

**December 17, 2020**

**Patricia Nation  
Office for Civil Rights and Civil Liberties  
U.S. Department of Homeland Security  
2707 Martin Luther King, Jr. Avenue, SE  
Washington, DC 20528-0190**

**Joseph V. Cuffari  
Office of Inspector General  
Department of Homeland Security  
245 Murray Lane SW  
Washington, DC 20528-0305**

**RE: Request for Investigation into U.S. and International Violations of Asylum Rights Resulting from Criminal Prosecutions of Migrants**

Dear Ms. Nation and Mr. Cuffari:

The National Immigrant Justice Center (NIJC) requests an investigation into violations of the rights of migrants resulting from criminal prosecutions brought under 8 U.S.C. §§ 1325 and 1326.<sup>1</sup> NIJC submits this complaint on behalf of individuals whose right to seek asylum has been violated as a result of migration-related prosecutions. This complaint is focused on the ways in which migration-related prosecutions undermine asylum rights. As NIJC legal teams have also observed a wide array of rights violations endured by migrants facing prosecutions for unauthorized entry and reentry, this complaint also raises concerns regarding racial justice and due process issues arising in §§ 1325 and 1326 prosecutions.

This complaint:

- Describes the ways in which migration-related prosecutions systemically undermine asylum rights along the southwest border;
- Summarizes the experiences of three complainants, whose declarations are appended, highlighting violations of their right to asylum resulting from §§ 1325 and 1326 prosecutions;
- Provides background on the racist roots of the laws used to prosecute people for unauthorized entry and reentry violations;
- Calls for an investigation into the abuses detailed in the complaint.

This complaint includes declarations from three former and current NIJC clients who were subjected to migration-related prosecutions, detailing the denial of asylum rights and

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<sup>1</sup> Headquartered in Chicago, NIJC provides legal services to more than 10,000 individuals each year, including survivors of human trafficking, domestic violence and other crimes, children designed as unaccompanied upon arrival at the southern border, and asylum seekers. NIJC's San Diego office provides representation in civil immigration proceedings for individuals facing §§ 1325 or 1326 prosecutions, and documents regular violations of immigrant rights resulting from such prosecutions. NIJC intends to supplement this complaint with any additional rights violations that our clients experience in the course of migration-related prosecutions.

mistreatment they suffered as a result of their prosecutions.<sup>2</sup> The complainants – Oliver, Alexis, and James – have all submitted declarations specifically illustrating how: 1) referrals for prosecutions violate U.S. and international obligations to protect asylum seekers, 2) the Department of Homeland Security (DHS) fails to ask required questions related to fear-based claims, 3) asylum-restricting policies fuel migration-related prosecutions, and 4) referrals for prosecutions restrict the ability of migrants to pursue fear-based claims and other forms of relief. The enclosed declarations are the first in a series of forthcoming complaints NIJC intends to submit on behalf of our clients in the coming months regarding the harms that flow from migration-related prosecutions.

## I. Systemic Violations Stemming from Migration-Related Prosecutions

Migration-related prosecutions have been used to separate families and violate the United States' national and international legal obligations to provide asylum protection to migrants seeking refuge. Perhaps the best-known recent example is the thousands of asylum-seeking families separated at the southern border when the Trump administration initiated its “Zero-Tolerance” policy, designed to deter people from seeking refuge in the United States through the use of criminal prosecution.<sup>3</sup> Through a series of executive actions,<sup>4</sup> the federal government increased prosecution under §§ 1325 and 1326 by nearly 50 percent from fiscal year 2017 to 2019.<sup>5</sup> Yet for nearly 20 years, the U.S. government has prosecuted migration-related offenses in greater numbers than any other type of federal offense in the United States. Such prosecutions contribute to approximately 10 percent of the federal prison population on any given day<sup>6</sup> and make up around 60 percent of all criminal prosecutions in federal courts.<sup>7</sup> Federal prisons and pre-trial

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<sup>2</sup> The public version of this complaint does not include the real names or personally identifying information about the individuals who submitted declarations, in order to protect their identities.

<sup>3</sup> See Katherine Hawkins and Jesse Franzblau, “Document Contradicts Administration’s Denials about Family Separation,” The Project on Government Oversight, September 27, 2018, <https://www.pogo.org/analysis/2018/09/documents-contradict-administrations-denials-about-family-separation>. See also Office of Inspector General, CBP Separated More Asylum-Seeking Families at Ports of Entry Than Reported and for Reasons Other Than Those Outlined in Public Statements, U.S. Department of Homeland Security, OIG-20-35 (May 29, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-35-May20.pdf>.

<sup>4</sup> In the first two months of office in 2017, the Trump administration issued Executive Orders instructing DHS and the DOJ to increase referrals and prosecutions for unauthorized entry and reentry violations. The DOJ issued a memo in April 2017 instructing federal prosecutors to prioritize and increase such prosecutions of non-citizens. In April 2018, the DOJ established a “Zero-Tolerance” policy, instructing U.S. Attorney’s offices at the southwest border to prosecute all migrants entering the United States without authorization, resulting in family separation on the border. See Jesse Franzblau, “A Legacy of Injustice: The U.S. Criminalization of Migration,” National Immigrant Justice Center, July 2020, <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

<sup>5</sup> See U.S. Department of Justice, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019,” October 17, 2019, <https://www.justice.gov/opa/pr/departments-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>.

<sup>6</sup> César Cuauhtémoc García Hernández, *Migrating to Prison: America’s Obsession with Locking Up Immigrants*, (New York: The New Press, 2019), at 83.

<sup>7</sup> “Prosecutions for 2020,” Transactional Records Access Clearinghouse (TRAC), Syracuse University, report generated May 2020, <https://tracfed.syr.edu/results/9x705ed667de5d.html>. Over 90 percent of migration-related violations are for unauthorized entry and reentry prosecutions. See also Mark Motivans, Immigration, Citizenship, and the Federal Justice System, 1998-2018, Bureau of Justice Statistics (Washington, DC: Department of Justice, September 2019), <https://www.bjs.gov/content/pub/pdf/icfjs9818.pdf>.

detention facilities hold an average of 20,000 people at any given time for migration offenses alone, on top of thousands of additional people transferred to and from Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) custody before and after completion of their criminal proceedings.<sup>8</sup>

This complaint is submitted on behalf of three individuals whose experiences demonstrate how the U.S. government continues to violate the law by prosecuting asylum seekers for their manner of entry.<sup>9</sup>

### **A. Referrals for criminal prosecutions violate the United States domestic and international obligations to protect asylum seekers**

The U.S. government is bound by domestic and international legal obligations to protect people fleeing persecution and torture. Through its 1967 Protocol Relating to the Status of Refugees<sup>10</sup>, the United States is a party to the obligations of the 1951 Refugee Convention.<sup>11</sup> Article 31 of the Refugee Convention expressly forbids penalization of asylum seekers for “illegal entry or presence,” even without authorization.<sup>12</sup>

Nevertheless, DHS consistently brings criminal charges against asylum seekers, the DOJ routinely pursues these charges, and federal courts conduct the related criminal proceedings.<sup>13</sup> The complainants, Oliver, Alexis and James were either referred for prosecution despite having clearly articulated their fears of return, or were never afforded their right to explain their fears.

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<sup>8</sup> Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Prison Policy Initiative, March 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>. The U.S. Marshals also projected they would receive 96,836 prisoners for immigration offenses during FY 2020. See U.S. Marshals Service, FY 2020 Performance Budget President’s Budget, Federal Prisoner Detention Appropriation (Washington, DC: Department of Justice, March 2019), <https://www.justice.gov/jmd/page/file/1144161/download>.

<sup>9</sup> From June 2019 to March 2020, NIJC launched an extensive investigation into rights violations stemming from migration-related prosecutions, consisting of structured interviews with more than 50 individuals who were facing or had experienced unauthorized entry or reentry prosecutions; analysis of primary source records; interviews with defense attorneys, judges, advocates, and legal experts during site visits to border regions; and court monitoring in the Southern Districts of Texas, Arizona, and California. The investigation found routine violations of international and domestic law stemming from the U.S. government’s prosecution of unauthorized entry and reentry, including violations of asylum protections, the permanent separation of family members, violation of basic due process protections provided to individuals facing criminal charges, and persistent dehumanizing and racist treatment of migrants by federal officials, including immigration officers. See Jesse Franzblau, “A Legacy of Injustice: The U.S. Criminalization of Migration,” National Immigrant Justice Center, July 2020, <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

<sup>10</sup> UN General Assembly, Protocol relating to the Status of Refugees, United Nations, Treaty Series, vol. 606, at 267 (October 1967), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>.

<sup>11</sup> UN General Assembly, “Convention Relating to the Status of Refugees,” United Nations, Treaty Series, vol. 189, at 137 (July 1952), <https://www.refworld.org/docid/3be01b964.html>.

<sup>12</sup> See Natasha Arnpriester and Olga Byrne, *Punishing Refugees and Migrants: The Trump Administration’s Misuse of Criminal Prosecutions*, Human Rights First, January 18, 2018, <https://www.humanrightsfirst.org/resource/punishing-refugees-and-migrants-trump-administrations-misuse-criminal-prosecutions>.

<sup>13</sup> *Ibid.*

## B. CBP fails to ask requisite questions about fear-based claims

Federal law requires that border officials ask all individuals apprehended at the border if they are afraid to return to their home countries or would face persecution if they did so.<sup>14</sup> CBP, however, does not do so and regularly violates the rights of asylum seekers by failing to ask these questions. As described below, Oliver tried to tell agents about the violence he would face if he were deported to Honduras, yet was referred for prosecution. CBP agents did not even record any answers relating to Oliver's fear of returning to Honduras, according to internal records showing that part of the form blank.<sup>15</sup>

The complainants are not alone. As discussed in NIJC's June 2020 report, our investigation found that nearly 90 percent of those interviewed said that CBP referred them for criminal prosecution without first asking if they were afraid to return to their home countries.<sup>16</sup>

When referred for criminal prosecution, asylum seekers are thrown into the general criminal system. They are placed under arrest, and are often told they have the right to remain silent. Sometimes, moreover, asylum seekers are asked questions relating to their fear of persecution only *after* they have received the Miranda warnings. This was the case for Alexis, who (as described below) chose to remain silent when asked if she was afraid to return because she worried that anything she said, including an expression of fear, could and would be used against her. Similarly, Border Patrol agents read James his Miranda warnings at his arrest, and failed to give him the opportunity to pursue his fear-based claim. Asylum seekers, therefore, often remain silent for fear that their answers could be used against them, and thus are dissuaded from exercising their right to seek asylum.

CBP has long been on notice of its systemic violations of asylum rights when making referrals for prosecutions. More than five years ago, the DHS Office of the Inspector General (OIG) found that CBP never issued guidance to its agents to use when referring individuals for Operation Streamline criminal prosecutions in cases where they expressed fear of persecution or return to their home countries.<sup>17</sup> The same OIG report raised questions about the practice of referring asylum seekers for criminal prosecution, noting the potential for violating U.S. treaty obligations.<sup>18</sup> Members of Congress have repeatedly raised similar concerns.<sup>19</sup> Yet CBP has still

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<sup>14</sup> See 8 U.S.C. § 1225(b)(1)(A)(II). See also "Asylum in the United States," American Immigration Council, June 11, 2020, <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

<sup>15</sup> See Enclosure I, excerpt of Oliver's I-213 document, illustrating that border agents did not record any answers relating to his fear of return, instead leaving that section of the form blank.

<sup>16</sup> Jesse Franzblau, "A Legacy of Injustice: The U.S. Criminalization of Migration," National Immigrant Justice Center, July 2020, <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

<sup>17</sup> Office of Inspector General, "Streamline: Measuring Its Effect on Illegal Border Crossing," (Washington, DC: U.S. Department of Homeland Security, May 2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-95\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf).

<sup>18</sup> *Ibid.*

<sup>19</sup> See U.S. Congress, Joint Explanatory Report to accompany H.R. 3931, Department of Homeland Security Appropriations Act, 116th Cong., 1st Sess., 116-180, (July 2019), at 23, <https://www.congress.gov/116/crpt/hrpt180/CRPT-116hrpt180.pdf>. ("The Committee is concerned by reports of the prosecution for illegal entry and reentry of individuals who express a fear of return to their country of origin during processing by CBP. The Administration is reminded of the United States' obligation under the 1951 Refugee Convention to refrain from punishing asylum seekers for the way in which they enter the country.")

not developed guidance in response to the OIG's 2015 recommendations and claimed they had no records in response to a Freedom of Information Act (FOIA) request for such policy guidance.<sup>20</sup>

Additionally, human rights groups and immigration attorneys regularly report that ICE and CBP fail to refer asylum seekers for credible fear interviews even *after* they have completed their criminal sentences.<sup>21</sup> Alexis is one of these cases, as she was deported without being afforded her right under international and U.S. law to have such an interview.

