

No. 19-15716

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

KEVIN MCALLENAN
Acting Secretary *et al.*, Homeland Security
Defendants-Appellants.

Q OFFICIALS IN SUPPORT OF

AROLD HONGKOH
RULE LAW CLINIC
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06520
(203) 432-4932

ALAN SCHOENFELD
OLGA MUSAYEV
WILME CUTLER PRCKERING
HALE AND ORR LLP
World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294

JULIA ROCHAZKA
WILME CUTLER PRCKERING
HALE AND ORR LLP
6 STATE STREET
Boston, MA 02109
(617) 526-6160

June 26, 2019

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I N T E R E S T O F A M I C I C U R I A E

Amici curiae are, from a national perspective, not only other public officials who have worked at the senior-most levels of the United States government in their careers—collectively, hundreds of years of experience in addressing the complex and sensitive issues of U.S.-Mexico relationships between the United States and Mexico—but also many of them have served in leadership roles in both major political parties. Amici curiae have also been instrumental in many substantial immigration cases and in this case.

I N T R O D U C T I O N M A I N P O I N T S O F T H E A R G U M E N T

The Migration Protection Protocol (MPP) requires that individuals who are not to be returned to Mexico are held in the United States while the government attempts to overhaul the United States' asylum system. Individuals who are held in this manner await their hearings in this case.

¹ Amici submit this brief pursuant to 29(a)(2) and 29(b) of the Federal Rules of Appellate Procedure (FRAP) for a party authored this brief. Amici curiae or their counsel made a motion

are justified by the immigrants, since
the increased number of asylum seekers

Rather than merely characterizing the defendant's conduct as a crime, the court should have examined the defendant's conduct in light of the facts and circumstances. The court's failure to do so is a reversible error. The defendant's conduct was not a crime, and the court's finding to the contrary is unsupported by the evidence. The court's decision is reversed and the defendant is acquitted.

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infrastructure to house the overwhelmed
onto the streets. Sending them
for them to obtain adequate
them from across the border
claims. These chaotic, violent
seekers face in receiving
the legal process
are buckling under these challenges.

Moreover, the MPPE states that
not to send asylum seekers
Migrants from the Northern
Mexico. Violating this obligation
harm's way—it threatens
depends on cooperation
flagrant violations under the MPP.

Third, the MPP damages
Mexico in an untenable
which undermines
migration issues
inevitably have

the Northern Triangle. But the MPP is not a wall from Mexico, which is a goal of the United States. And even when the coercive threat of a combustible situation, as it is, is so much for Mexico it is a strain on Mexico's actions—such as deporting migrants which they find difficult to do—migrants—that will only undermine the MPP undermines the very cooperation

A R G U M E N T

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

The government seeks to justify its increase in the number of noncitizens seeking asylum at the border. The MPP, the government's primary tool for managing and protect U.S. security and border security from asylum seekers on the border, is a discretionary tool which are unlikely to be used in a way that would be effective on the southern border of the United States. In light of the facts, the MPP cannot justify the policy.

A. The MPP Does Not Effectively Deal

have given rise to legitimate abuses in much of the Administration's policies.

Over the last decade, the Northern Triangle—Guatemala, Honduras, and El Salvador—has become known as the "Violent Northern Triangle." Council on Foreign Relations, *Central America's Violent Northern Triangle*, Council on Foreign Relations (2018), available at <https://www.cfr.org/latin-america/central-america/s-13944>; compare World Bank *International Homicides*, (in 2015 the global average homicide rate was 0.3 per 100,000 people, while the Northern Triangle countries have murder rates as high as 50 per 100,000 people); see also Renwick, *supra*.

Gangs and cartels perpetrate much of the violence in Central America. See *Central America* 5-6, Cong. Research Serv. (2017), available at <https://www.crs.org/>; see also *supra* at 7-57. Its main rival, the MS-13, has sought to undermine citizen security and subvert governments. See *supra* at 3. MS-13 and M-18 are the most prominent gangs, with M-18 typically involved in drug trafficking and M-13 in drug trafficking and extortion. See *supra* at 6. Gangs also frequently employ children and women as members or retainers. See *id.* at 6. In addition, the

and detain deportees for pre-emptive removal
governmental organizations that have been established.

