

No. 21-954

IN THE
Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE
UNITED STATES, ET AL.,
Petitioners,

v.

STATE OF TEXAS, ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

**BRIEF FOR *AMICI CURIAE* THE BORDER
PROJECT AND THE NATIONAL
IMMIGRANT JUSTICE CENTER
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae the Border Project (a pro bono initiative of Jones Day) and the National Immigrant Justice Center (“NIJC”) are committed to expanding access to justice for asylum seekers in removal proceedings. *Amici* have represented or assisted thousands of migrants who have entered the United States through, or have been detained in, Laredo, Texas. *Amici* have witnessed the degradation of access to justice for asylum seekers who are placed in the so-called Migrant Protection Protocols (“MPP”). In describing how MPP thwarts access to justice at every step, this brief also addresses the issues raised by the Government’s Brief: violence in Mexico and the forced cooperation between the U.S. and Mexican officials under the MPP.

***Amici*’s “Border Project”**

Jones Day, a global law firm, launched what is now known as the Border Project in 2014.² Over 1,800 Jones Day attorneys and staff have devoted more than 420,000 pro bono hours to this initiative. Initially, the Border Project focused on providing legal representation to unaccompanied minors who crossed the U.S. southern border in their quest for asylum or other immigration relief after fleeing persecution or being abandoned by their parents in their home

¹ Pursuant to Rule 37.2(a), both counsel of record filed a letter granting blanket consent. No counsel for any party authored this brief in any part, and no person or entity other than *amici*, its members, or its counsel made a monetary contribution to fund its preparation or submission.

² The Border Project was formerly known as the Laredo Project.

countries. In 2017, the Border Project expanded to provide pro se counseling and pro bono representation to women in Immigration and Customs Enforcement custody at the Laredo Detention Center and, soon thereafter, to mothers with children and other family members, most of whom had fled gender-based violence and other persecution in their home countries. Partners, associates, and support staff from Jones Day offices across the nation operated a full-time office in Laredo. They visited migrants at the detention center on a near-daily basis; provided Know Your Rights presentations to more than 5,000 migrants at the facility; prepared detainees for “credible fear” interviews with asylum officers; and represented clients in bond and removal proceedings.

Jones Day’s partner in this work has been NIJC, a program of the Heartland Alliance for Human Needs and Human Rights. NIJC is a Chicago-based not-for-profit organization that provides legal representation and consultation to low-income immigrants, refugees, and asylum seekers. Each year, NIJC represents hundreds of individuals before the immigration courts, the Board of Immigration Appeals, and the federal appellate courts. NIJC consults on or co-counsels a number of Border Project cases, and NIJC also accepts client referrals from the Border Project.

Amici’s Work During MPP 1.0

In 2019, the Trump administration initiated MPP (“MPP 1.0”), a policy under which newly-arrived migrants seeking asylum at the southwest border were barred from entering the United States and were instead sent back to Mexico to await their U.S. immigration proceedings there. When MPP 1.0 was launched in Laredo, the Border Project and NIJC

sought to respond to the legal and logistical challenges of providing services to asylum seekers sent back to Nuevo Laredo, the town across the border from Laredo, Texas. *Amici*'s practices in Laredo focused on providing pro bono representation and pro se counseling to asylum seekers subject to MPP who had claims pending in the Laredo Immigration Hearing Facility ("LIHF"). The LIHF is a "tent court"—a facility constructed of tents and shipping containers, where migrants present their claims over video-conference to the immigration judges of the San Antonio Immigration Court (and, occasionally, the Fort Worth Immigration Adjudication Center).

During MPP 1.0, Jones Day represented approximately 140 migrants in MPP proceedings in Laredo. Jones Day's clients prevailed in 45 out of 47 asylum trials in MPP Laredo proceedings. Jones Day also provided legal consultations to over 1,000 migrants in MPP proceedings in Laredo, and conducted daily Know Your Rights presentations in the Laredo hearing facility in the weeks leading up to the pandemic-imposed court closures. NIJC co-counseled with Jones Day on some of these cases and independently handled other matters heard at the LIHF. LIHF immigration judges provided protection-based relief to all of NIJC's clients.

As some of the very few lawyers practicing at the LIHF, *amici* observed first-hand the ways in which MPP 1.0 at Laredo deprived individuals seeking refuge in the United States of access to justice. When this Court granted certiorari to consider whether MPP is a lawful implementation of DHS's statutory authority, *amici* filed a brief illustrating the fundamental flaws of MPP and how the program

impermissibly closed the doors of justice. Brief of the Laredo Project et al. as *Amici Curiae* Supporting Respondents, *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212). While the case was pending, MPP ceased due to a change in administration, and the Court dismissed the case as moot.

Termination of MPP 1.0 And DHS’s Outreach To The Border Project For Assistance with MPP 2.0

On June 1, 2021, the Biden administration formally terminated MPP through a memorandum issued by the Department of Homeland Security (“DHS”). Two months later, the United States District Court for the Northern District of Texas determined that the June 1 memorandum was not issued in compliance with the Administrative Procedure Act, vacated the memorandum in its entirety, and remanded to DHS for further consideration. While that decision was on appeal, on October 29, 2021, the Secretary issued a new memorandum terminating MPP once again. The October 29 memorandum discussed the “several barriers in accessing counsel both in the United States and in Mexico” as one of the reasons to terminate MPP and cited *amici’s* brief in the challenge to MPP 1.0 before this Court. See Pet.App.298a-99a & n.70 (citing Brief of the Laredo Project et al. as *Amici Curiae* Supporting Respondents at 20-21, *Innovation Law Lab*, 141 S. Ct. 2842 (No. 19-1212)).

The Fifth Circuit held that the Secretary’s new memorandum could not be considered and forced DHS to maintain MPP (hereinafter referred to as “MPP 2.0”). Like the district court, the Fifth Circuit did not

consider the harms that MPP would continue to impose on asylum seekers and left the administration scrambling to figure out what improvements it could make to the program before implementation began. Like MPP 1.0, MPP 2.0 mandates that certain noncitizens seeking immigration relief in the United States be returned to Mexico during the pendency of their immigration proceedings. Unlike MPP 1.0, MPP 2.0 requires immigration authorities to ask every person in the program if they have a fear of returning to Mexico.

Given *amici's* prior work in MPP 1.0, DHS approached Jones Day, requesting that the firm provide legal services to migrants enrolled in MPP 2.0. Jones Day agreed to do so at the El Paso Central Processing Center ("CPC") on a short-term basis, and partnered with NIJC and another law firm to set up a hotline and train over a dozen lawyers to counsel migrants placed in MPP 2.0 who expressed a fear of returning to Mexico. The project launched on December 6, 2021. From December 6, 2021 to December 22, 2021, *amici* were contacted by 135 migrants, completed over 125 consultations, and participated in 17 non-refoulement interviews in which migrants sought to establish that they had a fear of returning to Mexico. *Amici* provided analysis, critiques, and recommendations for improvement to officials at DHS about access to counsel and due process issues *amici* encountered during the initial stages of the MPP 2.0 roll-out. The Border Project has now resumed its work in Laredo.

The stories recounted herein are from Border Project clients unless otherwise specified. Despite the inherent challenges and risks, *amici* have dedicated

themselves to bolstering access to justice for migrants who are detained or are otherwise in immigration proceedings in Laredo. *Amici* are committed to providing representation and other legal support to asylum seekers with meritorious claims. Consequently, *amici* have a strong interest in this matter—and a strong interest in safeguarding access to justice from the deleterious effects of MPP.

SUMMARY OF ARGUMENT

Access to justice “is the right conservative of all other rights, and lies at the foundation of orderly government.” *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Access to justice includes (1) a meaningful opportunity to be heard and (2) the ability to obtain the assistance of counsel. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”); *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993) (an alien’s right to representation by counsel of the alien’s choice is “an integral part of the procedural due process to which the alien is entitled”) (quotation marks omitted); *Leslie v. Att’y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010) (same); *Frech v. U.S. Att’y Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007) (same); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th Cir. 2004) (same); *Saakian v. INS*, 252 F.3d 21, 24 (1st Cir. 2001) (same); *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) (same). MPP corrodes these twin pillars of access to justice.

Under MPP 1.0 in Laredo, Texas, *amici* witnessed first-hand how swiftly a policy can all-but-eliminate the access to justice protections afforded to those seeking asylum in the United States. Under MPP 1.0,

asylum seekers located in Mexico often struggled to locate attorneys who could represent them across the border in United States immigration court. And even when asylum seekers managed to find representation for proceedings at LIHF, their lawyers—such as those at the Border Project and NIJC—faced serious obstacles providing representation: the migrants generally could not meet with their attorneys in person, had limited (or no) ability to receive or review documents, and had insufficient access to privacy and working phones. At times, clients represented by the Border Project and NIJC were under surveillance by Mexican cartels while conducting trial preparation by phone with their lawyers. Tragically, many were also kidnapped and became disconnected from their lawyers as a result, at times missing hearings because they were being held hostage by a cartel. Fear of kidnapping drove asylum seekers away from Nuevo Laredo, often rendering them transient and without the ability to communicate with counsel. These very issues led DHS to terminate MPP in June 2021 and again in October 2021.

A Texas district court and the Fifth Circuit have precluded DHS from applying its own policy preferences and, instead, required DHS to implement a policy that imposes structural hurdles effectively blocking any meaningful access to justice. With its hands tied, DHS acclaims a commitment to “reimplementing MPP in a way that enhances protection for individuals enrolled in the program” by coordinating with the Government of Mexico to provide access to shelters and transportation to and from hearings, as well as by handing out legal resource packets. Memo. from Dep’t of Homeland

Sec., *Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols* (Dec. 2, 2021), <https://tinyurl.com/mtsx56t8> (“MPP Reimplementation Memo”). But these marginal steps do not (and cannot) solve the access to justice obstacles inherent in MPP.

Legal representation is the single most important factor affecting the outcome of an asylum claim. Yet, access to counsel is thwarted at every stage under any version of MPP. *First*, obtaining counsel is extremely difficult. Counsel is largely unavailable to migrants in Mexico pursuing asylum claims across the border. Migrants are usually in the United States for less than a day before being returned to Mexico and remain in government custody the entire time. During this time, only a few lawyers have very limited access to migrants for the sole purpose of providing an overview of MPP. This means that the attorneys present at the LIHF cannot possibly evaluate claims and take on representation of the hundreds of migrants enrolled in MPP. All migrants get is a near-empty list of legal service providers who might be able to help after migrants are returned to Mexico. But, as the Government’s Brief acknowledges, violence in Mexico is endemic and cartels prey on migrants. As a result, migrants must find ways to contact these legal service providers by phone because they are unable to meet with most attorneys across the border. This set-up almost assures asylum relief will be impossible for the vast majority of asylum seekers subject to MPP.

Second, even if a migrant under MPP retains counsel, the attorney faces numerous challenges preparing the migrant’s claims. *Amici*, for instance, cannot travel to Nuevo Laredo due to the extreme

danger such trips would pose to *amici*'s attorneys and clients. Accordingly, Border Project and NIJC attorneys typically cannot meet their clients in person before appearing in court. Mailing documents has proven impossible because migrants are transient and often live in temporary shelters or public spaces without reliable mailing service, and phone communication is often limited. Yet, attorneys are tasked with establishing trust with their extremely traumatized clients, building a case, and preparing a filing that, in *amici*'s cases, usually spans 300-350 pages of a variety of documents and reports. The obstacles are daunting and often insurmountable.

Third, many attorneys are meeting clients in person for the first time, an hour before the hearing on the client's asylum claim is set to take place. This leaves many attorneys scrambling to establish a rapport with their client, review with the client for the first time the massive filing that the attorney prepared on behalf of the client in a space where the client can speak freely, and answer any questions—all in less than the one hour usually permitted by authorities at the LIHF.

DHS's promise to provide transportation to and from hearings does nothing to ensure migrants have better access to counsel or that they will be prepared for their hearing. It also does not address the limitations at the hearings themselves, such as the fact that the tent court's microphones pick up every sound making confidential communication between clients and attorneys almost impossible. Moreover, even this limited transportation benefit requires cooperation with the Mexican government, which often has proven unwilling or unable to protect

migrants. As the Government's Brief explains, this forced cooperation raises executive power issues. Moreover, as many Border Project clients have seen first-hand, the Mexican government has turned a blind eye to, or actively participated through corrupt officials, in violence against MPP enrollees. This can hardly be considered access to justice.

MPP 2.0 is plagued by the same unfixable structural problems as its predecessor. And MPP's defects erode the very nature of our justice system.

ARGUMENT

I. Access to Justice Is Critical In Asylum Cases.

Consistent with the most basic access to justice principles, a noncitizen placed in removal proceedings has a statutory right to “counsel of the [noncitizen’s] choosing” and a “reasonable opportunity ... to present evidence on the [noncitizen’s] own behalf.” 8 U.S.C. § 1229a(b)(4). “The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.” U.N. Human Rts. Comm., *General Comment No. 32: Article 14, Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶¶ 9-10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007). This is no different in asylum proceedings.

Indeed, having counsel is the “single most important factor affecting the outcome of an asylum case.” Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J.L. Reform 1001, 1015 n.51 (2015) (quoting Am. Bar Ass’n Comm’n on Immigr., *Reforming the Immigration System:*

Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases: Executive Summary ES-7 (2010)). That is not surprising because presenting any asylum claim is daunting. Asylum seekers must prepare the Application for Asylum and for Withholding of Removal (Form I-589), which comprises over one hundred questions and fourteen pages of instructions. This form must be completed and submitted in English, yet most asylum seekers have little or no English proficiency. See U.S. Dep't of Just., EOIR, *Statistics Yearbook: Fiscal Year 2018*, at 18, <https://tinyurl.com/t3v39le> (last updated Aug. 30, 2019) (reporting that 89% of immigration court cases required translation services).

Furthermore, successful asylum applicants generally support their claims with evidence such as police reports, medical records, identification documents, and photographs—but asylum seekers frequently flee with little more than the clothes on their backs. And even those who bring documentation may have it stolen. If kidnapped, as many are, asylum seekers often are stripped of their possessions, including documents and photos (in hard copy or stored electronically on their cell phones). And asylum seekers frequently have reason to fear that friends and family back home will face persecution if they help the asylum seekers to gather documentation. Lawyers are the best, and often the only feasible, way for an asylum seeker to collect official documentation without the involvement of the applicant's vulnerable friends or family. Other essential parts of the presentation include coordinating fact affidavits from witnesses in the

applicant's home country; retaining an expert to prepare a report regarding the state of human rights and other conditions in the applicant's country of origin; and coordinating certified English translations of any non-English language materials relevant to the applicant's fear of return to their country. In most of the Border Project's cases, this filing spans 300-350 pages.

Without lawyers, asylum applicants' challenges are further compounded by their reactions to trauma. Having fled extreme violence in search of safety, many asylum seekers experience post-traumatic stress disorder ("PTSD") and other mental health challenges. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 461 (2016). "Avoiding painful topics is common among trauma survivors, and when asylum seekers do open up, their memories can flood together." Ardalan, *supra*, at 1020. Asylum applicants who experience trauma are less likely to recall the details of their persecution consistently over time, and are more likely to recall memories in overgeneralized terms or to minimize the importance and intensity of their trauma. Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 Hastings Race & Poverty L.J. 235, 257 (2007); Pub. Interest Pro Bono Ass'n, *Working with Survivors of Abuse: A Trauma Informed Approach* 2 (Oct. 7, 2020), <https://tinyurl.com/y8also7m>. "None of these things [is] a reliable measure of whether a survivor is truthful, and yet they are the very things an

immigration judge will typically point to as evidence that an asylum seeker is not credible.” Paskey, *supra*, at 461-62. Lawyers are seldom therapists, but they can help a traumatized asylum applicant to clarify and corroborate their experiences and to obtain documentation and supporting materials to establish credibility.

It is for these reasons that an asylum applicant with representation is multiple times more likely than a pro se applicant to obtain relief. See TRAC Immigr., *Asylum Representation Rates Have Fallen Amid Rising Denial Rates* (Nov. 28, 2017), <https://tinyurl.com/y8fn2pzt>; Ardalan, *supra*, at 1003 & n.6; Samantha Balaban et al., *Without A Lawyer, Asylum-Seekers Struggle With Confusing Legal Processes*, NPR (Feb. 25, 2018), <https://tinyurl.com/yayysqgp>. In a survey of asylum decisions issued in FY 2018, 40% of represented asylum applicants obtained some form of immigration relief, compared to only 11.4% of applicants who were unrepresented. See TRAC Immigr., *Asylum Decisions*, <https://tinyurl.com/muvhrtzp> (last visited March 16, 2022) (filtered for FY 2018). In FY 2017, those numbers were 48.1% for asylum seekers with counsel and only 11.5% for asylum seekers without counsel. See *id.* (filtered for FY 2017). And in FY 2016, those numbers were 55.6% for asylum seekers with counsel and only 11.2% for asylum seekers without counsel. See *id.* (filtered for FY 2016).³

³ The data for FY 2019 and FY 2020 are not entirely reliable because thousands of asylum cases have been omitted. See TRAC Immigr., *Asylum Decisions*, <https://tinyurl.com/muvhrtzp> (last visited Mar. 16, 2021) (“13,160 Asylum Applications Disappeared From EOIR Data during FY 2019-2022”); TRAC

In MPP 1.0, the differences were even more stark. During the first implementation of MPP, only 0.65% of unrepresented individuals were granted some form of relief, compared to 26.4% of individuals who were represented by an attorney. TRAC Immigr., *MPP (Remain in Mexico) Deportation Proceedings—All Cases*, <https://tinyurl.com/2p8ctwtx> (last visited Mar. 16, 2022).

II. MPP, In Any Form, Thwarts Access to Justice.

The purpose of MPP is to prevent individuals who arrive at the southern border seeking asylum from entering the United States. These asylum seekers are returned to Mexico with little else but a notice to appear in U.S. immigration court at a later date. In MPP 1.0 at Laredo, it was almost impossible for asylum seekers to find attorneys to represent them. Migrants enrolled in MPP 1.0 at other ports along the southern border also struggled to retain counsel. Only

Immigr., *After EOIR Fixes Most Egregious Data Errors, TRAC Releases New Asylum Data—But with a Warning* (Sept. 16, 2020), <https://tinyurl.com/y3q4rzou> (discussing missing data). Nonetheless, the data that are available indicate that in FY 2019 and FY 2020, an asylum seeker with representation was approximately twice as likely to obtain relief as an asylum seeker without representation. See TRAC Immigr., *Asylum Decisions, supra* (filtered for FY 2019, showing that 34% of represented migrants obtained some form of relief, compared with 16.5% of unrepresented migrants; and filtered for FY 2020, showing that 32.1% of represented migrants obtained some form of relief, compared with 19.2% of unrepresented migrants). These statistics were generated by the Transactional Records Access Clearinghouse using EOIR data; EOIR-generated statistics do not straightforwardly address the issue. See Jeffrey S. Chase, *EOIR's New Math* (Dec. 12, 2020), <https://tinyurl.com/yxcbjxll4>.

7% of migrants under MPP 1.0 were represented. TRAC Immigr., *MPP (Remain in Mexico) Deportation Proceedings, supra*.

Now required to implement MPP 2.0, the government has suggested it will “enhance[] protection for individuals enrolled in the program.” MPP Reimplementation Memo, *supra*. But there is little evidence that MPP 2.0 will usher in a sea change for migrants’ access to justice. The conditions in Mexico have not improved and U.S. attorneys will still be unable to maintain a physical presence in Mexico. As such, migrants in MPP will continue to have limited ability to retain counsel, and counsel will be severely constrained in preparing and presenting their clients’ asylum claims.

A. Migrants In MPP Face Extraordinary Difficulties Retaining Counsel.

MPP makes it extraordinarily difficult for migrants to find an attorney to represent them. Asylum seekers in removal proceedings in the United States are generally able to relocate to areas where they have familial and other support networks, and their cases may be moved to courts near where they reside. Human Rts. Watch, “*We Can’t Help You Here*”: *US Returns of Asylum Seekers to Mexico* 34 (2019), <https://tinyurl.com/mrywk3vr>. Once in the United States, asylum seekers have access to attorneys and non-profit legal service providers, who can offer in-person consultations through which they take on individual cases for representation. By contrast,

under MPP, no such network of legal service providers is available.

DHS distributes to migrants enrolled in MPP 2.0 the “legal resource packets” containing contact information for legal service providers in the United States and guidance “about where they can locate places in Mexico to engage in telephonic or video communications with counsel.” MPP Reimplementation Memo, *supra*, at 6. But that document is of limited value. The packet distributed at the Laredo IFH only contains the contact information for the Border Project; no other service providers are listed. *See* U.S. Dep’t of Just., *List of Pro Bono Legal Service Providers*, <https://tinyurl.com/2p83w45b> (last updated Jan. 2022). For Brownsville, no dedicated MPP list is provided. The dearth of names illustrates the reality that many groups who typically provide legal assistance to asylum seekers are unable to do so in these circumstances.

The Government’s Brief acknowledges that migrants face “predatory violence” in Mexico. Gov’t Br. at 28. Indeed, violence is endemic in Mexico. The U.S. State Department assesses five states in Mexico as posing the highest possible safety risk (Level 4)—the same level as conflict-ridden countries such as Syria, Iran, Libya, and Afghanistan. U.S. State Dep’t, Bureau of Consular Affairs, *Mexico Travel Advisory* (Mar. 11, 2022), <https://tinyurl.com/wca3r5h3>. “Organized crime activity—including gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault—is common along the northern border” of Tamaulipas, where “[h]eavily armed members of

criminal groups ... operate with impunity.” *Id.* The State Department advises United States citizens not to travel to Tamaulipas at all. *Id.* Additionally, the State Department has issued travel advisories for many Mexican states due to “crime and kidnapping.” *Id.*

During MPP 1.0, the Border Project considered providing assistance to MPP enrollees by travelling across the border to Nuevo Laredo, but determined that it was far too dangerous to do so, both for its own attorneys and for those migrants it would be serving. When Border Project attorneys took an exploratory trip across the border, the local pastor with whom they were scheduled to meet (who ran a shelter for migrants) was missing; he had been kidnapped a few days earlier by cartel members, reportedly because he attempted to stop them from kidnapping asylum seekers. *See Premier Christian News, Still no sign of pastor one year after kidnapping* (Aug. 3, 2020), <https://tinyurl.com/yaefrzaq>; *Premier Christian News, Mexico: Commission calls for update three months after Pastor kidnapping* (Nov. 4, 2019), <https://tinyurl.com/yxl45swa>. And twenty-six percent of *amici*'s clients under MPP 1.0 at Laredo were kidnapped at least once after being forced to return to Mexico.

The Border Project has continued to monitor conditions in Nuevo Laredo and has no plans to send attorneys there. Even if migrants relocate to areas in Mexico that are relatively safer than Nuevo Laredo, that would only replace one logistical hurdle with another. It is not feasible for the Border Project to send attorneys all over Mexico to meet with clients; doing so would create substantial logistical difficulties

in the representation of clients and would consume resources and further restrict the number of cases the Border Project can take on.

Migrants enrolled in MPP 2.0 will also struggle to reach attorneys by phone from Mexico even if the U.S. government were to tell them where they could find a phone. Accessing a phone is only part of the problem. During MPP 1.0, migrants were often worried that the Border Project's phone number really belonged to a government official (who could deny relief), or to a cartel member (who could inflict harm). And migrants are scared of who might be listening to their conversations. Many Border Project clients stayed at shelters in Nuevo Laredo where, as a security measure, shelter staff only allowed residents access to their phones during limited hours of the day. Even then, calls happened in a communal space where Border Project clients had no privacy and feared the intimate details of their asylum claims would be heard by adverse parties, or by their children, who would be traumatized by such information. One migrant called the Border Project from a broom closet in a shelter because she was concerned that the pastor who ran the shelter was working with a cartel and might use against her the information she shared over the phone. In MPP 2.0, shelters continue to restrict migrants' access to phones and migrants still report feeling unsafe.

Once cartels discover the places where the U.S. government encourages migrants to make telephone or video calls, the ability for these communication hubs to provide any form of access to counsel vanishes. Given these conditions, many attorneys are hesitant to advertise their services or provide services at all

because it places them at the potential receiving end of a cartel's demand for ransom. Cartels frequently target "asylum seekers outside shelters, [immigration] offices, at bus stations, and in transit between those locations." Strauss Ctr. for Int'l Sec. & Law, *Migrant Protection Protocols: Implementation and Consequences for Asylum Seekers in Mexico* 34 (May 2020), <https://tinyurl.com/y9c968qz>. The cartel targets migrants "on the assumption that most asylum seekers in the MPP program have US relatives who can be extorted." Human Rts. Watch, *US: Investigate 'Remain in Mexico' Program* (June 2, 2020), <https://tinyurl.com/y38bl9jt>. "After being physically apprehended, asylum seekers are typically taken to warehouses or other locations where they are held until people pay their ransom, which is usually thousands of dollars." Strauss Ctr., *supra*, at 34.

Other U.S.-based attorneys have reported being threatened. See Human Rts. First, *Remain in Mexico Restart Threatens Safety of Attorney and Humanitarian Workers* (Nov. 2021), <https://tinyurl.com/unewk2xn>. The Border Project has even switched to non-traceable "burner" phones for client and potential client communications, to minimize the risk of individual attorneys being targeted for extortion. But communication under these circumstances is extraordinarily labor intensive. To obtain a consultation with the Border Project under MPP 1.0, a migrant would need to call the Border Project hotline, staffed by Border Project paralegals, and leave a callback number that staff—using a burner phone—would call-back to conduct an initial screening and to schedule a meeting with Border Project attorneys. At the scheduled meeting

time, Border Project attorneys would call the migrant using yet another burner phone or, in certain cases where the migrant's internet connection was sufficiently robust, using a business conferencing system. The same methods were also used to coordinate meetings with Border Project clients. Clients were assigned code numbers to use when they called the Border Project to confirm their identity. Many other service providers cannot offer the same resources and labor-intensive service. Providing a "legal resource packet" changes none of this.

This Court has recognized that the "right to be heard [is], in many cases, of little avail if it d[oes] not comprehend the right to be heard by counsel." *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). But for the vast majority of asylum applicants subject to MPP, retaining counsel will remain, as a practical matter, impossible. The very structure of MPP prevents it.

B. MPP Impedes Counsel's Preparation of Asylum Claims.

Even when a migrant subject to MPP is able to retain counsel, providing that legal representation is a significant challenge. Many immigration practitioners in the United States are unable—logistically or otherwise—to provide services to migrants across the border in Mexico. Human Rts. Watch, *We Can't Help You Here*, *supra*, at 34. For safety reasons, *amici* cannot travel to Mexico to meet with their clients. *See* Part II(A). Mexican attorneys cannot substitute for counsel in the United States because attorneys in Mexico are typically neither licensed nor otherwise able to provide representation

in United States courts. At the same time, because of MPP, *amici's* clients are not allowed to visit *amici's* law offices in the United States. As a result, attorneys have no choice but to put together a case without meeting their clients in person, except very briefly before or after a preliminary MPP hearing. This is extraordinarily difficult because there is no replacement for in-person contact to establish trust with a client.

Yet, under the MPP, almost all communication between an attorney and a migrant occurs virtually. Frequent power outages disrupt cell and internet service. For many clients, internet service on their phones is sporadic or nonexistent, which limits communication over WhatsApp (an instant messaging app). Migrants often have insufficient funds to purchase cellular data or minutes. Phone theft is common. And, to limit potential communication with cartels, many shelters have policies preventing migrants from accessing their phones except during specific two-hour time periods, into which migrants must squeeze all communication (legal and otherwise), and during which they have no privacy.

Although DHS has stated that “[m]igrant shelters in Mexico will provide computers/tablets that can be used for ... communication,” there is no evidence of that happening thus far in the Monterrey shelters where MPP Laredo enrollees have been taken and little reason to think that migrants will have unfettered access. Dep’t of Homeland Sec., *Information and Reminders for Individuals in MPP*, <https://tinyurl.com/374dxcr4> (last updated Feb. 8, 2022). Power outages and service disruptions also affect computers and tablets, and shelters will likely

continue to limit the time any single migrant can spend on the computer. And there is no indication that migrants will be able to take these computers/tablets to private locations, rendering them less effective as a means of attorney-client communication. *Amici* witnessed this first-hand.

During MPP 1.0, a Border Project client gave an account of a family-based persecution claim during an initial interview (based on the murder of his uncle by gang members and the gang's subsequent threats and extortion of his entire family). He did not disclose until three days before his final hearing that he had also been the victim of a brutal sexual assault by five men who made clear that they attacked him because he was gay. The client, who is HIV positive, believed that he contracted HIV during the assault. He was reluctant to disclose this information over the phone because he had no privacy; he feared what his roommates would do if they found out about his sexuality or his HIV status.

But *even if* migrants had access to computers and tablets, and *even if* they could use that technology in a private location, it would still be extraordinarily difficult for a migrant to relate their most painful memories to an attorney whom they have never met face-to-face. When clients suffer from PTSD, in-person meetings are particularly important in enabling attorneys to establish trust, to understand their clients' experiences, and to prepare clients for cross-examination by the government's lawyer and questioning from the immigration judge. One Border Project client was kidnapped and raped in front of her children after being returned to Mexico under MPP. Her attorneys did not learn about the sexual assault

until their fourth or fifth phone conversation because the events were so painful to recall. Border Project attorneys were not able to get the details of her story until they took the exceptional step of flying to Monterrey, Mexico, paying for hotel space, coordinating with a local charity to reserve meeting space, and arranging childcare so the attorneys could speak with their client in private. Such resources are unavailable in most cases, and practices such as these are unsustainable for legal service providers. But without them, the Border Project attorneys may never have learned the extent of their client's abuse.

In sum, telling migrants that they might be able to use a phone or computer in Mexico to engage in telephonic or video communications with counsel does nothing to solve the fundamental obstacles counsel encounter in trying to prepare a client's asylum case virtually.

C. MPP Limits Migrants' Opportunity to be Heard.

A migrant's hearing is the one opportunity, guaranteed by statute, to present evidence and testimony showing why she is deserving of asylum relief. *See* 8 U.S.C. § 1229a (procedures governing removal proceedings). But MPP hinders attorneys and migrants from presenting asylum claims in any meaningful way. The Government's Brief alludes to "the challenges for the immigration courts processing MPP enrollees' removal proceedings." Gov't Br. at 28. If anything, the Government's Brief understates these challenges.

Attorneys must prepare for the hearing with little contact from their clients. *See* Part II(B). And there

is virtually no way to mail documents to clients in Mexico. Many migrants subject to MPP have no mailing address because homeless shelters in Mexico typically do not accept mail for migrants. Even shelters that accept mail do not generally provide a stable address, since a migrant usually loses her spot (and her address) when she leaves the shelter. Human Rts. Watch, *We Can't Help You Here*, *supra*, at 37.

In *amici's* experience, attorneys in MPP 1.0 were allotted a total of one hour to meet with their clients before a hearing—but, because some of this time was taken up with security and movement within the LIHF, as a practical matter *amici* frequently were only able to speak with their clients for about half an hour. This meant that in the very brief time before a hearing starts, attorneys reviewed with their clients (and obtained signatures on) the I-589 Application for Asylum, a detailed document with over one hundred questions. Often, this is the first time migrants are able to discuss their cases in private and safe locations, which means clients often offer new important information that attorneys must rush to incorporate into written and oral submissions to the immigration judge moments before the hearing. During this brief time, attorneys must also quickly work to ensure that clients understand the legal and factual issues in the case and to discuss other submissions, including country condition reports and expert reports, some of which the client may be seeing in person for the first time. In MPP 1.0, there was little to no time to actually prepare the client for the types of questions they would be asked on the witness

stand or to explain how the proceeding would be conducted.

After the meeting, lawyers and clients were separated and were not allowed to sit next to each other. This prevented lawyers from exchanging last-minute preparatory information with their clients. Further, when a client's case was called, there was no opportunity to confer with the client quietly and privately during the hearing. The proceedings at LIHF are held in shipping containers, where the microphones pick up every sound and convey any conversations or whispers to the immigration judge and government attorney in the immigration court.

There is nothing to suggest that the changes ushered in by MPP 2.0 would do anything at all to fix these issues.

III. Providing Secure Transportation Does Not Alleviate The Access to Justice Issues And Requires Reliance On Mexican Authorities Who Have Been Known To Participate In Violence Against Migrants.

One of the few arguable improvements from MPP 1.0 to MPP 2.0 is its stated promise to provide "secure transportation to and from ports of entry." MPP Reimplementation Memo, *supra*, at 2-3. For individuals enrolled in MPP in Laredo, this is likely to mean that transportation will be provided through arrangements between the Mexican government and the International Organization for Migration, from Monterrey, Mexico to Nuevo Laredo. But providing transportation to and from hearings does not provide better access to counsel or help migrants prepare or present their asylum claims. Migrants in northern

Mexico are vulnerable to criminal predation and other harms that put their life in danger and create a significant possibility that they are not able to contact attorneys or make it to their designated bus at all. And such a plan inherently relies on the cooperation of a government that has proved unwilling or unable to protect migrants from harms that are omnipresent in Mexico. Any claim that transportation solves the access to justice issues described above rings hollow.

Mexico is dangerous, *see* Part II(A), and kidnapping of asylum seekers, in particular, has “become big business.” Ed Vulliamy, *Kidnappers prey with ‘total impunity’ on migrants waiting for hearings in Mexico*, THE GUARDIAN (Feb. 18, 2020), <https://tinyurl.com/tuqbm6>. Pastor Diego Robles further explained: “It is worse in Tamaulipas than other border states, and worse in Nuevo Laredo than anywhere else in Tamaulipas. There’s no formula to the abductions and disappearances—*they are kidnapped, beaten, women violated; most return, but not all.*” *Id.* (emphasis added). At one of *amici*’s client’s hearings in MPP 1.0, the government’s counsel told the court that kidnapping “is potentially a reality for every respondent.” The Lead, *Lawyer Defending Trump Policy Makes Stunning Admission*, CNN POLITICS (Mar. 11, 2020), <https://tinyurl.com/vdxxajl>. Kidnappings have not abated. As of June 17, 2021, Human Rights First “tracked 3,250 kidnappings and other attacks, including rape, human trafficking, and violent armed assaults, against asylum seekers and migrants expelled to or blocked at the U.S.-Mexico border since President Biden took office in January 2021” and suspended enrollment into MPP. Human Rts. First, *Update: Grave Dangers Continue*

for Asylum Seekers Blocked In, Expelled to Mexico by Biden Administration (June 22, 2021), <https://tinyurl.com/38jyvadm>.

Yet, DHS's transportation pledge requires confidence in, and ongoing reliance on, the Mexican government to help protect the safety and wellbeing of migrants placed in MPP. As the Government's Brief explains in detail, securing cooperation of the Mexican government has always been a feature of MPP, and it is particularly problematic from the executive powers perspective. *See* Gov't Br. at 26-28. In any event, that trust is misplaced. Up to this point, the Mexican government has not taken meaningful action to prevent the widespread victimization of migrants. Worse, some Mexican police and government officials have participated in the violence committed against migrants who, under MPP, are required to remain in Mexico. *See, e.g.,* Luis Chaparro, *Policies Trump started and Biden has continued are allowing corrupt officials and cartels to cash in on migrants*, BUSINESS INSIDER (Jan. 14, 2022), <https://tinyurl.com/4zkn6tsr>. Approximately seventy percent of the migrants *amici* consulted with during intake at the El Paso CPC in MPP 2.0 reported having been harmed by Mexican police or government officials while transiting to the U.S. border. Border Project attorneys heard migrants reporting abuses ranging from deliberately ignoring reports of crimes by cartels to extortion and kidnapping.

One migrant from Nicaragua was kidnapped by the Zetas cartel, and had a gang member hold a gun to his head and threaten to shoot him in the head. He told the Border Project that he observed uniformed Mexican police officers drinking and "partying" with

Zetas. Another Nicaraguan migrant whom the Border Project counseled, was extorted on two different occasions by Mexican officials and was delivered to a cartel by a taxi driver. Once in cartel custody, the migrant was held, bound on the floor, for six days. He was kicked in the ribs repeatedly and denied adequate food. He was only released after his mother paid a ransom to the cartel.

Reports of Mexican officials demanding bribes of migrants, often under threat of violence, have increased with alarming frequency. See Human Rts. Watch, *Mexico: Abuses Against Asylum Seekers at US Border* (Mar. 5, 2021), <https://tinyurl.com/ypretv28>; Associated Press, *105 Mexican immigration agents linked to corruption*, ABC NEWS (Jan. 13, 2022), <https://tinyurl.com/yckt6ynh>. A migrant from Venezuela, who the Border Project consulted with, was told by a Mexican police officer at a highway checkpoint that he would “disappear” if he failed to pay the police officer \$400. Similarly, the Border Project consulted with a Nicaraguan migrant who identified as a member of the Miskito indigenous community and who reported that, during one encounter with Mexican police, an officer demanded payment of a bribe while pointing a gun at the migrant’s head.

Refusing to pay often results in migrants being turned over to a cartel. The Border Project counseled a migrant from Nicaragua who was taken off of a bus by Mexican immigration officials after crossing Mexico’s southern border and told to pay a bribe before he could continue his journey to the northern border. After the migrant refused, these officials directed him to walk to a truck loaded with armed

men, who then drove him to a house filled with other migrants being held for ransom. After his captors confirmed his nationality, they pointed a gun at his head and told him that if he did not secure a payment of \$5,000—which they specified was the amount demanded of Nicaraguan nationals—he would be killed.

Providing transportation to a hearing—assuming that such transportation will even be carried out—does nothing to protect migrants from the dangers of living their day-to-day lives in Mexico as there is a high likelihood they can be kidnapped or killed and never make it to their hearing. Nor does it ensure that migrants can access counsel, and prepare for their asylum claims on non-hearing days. Nor does it alleviate limitations at the hearings themselves. This Court has made clear that “mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process.” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). Getting a ride is not access to justice.

* * *

“If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.” *Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring) (quoting Learned Hand, J.). But MPP limits migrants to only the stingiest ration. They are unlikely to find an attorney, making relief almost impossible to obtain. And even if they are able to find an attorney, MPP severely impedes the preparation and presentation of an asylum claim. Attorneys do not have a meaningful opportunity to elicit information from their clients, and clients must present testimonies to the court while overwhelmed

and exhausted. Migrants in Mexico live in fear of being kidnapped by cartels or extorted by corrupt officials associated with the Mexican government. This is MPP—and this is not meaningful access to justice.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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Respectfully submitted,

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