REVIVING THE ALIEN TORT STATUTE
A ROADMAP TO RECOVERY FOR ASYLUM SEEKERS SUFFERING THE HARM OF REFOULEMENT

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ABSTRACT

Envision a young family—two parents and five children—fleeing extortion, sexual assaults, and death threats in their home country of Guatemala. They leave Guatemala and travel through Mexico in search of safety in the United States. While in Mexico, they are robbed, assaulted again, and threatened at gun point. Terrified of the harm they experienced in Guatemala and the subsequent attacks during their journey through Mexico, the family requests asylum when they reach the United States. Prior to December 2018, this family would have likely demonstrated to Customs and Border Protection (CBP) that there is a "significant possibility" that they had been or may be persecuted on account of a protected ground. Then, they would have been detained by CBP or paroled in the United States pending the adjudication of their asylum claim in immigration court proceedings. Under the Migrant Protection Protocols (MPP), first implemented in January 2019, the Department of Homeland Security would require them to stay in Mexico throughout this process. While waiting for their hearings, the family suffered even more harm when it survived a shoot-out near their temporary shelter. Do these asylum seekers have a claim against Department of Homeland Security officials for their negligence in misapplying non-refoulement standards and the subsequent harms the family experienced as a result of the MPP?[1] This

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1. This is the story of the plaintiffs in *Doe v. McAleenan*. Doe v. McAleenan, 415 F. Supp. 3d 971, 974–75 (S.D. Cal. 2019). Their case centers around due process violations for prevention of access to counsel during the interview stage of the MPP. *Id.* at 973. However, they are also just one example of hundreds in the MPP who experienced harm as a result of being forced to stay in Mexico while pursuing their asylum claims in the United States. *E.g.*, *US: 'Remain in Mexico' Program Harming Children*, HUM. RTS. WATCH (Feb. 12, 2020, 8:00 AM), https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children ("Parents said that while waiting in Mexico, they or their children were beaten, harassed, sexually assaulted, or abducted. Some said Mexican police had harassed or extorted money from them. Most said they were constantly fearful and easily identified as targets for violence.").

note suggests that the family's mandatory enrollment in the MPP and the subsequent harms they suffered as a result is sufficient to file a tort claim against the United States for its negligence in returning the family to a country in which they were likely to continue suffering harm on a protected ground.

The MPP's alteration of prior asylum procedure leaves many individuals with not only significantly higher risk of injury but also no legitimate avenue to recover for these injuries. Given the grave humanitarian concerns affecting asylum seekers at the southern border, immigration advocates should consider opportunities in federal court to seek redress for these individuals. This note serves as a map for attorneys to navigate the challenges of the Westfall Act and jurisdictional problems created by procedures that are not applied exclusively within the United States.

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They may be eligible to sue United States officials on that basis, as argued in this note. *See Questions and Answers: Credible Fear Screening*, DEP'T OF HOMELAND SEC. (Jul. 15, 2015), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening (explaining that a credible fear of persecution is a "'significant possibility' that you can establish in a [hearing] before an… [immigration judge] that you have been persecuted or have a well-founded fear of persecution on account of [a protected ground] if returned to your country."); ASSESSMENT OF THE MIGRANT PROTECTION PROTOCOLS (MPP), DEP'T OF HOMELAND SEC. 9 (2019), https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf ("In conducting MPP assessments, asylum officers apply a 'more likely than not' standard. . . .").

I. INTRODUCTION

The administration of former President Donald Trump issued repeated attacks on asylum seekers and the asylum process during President Trump's tenure in the White House.[2] In that time, the Department of Homeland Security (DHS) implemented policies and practices ranging from family separation[3] to forced sterilization,[4] from unreasonable detentions[5] to violations of international law.[6] Shortly after President Biden took office, his administration placed a temporary

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2. *E.g.*, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (Jan. 11, 2021) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235). This rule, along with other last-minute promulgations from the Trump Administration, have been aptly named "Death to Asylum" given the stringent bars in place, preventing many people from being eligible for asylum). *Id.*; *see also* Matter of A-B-, 27 I&N Dec. 316 (Att'y Gen. (2018)) (overruling Matter of A-R-C-G- and preventing asylum claims stemming from gender-based violence, gang-related violence, and violence from other private actors); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (banning entry of citizens from Muslim-majority countries and suspending the entry of all refugees for 120 days); Jefferson Sessions, Att'y Gen., Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018) (transcript available at the U.S. Department of Justice Office of Public Affairs' website), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions (announcing "zero-tolerance policy," which includes criminal prosecution of all people at the southern border found to have been crossing without proper documentation and the family separation policy, based on an interpretation of the prohibition of "smuggling" undocumented individuals); Zolan Kanno-Youngs, *Federal Judge Strikes Down Trump Administration's Asylum Rule*, N.Y. TIMES (July 1, 2020), https://www.nytimes.com/2020/07/01/us/politics/trump-asylum-ruling-immigration.html ("strik[ing] down" a policy requiring asylum seekers presenting themselves at the southern border to have applied for and been denied asylum in a country in which they passed through prior to approaching the United States).

3. Michael D. Shear, Katie Benner & Michael S. Schmidt, *'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html ("Justice Department officials understood – and encouraged – the separation of children as an expected part of the desire to prosecute all undocumented border crossers.").

4. *ICE, A Whistleblower and Forced Sterilization*, NPR (Sept. 22, 2020, 3:04 PM), https://www.npr.org/2020/09/18/914465793/ice-a-whistleblower-and-forced-sterilization.

5. Vanessa Romo, *U.S. Citizen Detained for Weeks, Nearly Deported by Immigration Officials*, NPR (July 25, 2019, 6:01 PM), https://www.npr.org/2019/07/25/745417268/u-s-citizen-detained-for-weeks-nearly-deported-by-immigration-officials.

6. *See, e.g.*, Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168, 1183 (S.D. Cal. 2019) ("den[ying] access to the U.S. asylum process . . . 'in contravention of U.S. and international law'"); Al Otro Lado v. Mayorkas, No. 17-cv-02366-BAS-KSC, 2021 WL 3931886 (S.D. Cal. Aug. 5, 2022) (order denying Plaintiffs' motion to exclude Defendants' purported expert testimony).

pause on these programs to evaluate their implementation and efficacy[7] and has now undertaken the task of revising these harmful immigration practices.[8] However, the problems with these practices remain. In June 2022, the United States Supreme Court affirmed the Biden Administration's decision to end the MPP and remanded the case.[9] However, there remains a temporary injunction on the agency memo terminating the MPP.[10] Regardless of any policy changes, asylum seekers have already been harmed, and as such, may now have an opportunity to seek redress. This note will focus on a specific subset of people: those who suffered harm as a result of a negligent negative finding in their *non-refoulement* interview within the "Migrant Protection Protocols" (MPP).

The MPP strayed from the previously standard practice of paroling asylum seekers into the United States while they await their immigration hearings,[11] instead forcing them to endure the process in Mexico, where many may still be subject to persecution.[12] The bulk of this note and other pending litigation related to recent immigration policies attack potentially improper interpretations of existing immigration law and violations of the Administrative Procedure Act.[13] Though at first glance procedure may seem less harmful than substance, the effects of these procedural violations are incredibly severe.[14] These policies have created significant and life-threatening harms for tens of thousands of people, including kidnappings, robberies, sexual assaults, torture, extortion, targeted discrimination,

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7. Memorandum from David Pekoske, Acting Sec'y of the Dept. of Homeland Sec., on Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities to Troy Miller, the Senior Off. Performing the Duties of the Comm'r of the U.S. Customs and Border Protection, Tae Johnson, Acting Dir. of the U.S. Immigration and Customs Enforcement, and Tracey Renaud, Senior Off. Performing the Duties of the Dir. of the U.S. Citizenship and Immigration Services, (Jan. 20, 2021) (on file with the Department of Homeland Security), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

8. *E.g.*, Press Release, Alejandro N. Mayorkas, Secretary, Department of Homeland Security, DHS Secretary Statement on the 2019 Public Charge Rule (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule ("[T]he government will no longer defend the 2019 public charge rule as doing so is neither in the public interest nor an efficient use of limited government resources.").

9. Biden v. Texas, 597 U.S. 785 (2022); *but see* Texas v. Biden, 646 F. Supp. 3d 753 (N.D. Tex. 2022).

10. *Texas*, 646 F. Supp. 3d at 753.

11. *See infra* note 38 and related discussion.

12. 8 C.F.R. § 212.5 (2019); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PAROLE OF ARRIVING ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE ¶ 6.2 (2010) (explaining that ICE should parole asylum seekers who "present[] neither a flight risk nor danger to the community") [hereinafter ICE Directive 11002.1].

13. *See, e.g.*, Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168, 1183 (S.D. Cal 2019); *infra* notes 35–36.

14. *See, e.g.*, *supra* notes 3–6; *infra* notes 43, 83, 84.

and unsanitary living conditions.[15] There have even been reports of asylum seekers who died while in ICE custody[16] and as a result of being turned away at the border.[17] Moreover, individuals in the MPP often did not receive notice of upcoming hearings and "had little to no access to a lawyer in the United States[.]"[18] Though the specific harms are not detailed in this note, the underlying purpose of this research is to explore potential avenues of recourse for these harms.

Former Department of Homeland Security Secretary Nielsen described in a press release certain protections that DHS would implement alongside the MPP to attempt to avoid the international prohibition on *refoulement*.[19] However, those protections failed.[20] While these asylum seekers wait for their hearings,[21] they are vulnerable to continued persecution from transnational actors and organizations.[22] As a result, the United States and its officials may be civilly liable for implementing the program. If there is a violation of international law, and asylum seekers in the MPP want to bring suit to recover damages, they face a myriad of procedural obstacles to conquer before a court can get to the merits of these asylum seekers' tort claims.[23]

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15. *See, e.g.*, *supra* notes 3–6; *infra* notes 43, 66–67.

16. Memorandum Regarding ICE Health Services Corps (IHSC) Medical/Mental Healthcare and Oversight, Cameron P. Quinn & Marc Pachon, DEP'T OF HOMELAND SEC. (Mar. 20, 2019), https://www.documentcloud.org/documents/6575024-ICE-Whistleblower-Report.html; Joel Rose, *President Obama Also Faced a 'Crisis' at the Southern Border*, NPR (Jan. 9, 2019, 2:29 PM), https://www.npr.org/2019/01/09/683623555/president-obama-also-faced-a-crisis-at-the-southern-border.

17. AM. IMMIGR. COUNCIL, POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER: THE MIGRANT PROTECTION PROTOCOLS, PROMPT ASYLUM CLAIM REVIEW, HUMANITARIAN ASYLUM REVIEW PROCESS, METERING, ASYLUM TRANSIT BAN, AND HOW THEY INTERACT 1–2 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf.

18. Press Release, Biden Administration in the Clear to End the MPP, Am. Immigr. Council (Aug. 9, 2022), https://www.americanimmigrationcouncil.org/news/biden-administration-clear-end-mpp.

19. *See generally* MPP Press Release 2, *infra* note 39; Jordan, *infra* note 43; MPP FAQs, *infra* note 47; Guadana-Huizar & Alvarez, *infra* note 83; HUM. RTS. FIRST, *infra* note 83; Montoya-Galvez & Canales, *infra* note 84; Rose, *infra* note 84.

20. *See generally* Jordan, *infra* note 43; MPP FAQs, *infra* note 47; Guadana-Huizar & Alvarez, *infra* note 83; HUM. RTS. FIRST, *infra* note 83; Montoya-Galvez & Canales, *infra* note 84; Rose, *infra* note 84; Texas v. Biden, 646 F.Supp.3d 753 (N.D. Tex. 2022).

21. *See infra* notes 38–39.

22. *See infra* notes 43, 83, 84.