Given these dire conditions, including
women and children, have no choice but to
through Mexico to seek asylum & have
supra. The MPP is particularly dangerous
civilians, there has been a trend
from individual Mexican migrants.

with legitimate fears of persecution were denied asylum. The predominant reason

Representation by counsel in the success of their removal proceedings. See *Access to Counsel in Immigration Court: Special Report*, American Immigration Council (2016).

But the odds of a successful asylum claim when they are represented by counsel have fallen amid rising denial rates.

Records Access Clearinghouse, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates* (Nov. 28, 2017); U.S. Citizenship and Immigration Services, *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges* 30 (2008) ("For both

and defensive cases, a statistically significant three-fold increase in the asylum grant rate was observed between 2007 and 2010.

and defensive cases, a statistically significant three-fold increase in the asylum grant rate was observed between 2007 and 2010.

fold increase in the asylum grant rate was observed between 2007 and 2010.

(" I do not know where they are going to go. I do not know how I will make arrangements to get my great-grandchildren to safety. I am not represented by any lawyer. I am not taking any legal risk for deportation. (Lara Rodriguez), 31, 2 (FD-855, 856 (9th Cir. 2009) (no habeas corpus for asylum with no one to lead me). November 2016, a staggering 85% of removals were *absentia*. Catholic Legal Immigration Network Project *Denied a Day in Court: The Government's Use of In Absentia Removal Orders Against Families Seeking Asylum* (2018). Each of them is in denial of an asylum application for persecution.

Thus, the government's argument is "a baffle to account for the large numbers of refugees or never aired before the courts."

3. The MPP will not reduce the number of people coming to the southern border

evidence shows that the border is not a barrier to a complex interplay of forces that benefit the MMP.

Despite the admission, it is not clear, if or how goes considerably "a significant" to the socio-economic conditions in the region are likely to contain the poor security and the flow increased in the MMP. See Dickerson, *Breaking Point' as More Than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. Times (Mar. 5, 2017).

Changes in the number of migrants have fluctuated significantly in the home countries, and the number of migrants in 2017 who were higher than it was fifteen years ago.

Homeland Security,

faced death threats due to her chemical
leave." SER 30. She "got bound of right
there" and arrived without a trial. This
not make her a momentary patient when

border come to the forefront of the national political arena as a result of the
 smuggled through unauthorized means. *2018 National Drug Threat Assessment* 1, 99 *see also* (a) & Singh
Trump Claims There Is a Crisis at the Border. What's the Reality?, N.Y. Times
 11, 2019). Another common theme in the literature is that the border is a
 enter the United States across the border at the point of entry
 commercial cargo vessels, in some cases, and in some cases, in
 asylum *2018 National Drug Threat Assessment* 99. In addition to
 trafficking victims largely by the border, the most common
 most non-citizen trafficking victims are

The Hypocrisy of Trump's Anti-Trafficking Argument for a Border Wall, The New
 Yorker (Feb. 5, 2019). The government has argued that the MPP is necessary
 largely peripheral to the national security risk that the MPP is necessary

The Administration's efforts to the set the
 asylum-seeker population as a result of the current
 policy measures that find it to be an urgent

C. The Crisis At The Southern Border,
 Administration's Own Making, Does Not

The Administration's actions in the
 at the southern border, it is clear that the

eliminated rules designed to protect the interests of the United States in processing and determining the status of individuals who seek to enter the United States. The administration's policy is to create an emergency that justifies the suspension of humanitarian relief.

In early 2019, the administration announced a policy under which all border crossers must be processed. Under this policy, all individuals who are processed under the policy are considered to be in the United States illegally, with no exceptions for humanitarian relief. See *The Trump Administration's "Zero Tolerance" Immigration Enforcement*

Policy, Cong. Research Serv., *Report 45290*, at 1 (2019). Individuals who are detained in the United States are held in a facility where they are stretched out on the floor for long periods of time. See *Id.* at 2. In addition, the policy has had serious consequences for children, as children were separated from their parents and placed in the custody of adult relatives. See *Id.* at 3. The administration's policy has also caused administrative burdens of care for the United States government. See *Id.* at 4. *Family Separations a Year Later: The Fallout—and the Separations—Continue*, L.A. Times (Apr. 12, 2019).

