No. 19-673

In The
Supreme Court of the United States

MELIDA TERESA LUNA-GARCIA,

Petitioner,

v.

WILLIAM P. BARR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* CATHOLIC LEGAL IMMIGRATION NETWORK, INC., JUSTICE ACTION CENTER, AND LAS AMERICAS IMMIGRANT ADVOCACY CENTER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Catholic Legal Immigration Network, Inc. (CLINIC) is America's largest network of nonprofit immigration programs, with approximately 370 affiliates in 49 states and the District of Columbia that collectively serve hundreds of thousands of low-income immigrants each year. CLINIC's *Estamos Unidos Asylum Project* educates asylum seekers in Ciudad Juárez, Mexico about the United States asylum process. CLINIC has encountered scores of immigration hearing notices sent to migrant shelters in Mexico relating to asylum seekers who have never resided at the shelter. CLINIC has a substantial interest in the Court's resolution of this case because the Fifth Circuit's judgment in this case encourages the Department of Homeland Security to adopt notice practices that are not reasonably calculated to provide actual notice. This unreasonable calculation is detrimental to the asylum seekers forced to remain in Mexico and served by the *Estamos Unidos Asylum Project*.

The Justice Action Center (JAC) is a nonprofit organization dedicated to advancing the civil and human rights of immigrants in the United States through a combination of impact litigation, communications, and digital strategies. It provides support to select partner nonprofit organizations that have immigrant members or that provide direct legal services to immigrant

[1] The parties have consented in writing to the participation of *amici*. No party in this case authored this brief in whole or in part, or made any monetary contribution to its preparation and submission. The parties received timely notice of this filing.

communities. As an organization working on behalf of immigrant communities, JAC has a strong interest in protecting constitutional and statutory rights for asylum seekers. Moreover, having seen the devastation that *in absentia* removals have already caused to asylum seekers, including families separated and individuals subject to persecution and violence, JAC has an acute interest in the due process questions presented in Ms. Luna-Garcia's case. JAC therefore respectfully submits this brief to urge the Court to grant Ms. Luna-Garcia's certiorari petition.

Las Americas Immigrant Advocacy Center (Las Americas) is a nonprofit organization based in El Paso, Texas, that serves immigrants and refugees in Ciudad Juarez, Mexico, West Texas, and New Mexico. The mission of Las Americas is to provide free and low-cost legal services to low-income immigrants, including refugees and asylum seekers, families seeking reunification, and victims of crime. To achieve its mission, Las Americas manages several programs including a Detained Deportation Defense Program and a Non-Detained Deportation Defense Program that represents clients and provides pro se assistance in immigration court proceedings, including clients who are awaiting their immigration court proceedings in Mexico pursuant to the Migrant Protection Protocols (MPP). Las Americas is one of a very few nonprofit legal service providers that assist the more than 16,000 asylum seekers in Ciudad Juárez, Mexico.

SUMMARY OF ARGUMENT

Amici submit this brief to ensure that the Court has before it two critical views as it considers whether to grant Melida Teresa Luna-Garcia's certiorari petition. First, *amici* write to describe why the United States' international law obligations support a grant of certiorari in this matter. Second, *amici* write to provide the Court with essential first-hand narrative accounts of asylum applicants[2] in the Remain in Mexico or Migrant Protection Protocols program who would be adversely impacted if the court of appeals' decision is allowed to stand.

The court of appeals' interpretation of the relevant sections of the Immigration and Nationality Act (INA) cannot be squared with the United States' treaty obligations and requirements of customary international law. The court of appeals calls into question whether a noncitizen who has provided a foreign address as the location at which she can be reached is entitled to written notice of the time, date, and place of removal proceedings. Under the tiered-notice system created by the court of appeals, immigration officers may decide to apply a non-statutory U.S. address requirement or

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[2] Over the course of several days, *amici* interviewed twenty-three asylum applicants forced to wait in Ciudad Juárez, Mexico under the Migrant Protection Protocols. The stories highlighted in this *amici* brief are representative of a clear overall pattern of immigration officers rejecting valid addresses provided by asylum applicants and including government-manufactured addresses on notices.

allow a foreign address after a fact-intensive, case-by-case inquiry into the location of the asylum applicant and length of time she was physically present in the United States. This approach undermines the main purpose of the notice requirement, which is to ensure that all asylum applicants have advance notice of their day in court by providing notice of those court hearings to the address that the asylum applicant has identified as her point of contact. Notice is essential because failure to appear at immigration court hearings can have severe, and even life-threatening consequences for asylum seekers. Under U.S. law, asylum seekers who fail to appear for their immigration court hearings can be removed *in absentia*—and, therefore, potentially returned to countries where they will face persecution or death.

