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Re: U.S. Border Patrol's Mistreatment of Honduran Family Seeking Asylum & Summary Expulsion of Newborn U.S. Citizen

The ACLU Foundation of San Diego & Imperial Counties (“ACLU”) and Jewish Family Service of San Diego (“JFS”) submit this administrative complaint to the Department of Homeland Security’s Office of Inspector General (“DHS OIG”) and Office for Civil Rights and Civil Liberties (“CRCL”), regarding U.S. Border Patrol’s mistreatment of a Honduran family seeking asylum and the agency’s summary expulsion of the family and their newborn U.S. citizen to Mexico.¹ ACLU and JFS call on DHS OIG and CRCL to complete a thorough investigation of these events and review all relevant policies and procedures.² We also provide recommendations to prevent incidents like this from recurring in the future.

JFS provides crucial services to individuals and families seeking asylum in the Tijuana/San Diego border region, including direct representation and operation of the JFS Migrant Family Shelter in San Diego. The ACLU routinely encounters people who recently have been released by

¹ Members of the family include the father, Mr. [REDACTED], A [REDACTED]; the mother, Ms. [REDACTED], A [REDACTED]; and their nine-year-old son, [REDACTED], A [REDACTED].

Please be advised that, at the family’s request, a public version of this complaint redacts all names and A numbers. We ask that DHS OIG and CRCL protect and maintain the privacy of these complainants.

² The ACLU and JFS discussed some details of this case telephonically with CBP’s Office of Professional Responsibility (“OPR”) on July 7, 2020.

U.S. Customs and Border Protection (“CBP”), including the U.S. Border Patrol, in the San Diego region.³ JFS obtained all facts set forth in this complaint by interviewing Mr. [REDACTED] and Ms. [REDACTED] and reviewing their medical and immigration documents.

Between January and July 2020, the ACLU submitted several administrative complaints to DHS OIG detailing CBP’s abuse and mistreatment of people in its custody.⁴ Two complaints addressed the mistreatment of pregnant people; another, routine family separation stemming from apprehension by CBP.⁵ Troublingly, the account contained here echoes the themes set forth in these prior complaints. The Border Patrol must be held responsible for its willful disregard for agency policies, U.S. law, and basic human decency.

I. Facts

Mr. [REDACTED] and Ms. [REDACTED] fled Honduras with their nine-year-old son approximately one year ago. Seeking asylum in the United States, the family traveled through Mexico to the U.S. border. When they first presented in the United States (near Eagle Pass, Texas, around early March 2020), Ms. [REDACTED] was approximately 5 months pregnant.

Upon their arrival in the United States, the family turned themselves over to the U.S. Border Patrol and expressed a desire to apply for asylum. Although the Border Patrol did not ask whether the family was fearful of return to Mexico, the family affirmatively stated their fear to the agents. The Border Patrol forced the family into the so-called “Migrant Protection Protocols” (“MPP”) program, but rather than arrange for a legally required non-*refoulement* interview,⁶ the agents gave Mr. [REDACTED] and Ms. [REDACTED] paperwork indicating a March 25, 2020 immigration hearing in San Antonio, Texas, and expelled them back to Mexico without processing their fear claims.

On March 25, the family attempted to make their way by taxi from Monterrey to the U.S.-Mexico border to present themselves at the port of entry as instructed so that DHS could transport

³ Each reference to CBP in this document includes the Border Patrol, a sub-agency of Customs and Border Protection.

⁴ See *CBP’s Long History of Mistreatment of Detained People*, ACLU OF SAN DIEGO & IMPERIAL COUNTIES, <https://www.aclusandiego.org/legal/blr/cbp-mistreatment-of-detained-people/> (last visited July 9, 2020) (linking all complaints).

⁵ See ACLU OF SAN DIEGO & IMPERIAL COUNTIES, ET AL., ADMINISTRATIVE COMPLAINT RE: U.S. CUSTOMS AND BORDER PROTECTION AND BORDER PATROL’S ABUSE AND MISTREATMENT OF DETAINED PREGNANT PEOPLE (Jan. 2020), <https://www.aclusandiego.org/wp-content/uploads/2020/01/2020-01-22-OIG-Complaint-1-FINAL-1.pdf>; ACLU OF SAN DIEGO & IMPERIAL COUNTIES, ET AL., ADMINISTRATIVE COMPLAINT RE: SEPARATION OF FAMILIES VIA CBP DETENTION AND PROCESSING, AND THE AGENCY’S REFUSAL TO IMPLEMENT A DETAINEE LOCATOR SYSTEM (Apr. 2020), <https://www.aclusandiego.org/wp-content/uploads/2020/04/2020-04-15-OIG-Complaint-3-FINAL.pdf>; ACLU OF SAN DIEGO & IMPERIAL COUNTIES AND JEWISH FAMILY SERVICE OF SAN DIEGO, ADMINISTRATIVE COMPLAINT RE: U.S. BORDER PATROL’S ABUSE AND MISTREATMENT OF [REDACTED] (Apr. 2020), https://www.aclusandiego.org/wp-content/uploads/2020/07/2020-04-07-OIG-Cmplt-Final_Redacted.pdf.

⁶ Non-*refoulement* interviews assess “whether it is more likely than not that the [individual] would be persecuted in Mexico on account of [their] race, religion, nationality, membership in a particular social group, or political opinion ... or that the [individual] would be tortured in Mexico.” U.S. CITIZENSHIP AND IMMIGRATION SERVS., PM-602-0169, GUIDANCE FOR IMPLEMENTING SECTION 235(B)(2)(C) OF THE IMMIGRATION AND NATIONALITY ACT AND THE MIGRANT PROTECTION PROTOCOLS at 3 (Jan. 28, 2019), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>.

them to their immigration court hearing. Due to the outbreak of the COVID-19 pandemic, U.S. government officials had postponed the family's court date, yet the family had neither been informed of this delay nor provided any other guidance regarding the next step in their pending asylum case.⁷

On the way to the port of entry, however, the family was accosted and detained by a group of armed men who attempted to extort them. They were detained by these men for more than an hour before they were finally freed.

As a result of their forced placement in MPP, the family endured significant personal and material insecurity in Mexico for months. They struggled to access essential resources, including medical care, housing, and education for their son. They experienced discrimination and unsafe living conditions.

Increasingly fearful for their personal health and safety, and without any information from the U.S. government regarding the status of their asylum case, the family made the difficult decision to attempt once more to seek refuge in the United States. Late in the evening of June 27, the family turned themselves in to the U.S. Border Patrol in San Diego, California, seeking assistance and expressing their desire to pursue their asylum claims. At this time, Ms. [REDACTED]'s pregnancy was near full-term, and she was experiencing acute pain.

After calling an ambulance, the Border Patrol separated the family. Agents transported Ms. [REDACTED], alone and fearful, to Scripps Mercy Hospital in Chula Vista, California. Other agents transported Mr. [REDACTED] and his son to a nearby Border Patrol station, where both were fingerprinted and photographed.⁸ Mr. [REDACTED] told the Border Patrol agents of his family's fear of return to Mexico; despite this, the agents again failed to take any action to set up a legally required *non-refoulement* interview. And, although Mr. [REDACTED] pleaded in anguish for information about his partner, he was provided none whatsoever—the agents did not even tell him the name or location of the hospital to which she had been transported.

After approximately two hours in the Border Patrol station—at around 1 a.m. on June 28—a Border Patrol agent transported Mr. [REDACTED] and his son from the station. Although Mr. [REDACTED] was hopeful that the transport was to reunite him with his partner, he and his son were instead taken to El Chaparral, the pedestrian border crossing at the San Ysidro Port of Entry. Upon arrival, the Border Patrol agent instructed Mr. [REDACTED] and his son to return on foot to Mexico. Mr. [REDACTED] protested and pleaded again to be reunited with his partner, explaining that he did not want to be expelled from the United States without her. In response, the Border Patrol agent threatened Mr. [REDACTED], telling him that he would phone Mexican law enforcement who would arrive to arrest him and take his son away from him. Terrified of losing his child after already being separated from his pregnant partner, and feeling that he had no alternative, Mr. [REDACTED] walked back into Mexico with his son.

⁷ As of today, the family's next immigration hearing is set for September 30, 2020. The family was not aware of this court hearing date until an attorney from Jewish Family Service of San Diego checked the Executive Office of Immigration Review's online case status system and provided the family with this updated information, which they never received directly from the U.S. government.

⁸ Mr. [REDACTED] was never told the name of the Border Patrol station to which he and his son were transported.

On June 28, Ms. [REDACTED] gave birth to a baby boy, a U.S. citizen, at Scripps Mercy Hospital in Chula Vista. Throughout her hospitalization, Border Patrol agents interrogated Ms. [REDACTED], despite her acute pain and distress. Ms. [REDACTED] tried to explain why her family had fled Honduras and explained her fear of return to Mexico. Once more, the Border Patrol failed to arrange a legally required non-*refoulement* interview for Ms. [REDACTED]. She pleaded with the agents for information about her partner and son; in response, the agents claimed not to have any information about her family members. Desperate, Ms. [REDACTED] asked hospital staff whether *they* had any information about her family; staff told her that the Border Patrol agents had told them that Ms. [REDACTED]'s family was fine. Border Patrol agents also asked Ms. [REDACTED] whether she had family in the United States (she does) and, if so, for her family member's contact information (which Ms. [REDACTED] provided).

Ms. [REDACTED] and her newborn son were permitted to rest at the hospital for just two days, until June 30. Throughout her hospital stay, Ms. [REDACTED] remained in Border Patrol custody, and pleaded repeatedly (to no avail) with Border Patrol agents to tell her what had happened to her husband and older son. On the afternoon of June 30, Ms. [REDACTED] was discharged. The Border Patrol took her infant from her and placed him in a car seat in the front of a patrol vehicle. The Border Patrol placed Ms. [REDACTED] in the rear of the vehicle, where, unable to see her baby, she experienced acute anxiety.

The Border Patrol then transported Ms. [REDACTED] to the U.S.-Mexico border and directed her to walk over the border back into Mexico with her baby. Distressed, Ms. [REDACTED] again asked about the whereabouts of her partner and older son. The agents represented to her that Mr. [REDACTED] and their older child were both back in Mexico. Just two days after giving birth, Ms. [REDACTED] did not know what to believe and was fearful of prolonging her family's separation. Despite having expressed and explained her fears of being returned to Mexico, Ms. [REDACTED] was nevertheless coerced back to that country. Eventually, she was able to reunite there with Mr. [REDACTED] and the couple's older child, who thus met the newest member of their family for the first time.

In Mexico, Ms. [REDACTED] has been unable to obtain any medical attention for herself or her newborn—in contravention of the instructions provided by Scripps Hospital on her discharge paperwork (which instructed Ms. [REDACTED] to see a doctor both two days and two weeks after discharge). Fearful for their safety, the family remains confined to the room which they are renting.⁹

II. Violations of DHS Policies and U.S. Law

The U.S. Border Patrol's mistreatment of this asylum-seeking family—and the agency's summary expulsion of the family's newborn U.S. citizen—violated both DHS policy and U.S. law.

First, as advocates have explained elsewhere, the MPP program unlawfully denies asylum seekers adequate access to the United States asylum system and forcibly returns them to Mexico,

⁹ Concurrent with the submission of this administrative complaint, on Friday, July 10, 2020, Jewish Family Service of San Diego has submitted a parole request to CBP, asking that the family, including their U.S. citizen newborn child, be granted entry into the United States to pursue their asylum claims.

where they face immediate and ongoing threats to their security.¹⁰ Since the program's inception, DHS has claimed that U.S. officials would exercise discretion regarding whether to return vulnerable individual asylum seekers to Mexico, and that they would do so "consistent[ly] with the non-*refoulement* principles contained in Article 33 of the 1951 Convention Relating to the Status of Refugees and Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment."¹¹

Pursuant to these treaty obligations, codified in U.S. law, the United States may not return any individual to a country where they are more likely than not to face persecution or torture. 8 U.S.C. § 1231(b)(3). Because immigration agents, pursuant to explicit DHS policy, do not affirmatively inform people of these rights or ask about their fear of return to Mexico, however, many individuals forced into MPP are unaware that they can or should express such fears to U.S. officials. Nonetheless, in this case, *both* Mr. [REDACTED] and Ms. [REDACTED] *did* repeatedly express fears of return to Mexico. Yet instead of taking the requisite steps to arrange a non-*refoulement* interview for each, the U.S. Border Patrol summarily expelled them back to Mexico twice, in contravention of U.S. law and DHS's own stated policies.¹²

Second, DHS claims to exclude "individuals from vulnerable populations" from MPP.¹³ Consistent with this claim, CBP—the U.S. Border Patrol's parent agency—has expressly stated that certain individuals "are not amenable to MPP," and that those with "[k]nown physical [] health issues" and those who are "more likely than not to face persecution or torture in Mexico" should not be subjected to the program.¹⁴

That is not what happened here. Instead, both times this family presented themselves to U.S. Border Patrol agents, they expressed a fear of return to Mexico. And, both times, it was apparent that Ms. [REDACTED] had a "known physical health issue," i.e., that she was pregnant. In response to these obvious medical needs, Border Patrol agents should have exercised their discretion to parole

¹⁰ *See, e.g.*, HUMAN RIGHTS FIRST, A YEAR OF HORRORS: THE TRUMP ADMINISTRATION'S ILLEGAL RETURNS OF ASYLUM SEEKERS TO DANGER IN MEXICO (Jan. 2020), <https://www.humanrightsfirst.org/sites/default/files/MPP-aYearofHorrors-UPDATED.pdf>; AMERICAN CIVIL LIBERTIES UNION OF TEXAS, ET AL., ADMINISTRATIVE COMPLAINT RE: PREGNANT WOMEN RETURNED TO MEXICO UNDER THE "MIGRATION PROTECTION PROTOCOLS" (MPP) (Sept. 2019), https://www.aclutx.org/sites/default/files/aclu_oig_complaint_preg_mpp.pdf.

¹¹ DEP'T OF HOMELAND SEC., POLICY GUIDANCE FOR THE IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS 2 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

¹² CUSTOMS AND BORDER PROT., OFF. OF FIELD OPERATIONS, SAN DIEGO FIELD OFF., GUIDING PRINCIPLES FOR MIGRANT PROTECTION PROTOCOLS (Jan. 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf> ("If an [individual] who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that [individual] will be referred to a [U.S. Citizenship and Immigration Services] USCIS asylum officer for screening following the affirmative statement of fear of persecution or torture in, or return to, Mexico, so that the asylum officer can assess whether it is more likely than not that the alien will face persecution or torture if returned to Mexico.").

¹³ Press Release, Dep't of Homeland Sec., Migrant Protection Protocols (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

¹⁴ San Diego Field Office MPP Guiding Principles, *supra* note 12.

the family, intact, into the United States to pursue their asylum claims—*not* force them into MPP. The Border Patrol's failure to do so was inconsistent with DHS policy.

Third, DHS's failure to exercise its longstanding discretion and authority, *see* 8 U.S.C. § 1182(d)(5), to parole this family into the United States has caused profound and unnecessary additional trauma to an already traumatized family forced to flee their country of origin for their own safety. Mr. [REDACTED] and Ms. [REDACTED] should never have been separated; Ms. [REDACTED] should not have been forced to give birth alone, and Mr. [REDACTED] should have been present for his son's birth. Neither partner should have experienced the anguish of not knowing whether or when they would be reunited, and their nine-year-old son, already uprooted from his home, should not have been forced to see his parents (and only remaining source of stability) separated from one another just as his mother was about to give birth.