In addition, the administration's policy has caused the United States to be ineligible for asylum, in contrast to the United States.

2018, it mostly eliminated spending as a condition
District of Columbia issued a p

a n d s e c u r e i n t e r n a t i o n a l o r d e r .

United States, 59 Foreign Aff. 21, U.S. 1 (1980) is the world in refugee resettlement and, of still more than 4 million refugees resettled in the world. *For the First Time, U.S. Resettles Fewer Refugees Than the Rest of the World*, Pew Research Center (July 5, 2018) <https://www.pewresearch.org/fact-tank/2018/07/05/u-s-resettles-fewer-refugees-than-the-rest-of-the-world/>. The Refugee Act incorporated the Refugee Status of Refugees, including the definition of non-refoulement, 212, Pub. L. 94-304, set forth for the adoption of the UNHCR's standards sets forth the rights of refugees, Resolution 217 A, Article 14.

The MPP stands in stark contrast to its predecessor. It evinces callousness for the plight of refugees and a foundational commitment to the protection of refugees. It shut its eyes to the plight of refugees and its commitments.

B. The MPP Undermines A Well-Functioning Asylum System by Creating A Chaotic and Inconsistent System

The MPP actively undermines the asylum system by creating a chaotic and inconsistent system for the implementation of the MPP. The MPP has a bad track record

the policy leads asylum seekers to await conditions, undermining the purpose of fleeing persecution.

Under the MPP, most migrants are returned to Mexico to await hearings. *See Hennessey, Pregnant Women, Other Vulnerable Asylum Seekers are Returned to Mexico to Await Hearings*, L.A. Times (May 19, 2019), [https://www.latimes.com/nation/la-na-immigration-2019-05-19](#).
are among the most dangerous and violent cities in the world. *Five of the Six Most Violent Cities in the World Are in Mexico, Report Says*, L.A. Times (Mar. 14, 2019), [https://www.latimes.com/nation/la-na-immigration-2019-03-14](#).
has also documented that immigrants returned to Mexico are often sent outside the U.S. *See Moore, U.S. Sending Asylum Seekers*

reports, "migrants ... have to compete for
are at capacity" and "women and children"
Trump Administration's 'Remain in Mexico' Program Tangles Legal Process, NPR
(May 9, 2019). This makes not only it
migrants without a fixed address, "we can't
hear it. Mexico lacks the infrastructure to
the MPP or track these migrants' whereabouts.

This disorder hinders our ability to
counsel. Attorneys seeking to
by mail. In view of the difficulty
immigration attorneys have been
servicing. SER 9. As a result, "[a]
aren't touching [supra] MPP] in a
And even those who are willing
so due to the restrictions and
imposed by the American
Playing with Our Lives' Say the First Migrants Returned Under New Mexico Policy,
PRI (Feb. 5, 2019). The
disorder created by the MPP.

L a c k o f a v a i l a b l e l e g a l c o u n s e l j e o p

the hand of organized crime and corruption
and prosperity."

Allowing the breakdown of the high
regional conflicts and security heads
hundreds of thousands, if a benign
characterized by violence.

oppose their political interests they want to be a part of the process and
that the Mexican government is not to be involved in Honduras.

Mexico's policies and conditions have U.S. States, and vice versa. For the past several years, violent cartel wars in Mexico have had a significant impact on the U.S. The migrants in the United States are in a long line of issues that Mexico has addressed through cooperation.

Yet despite the cooperation, the MPP was imposed over significant opposition and not an agreement through the coercive threat of the MPP, the Mexican Foreign Ministry has taken unilateral measures implemented by Mexico. *Mexico Reiterates Its Stance on the Unilateral Migration Measures Taken by the U.S.* (Mar. 12, 2019). As the Mexican government has stated, the MPP was "unilaterally announced and not agreed with us," and that Mexico will not agree. " *Position of the Mexican Government on the US*

Trump Wants Asylum Seekers to Stay in Mexico. Here's How That Would Work,

likely that asylum seekers would be denied entry to the United States—or to us—because of their status in a humanitarian crisis, but the processing of their claims under the current law undermines the humanitarian crisis. The government's current policy of processing asylum seekers in a humanitarian crisis is not in the best interests of the United States.