23. Hernandez v. Mesa, 140 S. Ct. 735, 735 (2020). *Bivens* claims will not be successful given the lack of a clear constitutional violations and the Supreme Court's recent refusal to extend *Bivens* to a cross-border context. *Id. But see* discussion *infra* Section III.A., contemplating procedural due process violation. The Westfall Act mandates use of the FTCA, which does not apply extraterritorially. *See*

The maze to recovery for individuals in the MPP who continue to fear for their safety in Mexico can be summarized in four main points: First, claims stemming from the MPP are unlikely to meet the minimum threshold required for a successful *Bivens* action.[24] Second, the Westfall Act prohibits lawsuits against federal employees and mandates use of the Federal Tort Claims Act (FTCA) to permit certain lawsuits against the United States as a substitute defendant.[25] Third, the FTCA generally does not apply to torts committed outside of the United States.[26] It may be possible to suggest that asylum seekers in the MPP are in U.S. custody, in which case the FTCA would apply.[27] However, federal courts have been extremely cautious to intervene in matters of foreign affairs or national security.[28] Fourth, the

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discussion *infra* Section III.A., And, the only applicable exception to the Westfall Act requires a substitute, substantive statute. *See* discussion *infra* Section III.A., The ATS seems appropriate, but its jurisdictional reading will only be abandoned if claims satisfy the *Sosa* test, which does seem possible here. *See* discussion *infra* Section III.C.

24. *Hernandez*, 140 S. Ct. 735 (disallowing the extension of *Bivens* to a cross-border shooting by Customs and Border Protection that resulted in the death of a Mexican citizen); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (creating a cause of action for damages against federal officers' unconstitutional conduct while "acting under color of his authority"). Though the rape, kidnapping, and other violent crimes occurring as a result of the MPP are extremely severe, *Bivens* claims will only be successful for certain constitutional violations that involve certain "new context[s]" that do not give rise to "hesitat[ion] for the Court." *Hernandez*, 140 S. Ct. at 735; *See infra* note 83.

25. 28 U.S.C. § 2679 ("The authority of any federal agency to . . . be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under [The Federal Tort Claims Act]").

26. *See* 28 U.S.C. § 1346(b)(1).

27. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004) (holding that an extraterritorial application of the habeas statute was permissible for detainees at Guantanamo Bay). Issues of jurisdiction for military acts may extend to other United States government activity outside of the United States, such as the MPP, but will likely be distinguished given the narrow holdings of the litigation that sprung in the post-9/11 era, which related mostly to the United States Naval Base at Guantanamo Bay and CIA rendition. *See, e.g.*, *id.* at 470 ("[W]hether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."); Boumediene v. Bush, 553 U.S. 723, 736–38 (2008) (holding unconstitutional the Military Commission Act's bar of "action[s] 'relating to . . . an alien who is or was detained . . . as an enemy combatant . . . .'") (quoting Military Commissions Act of 2006, 120 Stat. 2600, 2241(e)(2)).

28. Arar v. Ashcroft, 585 F.3d 559, 581 (2d Cir. 2009) (upholding removal of a dual Canadian/Syrian citizen by U.S. officials to Syria where he was tortured by Syrian officials). *Contra id.* (Parker, J., dissenting) ("[T]he courts require no invitation from Congress before considering claims that touch upon foreign policy or national security. . . . In *Boumediene v. Bush*, . . . the Supreme Court rebuffed legislative efforts to strip the courts of jurisdiction over detainees held at Guantanamo Bay.") (citation omitted). The limited extraterritorial applications of jurisdiction in these post-9/11 cases occurred

Westfall Act *does* provide an exception for use of the FTCA if another substantive statute authorizes suit.[29] On its face, the Alien Tort Statute (ATS) seems to be an appropriate vehicle for noncitizens to bring suit in federal court.[30] Thus, the seemingly only available remedy for these individuals would require an expansive reading of the ATS to fit within the exception of the Westfall Act, as suggested by Judge Edwards's dissent in *Ali v. Rumsfeld*.[31]

Section II of this note provides necessary background regarding the statutory basis for the MPP, the pending litigation challenging the program, and an explanation of the United States' obligations under international law not to return (*refouler*) certain noncitizens. Section III addresses the application of the Westfall Act and the unique problems that noncitizens encounter with the ATS and FTCA, and it argues for an expansive interpretation of the jurisdictional status of the ATS, so it may be construed as a permissible exception to the Westfall Act. The note closes with Section IV detailing the possibility for certain individuals subjected to the MPP to sue U.S. officials under the ATS for DHS's violation of *non-refoulement* principles of international law.

II. THE MIGRANT PROTECTION PROTOCOLS AND NON-REFOULEMENT

The Migrant Protection Protocols are just one facet of the Trump Administration's attempts to deter asylum seekers from coming to the United States.[32] In one of her press releases,[33] former Secretary Nielsen used Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) to support the enactment

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because "the United States exercises control tantamount to sovereignty over GTMO." Richard H. Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 734 (2006) (citing *Rasul*, 542 U.S. at 480). Moreover, rendition cases are distinguishable because the government relied on the state secrets privilege. *E.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (holding that action brought by foreign nationals under the Alien Tort Statute against the CIA's extraordinary rendition program could be dismissed pursuant to the state secrets privilege).

29. 28 U.S.C. § 2679(b)(2)(B); *Arar*, 585 F.3d at 581 ("We recognize our limited competence, authority, and jurisdiction to make rules or set parameters to govern the practice called rendition.").

30. 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations . . . .").

31. Ali v. Rumsfeld, 649 F.3d 762, 791 (D.C. Cir. 2011) (Edwards, J., dissenting) ("[A] federal statute may incorporate enforceable substantive rights even though the statute does not spell out the details of those rights.").

32. *See, e.g.*, Muzaffar Chishti & Jessica Bolter, *Interlocking Set of Trump Administration Policies at the U.S.-Mexico Border Bars Virtually All from Asylum*, MIGRATION POL'Y INST. (Feb. 27, 2020), https://www.migrationpolicy.org/article/interlocking-set-policies-us-mexico-border-bars-virtually-all-asylum ("Through a set of interlocking policies, the Trump administration has walled off the asylum system at the U.S.-Mexico border, guaranteeing that only a miniscule few can successfully gain protection.").

33. *See also* sources cited *infra* note 39.

of the MPP and changes to the asylum process.[34] Since 2017, several immigration-advocacy groups have challenged multiple aspects of the altered asylum process, including "metering"[35] of asylum seekers, potential due process violations, and violations of the United States' obligations to adhere to *non-refoulement* principles under international law.[36] These cases are still pending.[37] However, though the claims may soon be moot, asylum seekers may still be able to seek redress.

A. Section 235(b)(2)(C) of the Immigration and Nationality Act

Former Secretary of Homeland Security, Kirstjen Nielsen, announced the rollout of the MPP on December 20, 2018[38] and officially implemented it on January 24, 2019.[39] Section 235(b)(2)(C) of the Immigration and Nationality Act (INA) serves as the basis for the program and says that certain asylum seekers arriving at the border "from a foreign territory contiguous to the United States" may be returned to that territory pending the adjudication of their asylum proceedings.[40] Though this provision has been in place since the last immigration overhaul in 1996,[41] it "has never before been implemented . . . in a systematic way."[42] Media outlets dubbed the Protocols "Remain in Mexico,"[43] since they require most asylum seekers to wait

34. 8 U.S.C. § 1225(b)(2)(C).

35. Al Otro Lado v. Wolf, 952 F.3d 999 (9th Cir. 2020); Al Otro Lado v. Mayorkas, No. 17-cv-2366-BAS-KSC (S.D. Cal. Aug. 5, 2022).

36. Innovation L. Lab v. Wolf, 951 F.3d 986 (9th Cir. 2020), *cert. granted*, No. 19-1212, 2020 WL 6121563, at *1 (2020); *id.*

37. *Innovation L. Lab*, 2020 WL 6121563, at *1.

38. *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, DEP'T OF HOMELAND SEC. (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration [hereinafter *MPP Press Release 1*].

39. *Migrant Protection Protocols*, DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [hereinafter *MPP Press Release 2*].

40. 8 U.S.C. § 1225(b)(2)(C). These proceedings referenced in Section 1225(b)(2)(C) are actually conducted under 8 U.S.C. § 1229a and 8 U.S.C. § 1229a (2006). First, the DHS official ("immigration officer" in Title 8) may find that the individual is inadmissible. 8 U.S.C. § 1225(b)(1)(A)(ii) (2008). After such finding, if the individual wishes to seek asylum, she is referred to an asylum officer to further assess her fear of persecution. § 1225(b)(1)(A)(ii). Then, removal proceedings according to Section 1229(a) may be instituted in immigration court, in which case the noncitizen may apply for relief in a process called defensive asylum. 8 U.S.C. §§ 1225(b)(2)(C), 1229a.

41. *See* Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 301(1)(9)(A)(iii), 110 Stat. 3009, § 576 (1996).

42. Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 766 (2020) (citing MPP Press Release 1, *supra* note 39).

43. *See, e.g.*, Miriam Jordan, *In Court Without a Lawyer: Consequences of Trump's 'Remain in Mexico' Plan*, N.Y. TIMES (Aug. 3, 2019), https://www.nytimes.com/2019/08/03/us/migrants-court-remain-in-mexico.html.

in Mexico while their cases move through immigration court.[44] Not only does this differ from previous policies, but of particular concern is the requirement that asylum seekers must *affirmatively* express a fear that the actors from whom they fled can still persecute them in Mexico.[45] Even a union representing employees of DHS and United States Citizenship and Immigration Services (USCIS) filed an *amicus* brief in *Innovation Law Lab*, expressing concern for the possibility of subjecting asylum seekers to persecution in a country where the same threats from which they fled are prevalent.[46] Without this affirmative expression, asylum seekers will not be considered for humanitarian parole into the United States.[47] This is a radical departure from longstanding immigration policy, which generally permitted the parole of certain asylum seekers into the United States, while they made their case in immigration court.[48]

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44. MPP Press Release 1, *supra* note 38. Wait times have been significantly impacted by COVID-19 and the metering process, which limits the number of asylum applicants at ports of entry each day, and at the time of this writing range from nine months to seventeen months. SAVITRI ARVEY, , ROBERT STRAUSS CTR. FOR INT'L SEC. AND L.: UNIV. TEX. AUSTIN 7–11, *Metering Update: February 2021* (Feb. 2021), https://www.strausscenter.org/wp-content/uploads/MeteringUpdate_Feb21.pdf; Al Otro Lado v. Wolf, No. 17-cv-2366-BAS-KSC, (S.D. Cal., Nov. 2, 2020).

45. MPP Press Release 1, *supra* note 38.

46. Amicus Brief at 22–24, Innovation L. Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) (No. 19-15716).

47. *Migrant Protection Protocols FAQ*, DEP'T OF HOMELAND SEC. (Oct. 9, 2020), [hereinafter *MPP FAQs*] https://www.dhs.gov/migrant-protection-protocols ("If an [individual] who is potentially subject to MPP . . . affirmatively states that he or she has a fear of persecution or torture in Mexico, . . . the asylum officer assesses whether it is *more likely than not* that the [individual] will face persecution on account of a protected ground, or torture, if returned to Mexico.") (emphasis added).

48. Memorandum for Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants, U.S. Dep't of Homeland Sec*.,* (Nov. 20, 2014), ("Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on [noncitizens] . . . who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.") https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf; *In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras With Parents Lawfully Present in the United States*, U.S. DEP'T OF STATE (Nov. 14, 2014), https://2009-2017.state.gov/j/prm/releases/factsheets/2014/234067.htm ("Applicants . . . will be considered on a case-by-case basis for parole, which is a mechanism to allow someone who is otherwise inadmissible to come to the United States for urgent humanitarian reasons. . . . An individual . . .may be eligible for parole if DHS finds that the individual is at risk of harm . . ."); *contra* Termination of the Central American Minors Parole Program, 82 Fed. Reg. 38,926, 38,927 (Aug. 16, 2017) ("As of August 16, 2017, USCIS will no longer consider or authorize parole under the [Central American Minor] parole program."). *See also* 8 U.S.C. § 1182(d)(5)(A) (2013) (providing that AG's decision to parole inadmissible asylum seekers is discretionary).