As the individual stories in this brief show, the court of appeals' approach to notice will undermine the due process rights of asylum applicants, particularly those forced to wait the duration of their removal proceedings in Mexico under MPP. Like Ms. Luna-Garcia, all of the 55,000 noncitizens currently in MPP were present in the United States when they were served with the immigration charging document, or Notice to Appear (NTA). Although federal law requires their address to be recorded, nearly all of their NTAs list no address or a foreign address unilaterally chosen by immigrant officers that the asylum applicant had never visited instead of the address at which the asylum applicant best can be reached for notice purposes. Nearly all of the asylum applicants in MPP interviewed by

amici had stable U.S. addresses to provide, and in many cases did provide those addresses to immigration officials. Nonetheless, the official documents list inaccurate, government-manufactured foreign addresses. Under the court of appeals' interpretation of the INA, Ms. Luna-Garcia and these individuals may be ordered removed *in absentia* because immigration officers are under no obligation to provide notice to a foreign address—despite that in the case of asylum applicants living in Mexico under MPP, it was federal immigration officers who manufactured the foreign addresses in the first place.

International instruments, bodies, and experts recognize that notice is *sine qua non* for ensuring the rights of individuals to appear and participate in removal proceedings. International law requires the United States to take all needed steps to provide proper and timely notice—an obligation that applies with equal force to asylum seekers at the border or inside the country. The court of appeals' decision to condition notice on geographic and temporal considerations violates internationally protected due process safeguards and magnifies the risk that individuals with credible fears of persecution will be returned to harm in violation of the prohibition against refoulement. Indeed, without proper notice, the United States' individualized determination system is rendered ineffective, undermining the nation's compliance with the international prohibition of collective expulsions.

ARGUMENT

I. Federal Immigration Statutes Should be Interpreted Consistently with U.S. Treaty Obligations and Customary International Law

Amici write to provide an additional reason necessitating the grant of certiorari—the conflict between the United States' international law obligations and the court of appeals' decision below in affirming Ms. Luna-Garcia's removal *in absentia*. For more than two centuries, this Court has recognized that federal statutes must be read in light of the United States' binding obligations under international treaties and customary international law. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (establishing the "maxim of statutory construction" that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"). Applying that approach here, this Court should avoid an interpretation of the INA that would flout the United States' obligations under international law by allowing the removal *in absentia* of asylum applicants without timely and proper notice.

A. International Law Guarantees Due Process to Asylum Applicants in Removal Proceedings

The United States has committed to international treaties that govern the treatment of asylum seekers, including the United Nations Convention Relating to

the Status of Refugees, July 28, 1951, 181 U.N.T.S. 137 (1951 Convention);[3] the International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ICCPR); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (Convention Against Torture); the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; S. Exec. Doc. C, 95-2 (1978) (Convention Against Discrimination); and the American Declaration of the Rights and Duties of Man, O.A.S., Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser.LV/I. 4 Rev. (1965) (American Declaration). These treaties all recognize that procedural due process rights are a core tenet of international human rights law. 1951 Convention, art. 32(2); ICCPR, arts. 9, 13, 14, 15; Convention Against Torture, art. 3; Convention Against Discrimination, art. 5; American Declaration, arts. XVIII, XXV, XXVI, XXVII. International law extends these due process protections to removal proceedings as an indispensable check on arbitrary treatment and abuse of fundamental rights.[4] Asylum cases, like criminal cases, involve potentially serious deprivations of life and liberty. Accordingly, each and every human

[3] In 1968, the United States acceded to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, 19 U.S.T. 6223 (1967 Protocol), thereby binding itself to the international refuge protection regime contained in the 1951 Convention.

[4] U.N. Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 10 (Sept. 30, 1986) (HRC General Comment No. 15) (establishing that the purpose of procedural due process protections "is clearly to prevent arbitrary expulsions").

rights treaty to which the United States is a party obligates states to fully inform asylum applicants of the time and place of those proceedings, guarantee the opportunity to be represented and heard, and uphold the right to appeal adverse decisions.[5]

The fairness of removal proceedings depends on timely notice—an obligation whose significance has been recently reaffirmed in authoritative interpretations of international law. The United Nations' International Law Commission (ILC), in its 2014 restatement of the rules of international law on the expulsion of noncitizens describes the "right to receive notice of the expulsion decision" as "a *conditio sine qua non* for the exercise by an alien subject to expulsion of all of his or her procedural rights."[6] The Committee against Torture, which monitors parties' compliance with the Convention,[7] has interpreted Article 3 of the Convention

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[5] 1951 Convention, art. 32(2); HRC General Comment No. 15, ¶ 9; U.N. Comm. Against Torture, General Comment No. 4: (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶¶ 13, 18, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018) (CAT General Comment No. 4); *Mortlock v. United States*, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 ¶ 78 (2008).

[6] ILC Draft Articles on Expulsion of Aliens, ILC Yearbook, 2011, Vol. II, Part 2, p. 39, § 2.

[7] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been ratified by 168 states, including the United States which ratified the Convention in 1994. U.N. Office of the High Comm'r, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Sept. 30, 2019), https://www.ohchr.org/Documents/HRBodies/CAT/OHCHR_Map_CAT.pdf (map).

Against Torture to require that all persons facing return to a territory where they face torture or a reasonable possibility of torture be "fully informed of the reasons why he/she is the subject of a procedure which may lead to a decision of deportation, and of the rights legally available to appeal such decision."[8] Moreover, the Inter-American Court of Human Rights has held categorically that the failure to notify an asylum applicant of a removal proceeding violates international law.[9]

Consistent with these international law obligations, federal law recognizes that, at a minimum, asylum seekers must be notified of the charges against them and have rights to a fair hearing, to adequate translation of the proceedings, and to appeal. *See* 8 C.F.R. §§ 1003.12-42; *see also* 8 U.S.C. § 1229(a)(1)(F) (requiring the Attorney General to provide noncitizens an NTA that specifies the time, place, and date of removal proceedings). Without appropriate notice, asylum applicants are likely to be deprived of their right to appear and participate in removal proceedings like Ms. Luna-Garcia was—and this increases the odds that they are returned to countries where they will face persecution or harm in violation of the international prohibition against refoulement.

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[8] CAT General Comment No. 4, ¶ 18(a).

[9] *Expelled Dominicans & Haitians v. Dominican Republic*, Preliminary Objections, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 396 (Aug. 28, 2014).

Moreover, the United States must provide these due process protections to all individuals within its "power or effective control," whether those individuals are physically in the United States or asylum applicants waiting to cross the border.[10] The United Nations High Commissioner for Refugees has observed that "[r]egardless of the particular system in place, minimum procedural or due process standards and safeguards need to be guaranteed for all applications, including those submitted at the border. . . ."[11] Under international law, the implementation of MPP, which has the effect of preventing noncitizens from reaching the border, "constitutes an exercise of jurisdiction" that obligates the United States to guarantee due process rights in any proceedings against those individuals.[12]

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[10] U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

[11] Inter-Parliamentary Union & U.N. High Comm'r for Refugees, *A Guide to International Refugee Protection and Building State Asylum Systems* 156 (2017), https://www.unhcr.org/3d4aba564.

[12] *See Hirsi Jamaa v. Italy*, App. No. 27765/09, Judgment ¶ 180 (Eur. Ct. H.R. 2012), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109231%22]}.