### **C. Asylum-restricting border policies increase unauthorized migration**

Exacerbating the aforementioned violations of asylum rights, the Trump administration has enacted numerous policies rendering it difficult or impossible for asylum seekers to access protection at ports of entry, forcing individuals fleeing persecution to cross the border without authorization<sup>22</sup> and as a result, to face criminal prosecutions as a result.<sup>23</sup>

Alexis sought to request asylum at a port of entry, but the so-called “metering” program in place meant she would have to wait at the border in a long queue. She felt her life was in danger in Mexico, and was left with little choice but to cross through an area without a fence in Mexicali. She was arrested by Border Patrol and referred for prosecution as a result. Oliver similarly waited months in an effort to request asylum at a port of entry, but was blocked because of the metering program in Tijuana. The dangerous conditions made his situation untenable, forcing him to cross the border without permission, where he was then arrested by Border Patrol.

The metering policy that blocked Alexis and Oliver's access to asylum is only one of a myriad of overlapping programs that block refugees from presenting themselves and seeking protection at ports, leading to an increase in unauthorized border crossings. The so-called Migrant Protection Protocols, or “Remain in Mexico” program, have forced over 65,000 people, including asylum seekers and children, to remain in Mexico in dangerous and uncertain conditions while awaiting adjudication of their asylum claims in U.S. courts.<sup>24</sup> An Asylum Cooperation Agreement (ACA)

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<sup>20</sup> U.S. Customs and Border Protection (CBP), letter in response to NIJC's Freedom of Information Act (FOIA) request, May 13, 2020, <https://assets.documentcloud.org/documents/20428383/cbp-2019-077960-final-response.pdf>.

<sup>21</sup> Natasha Arnpriester and Olga Byrne, *Punishing Refugees and Migrants: The Trump Administration's Misuse of Criminal Prosecutions*, Human Rights First, January 18, 2018, <https://www.humanrightsfirst.org/resource/punishing-refugees-and-migrants-trump-administrations-misuse-criminal-prosecutions>.

<sup>22</sup> For example, the DHS Inspector General found in 2018, and Customs and Border Protection (CBP) officials have confirmed, that turning people away at ports of entry as the administration has done through its so-called “metering” policy leads to an increase in illegal border crossings. See Office of the Inspector General, Department of Homeland Security, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, OIG-18-84, (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

<sup>23</sup> See e.g., Jesse Franzblau, “Funding the Administration's Hateful Border Policies Will Increase Abuse and Inflict More Harm on Migrants,” National Immigrant Justice Center, June 28, 2019, <https://immigrantjustice.org/staff/blog/funding-administrations-hateful-border-policies-will-increase-abuse-and-inflict-more>.

<sup>24</sup> “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,” American Immigration Council, January 29, 2020, <https://www.americanimmigrationcouncil.org/research/policies-affecting->

between the U.S. and the government of Guatemala<sup>25</sup> led to the deportation of nearly 1,000 non-Guatemalan asylum-seekers — 75 percent of whom were women and children — to Guatemala, where there is no meaningfully available asylum process.<sup>26</sup> Similar agreements with El Salvador<sup>27</sup> and Honduras,<sup>28</sup> if enacted, will put still more asylum seekers at risk of being deported to these countries. Expedited deportation programs called the Humanitarian Asylum Review Process (HARP)<sup>29</sup> and Prompt Asylum Claim Review (PACR)<sup>30</sup> have forced thousands of asylum seekers through expedited asylum proceedings while being held incommunicado in border facilities. The administration’s transit ban has wrongfully denied asylum to people who crossed through third countries on their way to the United States.<sup>31</sup> And now the border expulsions policy (so-called “Title 42 processing”) in place since the start of the COVID-19 pandemic in March 2020 has led to hundreds of thousands of summary expulsions without sufficient procedural safeguards.<sup>32</sup>

