asylum seekers to present themselves at international bridges four hours before their hearings. For asylum seekers with early morning hearings, this means traveling through dangerous border cities and waiting at bridges in the middle of the night, putting them at even more risk of kidnapping or assault. If they are unable to make the dangerous journey or fail to receive notification of changes in their hearing date, asylum seekers risk being ordered removed *in absentia*.

In late October, a small delegation of ABA members and staff traveled to our ProBAR project in South Texas for a week-long visit to provide legal assistance to detained migrants at Port Isabel Detention Center, observe MPP proceedings, and provide humanitarian assistance to asylum seekers waiting in Matamoros. During the visit, the group requested to observe a morning session of master calendar hearings for MPP asylum seekers at the Port Isabel

¹⁶ TRAC Immigration, “Details on Remain in Mexico (MPP) Deportation Proceedings”, <https://trac.syr.edu/phptools/immigration/mpp/> (last visited Nov. 16, 2019) (showing that, through September 2019, 1,109 of 47,313 MPP cases had legal representation).

Detention Center. After being denied access twice, the group was eventually allowed into the courtroom with the immigration judge, the government attorney, and the interpreter. The asylum seekers appeared via video from the temporary tent court facility in Brownsville. Approximately 50 asylum seekers were scheduled for hearings that day, but more than 20 of them were not present. Only three of the asylum seekers had attorneys. Many of the cases were reset for a later date.

During the hearings, no simultaneous interpretation was provided for MPP asylum seekers who were not fluent in English. Generally, the interpreter, who is present with the immigration judge via video conference, interprets only procedural matters and questions spoken by and directed to the asylum seeker by the immigration judge. The interpreter does not offer simultaneous translation of the entirety of the proceedings. Examples of what is not interpreted include critical information others are able to absorb in the ongoing hearing including legal argument by the government and questions the immigration judge may pose to government counsel. The ABA has long supported the use of in-person language interpreters in all courts, including in all immigration proceedings, to ensure parties can fully and fairly participate in the proceedings. This is especially important for noncitizens, who are unfamiliar with the U.S. legal system, and face additional unique barriers to accessing information regarding their legal rights and responsibilities. In addition to the lack of full interpretation of the hearing, video conferencing technology can also be unreliable, leading to disruptive delays that can further traumatize vulnerable asylum seekers. In October, when our group observed MPP master calendar hearings, the proceedings started more than 90 minutes late because the internet connectivity at the tent court facility in Brownsville was not functioning.

Even these few examples demonstrate that the conditions and procedures for hearings at the temporary tent courts result in unfairness and a lack of due process for asylum seekers subject to MPP, and create inefficiencies for the immigration court system.

Dangerous Humanitarian Conditions

Finally, we also have witnessed first-hand the dangerous humanitarian conditions in these border cities. ABA president Judy Perry Martinez, immediate past president Bob Carlson, members of the ABA Commission on Immigration, and ABA staff have crossed the International Gateway Bridge into Matamoros to meet asylum seekers living in a tent encampment steps from the international border. The stories ABA staff have heard are consistent with reports issued by human rights organizations that document dismal conditions, when the stated premise of the MPP program is that the Mexican government would provide humanitarian aid to those in MPP.¹⁷ That aid is obviously not being delivered and the U. S., while having delegated the provision of aid, cannot delegate its humanitarian and legal responsibility to these asylum seekers. There also are hundreds of incidents of violence suffered

¹⁷ Nielsen Policy Guidance at 2 (quoting from December 20, 2018 statement regarding MPP, which noted the U.S. government’s recognition that Mexico would be implementing protocols “providing humanitarian support for and humanitarian visas to migrants”).

by asylum seekers living in Mexico.¹⁸ To date, there are approximately 1,500 individuals living at the tent encampment in Matamoros, without access to adequate shelter, food, water, or medical care.¹⁹ Subjecting families and individuals who are fleeing violence and persecution to seek protection at our borders to these conditions is inconsistent with our values as a country.

Conclusion

The ABA repeatedly has emphasized that our government must address the immigration challenges facing the United States by means that are humane, fair, and effective – and that uphold the principles of due process. In our experience, the MPP program fails to meet these objectives and creates an unstable humanitarian crisis at our border. We urge that this policy be rescinded and that procedures be put in place to ensure fair treatment and due process for all asylum seekers.

¹⁸ See note 8, *supra*.

¹⁹ Nomaan Merchant, *Tents, stench, smoke: Health risks are gripping migrant camp*, Associated Press, Nov. 14, 2019, <https://apnews.com/337b139ed4fa4d208b93d491364e04da>.