Since 2009, Immigration and Customs Enforcement (ICE) has generally followed the "Directive," which permitted the parole of certain asylum seekers whose detention would not serve the public interest.[49] Others were detained pending the adjudication of their asylum claims in immigration court.[50] Parole means that a noncitizen will be temporarily allowed into the United States for some humanitarian purpose or for the public interest.[51] However, they are not formally admitted, with a visa, for example, for immigration purposes.[52] Though both parole and admission generally result in a noncitizen entering the country, they differ in part based on the reason why the noncitizen is in the United States.[53] Certain visas, like the R-1, for example, allow nonimmigrant religious workers to be admitted into the United States so they may be employed for a certain amount of time in the country.[54] Parole, on the other hand, is not a status for immigration purposes and generally ends upon departure from the United States or acquisition of status.[55] Though temporary, parole is essential to the fair adjudication of asylum cases and to the United States' obligation of *non-refoulement* because it provides a mechanism for those fleeing harm to litigate fully their claims while living in a safe environment.[56]

The Trump Administration's routine denial of parole[57] put asylum seekers at further risk by unnecessarily forcing them to live in a separate country from which their proceedings occur and in which they may be subject to further harm.[58] Potentially meritorious claims could have gone unheard simply because asylum seekers did not have adequate access to counsel or were unable to reach the venue[59] due to a variety of factors ranging from lack of transportation to

49. Damus v. Nielsen, 313 F. Supp. 3d 317, 323 (D.C. Cir. 2018); U.S. DEP'T OF HOMELAND SEC., *supra* note 489; ICE Directive 11002.1, *supra* note 12.

50. *E.g.*, Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) ("[C]ertain [asylum seekers] 'shall be detained for further consideration of the application for asylum.'").

51. *The Use of Parole Under Immigration Law*, AM. IMMIGR. COUNCIL (Jan. 24, 2018), https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law.

52. *Id.*

53. *Id.*

54. R-1 NONIMMIGRANT RELIGIOUS WORKERS, USCIS, https://www.uscis.gov/working-in-the-united-states/temporary-workers/r-1-nonimmigrant-religious-workers (Mar. 2, 2023).

55. AM. IMMIGR. COUNCIL, *supra* note 51.

56. *Id.*

57. *E.g.*, Mons v. McAleenan, No. 19-1593, 2019 WL 4225322, at *2 (D.D.C. Sept. 5, 2019) (explaining that "immediately following implementation of the [2009] Directive, DHS released asylum-seekers on parole at a 90% rate nationwide," but the New Orleans ICE office at issue in this case "denied 98.5% of release requests in 2018 and 100% of requests" at the time of the opinion in September of 2019).

58. *See infra* note 84.

59. *See Al Otro Lado v. McAleenan*, 394 F. Supp. 3d at 1184 (challenging the "metering" policy, which limits the capacity of each port of entry, resulting in asylum seekers being turned away at the

kidnapping.[60] The Transactional Records Access Clearinghouse (TRAC) estimates that just under 5,000 of the total 68,000 recorded MPP cases are represented by counsel.[61] Further, asylum seekers are only allowed into the United States for their immigration court hearings,[62] and this has forced large amounts of people to concentrate near ports of entry.[63] Metering[64] and the MPP are the primary causes for increased numbers of asylum seekers crowding at the border and a lack of access to the "asylum process altogether."[65] As of October 2020, over 24,000[66] individuals in the MPP had cases pending in immigration court, and at the time of writing, 81,350 have been subject to the Protocols since their implementation.[67] Notably, since the implementation of the MPP, over 30,000 asylum seekers and nearly a third of total participants have received *in absentia* removal orders, meaning they did not appear at their court hearing.[68] Even if the reasons for failing to appear were outside their control, the options for challenging a removal order are very limited.[69] Metering and related problems with the MPP, such as decreased access to immigration courts, improper hearing notices, risk of violence along the southern border, are the likely cause for the increase.[70]

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border); *Al Otro Lado v. Mayorkas*, No. 17-cv-2366-BAS-KSC, slip op.; *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (Dec. 19, 2019), https://trac.syr.edu/immigration/reports/587/ [hereinafter Contrasting Experiences]; Mica Rosenberg et. al., *Hasty Rollout of Trump Immigration Policy Has 'Broken' Border Courts,* REUTERS (Sept. 10, 2019, 3:04 AM), https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115.

60. *See infra* note 84.

61. *MPP Cases Highest Since Start of Pandemic*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (Oct. 20, 2020), https://trac.syr.edu/immigration/reports/628.

62. MPP Press Release 2, *supra* note 39.

63. Guadana-Huizar & Alvarez, *infra* note 83. Additionally, the denials are based in part on the belief that asylum seekers with potentially unsuccessful cases pose a flight risk (meaning they will not likely show up for future court dates). Matter of R-A-V-P-, 27 I&N Dec. 803, 807 (B.I.A 2020). This is contrary to data from TRAC, indicating that DHS programs keeping people outside the United States seems to be the basis for the increased number of missed court dates. Contrasting Experiences, *supra* note 59.

64. *See infra* note 70.

65. *Al Otro Lado v. Wolf*, 952 F.3d at 1005; AM. IMMIGR. COUNCIL, *supra* note 17, at 1.

66. *MPP Cases Highest Since Start of Pandemic*, *supra* note 61.

67. *MPP (Remain in Mexico) Deportation Proceedings*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (Nov. 2022), https://trac.syr.edu/phptools/immigration/mpp/.

68. *Id.* (to see figures for this graph, one must click the dropdown to change column headings to "Hearing Attendance – Jan 2021).

69. 8 C.F.R. § 1003.23.

70. *See, e.g.*, *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d at 1184; Contrasting Experiences, *supra* note 59; Rosenberg et al., *supra* note 59.

B. Current Litigation

Two cases relevant to the legal hurdles identified in this note have been filed, challenging associated problems with the MPP. Immigrant Defenders Law Center, Innovation Law Lab and other named plaintiffs cite a host of "procedural safeguards"[71] that are no longer available to individuals whose removal proceedings fall within the MPP.[72]

First, *Immigrant Defenders Law Center et al. v. Mayorkas* has existed since the early days of the MPP. Immigrant Defenders Law Center sought to end the indefinite "detention"[73] of MPP applicants in Mexico, lack of adequate access to counsel, and the presentation requirement—an "effectiv[e] confine[ment] to extreme danger zones."[74] Important for potential tort claimants is this presentation requirement, which could lead to a finding that asylum seekers in the MPP are in custody (and possibly in the United States), thereby permitting claims against DHS under the FTCA.[75] After the Supreme Court ruled in June 2022 that Secretary Mayorkas had properly ended the MPP, Immigrant Defenders Law Center then "asked the court to issue an emergency order allowing Individual Plaintiffs to return to the United States in order to seek reopening of their cases and continue pursuing their claims for asylum."[76] Judge Bernal in the federal district court for the Central District of California "granted in part and denied in part the Government's motion

71. *E.g.*, 8 U.S.C. §§ 1231(b)(3)(A), 1229(a)(B)(4), 1229(a)(C)(1) (2006) (establishing *non-refoulement* obligations, creating a right to meet with an attorney, and creating the right to an IJ decision, respectively); Respondents' Opposition to Application for Stay at 6, Wolf v. Innovation L. Lab, No. 19A960, *petition for cert. filed* (2020).

72. MPP Press Release 2, *supra* note 39. Unaccompanied minors, individuals in expedited removal proceedings, and others to be determined on a "case-by-case basis" are generally not placed in the MPP, but all others, including those that have expressed "a fear of return to Mexico," are subject to the program, unless an asylum officer determines that it is "more likely than not" that the individual will be persecuted based on a protected ground.

73. *See* Brief for Immigration Law Professors as *Amici Curiae* Supporting Plaintiffs' Motion for Preliminary Injunction, Immigrant Defenders Law Center, et al. v. Wolf, 2:20-CV-09893-JGB-SHK (C.D. Cal. Dec. 14, 2020) (arguing that DHS is detaining MPP applicants, without the use of an ICE detention center, by forcing the asylum seekers to wait in Mexico).

74. Complaint for Injunctive and Declaratory Relief ¶ 7, Immigrant Defenders Law Center, et. al. v. Wolf, 2:20-cv-9893 (C.D. Cal. Oct. 28, 2020) https://www.splcenter.org/sites/default/files/complaint_dkt_1-_immigrant_defenders_law_center_et_al_v._wolf_et_al.pdf; *see also Immigrant Defenders Law Center v. Wolf,* S. POVERTY L. CTR., https://www.splcenter.org/seeking-justice/case-docket/immigrant-defenders-law-center-v-wolf (last visited on Jan. 21, 2021) (listing four different organizations that have signed on as *amici* for the case).

75. *See* discussion *infra* Section III.A.

76. Stephen Manning, *Immigrant Defenders Law Center et al. v. Wolf: UPDATES*, IMMIGRANT L. DEF., https://innovationlawlab.org/cases/immigrant-defenders-law-center-et-al-v-wolf/ (last visited Dec. 9, 2023).

to dismiss and certified [the] class of 'All individuals subjected to MPP 1.0 prior to June 1, 2021, who remain outside the United States and whose cases are not currently active due to termination of proceedings or a final removal order.' "[77] As of December 2023, the case remains in the discovery phase.[78]

Second, *Mayorkas v. Innovation Law Lab*[79] challenged a variety of problems with the MPP, including whether (1) the reading of Section 235 of the INA serves as a lawful basis for the MPP, (2) the program is consistent with the United States' *non-refoulement* obligations, (3) its implementation violated certain requirements under the Administrative Procedure Act, and (4) the district court's preliminary injunction is overbroad.[80] The Supreme Court granted the petition for a writ of certiorari for *Innovation Law Lab v. Wolf* on October 19, 2020.[81] However, the Supreme Court determined in June 2021 that the case had become moot after the Biden Administration had announced the end of the MPP.[82] Though the MPP is no longer as active as it once was, hundreds of individuals have already experienced grave harm through the program[83] and thousands more remain at risk of such harm or have already lost the ability to seek redress.[84]

C. Non-Refoulement Obligations of the United States

At its core, *non-refoulement* is the agreement not to return refugees to countries where they may be subjected to persecution. The concept of *non-*

77. *Id.*

78. *Id.*

79. Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842 (2021) (Formerly Pekoske v. Innovation L. Lab, Innovation L. Lab v. Wolf, Innovation L. Lab v. McAleenan, and Innovation L. Lab v. Nielsen).

80. *SCOTUSblog on Innovation Law Lab v. Wolf*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/wolf-v-innovation-law-lab-2/ (Feb. 3, 2021).

81. Wolf v. Innovation L. Lab, No. 19-1212, 2020 WL 6121563 (2020).

82. Amy Howe, *Justices Dismiss Challenge to "Remain in Mexico" Policy*, SCOTUSBLOG (June 21, 2021, 8:52 PM), https://www.scotusblog.com/2021/06/justices-dismiss-challenge-to-remain-in-mexico-policy/.

83. Adriana Guadana-Huizar & Lauri Alvarez, *One Year of "Remain in Mexico" Impacts*, LATIN AM. WORKING GRP. (Dec. 31, 2019), https://www.lawg.org/updated-infographic-remain-in-mexico-impacts/; *A Year of Horrors*, HUM. RTS. FIRST (Jan. 2020), https://humanrightsfirst.org/library/a-year-of-horrors-the-trump-administrations-illegal-returns-of-asylum-seekers-to-danger-in-mexico/.