Most of these policies are the subject of ongoing litigation.<sup>33</sup> Together, this maze of rules and programs have trapped hundreds of thousands of people seeking asylum in the U.S. in life-threatening conditions near the U.S.-Mexico border, or worse, subjected them to deportations to their home countries, where they may suffer persecution and torture. Unsurprisingly, as asylum

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[asylum-seekers-border](#). See also U.S. Department of Homeland Security, “Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador,”

[https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf) (last visited December 3, 2020). Hillel Smith, *The Department of Homeland Security’s Reported “Metering” Policy: Legal Issues*, Congressional Research Service, LSB10295, (2019). “US: Investigate ‘Remain in Mexico’ Program,” Human Rights Watch, June 2, 2020, <https://www.hrw.org/news/2020/06/02/us-investigate-remain-mexico-program#>.

<sup>25</sup> Agreement between the Government of the United States and the Government of the Republic of Guatemala on Cooperation in the Examination of Protection Claims, 84 Fed. Reg. 64095 (Published November 20, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-11-20/pdf/2019-25288.pdf>. This agreement was signed by the parties on July 26, 2019.

<sup>26</sup> Yael Schacher, Rachel Schmidtke and Ariana Sawyer, “Deportation with a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement,” Human Rights Watch, May 19, 2020, <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>.

<sup>27</sup> U.S. Department of Homeland Security, “Fact Sheet: DHS Agreements with Guatemala, Honduras, and El Salvador,” [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf) (last visited December 3, 2020). The agreement between the U.S. and El Salvador was signed by the parties on September 20, 2019.

<sup>28</sup> Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims, 85 Fed. Reg. 25462 (Published May 1, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-01/pdf/2020-09322.pdf>. This agreement was signed on September 25, 2019.

<sup>29</sup> “Policies Affecting Asylum Seekers,” American Immigration Council, January 29, 2020.

<sup>30</sup> Robert Moore, “Trump Administration Testing Rapid Asylum Review, Deportation Process in Texas,” Washington Post, October 24, 2019, [https://www.washingtonpost.com/immigration/trump-administration-testing-rapid-asylum-review-deportation-process-in-texas/2019/10/24/caa91a62-f5d8-11e9-a285-882a8e386a96\\_story.html](https://www.washingtonpost.com/immigration/trump-administration-testing-rapid-asylum-review-deportation-process-in-texas/2019/10/24/caa91a62-f5d8-11e9-a285-882a8e386a96_story.html).

<sup>31</sup> Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (proposed Jul. 16, 2019) (to be codified at 8 C.F.R. Parts 208, 1003, 1208), <https://www.govinfo.gov/content/pkg/FR-2019-07-16/pdf/2019-15246.pdf>.

<sup>32</sup> See, i.e., Azadeh Erfani, “A Timeline of the Trump Administration’s Efforts to End Asylum,” National Immigrant Justice Center, (June 2020), <https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2020-06/06-01-2020-asylumtimeline-final.pdf>.

<sup>33</sup> See Complaint, *U.T. v. Barr*, No. 1:20-00116, (D.C. Cir. Jan. 15, 2020).

seekers have increasingly been turned away at ports of entry, unauthorized border crossings have increased.

#### **D. Criminal prosecutions restrict the ability of asylum seekers to seek relief**

When asylum seekers are subject to migration-related criminal prosecutions, access to counsel is often restricted as individuals endeavor to navigate both the criminal and immigration systems. Alexis was referred for prosecution for entering the country without permission, and subsequently deported without ever getting a chance to have a credible fear interview. Her access to an immigration attorney was restricted after she was prosecuted, shuffled between U.S. Marshals custody, CBP detention and ICE custody. James, also attempting to access the asylum process after he was prosecuted, was not able to communicate with his family or an attorney for weeks after he was arrested at a courthouse by DHS agents following a court appearance where his criminal charges were dropped.

Migration-related prosecutions involve a dizzying number of government agencies and overlapping processes because of redundancies in the criminal and civil systems. People referred by DHS for prosecution are shuffled from CBP facilities to U.S. Marshals' custody, back to CBP or ICE detention, or incarcerated under the jurisdiction of the Bureau of Prisons (BOP). NIJC has observed that even when their criminal charges are dropped, people are often arrested in federal court by immigration authorities and transferred back to CBP custody. Complainants who attempted to seek asylum have experienced their time in CBP custody as a frightening period of near-incommunicado detention, with no access to communication with counsel.<sup>34</sup> These overlapping challenges make attempting to obtain and access counsel and the necessary evidence to support an asylum claim difficult if not impossible for most.

### **II. Complainants' stories illustrate the violations of asylum rights that result from 1325 and 1326 prosecutions**

The following summaries of three individuals who suffered §§ 1325 and 1326 prosecutions capture the human rights violations suffered by these individuals. Their declarations are consistent with reports NIJC's legal teams have received. Specifically, individuals are referred for prosecutions instead of being allowed to pursue their fear-based claims or other forms of immigration relief. All complainants have had their rights violated as part of the process of facing criminal prosecutions for entering or reentering the U.S. without authorization.

#### **A. Oliver**

In 2019, Oliver fled death threats from gangs tied to corrupt police in Honduras. When he arrived at a port of entry at the U.S.-Mexico border, he tried to assert his asylum claim. But, CBP told him to wait. After waiting three months in dangerous conditions in Mexico, Oliver was left with little choice but to cross the border elsewhere. Upon crossing, he was arrested and referred for criminal prosecution for unauthorized entry. He told agents about the threats he had received in his home country and tried to explain to

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<sup>34</sup> Jesse Franzblau, "A Legacy of Injustice: The U.S. Criminalization of Migration," National Immigrant Justice Center, July 2020, <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

them about the gangs and corrupt police, and that he would be in grave danger if deported. Despite expressing his fear of returning to Honduras, he was not referred for a credible fear interview, but instead sent for prosecution and detained in U.S. Marshals' custody for more than a month before being released on bond.<sup>35</sup>

Oliver was released from U.S. Marshals custody on bond while awaiting his court date for his unauthorized entry charge. At his final court hearing in February 2020, the charges were dismissed. As he left the courthouse, however, CBP agents took him into custody. After he was detained at a CBP holding facility for over a week, he was transferred to ICE custody at the Otay Mesa Detention Center in San Diego, California, just before the COVID-19 virus began spreading in that facility. He was finally released in June 2020, after NIJC intervened on his behalf. He is pursuing his asylum claim. [Declaration enclosed]

### **B. Alexis**

Alexis, who is transgender, fled Guatemala after suffering violence due to her sexual orientation and gender identity and feared persecution if she returned. She attempted to apply for asylum in Mexico, but threats from organized criminal networks forced her to leave. When she arrived at the U.S. border, CBP neither asked about her fear nor referred her for a credible fear interview. Because she feared waiting in a dangerous environment near the border, she crossed into the United States through the desert.

When CBP agents arrested Alexis in August 2019, they did not give her the opportunity to explain that she was afraid to return to her country of origin; instead, they referred her for prosecution for unauthorized entry. The only time that DHS officials asked her about her fear was after she was read the Miranda warnings following her arrest. She chose to remain silent at that time, believing her words could be used against her.

After her prosecution, Alexis was deported to Guatemala without being interviewed about her fear of return, and despite having repeatedly told officers that she feared for her life in Guatemala. Alexis's attorneys had to intervene in order for her to be allowed to return to the United States and given the opportunity to seek asylum. [Declaration enclosed]

### **C. James**

In 2010, police pulled James over in a routine traffic stop and because he was unable to demonstrate his lawful status in the U.S. turned him over to ICE. He was then coerced to sign for voluntary return to Mexico, without being informed of the consequences, and he was sent to Mexico the same day. James was never informed that he had grounds to challenge his deportation, or that he had a right to a hearing.

In Mexico, James experienced cartel violence, including death threats from criminal drug networks with ties to the police. He feared the notorious cartel in the region, which was killing and disappearing people who refused to comply with their wishes. He decided to

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<sup>35</sup> See Appendix II, enclosed I-213 document, illustrating that border agents did not record any answers relating to Oliver's fear of return, instead leaving that section of the form blank.



return to the United States fearing for his life in order to seek safety from political violence. In July 2019, he was apprehended at the border and, instead of referring him for a credible fear interview, CBP agents sent him for prosecution for unauthorized entry (8 U.S.C. § 1325). Officers read him the Miranda warnings upon his arrest, but they did not give him the opportunity to explain his fear or pursue his asylum claim.

At trial, just moments after the criminal charges were dismissed, DHS agents entered the courtroom and arrested James to detain him during his civil immigration proceedings.<sup>2</sup> He was taken to the Chula Vista Border Patrol Station in Southern California in October 2019 and held with no access to family or counsel.

James' prolonged detention made it impossible to prepare for his immigration case. DHS held him with virtually no contact with the outside world, including family and counsel, for the entirety of his incarceration. Moreover, he was held in punitive conditions at a temporary Border Patrol holding facility.<sup>36</sup> He was finally transferred to ICE detention weeks later after NIJC filed a writ of habeas corpus demanding his release [Declaration enclosed]

### **III. Context: Migration-related prosecutions are rooted in racist ideology and anti-immigrant intentions**

The violations detailed in this complaint should be viewed in the context of the racist history of the statutes initially passed to exclude immigrants, including asylum seekers and refugees, from the United States. Federal laws that criminalize the act of crossing the border without authorization were first promoted by white supremacists and eugenicists in the early 20th century.<sup>37</sup> The 1920s brought a decade of anti-immigrant legislation fueled by the eugenics movement and xenophobia over “non-white” immigration.<sup>38</sup> At the height of the eugenics movement, Coleman Livingston Blease, an outspoken white supremacist Senator from South Carolina, introduced the “Undesirable Aliens Act of 1929,”<sup>39</sup> Senator Blease’s bill became law

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<sup>36</sup> Petition for Writ of Habeas Corpus. Copy on file with the author.

<sup>37</sup> See Ian MacDougall, “Behind the Criminal Immigration Law: Eugenics and White Supremacy,” ProPublica, June 19, 2019, <https://www.propublica.org/article/behind-the-criminal-immigration-law-eugenics-and-white-supremacy>. See also John Blake, “When Americans tried to breed a better race: How a genetic fitness ‘crusade’ marches on,” CNN, October 18, 2018, <https://www.cnn.com/2018/10/16/us/eugenics-craze-america-pbs/index.html>.

<sup>38</sup> See generally Daniel Okrent, *The Guarded Gate: Bigotry, Eugenics, and the Law That Kept Two Generations of Jews, Italians, and Other European Immigrants Out of America*, 2019. By 1924, Congress had severely restricted nonwhite immigration, banning all Asian immigration and cutting the number of immigrants allowed to enter the United States from anywhere other than Northern and Western Europe. See also Kelly Lytle Hernandez, “How crossing the US-Mexico border became a crime,” *The Conversation*, April 30, 2017, <https://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604>.

<sup>39</sup> See University of Texas, Austin, “Undesirable Alien’s Act of 1929 (Blease’s Law)” [last visited December 2, 2020] <https://immigrationhistory.org/item/undesirable-aliens-act-of-1929-bleases-law>. In debating and drafting this law, legislators referred to Mexicans as “mongrels” and “peons.” See Jia Lynn Yang, *One Mighty and Irresistible Tide: The Epic Struggle Over American Immigration*, 2020, at 3 (quoting Senator David A. Reed). See also Mae Ngai, *Impossible Subjects*, (Princeton University Press, 2004), at 23. Okrent at 3. See also Ngai, at 23.

in 1929.<sup>40</sup> When the federal immigration laws were overhauled in 1952, these provisions were codified at Sections 1325 (“illegal entry”)<sup>41</sup> and 1326 (“illegal reentry”)<sup>42</sup> of Chapter 8 of the U.S. Code, where they remain as part of the Immigration and Nationality Act today.