Additionally, DHS's failure to exercise discretion has also resulted in the expulsion of a newborn U.S. citizen child to Mexico—a country in which neither he nor his parents have any lawful status, making access to necessary postpartum and postnatal medical care difficult if not impossible. This outcome is especially egregious given Mr. [REDACTED]'s and Ms. [REDACTED]'s expressed and unaddressed fear of return to Mexico. Throughout the existence of the MPP program, asylum seekers, including pregnant women, have faced rape, kidnapping, assault, extortion, and death after being forced to return to Mexico.¹⁵ This family did not need to suffer as it has.

Discretion exists for exactly these types of circumstances: cases in which the only humane and sensible outcome would be to ensure that a vulnerable family remains together while pursuing their legal right to seek asylum in the United States.

III. Request for Investigation and Recommendations

Trapped once more in Mexico, this family continues to suffer physical and material insecurity as a result of their placement in MPP and their treatment by the U.S. Border Patrol. Individuals exercising their lawful right to seek asylum in the United States must not be torn apart from their families or summarily deported back to a country in which they fear persecution or torture. DHS has ample discretion. Agency officials can and must use that discretion to minimize further trauma for people seeking asylum.

By way of this complaint, we formally request DHS OIG to undertake a thorough investigation of these events and review all policies and procedures that permitted these outcomes. At a minimum, the following should be assessed:

- (a) the Border Patrol's response to Mr. [REDACTED]'s and Ms. [REDACTED]'s expressed fear of return to Mexico on their first entry in March 2020 (in Texas), including in particular the agency's failure to arrange for legally required non-*refoulement* interviews and the agency's decision to place the family in the MPP program in the first place;

¹⁵ *See* HUMAN RIGHTS FIRST, TRUMP ADMINISTRATION DELIVERS ASYLUM SEEKERS TO GRAVE DANGER IN MEXICO: 200+ PUBLICLY REPORTED CASES OF RAPE, KIDNAPPING, AND ASSAULT JUST THE TIP OF THE ICEBERG (Sept. 17, 2019), <https://www.humanrightsfirst.org/sites/default/files/MPP-One-Pager-September-2019.pdf>.

- (b) the Border Patrol's response to Mr. [REDACTED]'s and Ms. [REDACTED]'s expressed fear of return to Mexico on their second entry in June 2020 (in San Diego), including in particular the agency's decision to leave the family in the MPP program and failure, once again, to arrange for legally required non-*refoulement* interviews;
- (c) the Border Patrol's cruel and unnecessary decision to separate Mr. [REDACTED] and Ms. [REDACTED];
- (d) the Border Patrol's summary expulsion of Mr. [REDACTED] and his son to Mexico;
- (e) the Border Patrol's summary expulsion of Ms. [REDACTED] and her U.S. citizen newborn to Mexico; *and*
- (f) the extent to which DHS officials, including U.S. Border Patrol agents, actually utilize discretion to exempt vulnerable populations, and specifically people with known health conditions, from MPP.

Further, we call upon DHS OIG to:¹⁶

- (1) Recommend CBP immediately and formally exempt all pregnant persons from policies such as the so-called "Migrant Protection Protocols" and other fast-track deportation procedures;
- (2) Recommend that CBP instead prioritize the prompt release of such individuals from immigration detention and that the agency exercise its discretion and authority to parole such individuals, along with their families, into the United States to pursue their asylum claims in a non-detained setting;
- (3) Recommend CBP promptly release people who are forced to give birth while in CBP custody, along with their families, as soon as possible after birth; *and*
- (4) Recommend that CBP ensure compliance with the non-*refoulement* obligations set forth in international law and codified into U.S. domestic law, and hold officials who violate these obligations accountable.

Thank you for your attention to this important matter. Do not hesitate to contact us with questions or concerns.

Sincerely,

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¹⁶ Many of these recommendations echo our previous submissions over the past several months. *See generally supra* notes 4 and 5, and sources cited therein.