84. Camilo Montoya-Galvez & Angel Canales, *More Than 5,000 Asylum Seekers Have Been Returned Under 'Remain in Mexico' Policy*, CBS NEWS (May 13, 2019, 9:30 PM), https://www.cbsnews.com/news/remain-in-mexico-more-than-5000-asylum-seekers-have-been-returned-under-trump-policy/; Joel Rose, *Migrant Caregivers Separated from Children at Border, Sent Back to Mexico*, NPR (July 5, 2019, 5:16 AM), https://www.npr.org/2019/07/05/738860155/family-separations-under-remain-in-mexico-policy.

refoulement is foundational in international law.[85] Some assert that the principle has gained *jus cogens* interpretation,[86] meaning it is a norm "from which no derogation is permitted."[87] Others agree that the principle is foundational, but refuse to extend *jus cogens* interpretation, since the United Nations does permit *non-refoulement* exceptions when states reasonably believe that a refugee will commit an act of terror, for example.[88] The debate on *jus cogens* interpretation aside, the obligation to at least screen for risk of *refoulement* is still required by international law.[89] The United States and other signatories to United Nations refugee protocol agree not to return refugees and asylum seekers to countries where they are likely to be persecuted based on an immutable characteristic.[90] This is the principle of *non-refoulement*. When returned to Mexico, though, individuals in the MPP who are fleeing transnational actors may still face persecution on account of a protected ground, if those actors also operate in Mexico.[91] Moreover, their forced participation in the MPP may also establish their membership in

85. *See, e.g.*, Sir Elihu Lauterpacht & Daniel Bethlehem, *Scope and Content Principle* Non-Refoulement: *Opinion*, REFUGEE PROT. INT'L L.: UNHCR'S GLOB. CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 141 (June 2003), (expressing that there is "cogent authority" to "use treaties and treaty practice as a source of customary international law").

86. *See* Jean Allain, *Jus Cogens Nature Non-Refoulement*, 13 INT'L J. OF REFUGEE L. 533, 534 (2001) ("States may, individually or collectively, attempt to introduce policies which have the effect of violating the provisions of Article 33, yet if it can be demonstrated that the notion of *non-refoulement* has attained the normative value of *jus cogens*, then States are precluded from transgressing this norm in anyway [sic] whatsoever.").

87. INT'L LAW COMM'N, REP. ON THE WORK OF ITS SEVENTY-FIRST SESSION, U.N. Doc. A/74/10, ¶ 56 (2019), https://legal.un.org/ilc/reports/2019/english/a_74_10_advance.pdf.

88. Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law*, 62 WM. & MARY L. REV. 1067 (2021).

89. G.A. Res. 429 (V), Convention Relating to the Status of Refugees (Jul. 1951) (agreeing 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"); G.A. Res. 2198 (XXI), Protocol Relating to the Status of Stateless Persons (Dec. 16, 1966).

90. G.A. Res. 2198 (XXI), *supra* note 89.

91. *See* Matter of Acosta, 19 I. & N. Dec. 211, 233 (1985) (explaining that an "immutable characteristic" is one of the five defined classes that U.S. asylum law adopted from the 1951 United Nations Refugee Convention, where refugees were defined as individuals who hold a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion") (codified at 8 U.S.C. § 1101(a)(42)(A)); *see also* Guadana-Huizar & Alvarez, *supra* note 83; *Asylum Seekers Cling to Hope, Safety in Camp at US-Mexico Border,* AL JAZEERA (Oct. 16, 2019), https://www.aljazeera.com/news/2019/10/16/asylum-seekers-cling-to-hope-safety-in-camp-at-us-mexico-border; *see also* 8 U.S.C. § 1158(a)(2)(A) (1980) (codifying Art. 33, § 1 of the Economic and Social Council Res. 319 (XI) B. I. (Aug. 16, 1950)).

another particular social group for purposes of demonstrating eligibility for asylum.[92]

News reports demonstrate that DHS lacks a clear understanding of its obligations to adhere to the international law of *non-refoulement*.[93] Further, the United States relies heavily on the Mexican government to ensure the safety of the asylum seekers,[94] while simultaneously issuing severe travel warnings for certain border towns in Mexico,[95] on par with active war zones in Afghanistan[96] and Syria.[97] Senior DHS officials have varying responses to the "appalling conditions in Mexican border towns where asylum-seekers are waiting."[98] While collaboration among nations is not discouraged, the United States holds an independent obligation to avoid *refoulement.*[99]

Improper reliance on the Mexican government and a failure to consider whether transnational actors may continue to persecute certain asylum seekers in Mexico demonstrates the negligence of DHS officials conducting the *non-refoulement* interviews. For example, DHS has glibly referred to reports of "kidnapping and extortion and other violent crimes".[100] as mere "anecdotal

92. Matter of Acosta, 19 I. & N. Dec. at 233.

93. Guadana-Huizar & Alvarez, *supra* note 83; AL JAZEERA, *supra* note 91.

94. Ariel G. Ruiz Soto, *One Year After the U.S.-Mexico Agreement*, MIGRATION POL'Y INST. (June 2020), https://www.migrationpolicy.org/sites/default/files/publications/OneYearAfterUS-MexAgreement-EN-FINAL.pdf; Molly O'Toole, *Trump Administration Appears to Violate Law in Forcing Asylum Seekers back to Mexico, Officials Warn,* L.A. TIMES (Aug. 28, 2019, 12:12 PM), https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases (writing that Mark Morgan, acting head of CBP said "the U.S. didn't track what happened to migrants once they were returned to Mexico. 'That's up to Mexico.'"); John Burnett*, 'I Want to Be Sure My Son Is Safe': Asylum-Seekers Send Children Across Border Alone* (NPR broadcast Nov. 27, 2019, 3:41 PM), https://www.npr.org/2019/11/27/783360378/i-want-to-be-sure-my-son-is-safe-asylum-seekers-send-children-across-border-alon.

95. *E.g.*, *Mexico Travel Advisory,* U.S. DEP'T OF STATE (Sept. 8, 2020), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html (issuing highest warning, Level 4: Do Not Travel, to Tamaulipas).

96. *Afghanistan Travel Advisory,* U.S. DEP'T OF STATE (Aug. 24, 2020), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/afghanistan-advisory.html (issuing Level 4: Do Not Travel warning).

97. *Syria Travel Advisory*, U.S. DEP'T OF STATE (Aug. 6, 2020), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/syria-travel-advisory.html (issuing Level 4: Do Not Travel warning).

98. Burnett*, supra* note 94.

99. DREE K. COLLOPY, AILA'S ASYLUM PRIMER 4 (Am. Immigr. Laws. Ass'n, 8th ed. 2019) ("the principle of *non-refoulement* (Article 33) ha[s] been incorporated into U.S. domestic law").

100. Press Briefing by Acting CBP Commissioner, Mark Morgan, DEP'T OF HOMELAND SEC. (Nov. 14, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/press-briefing-acting-cbp-commissioner-mark-morgan-2/.

stuff."[101] A brief from a union representing several USCIS officials demonstrated a more sincere approach to the *non-refoulement* interviews, yet still believed that DHS may be negligent for its role in returning certain asylum seekers.[102]

Before the MPP, the asylum process very broadly looked like this: An individual arrives at the border, upon presentation or apprehension, CBP asks if the individual has a fear of return; if the individual expresses a fear, then they are referred to USCIS for a credible fear interview (CFI), during which an asylum officer will determine if there is a "significant possibility" that the individual could present a successful asylum case before an immigration judge.[103] If a "significant possibility" of persecution is found to exist, then removal proceedings are initiated, and the individual may be paroled into the United States according to the Directive.[104] Though removal proceedings serve as the formal mechanism to potentially remove individuals from the United States, the term is slightly misleading because the proceedings entitle an individual to a hearing before an immigration judge, which may result in a grant of status, permitting the individual to stay in the United States.[105] By contrast, an adverse CFI determination generally results in expedited removal proceedings, wherein an individual is not entitled to the benefits of the immigration court system.[106]

Under the MPP, there are two significant differences in the now-called *non-refoulement* interview. First, asylum seekers must affirmatively express a fear of return to Mexico.[107] That expression will not be prompted by CBP.[108] Second, the standard for assessing that fear of return is much higher. Instead of the "significant possibility"[109] of being able to make a case before an IJ, an asylum seeker will only be permitted to enter the United States if it is "more likely than not" or if there is a "clear probability" that they will be persecuted or tortured upon return.[110]

Congress intended for credible fear interviews to have a "low bar to help ensure the U.S. did not violate the law by returning people to harm."[111] In one of

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101. *Id.*

102. Brief of Amnesty International USA et al. as *Amici Curiae* in Support of Plaintiffs-Appellees at 18, Innovation L. Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) (No. 19-15716) ("[T]he MPP directs that individuals who, unprompted, express a fear of persecution or torture in Mexico be referred for an interview before an asylum officer—but the interview process also virtually guarantees a violation of the nonrefoulement obligation.").

103. ICE Directive 11002.1 ¶¶4.1, 6.1, ¶ 6.2.

104. ICE Directive 11002.1; *supra* note 12, ¶ 5.2.

105. *Immigration Benefits in EOIR Removal Proceedings*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings (May 4, 2023).

106. 8 U.S.C.A. § 1225(b)(1)(A)(i) (West 2009).

107. MPP Press Release 1, *supra* note 38.

108. MPP Press Release 1, *supra* note 38.

109. ICE Directive 11002.1(5.2); *supra* note 12 ¶ 5.2.

110. MPP Press Release 2, *supra* note 39.

111. O'Toole, *supra* note 94.

the briefs for *Innovation Law Lab*, the government contended that *non-refoulement* only applies to traditional removal of non-citizens, rather than the temporary holding in Mexico of those in the MPP awaiting future hearings in immigration court.[112] However, the purpose of *non-refoulement* is to avoid potential harm, so this distinction is likely a violation of DHS's own guidance for the MPP.[113] Putting the onus on individual asylum seekers to express affirmatively a fear of return to Mexico is troubling for many reasons, but specifically in this context, it only triggers *non-refoulement*-related procedures if the individual asks for them, which may indicate negligence on behalf of DHS officials.[114]

III. POTENTIAL REMEDIES: *BIVENS*, THE FEDERAL TORT CLAIMS ACT, AND THE ALIEN TORT STATUTE

Asylum seekers in the MPP may be able to seek redress through the Alien Tort Statute for harms incurred when they received a negligent, negative determination in their *non-refoulement* interview. The standard form of recourse against federal officers is described in *Bivens*, which created a cause of action for damages resulting from unconstitutional behavior "by a federal agent acting under color of his authority."[115] However, in the years since *Bivens*, the Supreme Court has repeatedly narrowed such claims, recognizing several factors "counseling hesitation"[116] to expand the doctrine, including a factor as amorphous as a lack of desirability in permitting a *Bivens* claim.[117] Most recently, the Supreme Court found that a cross-border shooting by a Customs and Border Protection (CBP) officer resulting in the death of a minor was insufficient to bring a *Bivens* suit, even though such a claim would have been permissible if the death had occurred on U.S. soil.[118] When the Supreme Court held that *Bivens* was not an appropriate remedy for constitutional violations by a CBP officer, it eliminated the only avenue of recourse for non-citizens to seek damages for such violations that resulted in harms incurred at the hands of federal officers and agencies. Given the Court's refusal to expand

112. Brief for Appellants at 32, Innovation L. Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) No. 19-15716, 2019 WL 2290420.

113. *See also* O'Toole, *supra* note 94.

114. U.S. Customs and Border Protection, U.S. Department of Homeland Security, "MPP Guiding Principles," January 28, 2019, 1, https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf.

115. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

116. *Id.* at 396.

117. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (explaining that federal courts tend to prefer the creation of causes of action to come from Congress, rather than the courts); *see also Bivens*, 403 U.S. at 429 (Black, J., dissenting).

118. Hernandez v. Mesa, 140 S. Ct. 735, 753, 756 (2020) (Ginsburg, J., dissenting).

the doctrine, it does not appear likely that a *Bivens* claim would be successful in the MPP context.

As a result, claimants must turn to the Westfall Act. The Westfall Act requires use of the Federal Tort Claims Act to recover for torts of government employees.[119] However, the FTCA applies only to torts that occur *inside* the United States.[120] As Justice Alito succinctly put it, "claims that would otherwise permit the recovery of damages are barred if the injury occurred abroad."[121] However, this note suggests that this bar on extraterritorial application of the FTCA does not completely close the door for asylum seekers harmed by the MPP.

There is an exception to the FTCA, which provides that "[t]he Westfall Act does not immunize a federal employee/official from a suit 'brought for violation of a statute . . . under which such action . . . is otherwise authorized.'"[122] The Alien Tort Statute may permit "such action,"[123] and it should because "'[w]ithout the possibility of civil liability, the unlikely prospect of discipline or criminal prosecution will not provide a meaningful deterrent to abuse at the border.'"[124] While the ATS has been viewed largely as a jurisdictional statute[125] (based in part on its inclusion with the Judiciary Act of 1789), the original intent speaks more broadly—"international law during the founding era was understood to place an affirmative obligation on the United States to redress certain violations of the law of nations."[126]

D. Problems (and Potential Solutions) with the Federal Tort Claims Act

The FTCA substitutes the United States as a defendant and waives sovereign immunity, permitting suits against the federal government to proceed.[127] The Act was designed to limit sovereign immunity, so individuals who were injured at the hands of employees working on behalf of the United States would have an option—that previously did not exist—to recover for their injuries.[128] Remember the Guatemalan family? At first blush, the Act seems like an authorization from the U.S.

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119. 28 U.S.C. § 2679.

120. *Hernandez*, 140 S. Ct. at 748 (referencing the Federal Employees Liability Reform and Tort Compensation Act of 1988).

121. *Id.*

122. Ali v. Rumsfeld, 649 F.3d 762, 775 (D.C. Cir. 2011) (quoting 28 U.S.C. § 2679(b)(2)(B)).

123. *Id.*

124. *Hernandez*, 140 S. Ct. at 760 (Ginsburg, J., dissenting) (quoting Brief for Former Officials of U.S. Customs and Border Protection Agency as *Amici Curiae* 4).

125. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 11 n.19 (2018).

126. *Id.* at 3 (quoting Jesner v. Arab Bank, 138 S. Ct. 1386, 1406 (2018)).

127. 28 U.S.C. § 2679(d)(1).

128. *See* Dalehite v. United States, 346 U.S. 15 (1953); Coulthurst v. United States, 214 F.3d 106 (2d Cir. 2000) (permitting negligence suit to proceed for prisoner who was injured when a weightlifting cable snapped and caused serious injury).

government for the family to recover for the tortious harms that DHS caused when it rendered a negative decision during their *non-refoulement* interview. However, there are two major procedural hurdles to overcome for the FTCA to support a lawsuit in this context.

First, the Act only permits claims for torts that occur within the United States,[129] which creates a loophole for federal agencies that do not act exclusively within the United States, like certain branches of the Department of Homeland Security.[130] Asylum seekers in the MPP are at risk of, and often suffer, harm in Mexico, which would preclude the use of the FTCA for "[a]ny claim arising in a foreign country."[131] Again, however, some pending litigation asserts the possibility that asylum seekers in the MPP are in DHS custody and their harm stems from DHS policy, which originated in Washington D.C.; therefore, a claim under the FTCA may be appropriate.[132] Another potential way to avoid the bar on extraterritorial application is to show that the harm occurs on U.S. soil at the *non-refoulement* interview—not while the asylum seekers wait in Mexico for their court hearings.

In sum, there are two potentially successful ways that claimants could sue under the FTCA: arguing that (1) those in the MPP are detained in Mexico and their claims stem from being in "custody" in a country where they are susceptible to harms; and (2) their claims arise when they are actually turned away at the border, rather than when they later experience a harm in Mexico.

With respect to the detention-in-Mexico argument, *amici* in a case led by Immigrant Defenders Law Center suggest that section 253.3(d) of Title 8 of the Code of Federal Regulations, which governs implementation of section 235(b)(2)(C) of the INA (the purported statutory basis for the MPP), classifies MPP applicants as detained.[133] The regulation states that "such alien shall be considered detained for a proceeding within the meaning of section 235(b) of the Act," and *amici* read that the "ordinary meaning of 'considered' in this context would be to *regard* or *deem*

129. *E.g.*, Smith v. United States, 507 U.S. 197 (1993) (finding that the FTCA is not applicable for a wrongful death suit brought by spouse of construction worker killed in Antarctica while working for the National Science Foundation).

130. *On a Typical Day in Fiscal Year 2019, CBP...*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/newsroom/stats/typical-day-fy2019 (Apr. 15, 2020).

131. 28 U.S.C. § 2680(k); *e.g.*, Michael Garcia Bochenek, *US: 'Remain in Mexico' Program Harming Children*, HUM. RTS. WATCH (Feb. 12, 2020, 8:00 AM), https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children# ("Parents said that while waiting in Mexico, they or their children were beaten, harassed, sexually assaulted, or abducted. Some said Mexican police had harassed or extorted money from them. Most said they were constantly fearful and easily identified as targets for violence.").

132. *See* Brief for Immigration Law Professors et. al. as *Amici Curiae* Supporting Plaintiffs' Motion for Preliminary Injunction, Immigrant Defenders Law Center v. Wolf, 2:20-CV-09893-JGB-SHK (C.D. Cal. Dec. 14, 2020).

133. *Id.* at 6:6–11.

those in MPP as detained, even while they are in Mexico."[134] The amicus brief explains the intersection of multiple INA provisions that effectively classify noncitizens as detained for the entirety of their removal proceedings.[135] But, critically for FTCA purposes, the brief defines "constructive custody" as a type of detention in which the detaining authority imposes some sort of restraint on personal liberty.[136] In the present case, DHS requires individuals in the MPP to "appear[] repeatedly at a specified port of entry at a specified time for hearings and other proceedings."[137] This presentation requirement effectively restrains their mobility in Mexico and creates the constructive custody that is considered detention under I.N.A. § 235(b)(2)(A) and 8 C.F.R. § 253.3(d)."[138] Under this analysis, a court could find that individuals in the MPP were harmed while they were in DHS custody, thereby permitting a claim under the FTCA to proceed. However, given the hesitation of courts to permit tort claims of torture victims in federal custody, this argument may not likely be successful.[139]

Another option for potential claimants is to move away from an in-custody argument and instead focus on DHS's negligence in offering insufficient *non-refoulement* interviews. Initially, this looks like a precluded claim under the Headquarters Doctrine, but this tort may be distinguishable. A claim under the Headquarters Doctrine generally "involve[s] allegations of negligent guidance in an office within the United States . . . of activities which take place within a foreign country,"[140] but these sorts of claims are unlikely to be successful after *Sosa*.[141] In *Sosa*, the Court refused to apply the Headquarters Doctrine because it would have permitted most tort claims stemming from harms outside the United States to be "repackaged" as claims "based on . . . the adoption of a negligent policy" within the United States, therefore "threaten[ing] to swallow the foreign country exception whole."[142] This note suggests that the MPP is distinguishable because claimants can argue that the tort did not occur on foreign soil, rather at the ports of entry in Texas and California where asylum seekers were turned away in violation of *non-refoulement* obligations under domestic and international law.[143]

Under this theory, the harm itself occurs not in Mexico, but at the ports of entry to the United States where DHS conducts potentially unconstitutional and

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134. *Id.* at 6:11–13.

135. *Id.* at 4:4–22.

136. *Id.* at 10:7–15.

137. Brief for Immigration Law Professors as *Amici Curiae* Supporting Plaintiffs' Motion for Preliminary Injunction, *supra* note 73, at 10:26–11:4.

138. *See* Brief for Immigration Law Professors et. al. *supra* note 132, at 10:26-11:4.

139. *E.g.*, Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011).

140. Sosa v. Alvarez-Machain, 542 U.S. 692, 701 (2004) (quoting Cominotto v. United States, 802 F.2d 1127, 1130 (9th Cir. 1986)).

141. *Id.* at 702–03.

142. *Id.*

143. Innovation L. Lab v. Wolf, 951 F.3d 1071, 1093; MPP FAQ's, *supra* note 47.

negligent *non-refoulement* interviews.[144] In other words, rather than the tort being an extraterritorial harm that could occur at any point after the interview, the harm is the *refoulement* when a DHS official negligently finds that the individual has not met the heightened "more likely than not" standard.[145] This theory could avoid the problem with the Headquarters Doctrine by distinguishing negligent policy that may remotely cause an injury from the more specific injury of *refoulement* that occurs after interviews at ports of entry. The subsequent harms suffered in Mexico could be classified as reasonably foreseeable consequences. Arguing that the foreign country exception does not apply could avoid problems with *Sosa*'s outright dismissal of claims that appear to fall under the Headquarters Doctrine.[146]

Another challenge with the FTCA is that the statute purportedly authorizing the MPP gives the Attorney General discretion to use this provision of the United States Code,[147] suggesting a potential application of the discretionary function exception to the FTCA.[148] However, in *Innovation Law Lab,* the Ninth Circuit found that "the MPP so clearly violates [Section 235(b)(2)(C)]," so the discretionary function may not even be an issue.[149] While claimants may be able to proceed with the FTCA, as mandated by the Westfall Act, if they are in custody or if their claims arise at a port of entry, they will likely be more successful arguing that their claims satisfy an exception to the Westfall Act.

E. History of the Alien Tort Statute

The Westfall Act provides an exception to the mandated use of the FTCA "for a violation of a statute . . . under which such action . . . is otherwise authorized."[150] The Alien Tort Statute may qualify as such an exception.[151] The legislative intent underlying the ATS aligns more closely with the creation of substantive rights, thereby permitting tort claims based on violations of international law, rather than as a strictly jurisdictional statute, as it has been used in the last two centuries. Enacted in 1789 as part of the Judiciary Act, the ATS conferred jurisdiction on

144. Innovation L. Lab, 951 F.3d at 1089; ASSESSMENT OF THE MIGRANT PROTECTION PROTOCOLS, *supra* note 1, at 3.

145. ASSESSMENT OF THE MIGRANT PROTECTION PROTOCOLS, *supra* note 1, at 5.

146. *Sosa*, 542 U.S. at 712 ("We therefore hold that the FTCA's foreign country exception bars all claims based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred.").

147. 8 U.S.C. § 1225(b)(2)(C) ("[T]he Attorney General *may* return the alien to that territory") (emphasis added).

148. 28 U.S.C. § 2680(a) (The FTCA will not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . .").

149. *Innovation L. Lab*, 951 F.3d at 989.

150. 28 U.S.C. § 2679(b)(2)(B).

151. 28 U.S.C. § 1350. The Westfall Act also has an exception for constitutional violations. *See* discussion *infra* p. 29; 28 U.S.C. § 2679(b)(2)(A).

federal courts, empowering them to hear noncitizens' tort claims.[152] The Act was intended to "avoid foreign entanglements"[153] by offering a remedy to noncitizens who might otherwise turn to foreign governments to redress violations of international law.[154] The ATS remained largely unused for its first two hundred years of existence.[155] However, in 1980, the United States Court of Appeals for the Second Circuit held in *Filartiga v. Pena-Irala*[156] that the ATS could be used to bring suit "over violations of international law *in light of evolving jurisprudence.*"[157] In other words, *Filartiga* created subject matter jurisdiction for torts committed in violation of evolving international law.[158]

After *Filartiga*, ATS litigation "explo[ded]."[159] That litigation can generally be separated into two categories: state-actor cases and private-actor cases.[160] State-actor cases involve government agencies, former state officials, and other government-affiliated actors as defendants, while private-actor cases involve non-governmental entities as defendants.[161] The state-actor cases are rare due to the Foreign Sovereign Immunities Act, [162] which limits the liability of foreign states, [163] and a desire to avoid potential foreign policy implications.[164] However, private-actor cases, specifically related to multinational corporations, are more common.[165]

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152. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789 3 (Inst. For Int'l Econ. ed., 2003).