In their current application, prosecutions for entry and reentry violations bring together the civil and criminal immigration legal systems in ways that exacerbate racial and ethnic discrimination. Migration-related prosecutions continue to impact Mexican and other Latinx defendants disparately. Latinx immigrants, led by Mexicans and Central Americans, have made up more than 90 percent of all people imprisoned for unauthorized entry and reentry.<sup>43</sup> Asylum seekers and migrants who are referred for prosecution for unauthorized entry and reentry are shuttled between the criminal and immigration systems, where racial profiling and discrimination are common to both.<sup>44</sup> As a result, communities of color are disproportionately impacted.<sup>45</sup>

The discriminatory nature of prosecutions for unauthorized migration is currently being addressed in the U.S. justice system. In *United States of America v. Vilmar Bernal Sanchez*, the appellant argued that the racist history of the migration prosecution statutes renders prosecutions under them presumptively unconstitutional.<sup>46</sup> The treatment of NIJC clients and others prosecuted under these statutes in their denial of asylum rights and due process, as well as discriminatory treatment, illustrate that the current implementation of these laws is a continuation of their racist origins.

#### **IV. Conclusion: CRCL & OIG should investigate the cases presented in this complaint and ongoing rights abuses stemming from entry and reentry prosecutions**

The DHS CRCL and OIG investigation into the above cases should examine the violations of asylum rights committed against the complainants and follow up on the OIG’s previous recommendation that CBP issue guidance for its agents while dealing with non-citizens who express a fear of persecution upon returning to their country of origin.<sup>47</sup>

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<sup>40</sup> “An Act Making it a felony with penalty for certain aliens to enter the United States of America under certain conditions in violation of law,” Public law 1018, Chp. 690, U.S. Stat. 5094 (1929): 1551-1552, <https://www.loc.gov/law/help/statutes-at-large/70th-congress/session-2/c70s2ch690.pdf>.

<sup>41</sup> Immigration and Nationality Act Section 275, 8 U.S. Code Section 1325.

<sup>42</sup> Immigration and Nationality Act Section 276, 8 U.S. Code Section 1326.

<sup>43</sup> See Mark A. Motivans, U.S. Department of Justice, Bureau of Justice Statistics, “Immigration Offenders InThe Federal Justice System, 2010,” July 18, 2012, <https://www.bjs.gov/index.cfm?ty=pbdetail&id=4392>.

<sup>44</sup> See, e.g., “The Truth about ICE and CBP,” United We Dream (February 2019), <https://unitedwedream.org/wp-content/uploads/2019/02/TheTruthICECBP-02052019-v3.pdf>.

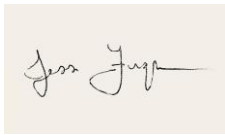
<sup>45</sup> See Kelly Lytle Hernández, *Amnesty or Abolition: Felons, Illegals, and the Case for a New Abolition Movement*, Urban Research Network, (December 2011) [https://urbanresearchnetwork.org/wp-content/uploads/2014/07/Amnesty-or-Abolition\\_Dec-2011\\_BOOM.pdf](https://urbanresearchnetwork.org/wp-content/uploads/2014/07/Amnesty-or-Abolition_Dec-2011_BOOM.pdf).

<sup>46</sup> *United States of America v. Jhoantan Vilmar Bernal Sanchez* (9<sup>th</sup> Cir. 2020).

<sup>47</sup> This complaint should be considered in the broader context of documented abuses committed against people facing migration-related prosecutions, and should incorporate additional complainants as the investigation advances. For a more detailed overview of the context of the racist origins of 8 U.S.C. §§ 1325 and 1326 and the rights violations systemic to the prosecution of migration-related offenses, see Jesse Franzblau, “A Legacy of Injustice: The U.S. Criminalization of Migration,” National Immigrant Justice Center, July 2020, <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

The complainants and NIJC await the Inspector General and CRCL's response and look forward to working with them to provide guidance to ensure that the international and domestic protections owed to asylum seekers are upheld. If you have any questions about this complaint, please contact Jesse Franzblau, Senior Policy Analyst, at [jfranzblau@heartlandalliance.org](mailto:jfranzblau@heartlandalliance.org).

Respectfully submitted,

A rectangular box containing a handwritten signature in black ink on a light beige background. The signature appears to read "Jesse Franzblau".

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## Appendices

### **I: Declarations (enclosed)**

### **II: Oliver's I-213 form left blank by CBP officials (excerpt)**

U.S. Department of Homeland Security

#### **Jurat for Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act**

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Q: Why did you leave your home country or country of last residence?

A.

Q: Do you have any fear or concern about being returned to your home country or being removed from the United States?

A.

Q: Would you be harmed if you are returned to your home country or country of last residence?

A.

Q: Do you have any question or is there anything else you would like to add?

A.