The government claims (at 51) that it is not in the best interests of the United States to grant asylum to individuals who are fleeing a humanitarian crisis because it "harms the United States' ability to respond to a humanitarian crisis that is no evidence that an individual would be harmed by the United States' current policy of processing asylum seekers in a humanitarian crisis who include long-term residents of the United States."

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relations with h g Mex it c woul dofnesa sbyt lrheotsuer nrie
to *stathsequo ante*, before this Administration f
openly protested. Mexico is r f w i t b w o n g
tem, and so will understamy d a t h g u m e n t i m a
the governmei n g n b p a s l e i d c y n i s o t h e u s m e r i t l e s

CONCLUSION

The district y c b a j t h n s t p o a l i s m b a d b e a

Respectfully submit t

/s/ Alan E. Schoenf

HAROLD HONG J K D H
RULE L A F W C L I N I C
YAL L A W S C H O O L
127 Wall Street
New Haven, CT 06520
(203) 432-4932

ALAN E SCHOENFELD
OLGA MUSAYEV
WILMECUTLER PRCKERING
HALE ADORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294

JULIA PROCHAZKA
WILMECUTLER PRCKERING
HALE ADORR LLP
6 STATE STREET
Boston, MA 02109
(617) 526-6160

June 26, 2019

STATEMENT OF RELATED CASES

Pursuant to Circuit Court Order 2019-06-26-001, the following is a list of related case pending in this Court.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

June 26, 2019

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APPENDIX: LIST OF AMICI CURIAE

James Clapper as U.S. Director of National Intelligence from 2009 to 2017.

Bathsheba Kerker as Assistant Secretary for International Affairs from 2014 to 2017.

Nancy Ely Rappold as Senior Secretary to the Director of the Office of Combat Mission from 2003 to 2009. She previously served as the U.S. Ambassador to the United Kingdom from 2001 to 2003.

Daniel F. Sevchuk as Acting Chief of Mission to Pakistan from 2014 to 2017.

Heather A. Haggard as Deputy Secretary for Management and Resources from 2013 to 2017.

Christopher R. Hill as Assistant Secretary for East Asia and Pacific Affairs from 2005 to 2009. He served as the U.S. Ambassador to Iraq from 2009 to 2011, to the Democratic People's Republic of Korea from 2011 to 2014, and to the U.S. from 2014 to 2017. He also served as the U.S. Ambassador to Macedonia from 1991 to 1993.

Janet Napravnik as Secretary of Homeland Security from 2003 to 2005. She served as Assistant Secretary of State for International Security and Arms Control from 2003 to 2005.

James C. Sorensen as Special Representative for the U.S. Department of State from 2015 to 2017. S. He served as Deputy Assistant Secretary for International Security and Arms Control from 2015 to 2017. He also served as Principal Deputy Special Representative for the U.S. Department of State as Presidential Envoy for the Balkans.

Matthew G. Overton as Director of the Center for Strategic and International Studies from 2011 to 2014.

Anne W. Patterson as Assistant Secretary for International Security and Arms Control from 2013 to 2017. She served as Ambassador to Egypt from 2013 to 2017, 2007 to 2010, 2003 to 2007, and from 1997 to 2000.

Thomas R. Pickering

Jeffrey Perrewo is Deputy Assistant Secretary
President from 2013 to 2015, and also the
Director for the National Security Council from 2009 to 2012.

Dan Restrepo is Deputy Assistant Secretary
Director for the National Security Council from
2009 to 2012.

Anne C. Riechardt is Deputy Assistant Secretary
Refugees, and Migration from 2012 to 2015.

David Robinson is Deputy Assistant Secretary
Stabilization Operations and Policy for the
Bureau of Population, Refugees, and Migration

Wendy R. Sheer is Deputy Assistant Secretary
from 2011 to 2015.

Vikram J. Singh is Deputy Assistant Secretary
and Pakistan from 2012 to 2014.

Dana Shelsler is Deputy Assistant Secretary
Previously, she was Deputy Assistant Secretary

J a k e S u s e r i w a c h a s N a t i o n a l S e c u r i t y C o u n c i l
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing without the Ninth Circuit and the case are understood system.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD