

The Honorable Susan Rice
Assistant to the President
Domestic Policy Council
1600 Pennsylvania Ave. NW
Washington, D.C. 20500

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
2707 Martin Luther King Jr. Ave SE
Washington, D.C. 20528

Re: DHS's Stated Intention to Issue a New Memorandum Terminating the Migrant Protection Protocols/Remain in Mexico Program

Dear Ambassador Rice and Secretary Mayorkas,

Since 2019, the undersigned organizations have strongly opposed the so-called "Migrant Protection Protocols" ("MPP").¹ Organizations that have signed this letter have represented people placed into MPP, travelled to the border to observe MPP hearings firsthand,² worked with individuals allowed to enter the United States through the MPP winddown begun under the Biden administration, and submitted amicus briefs in support of the Biden administration's defense of the MPP winddown.³

On September 29, 2021, the Department of Homeland Security ("DHS") announced that it intended to issue "a new memorandum terminating the Migrant Protection Protocols." We write today to support this decision and to offer our assessment of the factual and legal bases for doing so.

A key part of these recommendations is that DHS must openly acknowledge the many failures of MPP, a program that one U.S. Citizenship and Immigration Services whistleblower declared made him and his colleagues "complicit in the persecution, torture, and other human rights abuses" faced by individuals returned to Mexico.⁴ While the first termination memorandum

¹ See, e.g., American Immigration Council, American Immigration Lawyers Association, and Catholic Legal Immigration Network, Inc., "Re: Substantial Evidence Demonstrating Catastrophic Harms That Will Befall Migrants in Mexico with Continued Implementation and Further Expansion of Migrant Protection Protocols," February 6, 2019, https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/letter_urges_sec_nielsen_end_migrant_protection_protocols_policy.pdf.

² See American Immigration Council, "Statement for the Record: Hearing on Examining The Human Rights and Legal Implications of DHS's 'Remain in Mexico' Policy," https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/statement_for_the_house_migrant_protection_protocols_11_21_19.pdf.

³ See, e.g., "Council and Partners Submit Amicus Brief to Stop the Reinstatement of the Migrant Protection Protocols," American Immigration Council, August 18, 2021, https://www.americanimmigrationcouncil.org/amicus_brief/council-submit-amicus-brief-stop-reinstatement-MPP-migrant-protection-protocols.

⁴ Government Accountability Project, "House Committee Holds Hearing on Implications of 'Remain in Mexico' Policy," <https://whistleblower.org/press/press-release-house-committee-holds-hearing-on-implications-of-remain-in-mexico-policy/>.

alluded to many of these failings, we ask that DHS highlight more forcefully the humanitarian catastrophe caused by MPP.

I. The Second Termination Memorandum Should Acknowledge MPP's Failure to Protect People from *Refoulement* and Harm in Mexico

Throughout the time in which MPP was in operation, advocates, researchers, whistleblowers, and internal government reviews documented extensively how the nonrefoulement interview process failed to protect people from persecution and torture. These failures were both structural and operational; structural because the requirements improperly placed an unacceptably high burden on migrants to spontaneously raise a fear of persecution and demonstrate more than a 50% chance of persecution or torture, and operational because DHS officers repeatedly failed to provide individuals with nonrefoulement interviews in violation of MPP. The result of these failures is well-documented; there are over 1,500 documented cases of people suffering harm in Mexico after having been placed into MPP, many of which occurred *after* an individual either had a *nonrefoulement* interview or was denied an interview.⁵

Requiring asylum seekers to *affirmatively* express a fear of persecution in Mexico was fundamental to the operation of MPP. Trump administration officials repeatedly argued that MPP could not function effectively without this burden-shifting because almost everyone would express a fear of persecution in Mexico if asked.⁶ And in the Trump administration's view, people who "genuinely fear[ed] returning to Mexico [would] have 'every incentive' to affirmatively raise that fear . . . and that Mexico is not a dangerous place for non-Mexican asylum seekers".⁷ But as the 9th Circuit explained in *Innovation Law Lab*, that conclusion rested entirely on fact-free speculation:⁸

[T]he Government points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico. . . . [E]vidence in the record is enough—indeed, far more than enough—to establish that the Government's speculations have no factual basis.

In addition, the operational failures of DHS officers to carry out even the limited protections afforded to migrants in MPP is well-documented. A survey of hundreds of asylum seekers placed into MPP proceedings in San Diego revealed that 60% of all people who expressed a fear of persecution to CBP officers were *not* given a nonrefoulement interview despite having

⁵ Human Rights First, *Delivered to Danger*, <https://www.humanrightsfirst.org/campaign/remain-mexico>.

⁶ See Department of Homeland Security, Assessment of the Migrant Protection Protocols, October 29, 2019, https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (arguing that "Once it becomes known that answering 'yes' to a question can prevent prompt return to Mexico under MPP, DHS would experience a rise in fear claims similar to the expedited removal/credible fear process").

⁷ *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1089-90 (9th Cir. 2020).

⁸ *Id.* at 1090, 1092.

affirmatively raised a fear of persecution.⁹ Furthermore, many individuals who received nonrefoulement interviews were actively prevented from expressing their specific fears by asylum officers.¹⁰

These operational failures were well-documented within DHS itself. The 2019 Red Team Report concluded that “at some locations, CBP uses a pre-screening process that preempts or prevents a role for USCIS to make its determination” and that “some CBP officials pressure USCIS to arrive at negative outcomes.”¹¹ CBP officers also routinely denied those in MPP access to nonrefoulement interviews at ports of entry, especially after hearings were suspended in 2020.

These structural and operational problems persisted within USCIS as well. Asylum officer decisions denying migrants’ claims of fear in Mexico received no supervisory review, while rare decisions in favor of the migrants were subject to extensive supervisory and headquarters review, often leading to asylum officers’ decisions being overruled.¹² As one asylum officer whistleblower described this process, “if you want to go positive [on an interview], you will face Herculean efforts to get it through... If your supervisor says yes, headquarters will probably say no.”¹³

Similarly, the narrow focus only on persecution on account of a protected ground and torture meant that asylum officers were forced to deny MPP exemptions to individuals who they believed would be murdered on return to Mexico.¹⁴ Multiple individuals who had *already been kidnapped and assaulted* while in Mexico were nevertheless sent back to Mexico after failing nonrefoulement interviews, in part because officers deemed their horrific experiences not persecution on account of a protected ground.¹⁵

DHS’s second termination memorandum should acknowledge that these structural and operational problems were inherent to MPP and rendered the program fatally flawed. In addition, the memorandum should make clear that the long-standing and well-documented problems of safety in northern Mexico make it fundamentally impossible to operate a contiguous

⁹ “Seeking Asylum: Part 2,” U.S. Immigration Policy Center, UC San Diego, October 29, 2019, <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

¹⁰ *Innovation Law Lab v. Wolf*, 951 F.3d at 1092 (“Two declarants wrote that asylum officers actively prevented them from stating that they feared returning to Mexico ... Two declarants did succeed in telling an asylum officer that they feared returning to Mexico, but to no avail”).

¹¹ Department of Homeland Security, “The Migrant Protection Protocols Red Team Report,” October 26, 2019, https://immpolicytracking.org/media/documents/The_Migrant_Protection_Protocols_Red_Team_Report.pdf

¹² Senator Jeff Merkley, “Shattered Refuge: A U.S. Senate Investigation into the Trump Administration’s Gutting of Asylum,” November 2019, <https://www.merkley.senate.gov/imo/media/doc/SHATTERED%20REFUGES%20-%20A%20US%20Senate%20Investigation%20into%20the%20Trump%20Administration%20Gutting%20of%20Asylum.pdf>.

¹³ *Ibid.* at 44.

¹⁴ *Ibid.* at 46.

¹⁵ *Ibid.* at 36.

territory return program that protects asylum seekers not only from *refoulement* but also from severe harm.

II. The Second Termination Memorandum Should Explain Why High *In Absentia* Rates in MPP Were Evidence of the Program’s Serious Flaws

One primary reason for terminating MPP included in DHS’s first termination memorandum was the “high percentage of [MPP] cases completed through the entry of in absentia removal orders,” which raised concerns about “whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief,” such as “whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety” led to this high absentia rate.¹⁶ Rather than engaging with the record to determine if those concerns were supported, the district court entirely ignored this portion of the termination memorandum, instead presuming that in absentia removal orders are a proxy measure for meritless asylum claims, such that the high rate of in absentia orders simply shows that many meritless claims were abandoned.¹⁷ In the interest of correcting the district court’s error, the second termination memorandum should explain (1) why a 44% failure to appear rate is unacceptably high, and (2) why the district court’s presumptions were incorrect.

First, a 44% failure to appear rate is nearly three times higher than the rate for non-MPP cases. From 2008 to 2018, 17% of non-detained removal cases filed inside the United States ended with an *in absentia* order.¹⁸ The *in absentia* rate for MPP cases was thus nearly three times higher than the rate for non-MPP cases. The fact that nearly 50% of people were unable to appear for their hearings—a rate three times higher than for similarly situated individuals inside the United States—demonstrates that migrants were not receiving due process as a direct result of the barriers placed on their access to court.

Measuring the percent of individuals who failed to appear for MPP hearings was the correct analytical method. But the district court adopted a different, less accurate calculation method (the Executive Officer for Immigration Review “*in absentia* rate”), which the termination memorandum should clarify was not appropriate in the circumstances.

As the report “Measuring *In Absentia* Removal in Immigration Court” explains, EOIR *in absentia* rates “overstate the rate at which immigrants fail to appear in court.”¹⁹ “*In absentia* rate” is an EOIR statistic produced by dividing annual *in absentia* removal orders by annual “initial case

¹⁶ Secretary Mayorkas, “Termination of the Migrant Protection Protocols Program,” June 1, 2021, https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

¹⁷ See, e.g., District Court Order at *18, *20.

¹⁸ American Immigration Council, “Measuring *In Absentia* Removal in Immigration Court,” January 28, 2021, at 9 https://www.americanimmigrationcouncil.org/sites/default/files/research/measuring_in_absentia_in_immigration_court.pdf.

¹⁹ *Ibid.*

completions.”²⁰ It does not represent the rate at which people fail to appear in court.²¹ For example, if 10 people are scheduled to appear for a hearing on a given day, one person is ordered removed for failure to appear, and no other cases are completed that day, the *in absentia* rate would be 100%. A 100% “*in absentia* rate,” therefore, does not indicate that 100% of the cases *heard* on a given day resulted in *in absentia* orders. But even if the termination memorandum *had* used the EOIR method cited by the district court, the conclusion would have been the same. The EOIR *in absentia* rate for MPP cases was 63%—27,802 MPP cases ended with an *in absentia* removal order out of 44,014 initial case completions. When calculated using the EOIR method, MPP’s *in absentia* rate of 63% is far greater than the 44% EOIR *in absentia* rates chosen as relevant comparators by the district court.

Second, the termination memorandum should expand on the irrefutable evidence of the dangers faced by asylum seekers in Mexico, as well as systemic barriers to completing proceedings and obtaining protection under MPP that resulted in many *in absentia* orders.

From the moment individuals and families were returned to Mexico under MPP, many faced unrelenting violence that threatened their lives and blocked their access to protection in the United States. For example, Médecins Sans Frontières reported that 75% of its patients returned to the border city of Nuevo Laredo under MPP in October 2019 were kidnapped.²² To reach U.S. immigration courts, asylum seekers and other migrants in MPP were repeatedly forced to run a gauntlet of potential kidnapping and assault—unconscionable violence those attending a non-MPP immigration court hearing in the United States would not face.

The record underlying the first termination memorandum shows that asylum seekers were routinely assaulted and kidnapped near the ports of entry while traveling to or from their MPP hearings. In one case, a mother and her nine-year-old daughter, who is deaf and mute, were kidnapped at knife-point by a group of men while leaving the port of entry following an MPP hearing.²³ Both the mother and daughter were held for ransom, during which time they were repeatedly beaten and raped. After family members were able to collect enough money to pay the ransom, they were released to learn that they had been ordered removed *in absentia* during the time they were held hostage. The history of MPP is replete with similar accounts.

In implementing MPP, the Government effectively delivered asylum seekers into the hands of highly organized criminal cartels exercising significant control in many regions of Mexico, as well as corrupt Mexican officials. The extreme violence, despair, and insecurity people endured under MPP forced many asylum seekers to choose between risking their lives to travel to hearings at

²⁰ *Ibid.* at 7.

²¹ *Ibid.* at 9.

²² Médecins Sans Frontières, “The devastating toll of ‘Remain in Mexico’ asylum policy one year later,” January 29, 2020, <https://www.msf.org/one-year-inhumane-remain-mexico-asylum-seeker-policy>.

²³ American Immigration Council Statement for the Record, *supra*.

unsafe ports of entry, frequently in the middle of the night, or abandoning their claims for humanitarian relief.

Finally, even when asylum seekers appeared at the border at the correct time, some border officials turned them away, either willfully or carelessly providing them with false information. Moreover, the information regarding when and where to appear for transport was given on a “tear sheet,” a separate document from the NTA, which was only provided in a limited number of languages.²⁴ This documentation process was highly criticized, even within the Government, because it failed to include critical information about the respondent such as name and A number, and there was no proof of service.²⁵

Compounding these problems, MPP respondents often lacked stable addresses for follow-up communications from DHS and the immigration court, and as the DHS Red Team Report explained, CBP had no reliable method of communication with migrants in MPP.²⁶ When hearings were changed or rescheduled, respondents alone carried the burden to figure that out, despite the challenges of living in tents or shelters (if they were lucky). Given these widespread notice issues, it is highly likely that some individuals missed court as a result.

Rather than just alluding to these extensively documented flaws, the second termination memorandum should be clear that it was MPP itself that led to an unacceptably high number of individuals missing court through no fault of their own.

III. The Second Termination Memorandum Should Clarify That the DHS Assessment Relied Upon by the District Court Was Deeply Flawed

In reaching its conclusion that the first termination memorandum was arbitrary and capricious, the district court relied heavily on an October 29, 2019 “assessment” of MPP. This conclusion was deeply flawed because the assessment is riddled with speculation, error, and unverifiable statements of opinion, such as the statement that MPP was “restoring integrity to the immigration system.” The second termination memorandum should make clear that reliance on this document is inappropriate and contradicted by both internal and external evidence.

Before discussing the factual errors in the assessment, we believe it is important to highlight the concerns raised by the document’s origin.²⁷ The strong impression is that the assessment was not a neutral analysis of the benefits of MPP and was instead created primarily for litigation

²⁴ See Amicus Br. of American Immigration Council and Immigration Non-Profits to the Bd. of Immigration Appeals (Oct. 20, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/council_submits_amicus_brief_on_insufficiency_of_notice_in_migrant_protection_protocols_proceedings.pdf.

²⁵ Ibid.; DHS Red Team Report at 7.

²⁶ Ibid.

²⁷ Concerningly, the “assessment” contains no information about its creation. It is not signed by any official, nor has DHS ever explained who carried out the assessment and how it was produced.

purposes.²⁸ On October 1, 2019, the 9th Circuit heard oral argument in *Innovation Law Lab* on the legality of MPP. At oral argument, the 9th Circuit panel expressed intense skepticism with the structure of MPP, including whether the requirement that migrants “affirmatively” express a fear of persecution in Mexico necessarily led to *refoulement* in violation of the law. On October 30, 2019, one day after DHS published the “assessment,” the Department of Justice filed it with the 9th Circuit through a Rule 28(j) letter²⁹ which expressly addressed the concerns raised during oral argument.³⁰

Setting aside the questionable circumstances of its creation, flaws in the assessment include some of the following:

- a. The assessment claims that MPP led to a reduction in border encounters. But three days *before* the assessment was published, the DHS Red Team Report indicated that DHS should develop “specific measures of effectiveness . . . to evaluate MPP’s effectiveness and scope.”³¹ Given the agency’s admission that no such measures existed at the time of the assessment, any conclusions were inherently unreliable and speculative.
- b. The assessment states that MPP caused those without meritorious claims to “voluntarily return home.” But this statement is based only on DHS’s estimation that, of the more than 55,000 people enrolled in MPP in October 2019, only 20,000 people were sheltered near the border, and 900 people had taken advantage of the International Organization for Migration’s “Assisted Voluntary Return” program. In light of the extensive evidence of the dangerous and unstable living conditions in Mexico, the inference drawn by DHS that anyone who returned home or who was not in a shelter did not have a meritorious asylum claim strains credulity.³² The unreasonable nature of this conclusion is further highlighted by the agency’s

²⁸ This conclusion is further bolstered by statements within the “assessment” that appear to directly address the possibility of a court blocking MPP, such as a claim that “disruption of MPP would adversely impact U.S. foreign relations.” It is unclear why a statement such as that would be included in a putative neutral assessment of MPP.

²⁹ See Appendix I, Petition for a Writ of Certiorari, *Wolf v. Innovation Law Lab*, at 199a, available at <https://innovationlawlab.org/media/Wolf-v.-Innovation-Law-Lab-Cert-Petn-and-Appx.pdf>.

³⁰ For example, Appendix A of the “assessment” appears to have been drafted specifically to respond to concerns raised by Judge Paez about the *nonrefoulement* interview process.

³¹ DHS Red Team Report at 8 (listing as 1 of 16 overall recommendations that DHS “Establish MPP Measures of Effectiveness”).

³² DHS’s conclusion is also undermined by the fact that many individuals were able to rent apartments or find long-term hotel accommodations while waiting for their court hearings. Mary Beth Sheridan, “Cubans were once privileged migrants to the United States. Now they’re stuck at the border, like everyone else,” *Washington Post*, November 5, 2019, https://www.washingtonpost.com/world/cubans-were-once-privileged-migrants-to-the-united-states-now-theyre-stuck-at-the-border-like-everyone-else/2019/11/04/65f1a4ea-fa60-11e9-9e02-1d45cb3dfa8f_story.html (“Unlike the Central Americans, the Cubans have largely been welcomed in Mexico. Many have enough money to rent apartments or hotel rooms and to eat out.”). To the extent DHS believed that peoples’ only choice was a shelter and that anyone who didn’t go into a shelter had returned to their home country, that conclusion was obviously wrong at the time of the assessment.

acknowledgement in the DHS Red Team Report three days earlier that migrants were required to “give up shelter space in Mexico when they c[a]me to the US for a hearing.”³³

- c. The assessment’s claim that Mexico’s commitment to provide safety to migrants “should be taken in good faith” is absurd given the well-documented violence and instability faced by migrants. At the time of the assessment, DHS was on notice that Mexican police themselves routinely violated the rights of migrants.³⁴ Similarly, the assessment’s claim that migrants “are provided access to humanitarian care and assistance, food and housing, work permits, and education” was well-documented to be false by the time of the assessment.
- d. The assessment’s claims about the adequacy of the *nonrefoulement* screening process are belied by the experiences of migrants, attorneys, and Asylum Officers themselves. Douglas Stephens, an asylum officer whistleblower, declared to Congress that “the program actively places asylum seekers in exceptionally dangerous circumstances” and that “the ad hoc implementation, lack of regulations, and high legal standard all but ensure that an applicant is unable to meet his or her burden.”³⁵ Similarly, the Red Team Report issued *prior to* the assessment showed that CBP officers in some locations were pressuring migrants not to request a *nonrefoulement* interviews.³⁶
- e. The assessment’s claims that MPP provided asylum seekers with a brief court process lasting a matter of months had already been proven wrong by the time the assessment was published. According to Reuters, “In June [2019], a U.S. immigration official told a group of congressional staffers that the program had ‘broken the courts’ . . . The official said that the court in El Paso at that point was close to running out of space for paper files.”³⁷ Internal assessments in 2019 leaked to the press found that EOIR would have to reassign 100 judges from around the country to the border to meet the program’s 6-month guideline for cases.³⁸ By August 1, 2019, nearly half of the case backlog in the El Paso Immigration Court was made up of MPP hearings, with

³³ DHS Red Team Report at 7.

³⁴ See, e.g., Brief of Amnesty International USA et. Al, *Innovation Law Lab v. McAleenan*, June 26, 2019, at 22, https://www.splcenter.org/sites/default/files/documents/2019.06.26_0044_amnesty_international_amicus_brief198883.1.pdf (“A 2017 survey concluded that a quarter of crimes against migrants had been committed by Mexican police and other government officials.”).

³⁵ Douglas Stephens, “Statement for the Record: Hearing on Examining The Human Rights and Legal Implications of DHS’s ‘Remain in Mexico’ Policy,” *available at* <https://www.congress.gov/116/chrg/CHRG-116hrg40466/CHRG-116hrg40466.pdf>.

³⁶ DHS Red Team Report at 6.

³⁷ Mica Rosenberg, Kristina Cooke, Reade Levinson, “Hasty Rollout of Trump immigration policy has ‘broken’ border courts,” *Reuters*, September 10, 2019 <https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1VV115>.

³⁸ *Ibid.*

some judges assigned to preside over 100 cases per hearing.³⁹ Given these challenges, it was impossible for the immigration court system to ever handle the volume of MPP cases assigned within a 6 month timeframe, a fact that was well-known by October 2019.

Given these serious concerns with the assessment, we believe that the second termination memorandum should expressly disclaim the document.

IV. COVID-19 Continues to Be A Major Concern in Resuming MPP, And DHS Cannot Send People Back to Mexico Without Any Scheduled Hearing Dates.

The first termination memorandum determined that “the COVID-19 pandemic” led to both the closure of “immigration courts designated to hear MPP cases” and also to “tens of thousands of enrollees [] living with uncertainty in Mexico as court hearings were postponed indefinitely.” In light of these conditions, the Secretary concluded that “any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.” However, the district court held that this conclusion was “arbitrary” and “without any merit” because “immigration courts were reopened by the end of April 2021.”⁴⁰

Both the first termination memorandum and the district court failed to mention a key policy which would even today prevent the resumption of MPP hearings. Specifically, the resumption of MPP hearings was not premised on the status of the immigration courts, but rather on the progression of the COVID-19 pandemic both globally and at the border. Under a July 17, 2020 agreement between DHS and EOIR, hearings were suspended indefinitely until:⁴¹

- (1) “California, Arizona, and Texas progress to Stage 3 of their reopening,”
- (2) Both the Department of State and the CDC “lower their global health advisories to Level 2, and/or a comparable change in health advisories, regarding Mexico in particular”; and
- (3) When “[Mexico’s] ‘stoplight’ system categorizes all Mexican border states . . . as ‘yellow.’”

Not only were these criteria unmet at the time the first memorandum was signed, they remain unmet today.⁴² Restrictions at ports of entry remain in place for all non-essential travel, and

³⁹ Ibid.

⁴⁰ District Court Order at *21. The district court was simply wrong about this fact. Three out of four MPP courts were still closed as of June 1, 2021. The El Paso Immigration Court, as well as the San Antonio and Harlingen Immigration Courts (which had administrative control over the Laredo and Brownsville Institutional Hearing Facilities), did not reopen until July 6. See Executive Office for Immigration Review, EOIR Operational Status, <https://www.justice.gov/eoir-operational-status> (“On July 6, EOIR resumed non-detained hearings at the following immigration courts: . . . El Paso, . . . Harlingen, . . . San Antonio.”).

⁴¹ Executive Office for Immigration Review, “Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings,” July 17, 2020.

⁴² See Centers for Disease Control, COVID-19 in Mexico, <https://wwwnc.cdc.gov/travel/notices/covid-3/coronavirus-mexico> (Mexico remains at Level 3 threat); Secretary of Foreign Affairs, Mexico’s COVID-19 Monitoring System,

resumption of MPP hearings would require modifying those restrictions. Resumption of hearings would also require the Centers for Disease Control and Prevention to issue new exemptions under Title 42, as individuals in MPP are held in “congregate settings” and thus subject to a prohibition on entry under Title 42.

The district court’s suggestion that COVID-19 was not a concern once courts had reopened is also unsupported. A careful examination of the physical infrastructure of the courts and hearing facilities used to operate MPP is necessary to explain why COVID-19 would still make MPP impossible to carry out in a safe manner.

In San Diego and El Paso, hearings were held at GSA-leased federal buildings inside the United States where the current immigration courts are housed. Because the courts are not in their own independent buildings, acquiring additional space to carry out socially distanced hearings would be expensive and logistically difficult.

In both locations, individuals arrived for MPP hearings at the port of entry by 4:30 AM. Once respondents had arrived, they were transported inside the ports of entry for initial processing by CBP officers. In a congregate setting inside the port of entry, officers would verify with each individual that they had a court hearing that morning, and then issue a temporary parole for each individual to permit them to enter the United States. This process typically took more than an hour and would require CBP to limit the number of people who could be processed for MPP hearings each day if social distancing protocols were implemented.

Once all individuals with court hearings that day had been processed inside the port of entry, CBP would then transfer custody of the individuals to a contractor hired by ICE. The contractor would then transport all the respondents from the port of entry to the immigration court in a crowded van or bus. Social distancing during transport would be difficult.

The ICE contractor would then bring the respondents inside the immigration court for their hearings. In both El Paso and San Diego, courtrooms were highly crowded because MPP hearings were as a matter of policy over-booked, with 100 people scheduled for a single hearing being common.⁴³ The courtrooms were so crowded that in El Paso, court administrators routinely denied public access to the media and court observers on grounds of overcrowding.

Once individuals had been inside a crowded courtroom for several hours for their hearing, they were then transported back to the port of entry and the ICE contractor would transfer custody back to CBP. At the port of entry, CBP would then carry out individualized processing for each respondent to determine the next steps in their case. If they had a new hearing scheduled, CBP

<https://embamex.sre.gob.mx/eua/index.php/en/2016-04-09-20-40-51/tourism/1760-mexico-s-covid-19-monitoring-system> (Baja California remains at an “orange” level under the spotlight system, one step above yellow).

⁴³ Mica Rosenberg, Kristina Cooke, Reade Levinson, “Hasty Rollout of Trump immigration policy has ‘broken’ border courts,” <https://www.reuters.com/article/us-usa-immigration-courts-insight/hasty-rollout-of-trump-immigration-policy-has-broken-border-courts-idUSKCN1W115>.

would process them for a subsequent MPP return and then issue a new “tear sheet” before releasing them back into Mexico. This process would routinely take hours.

Individuals who had requested a nonrefoulement interview were held for much longer, because the nonrefoulement interview took place inside the port of entry while individuals were still in CBP custody. It was routine for individuals to be held for 2-3 days for the entire nonrefoulement interview process to be carried out.⁴⁴ Throughout this time, they would be held in congregate custody in detention cells where social distancing is not possible and ventilation is poor.