B. The United States' Failure to Provide Notice to Asylum Applicants Violates Due Process Rights Under International Law

The court of appeals' decision impermissibly allows immigration officers to use geographic and temporal considerations to circumvent the international obligation to notify asylum applicants of removal proceedings and thereby endangers essential due process protections. The vast majority of asylum applicants placed in removal proceedings appear for all of their court hearings.[13] The consequences of failing to appear can be *in absentia* removal. 8 U.S.C. § 1229(a). When asylum seekers miss court appearances, it is often because the Government has failed to provide adequate or proper notice. Immigration officials routinely issue NTAs with incorrect or missing dates or locations of hearings, mail NTAs to incorrect addresses, or fail to send notice.[14]

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[13] Approximately 86% of families and 81% of individuals applying for asylum who were released from government custody in 2001-2016 appeared at their hearings. Am. Immigration Council, *Immigrants and Families Appear in Court: Setting the Record Straight* 2 (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_and_families_appear_in_court_setting_the_record_straight.pdf.

[14] *See also* Monique O. Madan, *Fake Court Dates Are Being Issued in Immigration Court. Here's Why*, Miami Herald (Sept. 18, 2019), https://www.miamiherald.com/news/local/immigration/article234396892.html; Dianne Solis, *ICE Is Ordering Immigrants to Appear in Court, but the Judges Aren't Expecting Them*, Dallas News (Sept. 16, 2018), https://perma.cc/MJU5-5WNA; Maria Sacchetti & Francisco Alvarado, *Hundreds Show up for Immigration-Court Hearings that Turn out Not to Exist*, Wash. Post

The Trump administration's implementation of MPP in January 2019 has exacerbated existing failings in the notice system. Asylum applicants who arrive at ports of entry on the southern U.S. border are instructed to join a waitlist and remain in Mexico for weeks or months until border agents determine it is their turn to present an asylum claim.[15] Once non-Mexican asylum applicants at the southern U.S. border are inspected and placed in removal proceedings, they must return to Mexico during the pendency of those proceedings.[16] Thus far, almost 55,000 individuals seeking asylum at points of entry in California, Texas, and Arizona have been forced to live in Mexico under MPP.[17]

(Jan. 31 2019), https://www.washingtonpost.com/local/immigration/hundreds-show-up-for-immigration-court-hearings-that-turn-out-not-to-exist/2019/01/31/e82cc61c-2566-11e9-90cd-dedb0c92dc17_story.html.

[15] Hillel R. Smith, Congressional Research Serv., LSB10295, The Department of Homeland Security's Reported "Metering" Policy: Legal Issues (2019), https://fas.org/sgp/crs/homesec/LSB10295.pdf.

[16] Action Memorandum from Kirstjen M. Nielsen, U.S. Dep't of Homeland Security, to L. Francis Cissna et al. (Jan. 25, 2019) (Policy Guidance for Implementation of the Migrant Protection Protocols), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

[17] *See* Maria Verza, *Migrants Thrust by U.S. Officials into the Arms of the Cartels*, Wash. Post (Nov. 16, 2019), https://www.washingtonpost.com/world/the_americas/migrants-thrust-by-us-officials-into-the-arms-of-the-cartels/2019/11/15/84770670-07e5-11ea-ae28-7d1898012861_story.html.

Although all of the noncitizens currently in MPP were present in the United States when they provided an address to the Attorney General, *amici*'s interviews show that U.S. government officials systematically disregard the notice requirements under U.S. law and record addresses for asylum seekers that are not only foreign addresses—which the court of appeals decision prohibits—but also bear no relationship to where asylum seekers can be contacted. The nearly two dozen NTAs compiled by *amici* from individuals living in Ciudad Juárez all listed the same shelter in Mexico as the place where notice of hearings should be provided, despite the fact that *none* of the asylum seekers interviewed had ever visited that shelter.[18] According to a recent study of 332 NTAs issued to individuals by U.S. immigration officers in California before they were forced to return to Mexico, 99.7% do not list addresses.[19] News reports also include details of immigration officials placing street corners in Mexico, "*domicilio conocido*" (translation to English: "known address") or "Facebook" on the NTAs of asylum applicants.[20] The Government's failure to properly fill out

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[18] Redacted NTAs compiled by *amici curiae* in Exhibit A thru J available at https://law.berkeley.edu/redacted-NTAs.

[19] Tom K. Wong, *Seeking Asylum: Part 2* app. 1 (2019), https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-appendix-1-final.pdf.

[20] Adolfo Flores, *Border Patrol Agents Are Writing "Facebook" as a Street Address for Asylum Seekers Forced to Wait in Mexico*, BuzzFeed News (Sept. 17, 2019), https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico; Molly O'Toole, *Trump Administration Appears to Violate Law in Forcing Asylum Seekers Back to Mexico, Officials Warn*,

NTAs has led immigration judges to terminate cases after ruling that the Government violated the due process rights of asylum applicants.[21]

U.S. government officials along the length of the U.S.-Mexico border are making a mockery of notice requirements under domestic and international law. Under the court of appeals' decision, the Attorney General has no obligation to notify Ms. Luna-Garcia because she provided a foreign address to a border agent in Laredo, Texas; and under the court of appeals' decision, the Attorney General may or may not be obligated to provide written notice to asylum applicants under MPP at foreign addresses manufactured by border patrol agents. Petitioner and other asylum applicants were ordered removed *in absentia* after providing valid foreign addresses where they could be contacted.

> Juan,[22] who is originally from Honduras, is a long-time resident of the United States and

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L.A. Times (Aug. 28, 2019), https://www.latimes.com/politics/story/2019-08-28/trump-administration-pushes-thousands-to-mexico-to-await-asylum-cases.

[21] Alicia A. Caldwell, *Judges Quietly Disrupt Trump Immigration Policy in San Diego*, Wall St. J. (Nov. 8, 2019), https://www.wsj.com/articles/judges-quietly-disrupt-trump-immigration-policy-in-san-diego-11574942400.

[22] This is an anonymized excerpt of a declaration provided to *amici curiae* by an individual who was ordered removed *in absentia* after he provided a foreign address to immigration authorities, but was never notified of his hearing date. According to government documents obtained by his lawyer, "the government never even attempted to give [him] notice of the hearing date scheduled sometime after his release from custody, instead holding his

> grandfather of two girls, both born as U.S. citizens. His life was upended when he learned he was ordered removed *in absentia* almost 20 years ago. When Juan came to the United States he provided immigration officials with an address in Honduras—the only address at which he could be contacted at the time. He never received notice for a hearing or any removal orders. He now lives in limbo, fearing separation from his wife, daughter, son-in-law, and two granddaughters he adores.

Below are additional case examples that are typical of the experiences of asylum seekers who were detained in the United States before being forced to return to Mexico under MPP. Pseudonyms are used to protect their identities, and documentation supporting their claims are on file with *amici curiae*.

> Angelina is a forty-two-year-old lesbian woman from Cuba. She arrived at the U.S.-Mexico border in late July 2019. While detained in the United States, Angelina provided the name and phone number of her partner who was living in Florida. A border agent called the number, verified that the woman knew Angelina, and requested her address in Florida. The border agent recorded the address as Angelina's point of contact on an I-213 form, a form immigration officers are required to complete when they take an

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hearing on a 'Special No Address Docket.'" Documentation supporting this claim are on file with *amici curiae*.

immigrant into custody.[23] However, the NTA issued by border officers disregards the valid U.S. address provided by Angelina and verified by border agents and lists instead a shelter in Ciudad Juárez.[24] Angelina has never been to the shelter and does not know where the shelter is located.

Johana fled Cuba due to harassment by police because of her sexual orientation. In April 2019, Johana arrived in Ciudad Juárez, put her name on a waitlist, rented a room, and looked for work while she waited her turn to apply for asylum. As months passed, Johana became more afraid of living in one of the most dangerous cities in the world. In late July, she crossed into the United States and was picked up almost immediately by Border Patrol agents. While detained in the United States, Johana provided a border agent with the name, phone number, and address of her cousin in Florida who is a U.S. citizen. The border agent recorded the address she provided as a point of contact on an I-213 form.[25] The border agent disregarded this valid point of contact and listed a shelter in Ciudad Juárez on her NTA.[26] Johana has never been to the shelter and does not know where the shelter is located. Johana does not understand

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[23] Exhibit B at https://law.berkeley.edu/redacted-NTAs.

[24] *Id*.

[25] Exhibit C at https://law.berkeley.edu/redacted-NTAs.

[26] *Id*.

> why border officials did not use her cousin's address or request an address in Mexico.
>
> Abrahán and Sara are a married couple who fled El Salvador with their two teenage children. In October 2019, the family was detained for four nights in the United States in cold, overcrowded rooms. Abrahán gave immigration officials a U.S. address for his mother-in-law that does not appear on their paperwork. Instead, the family's NTAs list an address for a shelter in Ciudad Juárez that Abrahán and Sara do not recognize.[27] The family is desperate to explain that criminal gangs have attacked their family because of their evangelical missionary work and will kill them if they return to El Salvador.

The INA requires immigration officials to record a legitimate point of contact on NTAs under 8 U.S.C. § 1229(a)(2)(A), 1229(a)(3). Without properly recording a stable address, the Government has no way to ensure that tens of thousands of asylum seekers waiting in Mexico under MPP receive adequate and timely notice of their hearings, especially when hearing dates are cancelled or changed. Asylum applicants have missed hearings due to scheduling changes and others live in fear that they will lose their day in court through no fault of their own.[28]

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[27] Exhibit D at https://law.berkeley.edu/redacted-NTAs.

[28] Kate Morrissey, *Scheduling Glitch Affects First Hearings for 'Remain in Mexico' Returnees*, San Diego Trib. (Mar. 14, 2019), https://www.sandiegouniontribune.com/news/immigration/sd-me-remain-in-mexico-hearings-20190314-story.html; Mica Rosenberg

> Daniel, an opposition party organizer, fled Venezuela in 2019 with his wife Alejandra after masked paramilitaries searched and ransacked their home. During two days in U.S. detention, Daniel tried to explain to border agents why he fled and feared being returned to Venezuela, but he was told by the border agents that they were not authorized to listen to the information. Border officials did not issue NTAs to Daniel and his wife but instead provided a printout with instructions on how to arrive for their first hearings. On the date of his hearing, Daniel appeared at the El Paso port of entry, but immigration officials never called his name. He insisted that he had a hearing and begged officials to look up his case. Officials verified the date and time of his hearing and permitted Daniel to attend. At the end of the hearing, the government attorney printed an NTA and gave it to Daniel.[29] The address on the NTA is a shelter in Ciudad Juárez that Daniel does not recognize. Daniel fears missing his hearings because immigration officers have no way to contact him. He is terrified he will lose his only opportunity to demonstrate that he faces life-threatening danger in Venezuela.

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et al., *Hasty Rollout of Trump Immigration Policy Has 'Broken' Border Courts*, Reuters (Sept. 19, 2019), https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115.

[29] Exhibit E at https://law.berkeley.edu/redacted-NTAs.

> Carlos, a Cuban dissident who fled the island earlier this year, was shocked to discover that immigration officers included the address for a shelter that is unknown to him as his point of contact.[30] Carlos worries that immigration officials have no way to communicate to him a change to the date, time, or place of his hearing. Immigration officials gave Carlos a toll-free number to call to confirm the date and time of his hearing, but when he tried to call multiple times, an automated voice informed him that his case was not listed in the system. Several other asylum applicants have told him that the phone number does not work.

Both international and U.S. law compel immigration officers to identify and record the address at which the asylum applicant can be reached. The court of appeals' approach prompts immigration officers, not the asylum applicant, to make the decision of whether to use a U.S. or foreign address. This approach further entrenches practices that have led immigration officers to improperly fill out NTAs, asylum seekers to miss court hearings, and immigration judges to issue removals *in absentia*. Proceeding with removal *in absentia* under these circumstances violates international law's due process requirements and protections.

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[30] Exhibit F at https://law.berkeley.edu/redacted-NTAs.

II. Certiorari Is Necessary to Protect Against the Refoulement of Asylum Applicants

Protection against refoulement requires procedural safeguards such as access to a fair and impartial decision maker, opportunity to present a defense and receive an effective remedy, and the right to an individualized case assessment. Notice is the foundation on which these protections rest.

A. International Law Prohibits Refoulement

The principle of non-refoulement, which obligates states not to return a refugee to a territory where she faces persecution or a reasonable possibility of harm, is the cornerstone of the asylum protection regime.[31]

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[31] Widely ratified treaties, as well as customary international law, include *non-refoulement* protections. 1951 Convention, art. 33(1); U.N. Human Rights Comm., CCPR General Comment No. 36: Article 6, ¶¶ 30, 31, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018); Convention Against Torture, art. 3; American Declaration, art. XXVIII; American Convention on Human Rights art. 22 (8), Nov. 22, 1969, 1144 U.N.T.S. 123 (American Convention); U.N. Comm. on the Rights of the Child, General Comment No. 6, ¶¶ 26-28 (2005), http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf; *Cruz Varas v. Sweden*, App. No. 15576/89, Judgment ¶ 70 (Eur. Ct. H.R. 1991), https://www.globalhealthrights.org/wp-content/uploads/2015/01/CRUZ-VARAS-AND-OTHERS-v.-SWEDEN.pdf; U.N. High Comm'r for Refugees, Executive Comm. Programme, Non-Refoulement, Conclusion No. 6 (XXVIII) (1977) ("[T]he fundamental humanitarian principle of non-refoulement . . . is generally accepted by States."). The United States' commitment to *non-refoulement* is codified in domestic laws. 8 U.S.C. §§ 1158(a)(1), 1231(b)(3); *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

The international legal regime allows for exceptions to the refoulement prohibition in only a narrow set of cases and after individualized hearings. 1951 Convention, art. 33(2). The Refugee Convention and 1967 Protocol require that a refugee should be "allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority." Refugee Convention, art. 32(2). As a practical matter, the failure to provide effective notice undermines the United States' compliance with these fundamental protections.

B. Removal Without Notice Risks Violating the International Prohibition of Refoulement

Even in the context of expedited proceedings, the United States has enacted measures to prevent the return of refugees to harm. 8 C.F.R. § 235.3(b)(4). But under MPP, border officers do not ask asylum seekers if they are afraid of returning to Mexico or their country of origin and "routinely fail to even refer asylum seekers and migrants for fear screenings, even if they affirmatively express a fear of return to Mexico."[32] Timely and proper notice is particularly important for asylum seekers under MPP because the hearing is their first opportunity to articulate fear of serious

[32] Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* 8-9 (2019), https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf.

harm. By undermining the right to notice, the court of appeals endangers any opportunity for asylum applicants to have their day in court.

> Isabel and her husband Chris fled Venezuela with their two toddler children. After becoming active in the political opposition, they came under attack by paramilitary groups. When they arrived in Ciudad Juárez in July 2019, they rented a room in a hotel. The NTAs issued by immigration officers include an address for a shelter in Ciudad Juárez that the couple does not recognize.[33] Immigration officials did not request a point of contact in Mexico and did not use the address the couple provided of a relative in the United States. Isabel and Chris believe that attending their hearings is the most important thing on earth. They say an opportunity to explain why they cannot return to Venezuela carries the weight of the whole family's future.
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> Roberto is an Afro-Cuban man who fled Cuba due to serious and persistent government harassment and abuse related to his dissident political activities and his race. In April 2019, Roberto arrived to Ciudad Juárez, rented a room, and looked for work while he waited in Mexico for his turn to present his asylum claim. As the months passed, Roberto grew increasingly desperate. In July 2019, four months after he arrived, he crossed the border and turned himself over to border officials. He was placed in detention for three days. While

[33] Exhibit G at https://law.berkeley.edu/redacted-NTAs.

> detained, Roberto provided a border agent an address and a phone number in Florida for his sister, who is a U.S. citizen. The official allowed Roberto to call and speak with his sister. Roberto's NTA lists a shelter in Ciudad Juárez.[34] Roberto has never been to the shelter and does not know where it is located. Had officials requested a mailing address, Roberto would have provided the address where he had been living for more than four months in Mexico. Roberto is terrified that, without having had the opportunity to explain why he was forced to flee, he will be returned to Cuba, where he is certain that he will be tortured or killed.

III. Certiorari is Necessary to Protect Against the Collective Expulsion of Asylum Applicants

By excusing the Attorney General from notifying asylum seekers of their hearings if the individuals provide foreign addresses—even when individuals have provided a valid address where they may be contacted, like Ms. Luna-Garcia did—the court of appeals opens the door to a deportation regime that does not engage in an individualized assessment of asylum seekers' claims and instead endorses a procedure that amounts to collective expulsion.