153. Chinmayi Sharma, *Summary: Supreme Court Rules in Jesner v. Arab Bank*, LAWFARE (Apr. 27, 2018, 11:48 AM), https://www.lawfareblog.com/summary-supreme-court-rules-jesner-v-arab-bank.

154. *Id.*

155. *Id.*

156. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

157. HUFBAUER & MITROKOSTAS, *supra* note 152, at 4.

158. *Id.* at 4.

159. Stephen P. Mulligan, Cong. Rsch. Serv., R44947, The Alien Tort Statute (ATS): A Primer 1 (2018).

160. HUFBAUER & MITROKOSTAS, *supra* note 152, at 60–72.

161. HUFBAUER & MITROKOSTAS, *supra* note 152, at 59.

162. 28 U.S.C. § 1604.

163. *E.g.*, Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (dismissing claims against former President of Zimbabwe, Robert Mugabe, and other officials who could invoke sovereign or diplomatic immunity, but allowing the case to proceed against Zimbabwe's ruling political party, Zimbabwe African National Union – Patriotic Front "ZANU-PF"); Abrams v. Société Nationale des Chemins de Fer Français, 175 F. Supp. 2d 423, 425 (E.D.N.Y. 2001) (dismissing claims against the SNCF for its participation in the "deportation of Jews and others from their homes in France to various Nazi death camps during World War II" because plaintiffs failed to demonstrate that the court had subject matter jurisdiction under the FSIA).

164. *E.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (dismissing claims against the Palestinian Liberation Organization (PLO) because the case raised a political question and was nonjusticiable, among other reasons).

165. HUFBAUER & MITROKOSTAS, *supra* note 152, at 63–72.

Though *Filartiga* named a government actor as the defendant, the Second Circuit's ruling opened the door for plaintiffs wanting to bring substantive tort claims against private-actors.[166] It did not taken the Supreme Court long to narrow the permissible claims brought forth under the ATS.[167] In *Sosa v. Alvarez-Machain*, the leading case regarding claims against private actors, the Court developed a two-part part test that must be satisfied for such claims to succeed.[168] Since then, the Court has been hesitant to expand the scope of claims against private actors.[169] For example, in *Jesner*, plaintiffs used the ATS to seek damages from Arab Bank as a result of its ties to Hamas and alleged human rights violations.[170] The Supreme Court held that expansion of corporate liability under the ATS was improper based on the "language, purpose, and history"[171] of the statute.[172] A plurality applied the *Sosa* test, which also "counsel[ed] against"[173] expansion of corporate liability.[174] Since then, the Supreme Court has seemed unwilling to recognize a broad swath of ATS claims, likely due both to deference to the executive on matters of national security as well as an attempt to restrict what could easily turn into an explosive arena with abundant litigation.[175] But, instead of completely closing the door on ATS claims, the Court's related opinions have further defined applications of the *Sosa* test, suggesting that, for specific types of claims, the ATS may be more than just a jurisdictional statute.

F. The ATS as an Exception to the Westfall Act

To satisfy the Westfall exception, the ATS must be interpreted to authorize suit against the United States. The ATS reads, "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."[176] The ATS has mostly been used to try to sue corporations for torts occurring outside the United States,[177] but these cases have not been particularly successful for reasons like the claims did not adequately "touch and

166. HUFBAUER & MITROKOSTAS, *supra* note 152, at 4.

167. *See* discussion *infra* Section III.C.

168. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *see* discussion *infra* Section III.C.

169. *E.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

170. *Jesner*, 138 S. Ct. at 1394.

171. Sharma, *supra* note 153.

172. *Jesner*, 138 S. Ct. at 1394.

173. Sharma, *supra* note 153.

174. *Jesner*, 138 S. Ct. at 1405.

175. Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004) ("[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.").

176. 28 U.S.C. § 1350.

177. *E.g.*, Kiobel v Royal Dutch Petro. Co., 569 U.S. 108, 111 (2013).

concern" the United States[178] or that the alleged torts were generic in nature.[179] Though recently, Hatice Cengiz, the fiancé of former journalist, Jamal Khashoggi, filed suit in the District Court in Washington D.C., using the ATS to sue a host of foreign defendants for the murder of Mr. Khashoggi.[180] The ATS may be more successful in this context of naming human defendants and listing specific harms. As such, individuals whom DHS negligently returned to Mexico may use the ATS to sue the United States for harms incurred as a result of their *refoulement*.

The ATS may be read as a grant of jurisdiction, but the Supreme Court has also permitted some substantive claims, therefore triggering an exception to the Westfall Act.[181] Hesitant to open the door completely, though, to all potential liability arising from tortious conduct by non-citizens, the Court offered some guideposts in *Sosa*, the leading case on the issue.[182]

In order to bring a successful ATS claim, the plaintiff must show that (1) the violation was "specific, universal, and obligatory" and (2) permitting the case to proceed is "an 'appropriate' use of judicial discretion."[183] In *Sosa*, Alvarez brought suit under several theories, including the ATS, after he was kidnapped by Sosa and other Drug Enforcement Agency operatives.[184] With respect to the ATS claim, Justice Souter, writing for the majority, went to great lengths to unpack the Framers' intent for the statute.[185] He recognized a variety of factors supporting a purely jurisdictional reading of the ATS, but ultimately permitted an exception, explaining: "[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." [186] In so doing, the Supreme Court suggested that the ATS may be an appropriate vehicle for claims that arise from events or procedures that the United Nations has plainly specified and prohibited.[187] Then,

178. *Id.* at 124–25.

179. *E.g.*, Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d Cir. 2007).

180. Complaint at ¶¶ 36, 38, Cengiz v. Bin Salman, Case No. 1:20-cv-03009, 2020 WL 6152108 (D.C. Cir. 2020), The Federal District Court for the District of Columbia dismissed the case in December 2022, finding that defendant Mohammed Bin Salman was entitled to head of state immunity. Cengiz v. Bin Salman, Case No. 1:20-cv-03009-JDB 2022 WL 17475400 (D.C. Cir. 2022), at 13. The court seemed to imply that the plaintiff's claims may have been successful if head of state immunity did not apply and the case could have been pursued but offered no substantive analysis of the claims pertaining to the ATS. *Id.*

181. 28 U.S.C. § 2679(b)(2)(B); Sosa v. Alverez-Machain, 542 U.S. 692, 719–20 (2004).

182. *Sosa*, 542 U.S. at 719–20.

183. MULLIGAN, *supra* note 125, at 11–12 (quoting *Sosa*, 542 U.S. at 724).

184. *Sosa*, 542 U.S. at 697–99.

185. *Id.* at 712–25.

186. *Id.* at 725.

187. *Id.*

Justice Souter explained the second requirement, which ultimately doomed Alvarez's ATS claim.[188]

The second prong of the test is better understood in the context of *Erie*, which marked a turning point for federal courts and the creation of federal common law.[189] Though ATS claims do not rest on state law as did the claims in *Erie*,[190] the guiding and relevant principle is "to look for legislative guidance before exercising innovative authority over substantive law."[191] It is this decision that influenced the Court's reservation to expand its judicial discretion.[192] However, the *Erie* Doctrine does not defeat all claims that rely on judicial discretion.[193] In subsequent ATS suits, the Court continued to apply and refine the *Sosa* test without abandoning completely the idea that the statute could permit claims for violations of international law.[194]

While the Supreme Court has not permitted many ATS claims in the years since *Sosa*, and there is current disagreement on the bench about the viability of the case, that framework is still the leading authority on the matter.[195] For example, in *Jesner*, the justices sparred over the *Sosa* test and the literal reading of the ATS.[196] In his concurrence, Justice Gorsuch suggested that the Court wrongly decided *Sosa* because the ATS does not account for the modern law of nations.[197] Instead, he argued the statute limits claims to the only three areas of international law that were defined in the founding era—"violations of safe conduct, assaults against ambassadors [and] piracy . . . ."[198] Textualists may agree with Justices Gorsuch, Alito, and Scalia, but Justice Sotomayor disagreed and followed Justice Souter's explanation in *Sosa* instead.[199] She referenced congressional intent in 1789 when the law was passed, arguing that if lawmakers truly intended to limit the types of claims arising under international law, then Congress would have written those three categories into the statute itself.[200] This note suggests that the statute more likely permits "causes of action arising under the 'law of nations' and 'treaties of

188. *Id.* at 725–38.

189. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

190. *Id.* at 70.

191. *Sosa*, 542 U.S. at 695.

192. *Id.* at 726.

193. *Id.* at 729 ("[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping . . . .").

194. *E.g.*, Jesner v. Arab Bank, 138 S. Ct. 1386, 1398 (2018).

195. *Id.* at 1409–10 (Alito, J., concurring) ("For the reasons articulated by Justice Scalia in *Sosa* and by Justice Gorsuch today, I am not certain that *Sosa* was correctly decided.").

196. *Id.* at 1409 (Alito, J., concurring).

197. *Id.* at 1412–13 (Gorsuch, J., concurring).

198. *Id.* at 1427 (Sotomayor, J., dissenting).

199. *Id.* at 1419 (Sotomayor, J., dissenting).

200. *Jesner,* 138 S. Ct. at 1427 (Sotomayor, J., dissenting).

the United States,'"[201] both of which are more malleable than the textualist approach, yet limited by the Court's holding in *Sosa*.[202]

Though not likely to be at issue in cases that involve federal agencies, like Sosa and the Drug Enforcement Agency and potential MPP claimants and DHS, for example, plaintiffs using the ATS must also show that the violation of international law "touch[es] and concern[s]" the United States.[203] In *Kiobel*, the Court dismissed an ATS claim brought by former Nigerian citizens against Dutch, British, and Nigerian corporations that aided and abetted violations of international law in Nigeria because of the presumption that domestic laws do not apply extraterritorially.[204] However, the Court left open the potential for extraterritorial application if the claims "touch and concern" the United States.[205] Though there is a strong argument that the events giving rise to these claim are not extraterritorial at all, practitioners should include reference to *Kiobel* when bringing suit under the ATS.[206]

It is this reading of the ATS—that the statute permits liability for violations of international law that "touch and concern" the United States—that qualifies the statute as an exception to the Westfall Act.[207] When claims satisfy the *Sosa* test, then the ATS is more than a jurisdictional statute because it allows for the creation of causes of action based on violations of international law.[208]

Additionally, the Westfall Act also permits exceptions for claims arising out of constitutional violations.[209] Potential claimants may be able to use this exception as well. For example, Innovation Law Lab alleged notice-and-comment violations that would subsequently implicate procedural due process violations for asylum seekers in the MPP.[210] In its order granting a preliminary injunction, the district court held that plaintiffs were likely to succeed in showing that DHS violated Section 553(b) of the Administrative Procedure Act.[211] However, the Ninth Circuit failed to reach this question[212] and the case was deemed moot by the Supreme Court.[213] Potential claimants' deprivation does appear to satisfy the *Mathews* test, and as such, may be enough to satisfy this exception to the Westfall Act.[214]

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201. Sharma, *supra* note 153.

202. *Sosa*, 542 U.S. at 729.

203. *Kiobel*, 569 U.S. at 124–25.

204. *Id.* at 111–12.

205. *Id.* at 125.