Processing at the Institutional Hearing Facilities in Laredo and Brownsville was not significantly different than in El Paso and San Diego, other than the lack of transportation from one facility to another. The COVID-related concerns were nearly the same; individuals held in congregate settings for initial CBP processing, then again for hours in the Institutional Hearing Facilities, then again by CBP for processing back to Mexico or longer-term if a nonrefoulement interview was required.

Throughout this process, respondents in a reinstated MPP would be held in congregate settings and unable to socially distance, raising the risk of the spread of COVID-19. This would violate current EOIR policy, which requires that all respondents in court stay at least 6 feet apart.⁴⁵ The only way to operate MPP hearings and maintain any form of social distancing would be to limit hearings to only a few dozen people a day, which would directly interfere with DHS’s goals behind MPP by either forcing the agency to drastically limit the number of people placed into MPP (thus undermining the deterrence rationale), or drastically extending the amount of time people would have to wait in Mexico (thus undermining the expedient hearing rationale).

Importantly, requiring individuals to show proof of vaccination and a negative COVID test to be admitted would not resolve these issues either. It would in fact create an entirely separate set of problems because tests and vaccines are not universally available to migrants in Mexico and because delays related to any COVID protocol would prolong respondents’ stay in Mexico. For example, many individuals could be forced to spend months longer in Mexico under MPP just because they could not procure a test in time for the hearing, or if they tested positive. And because breakthrough infections remain possible, holding people in congregate settings without social distancing still risks disruption.

Thus, the second termination memorandum should more clearly explain *why* COVID-19 continues to prevent the resumption of MPP hearings. And without the ability to resume MPP hearings in a safe manner, DHS must not and cannot resume the Trump administration post-

⁴⁴ ACLU, “ACLU: Asylum Seekers Subject to Trump’s Remain in Mexico Policy Must be Given Access to Counsel,” November 5, 2019, <https://www.aclusandiego.org/en/news/aclu-asylum-seekers-subject-trumps-remain-mexico-policy-must-be-given-access-counsel>.

⁴⁵ Executive Office for Immigration Review, “Notice of Public Health Procedures,” July 2021, <https://www.justice.gov/file/1398881/download>.

COVID policy of sending people back to Mexico through MPP to wait indefinitely until such a time as the COVID-19 pandemic subsides, which was in direct contradiction to the stated intent of MPP to *expedite* the court process. The memorandum should also clarify the importance of adequate notice of the date and time of any future scheduled removal hearings,⁴⁶ which would be next-to-impossible if DHS resumed MPP prior to the creation of a COVID-safe hearing process.

V. Conclusion

We are grateful that the Biden administration is continuing to engage in a process that will lead to the eventual termination of MPP. In order to do so, the administration and DHS must go beyond the mild condemnations of the initial termination memorandum and instead fully document the myriad ways in which the Migrant Protection Protocols provided neither protection nor adequate protocols to migrants.

Sincerely,

The American Immigration Council
Al Otro Lado
American Friends Service Committee
American Immigration Lawyers Association
Asylum Seeker Advocacy Project (ASAP)
Border Organizing Project
Catholic Legal Immigration Network, Inc.
Church World Services
El Instituto para las Mujeres en la Migración (IMUMI)
Florence Immigrant & Refugee Rights Project
Haitian Bridge Alliance
HIAS
Hope Border Institute
Immigrant Defenders Law Center
Immigration Hub
Latin America Working Group (LAWG)
Lutheran and Immigrant Refugee Service
Migrant Center for Human Rights
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project (NIPNLG)
Oxfam America
Refugee and Immigrant Center for Education and Legal Services (RAICES)
Refugee Congress
Refugees International
Save the Children

⁴⁶ See 8 U.S.C. 1229(a)(1); *cf. Niz-Chavez v. Garland*, 141 S.Ct. 1474 (2021).

Save the Children Action Network
The Advocates for Human Rights
The International Rescue Committee
Witness at the Border
Women's Refugee Commission