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[34] Exhibit H at https://law.berkeley.edu/redacted-NTAs.

A. International Law Prohibits Collective Expulsion

International human rights treaties prohibit the collective expulsion of migrants.[35] Any government measure "compelling aliens as a group to leave the country, except where such measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group," constitutes collective expulsion.[36] The prohibition on collective expulsion, a widely recognized principle of international law, is binding on the United States through its ratification of the 1967 Protocol, ICCPR, Convention Against Torture, Convention Against Discrimination, and OAS Charter. The definition of collective expulsion turns on whether the Government afforded the noncitizens individualized assessments, not on how many noncitizens were removed during a specific time period.[37]

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[35] *See* HRC General Comment No. 15, ¶ 10; American Convention, art. 22(9); *Mortlock v. United States*, ¶ 78; Protocol 4 to the European Convention on Human Rights, Art. 4: Prohibition of Collective Expulsion of Aliens, May 2, 1968, E.T.S. No. 46, http://hri.org/docs/ECHR50.html#P4; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 22(1), July 1, 2003, 2220 U.N.T.S. 3.

[36] *Andric v. Sweden*, App. No. 45917/99, Decision (Eur. Ct. H.R. 1999). *See also Nadege Dorzema v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 251, ¶ 171 (2012).

[37] *Expelled Dominicans & Haitians v. Dominican Republic*, ¶ 362; *Conka v. Belgium*, App. No. 51564/99, Judgment ¶ 63 (Eur. Ct. HR 2002); Comm. on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination

B. Removal *In Absentia* Without Notice Violates the International Prohibition on Collective Expulsion

By eliminating officials' obligations to notify asylum applicants who have provided valid foreign addresses or whose addresses were manufactured by government officials, the court of appeals creates a new category of individuals who are subject to removal *in absentia* without an individualized determination. Under MPP, immigration officers have selected a foreign address that may not suffice for notice purposes after refusing to record, in some cases, the actual addresses provided by asylum applicants. If this Court allows the court of appeals' opinion to stand, thousands of these individuals—through no fault of their own—may face removal *in absentia*.

> Alejandra and Victor fled El Salvador with their three children after filing a police report against leaders of the MS-13 gang. While in detention in the United States, Alejandra showed a border agent an original document issued by authorities that confirms she filed a police complaint against the gang, was the victim of death threats, and authorized the family to leave El Salvador because they were not safe in the country. The border agent threatened to rip up the police report. Alejandra began to cry and begged him not to destroy her only copy. The NTAs issued to Alejandra, Victor, and their children all list the same shelter

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Against Non-Citizens, ¶ 26, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

> in Ciudad Juárez.[38] They have never been to the shelter and do not know where it is located. The family lives in perpetual terror in Ciudad Juárez. They witnessed a killing, were followed in a menacing way by strangers, and they have seen MS-13 graffiti painted on city walls.
>
> Gabriela grew up in Honduras where she helped her father, a pastor, to persuade young people to leave gangs and join the church. In December 2018, M-18 gang members, infuriated by her work, kidnapped Gabriela and raped her. One of her assailants told her "we warned you and you did not pay attention. Now, after what we are doing to you, you won't return to preach about . . . your God of love." During her detention in the United States, immigration officers issued an NTA that lists an address for a shelter Gabriela does not recognize.[39] The border agents never requested an address at which Gabriela could be contacted in Mexico. She has an aunt who has lived in Ciudad Juárez for 15 years. When Gabriela first arrived in the United States, she did not understand what it meant to request asylum. All she had was her story. She prays to God that she has the opportunity to explain why she fled her country and why she cannot return.

The expulsion of thousands of individuals *in absentia* who miss a court hearing because the Attorney

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[38] Exhibit I at https://law.berkeley.edu/redacted-NTAs.

[39] Exhibit J at https://law.berkeley.edu/redacted-NTAs.

General failed to send notices or sent notices to manufactured addresses would violate the United States' international treaty obligations not to engage in collective expulsion.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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