206. *Id.*; *see also* discussion *supra* Section III.A.

207. *Kiobel*, 569 U.S. at 124–25; *Sosa*, 542 U.S. at 724.

208. *Sosa*, 542 U.S. at 724.

209. 28 U.S.C. § 2679(b)(2)(A).

210. Innovation L. Lab v. Nielsen, 366 F. Supp. 3d 1110, 1128 (N.D. Cal. 2019).

211. *Id.*

212. Innovation L. Lab v. Wolf, 951 F.3d 1073, 1082 (9th Cir. 2020).

213. Howe, *supra* note 82.

214. 28 U.S.C. § 2679(b)(2)(A); Mathews v. Eldridge, 424 U.S. 319 (1976).

Given the uncertainty with constitutional claims, though, claimants may be more successful following the statutory exception provided by the ATS.[215]

G. Illustrative Example: *Ali v. Rumsfeld*

Ali v. Rumsfeld is a Court of Appeals for the D.C. Circuit case that illustrates how this ATS/*Sosa* framework applies in federal court.[216] In *Ali*, Afghan and Iraqi citizens were tortured in American military facilities abroad.[217] The majority held that their ATS claims were not viable under the *Sosa* framework because the ATS was purely jurisdictional and creating a cause of action, thereby treating the ATS as a substantive statute, would interfere with U.S. foreign relations.[218] However, there is some room to argue that this case was wrongly decided, since the majority did not apply *Sosa's* two-pronged test, and instead focused on its own interpretation of the ATS.[219]

The dissent in *Ali*, authored by Judge Edwards, outlined the most reasonable approach for noncitizens to bring a tort claim against the federal government.[220] After *Hernandez v. Mesa*, this approach appears to be the only viable option for redress for noncitizens.[221] Judge Edwards argued that "the ATS incorporates the law of nations"[222] because without that reading, the "obligation to recognize . . . violations of the law of nations" by U.S. officials would disappear.[223] University of California Hastings Professor Dodge foresaw this likely outcome, writing several years before the *Ali* decision that, under the originalist's reading, substantive ATS claims would only be successful if international law was "frozen in 1789,"[224] thereby eliminating the opportunity for "contemporary human rights" litigation.[225]

In his detailed history of the ATS in *Sosa*, Justice Souter explained that it is highly unlikely that the First Congress "pass[ed] the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress . . . that might, someday, authorize the creation of causes of action."[226] This explanation fits within the historical context of tort law. As Professor Dodge explained, common law in 1789 provided the basis to sue for any kind of tort—not just those in violation of

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215. 28 U.S.C. § 2679(b)(2)(B).

216. *Ali*, 649 F.3d at 762.

217. *Id.* at 765–66.

218. *Id.* at 774–76.

219. *Id.* at 778.

220. *Ali*, 649 F.3d at 778–93 (Edwards, J., dissenting).

221. *See generally* Hernandez v. Mesa, 140 S. Ct. 735, 749–50 (2020).

222. *Ali*, 649 F.3d at 788 (Edwards, J., dissenting).

223. *Id.*

224. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 223 (1996).

225. *Id.* at 224.

226. *Sosa*, 542 U.S. at 719.

international law.[227] It was only later that Congress decided to require "an express cause of action."[228] Judge Edwards reiterated this important distinction, emphasizing that Congress initially understood the ATS to incorporate violations of international law "without further statutory authority."[229]

Thus, by treating the ATS as purely jurisdictional, where, then, could aggrieved individuals turn? Judge Edwards cautioned that if Congress were to repeal the ATS today, then there would be no cause of action for even the most egregious harms such as torture, genocide, and other internationally recognized crimes.[230] However, as Justice Souter recommended, the ATS is not completely left behind, since the *Sosa* test acts as a quasi-subject-matter-jurisdiction check while permitting both incorporation of and jurisdiction for certain tort claims brought by non-citizens.[231]

After recognizing these scenarios, Judge Edwards's reading of the ATS as a substantive, incorporation statute makes more sense. Moreover, with respect to the facts of *Ali,* he also noted that disallowing the ATS to fit within the Westfall exception created a disturbing hypothetical—that a foreign national tortured by a foreign official in a foreign country could bring an ATS claim in federal court (so long as the claim "touch[ed] and concern[ed]"[232] the United States), but not if a United States official conducted the torture.[233] With that hypothetical in mind, Judge Edwards argued that because the alleged violation in *Ali* satisfied the *Sosa* test, the ATS should be used as a permissible exception to the Westfall Act.[234] This note recommends that advocates for noncitizens should consider following Judge Edwards's approach—that the ATS, through the *Sosa* test, is a substantive statute by its incorporation of certain international laws, thereby creating domestic causes of action. *Ali* dealt with torture as a violation of international law,[235] and asylum seekers in the MPP may assert a violation of the *non-refoulement* principle, which holds similar standing in the realm of international law.[236]

IV. CERTAIN ASYLUM SEEKERS MAY HAVE A CAUSE OF ACTION AGAINST DEPARTMENT OF HOMELAND SECURITY OFFICIALS

Assuming that the Alien Tort Statute falls under the exception of the Westfall Act, it would be permissible for asylum seekers who suffered reasonably foreseeable harm as a negative determination in their MPP *non-refoulement*

227. Dodge, *supra* note 224, at 237–38.

228. *Id.* at 237.

229. *Sosa*, 542 U.S. at 729.

230. *Ali*, 649 F.3d at 791 (Edwards, J., dissenting).

231. *See Sosa*, 542 U.S. at 719.

232. *Kiobel*, 569 U.S. at 124–25.

233. *Ali*, 649 F.3d at 789 (Edwards, J., dissenting) (citing, *e.g.*, Filartiga v. Pena–Irala, 630 F.2d 876 (2d Cir. 1980)).

234. *Id.* at 790.

235. *Id.* at 791.

236. *Id.* at 765–67 (majority opinion).

interview to file suit against United States officials. The involvement of DHS officials in instituting the MPP may be considered a violation of the international principle of *non-refoulement*. Given the widespread adoption of *non-refoulement* in international law, the violation will likely pass the first prong of the *Sosa* test as a "specific, universal, and obligatory" violation.[237] The second prong of the test will be more challenging, as the Supreme Court has been reluctant to expand common law rights.[238] However, given the stray from domestic asylum policy, federal courts may find claims stemming from the MPP to be permissible under the second prong of the *Sosa* test.[239] Therefore, if the plaintiffs can satisfy this test, then they can establish the violation as a substantive issue and use the ATS as the statutory vehicle to bypass the Westfall Act.

The harms experienced by certain asylum seekers in the MPP are significant, reasonably foreseeable, and preventable, had the United States adhered to *non-refoulement* principles. As a result, those asylum seekers may bring a tort claim against U.S. officials for their role in negligently implementing the MPP. At a textual level, the ATS requires "(1) a civil action, (2) by an alien, (3) for a tort, (4) committed in violation of international law."[240] However, subsequent case law and scholarly discussion about the ATS essentially merge the tort and violation of international law elements.[241] Put another way, the violation of international law is the tort itself. For example, torts brought under the ATS have included torture,[242] piracy,[243] genocide, war crimes, crimes against humanity,[244] and arbitrary arrest and detention,[245] all of which are considered to be prohibited by the law of nations.[246]

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237. *See* discussion *supra* Sections II.C., III.C.

238. *E.g.*, *Sosa*, 542 U.S. at 727 (2004); *Kiobel*, 569 U.S. at 117.

239. 8 U.S.C. § 1101(a)(42)(A) (2014).

240. MULLIGAN, *supra* note 125, at 1.

241. *E.g.*, MULLIGAN, *supra* note 125, at 1–2 n.10 (citing Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008); ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3661.1 (4th ed. 2009)).

242. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

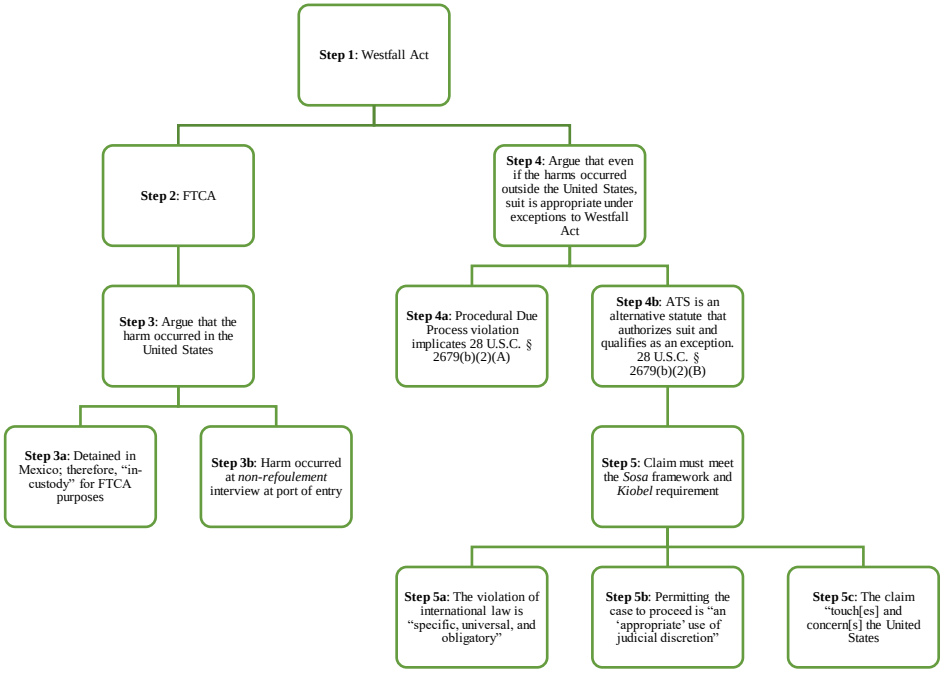
243. Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795).

244. Kadic v. Karadzic, 70 F.3d 232, 236–37 (2d Cir. 1995) ("[A]llege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war").

245. *Kiobel*, 569 U.S. at 114 (allowing ATS claims based on certain violations of international law to proceed, but ultimately finding that the presumption against extraterritoriality applies to ATS claims brought by foreign nationals against foreign nationals for crimes that occurred in a foreign country (the so-called foreign-cubed suits)); *see also* MULLIGAN, *supra* note 125, at 14 n.132; William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT'L & COMPAR. L. REV. 351, 351–52 nn.2–13 (2001).

246. Dodge, *supra* note 224, at 354 ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.") (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987)) (internal quotation marks omitted).

However, courts have been cautious to find liability in all of these cases (though some were successful)[247] and for all violations of international law, hence the need for the *Sosa* framework.[248] In this case, potential claimants should classify the tortious conduct as *refoulement*. Those suits will stem from harms that occurred when a DHS official who conducted a *non-refoulement* interview reasonably should have known that the basis of the asylum seeker's claim would continue to be a threat in Mexico. Not all asylum seekers in the MPP will be able to show *refoulement*, but for plaintiffs who meet that initial threshold, their argument for recovery would follow this framework:



Successful plaintiffs must be able to show that (1) the DHS official who conducted their *non-refoulement* interview reasonably should have known that the basis of the asylum seeker's claim would continue to be a threat in Mexico, (2) *non-refoulement* is a well-established pillar in international law from which countries may not stray, (3) it is "appropriate" for courts to recognize these claims,[249] and (4) these claims "touch and concern" the United States.[250] Because they must be determined on a case-by-case basis, this first requirement narrows the applicable

247. *Kadic*, 70 F.3d at 236; *Filartiga*, 630 F.2d at 890.

248. *E.g.*, *Kiobel*, 569 U.S. at 114; *see also*, discussion of *Sosa* framework *supra* Section III.C.

249. MULLIGAN, *supra* note 125, at 11 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. at 724 (2004)).

250. *Kiobel*, 569 U.S. at 124–25.

pool of claimants from those subject to the MPP generally to those who DHS officials unreasonably found not to have met the "more likely than not" standard in the *non-refoulement* interviews. The second can be established by reference to customary international law, multinational treaties, and various international instruments.[251] To meet the third requirement, advocates should rely on the fourth—specifically, how closely these claims do in fact "touch and concern" the United States—as well as demonstrating why these claims do not implicate national security concerns.[252]

The example of the Guatemalan family may be helpful to demonstrate the case-by-case analysis required for determining *non-refoulement* violations. Consider two families seeking asylum via the MPP—one has a potential asylum claim based on a fear of harm from a Central American government and the Guatemalan family has a potential asylum claim based upon threats from a criminal organization that operates in both Guatemala and Mexico. In the first case, subsequent harms experienced while in the MPP are not reasonably foreseeable because the individual left the country whose government posed a threat, but subsequent harms experienced by the Guatemalan family whose claims are based on the behavior of transnational actors did not cease to exist when they crossed the border into Mexico, and as such should have been reasonably foreseeable during the *non-refoulement* interview.[253]

After determining whether an asylum seeker was negligently returned to Mexico where she may be subject to further harm from a transnational actor, the next step is to satisfy the *Sosa* requirement—that *refoulement* as a result of mandatory enrollment in the MPP is a "specific, universal, and obligatory" violation of international law.[254] This is likely, given not only the widespread, international adoption of the principle,[255] but also the domestic incorporation of the principle as the founding basis for United States asylum policy.[256] Not all United Nations treaties are self-executing or adopted domestically.[257] The United States has been intentionally specific with respect to treaties it wishes to adopt and provisions it wishes to self-impose, either via congressional adoption or a policy position "that

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251. *See, e.g.*, Complaint at ¶ 167, Cengiz v. Bin Salman, Case No. 1:20-cv-03009, 2020 WL 6152108 (D.C. Cir. 2020).

252. *Kiobel*, 569 U.S. at 124–25; *Sosa*, 542 U.S. at 727–28.

253. This reasonable foreseeability analysis may be expanded, given reports of criminal actors and organizations specifically targeting members of the MPP, regardless of their national origin. *E.g.*, Guadana-Huizar & Alvarez, *supra* note 83. However, for the purpose of this note, the focus is on reasonably foreseeable harms at the time of the *non-refoulement* interview.

254. *Sosa*, 542 U.S. at 732.

255. UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, (2015), https://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

256. 8 U.S.C. § 1101(a)(42)(A).

257. COLLOPY, *supra* note 99, at 2.

no legislation is necessary to comply with its obligations under certain human rights-related treaties."[258] It is this care to adopt certain provisions that emphasize the "specific" and "obligatory" nature of *non-refoulement* as a bedrock principle of U.S. asylum law.[259] By incorporating those principles into its own Code, the United States added another safeguard to ensure that they were followed.[260] The United States is a party to many treaties, but not all hold this same force of law.[261]

Further, this requirement should be satisfied given the prevalence and authority of the United Nations.[262] The historical development of the agency of the United Nations High Commissioner for Refugees (UNHCR) is telling.[263] Initially created after World War II, member states intended to disband UNHCR after three years.[264] However, as various conflicts continued to produce massive amounts of refugees, member states "reiterate[ed] the importance of the legal foundation that UNHCR had created for [refugees'] protection."[265] The United States agreed to be bound by the updated Protocol in 1968 and has continued its support since then.[266] By incorporating reference both to U.S. asylum law and to establishing principles defined by the United Nations, claimants should be able to show that the implementation of the MPP is a "specific, universal, and obligatory" violation of *non-refoulement*.[267] Lastly, though the Ninth Circuit and the Supreme Court allowed the program to continue until a decision on the merits can be reached,[268] the Ninth Circuit believed it violated *non-refoulement* obligations and caused irreversible harm.[269]

Third, advocates will need to argue that it is "appropriate" for the court to permit an ATS claim to proceed.[270] This is naturally more challenging than the other

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258. *Id.* at 3.

259. *Sosa*, 542 U.S. at 732; 8 U.S.C. § 1101(a)(42)(A).

260. *E.g.*, 8 U.S.C. § 1101(a)(42)(A).

261. COLLOPY, *supra* note 99, at 2–3 (explaining that, with respect to treaties onto which the United States has signed but not ratified, the United States will "refrain from acts that would defeat the object and purpose of the treaty").

262. *Sosa*, 542 U.S. at 732.

263. *See, e.g.*, *History of UNHCR,* UNHCR, https://www.unhcr.org/en-us/history-of-unhcr.html (last visited on Dec. 13, 2020).

264. COLLOPY, *supra* note 99, at 4.

265. *Id.*

266. *Id.*

267. *Sosa*, 542 U.S. at 731 (*In re* Est. of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

268. Innovation L. Lab, 140 S. Ct. at 1564; Innovation L. Lab, 951 F.3d at 991. DHS also suspended new enrollments in the MPP, effective January 20, 2021. DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program, DEP'T OF HOMELAND SEC. (Jan. 20, 2021), https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program.

269. *Innovation L. Lab*, 951 F. 3d at 989.

270. *Sosa*, 542 U.S. at 724.

requirements because it is largely discretionary but may be successful for a few reasons. First, this potential case will likely not have a significant impact on foreign relations, as was the concern in *Ali.*[271] There are reports that Mexico did not encourage the MPP, but rather was initially strongarmed into accepting the agreement, indicating that it may support an end to the Protocols.[272] Second, while the Executive enjoys broad discretion on foreign policy matters,[273] Congress has passed specific legislation on asylum policy.[274] The problems with the MPP stem more directly from statutory interpretation as opposed to a discretionary executive choice where the judiciary may be more deferential.[275] Some judges have called ATS claims nonjusticiable for political question reasons[276] and Supreme Court justices have alluded to this as well in their deference to the Executive in matters of foreign policy.[277] However, where statutory interpretation is the basis of the claim, a court may be less trepidatious.

The last reason for why it is "appropriate"[278] for courts to exercise positively their discretion is best understood in conjunction with the fourth and final requirement to bring suit—that claims "touch and concern" the United States.[279] Potential cases have a benefit over prior ATS litigation in that the claims more closely "touch and concern" the United States than previous cases.[280] Courts have a strong interest in reviewing agency policy, specifically pertaining to alleged violations of international law. Moreover, unlike *Kiobel*, for example, a "foreign-cubed" case involving non-citizen plaintiffs and foreign, corporate defendants as well as claims based on events that occurred outside the United States, therefore not adequately "touch[ing] and concern[ing]" the United States, plaintiffs here have significantly closer ties to the United States.[281] The potential defendants are

271. *Ali*, 649 F.3d at 774-76.

272. Ruiz Soto, *supra* note 94, at 1 ("To avert the imposition of tariffs on Mexican goods threatened by U.S. President Donald Trump, the administration of Andrés Manuel López Obrador . . . accepted the expansion of the Migrant Protection Protocols (MPP, also known as Remain in Mexico) along the entirety of the U.S.-Mexico border . . .").

273. *E.g.*, U.S. CONST. art. II, § 2.

274. *E.g.*, 8 U.S.C. § 1101(a)(42)(A).

275. Innovation L. Lab v. Wolf, 951 F.3d 1073, 1079 (9th Cir. 2020).

276. *E.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 822 (D.C. Cir. 1984) (Robb, J., concurring).

277. *E.g.*, *Sosa*, 542 U.S. at 727–28 ("[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences. . . .").

278. *Sosa*, 542 U.S. at 730.

279. *Kiobel*, 569 U.S. at 124–25.

280. *E.g.*, *id.*; *see also* MULLIGAN, *supra* note 125125, at 14 n.32; Dodge, *supra* note 224, at 351–52 & nn.2–13.

281. *E.g.*, *Kiobel*, 569 U.S. at 113–14, 124–25; *see also* MULLIGAN, *supra* note 125, at 14 n.32; Dodge, *supra* note 224, at 351–52 & nn.2–13.

individuals and entities residing and operating within and on behalf the United States, the events giving rise to the plaintiffs' claims occurred in the United States, and, unlike several classes of noncitizens, these plaintiffs are entitled to certain benefits of the United States Constitution.[282] In other words, the only similarity to *Kiobel* is that the plaintiffs in both cases are non-citizens; otherwise, the events and parties are distinguishable because the potential case here closely involves the United States.[283] Further, the DHS policy originated in the United States, the *non-refoulement* interviews occur at ports of entry, and asylum seekers, though waiting in Mexico, ultimately get to cross the border for their hearings with American immigration courts.[284] Considered together, the fact that these claims so closely connect the plaintiffs to the United States and DHS agency policy counsel for a finding both that it is "appropriate" for courts to exercise their discretion in these cases and that plaintiffs clear the "touch and concern" hurdle from *Kiobel*.[285]

V. CONCLUSION

Immigration policy is anything but simple. The events giving rise to massive flows of people fleeing harm are caused by a multitude of factors.[286] The United States has tried in some cases to tide the flow by addressing the root causes.[287] However, those efforts have not often been successful.[288] Instead, the United States adopted domestic and international provisions for assisting those fleeing harm.[289] That system is far from perfect, and this note does not attempt to reform those processes. Rather, it focuses on the United States' most basic obligation—to allow refugees an opportunity to present their case before an immigration judge, who may find that they are in fact persecuted on account of a protected ground. By instituting a policy that interferes with that minimal threshold, DHS violated the international and domestic law of *non-refoulement*.

This policy further harmed the Guatemalan family who had fled to the United States in search of safety. They and many others have asylum claims based on the behavior of transnational actors operating in both their home countries and in

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282. *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d at 1128; Doe v. McAleenan, 415 F. Supp. 3d 971, 974–75 (S.D. Cal. 2019); ASSESSMENT OF THE MIGRANT PROTECTION PROTOCOLS (MPP)*, supra* note 1; *see also* STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY (Saul Levmore, et al. eds., 7th ed. 2019) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.") (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

283. *Kiobel*, 569 U.S. at 124–25.

284. MPP Press Release 2, *supra* note 39.

285. *Kiobel,* 569 U.S. at 124–25; MULLIGAN, *supra* note 125, at 11 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)); O'Toole, *supra* note 94; Ruiz Soto, *supra* note 94.

286. *See, e.g.*, *supra* notes 3–6, 17, 42–43, 46, 51, 83–84.

287. Ruiz Soto, *supra* note 94, at 1.

288. *Id*. at 16.

289. *See, e.g.*, 8 U.S.C. § 1101(a)(42)(A).

Mexico. A reasonable DHS official would have recognized this claim as an indication that Mexico is not a safe place for these asylum seekers. And, if Mexico is not a safe place for these asylum seekers, then forcing them to stay there is a violation of the United States' obligations under the international law of *non-refoulement*. They may bring a tort claim against DHS officials through the Alien Tort Statute to recover for the injuries caused as a result of a negligent denial in their *non-refoulement* interview.

The FTCA is not the required vehicle for these suits (though it may be an acceptable option to seek redress), since the Westfall Act provides an exception for statutes that otherwise authorize suit. The Alien Tort Statute is a permissible exception. It can be argued that this statute is not purely jurisdictional and incorporates international law when the plaintiff can show that the violation of international law is "specific, universal, and obligatory"[290] and that the suit is an "appropriate" use of judicial discretion.[291] Further, the ATS applies extraterritorially, if necessary in this context, because the MPP "touch[es] and concern[s]" the United States.[292] By meeting the *Sosa* and *Kiobel* requirements for incorporation and extraterritorial application, respectively, plaintiffs may be successful in their tort claim arising from harms caused by former DHS officials and their implementation of the Migrant Protection Protocols.

290. *Sosa*, 542 U.S. at 732 (quoting *In re* Est. of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

291. Id. at 738.

292. *Kiobel*, 569 U.S. at 124–25.