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**Statement of the American Immigration Lawyers Association
Submitted to the House Homeland Security Subcommittee on Border Security,
Facilitation, & Operations**

**Hearing on “Examining the Human Rights and Legal Implications
of DHS’ ‘Remain in Mexico’ Policy”**

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As the national association of more than 15,000 attorneys and law professors who practice and teach immigration law, the American Immigration Lawyers Association (AILA) is deeply concerned with the Remain in Mexico policy, also known as the [Migrant Protection Protocols](#), which requires asylum seekers at our southern border to wait in Mexico until their requests for humanitarian protection are decided.¹

Remain in Mexico dramatically alters the processing of asylum claims at the U.S. southern border, making it far more difficult for asylum seekers to receive a fair and meaningful review of their claims. In January, AILA [expressed grave concerns](#) that the policy effectively denies asylum seekers their right to [be represented by counsel](#) and curtails their ability to receive a fair and meaningful review of their claims.² Additionally, the [well-documented violence](#) and instability that migrants face in Mexico exposes returned asylum seekers to severe risk of further trauma while they wait for their hearings.³ AILA has [urged the administration to terminate Remain in Mexico](#) and return to the longstanding practice of allowing asylum seekers to wait in the U.S. while their cases are being reviewed. In addition, many Remain in Mexico cases are heard in [massive tent facilities](#) in Laredo and Brownsville, Texas that function as virtual immigration courtrooms.⁴ These tent courts mount significant roadblocks to access to counsel, due process, and transparency.

¹ *DHS Releases Policy Guidance for Implementation of the Migrant Protection Protocols*, AILA Doc. No. 19012907 (January 25, 2019), available at <https://www.aila.org/infonet/dhs-implementation-migrant-protection-protocols>.

² *Trump Administration Unveils More Severe Restrictions on Due Process and Asylum in “Remain in Mexico,”* AILA Doc. No. 19012842 (January 28, 2019), available at <https://www.aila.org/advo-media/press-releases/2019/trump-administration-unveils-more-severe-restrict>; *AILA Sends Letter to DHS Acting Secretary Detailing MPP’s Barriers to Counsel*, AILA Doc. No. 19060336 (June 3, 2019), available at <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>.

³ *Human Rights First, Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process* (August 2019), available at <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>; see also *AILA and Advocates Send Letter Urging Secretary Nielsen to End the Migrant Protection Protocols Policy*, AILA Doc. No. 19020631 (February 6, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/aila-and-advocates-send-letter-urging-secretary>.

⁴ See www.aila.org/portcourts; Haley Willis, Christoph Koettl, Caroline Kim and Drew Jordan,

While there are many troubling aspects of the Remain in Mexico policy, this statement focuses on how the policy effectively denies asylum seekers' right to be represented by counsel. The collective experience of AILA members who represent asylum seekers subject to this and other policies makes us well-qualified to offer views on their harmful impact. In addition to being in touch with AILA members practicing on the Southern border, in September and November AILA sent delegations to observe the effects of these policies in Brownsville, Laredo, and San Antonio, Texas, as well as Matamoros, Mexico.

Background on Tent Courts

In September, [DHS opened massive tent facilities](#) in Laredo and Brownsville, Texas that serve as virtual immigration courtrooms for Remain in Mexico cases.⁵ During the hearings, asylum seekers are held in tents at the ports of entry while judges appear remotely via video teleconference from traditional brick-and-mortar courtrooms elsewhere. DHS chose to open these courts without meaningful notice to the public or the legal community and provided almost no information about even basic operations and procedures at the tent courts once they were operational. The location of these tent courts forces asylum seekers to [wait for their proceedings](#) in extreme danger in Nuevo Laredo and Matamoros, which have both been designated by the U.S. State Department with a level four "[Do Not Travel](#)" warning due to high rates of crime and kidnapping.⁶

Harsh Conditions in Mexico Present Nearly Insurmountable Barriers to Legal Services

To understand the impact of Remain in Mexico on the right to counsel, it is important first to understand the conditions that asylum seekers are subjected to while in Mexico, and how those conditions make it more difficult for them to access the few legal resources that may be available. Asylum seekers subject to Remain in Mexico must be able to present at ports of entry when they are scheduled for immigration court hearings, which means they must wait in Mexico's northern border region for months.

While in Mexico, asylum seekers – an increasingly large proportion of which are mothers, children, and families⁷ – often must stay in shelters or temporary camps set up by local nonprofit organizations with limited resources. These camps have been unable to keep up with the demand for housing and basic services, and the conditions in the camps are deteriorating.⁸ When space is full at shelters and camps, asylum seekers are forced to find alternative housing, even though they may not speak Spanish and often do not have any local family or other ties. Many end up sleeping on the streets. In addition, asylum seekers stuck in the Mexico may not have regular access to food or clean water.

Trump Is Having Tent Courthouses Built Along the Border. Here's What They Look Like., New York Times available at <https://www.nytimes.com/video/us/politics/100000006681200/border-immigration-tent-courthouses.html>.

⁵ *Id.*

⁶ Patrick McDonnell, *Pastor's kidnapping underscores threat to migrants returned to Mexican border towns*, *LA Times* (September 2, 2019), available at <https://www.latimes.com/world-nation/story/2019-09-01/kidnapping-of-pastor-in-mexican-border-town-dramatizes-threats-to-migrants>; Department of State, *Mexico Travel Advisory* (April 9, 2019), available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>.

⁷ See Migration Policy Institute, *Eight Key U.S. Immigration Policy Issues*, Doris Meissner and Julia Gelatt, May 2019, available at <https://www.migrationpolicy.org/research/eight-key-us-immigration-policy-issues>.

⁸ See Patrick Timmons, *Squalid migrant shantytowns forms in Mexican border city*, May 14, 2019, available at https://www.upi.com/Top_News/World-News/2019/05/14/Squalid-migrant-shantytown-forms-in-Mexican-border-city/5501557701209/.

Those waiting in Mexico frequently experience violence. In fact, the Dilley Pro Bono Project, a collaboration run by AILA and other organizations, found that 90.3% of the 500 respondents they [surveyed](#) in January and February of 2019 said they did not feel safe in Mexico, and 46% reported that they or their child had experienced at least one type of harm while in Mexico.⁹

Without regular access to basic life necessities like food, water, shelter, and safety, asylum seekers often do not have the ability to seek out the few legal services that may be available. They may not have cell phones or regular access to landlines to call organizations to request representation, much less the money to make international calls to organizations in the U.S. They are particularly vulnerable to notaries and other bad actors in the area who prey on these exact vulnerabilities. Additionally, the trauma suffered by these families and the ongoing dangers they face in Mexico would make it even more difficult for survivors to relay their stories clearly and concisely to a legal services provider in a consultation, much less an asylum officer or judge.

By contrast, if asylum-seekers could wait in the U.S. while their claims are reviewed, they would live in comparatively safe and sanitary detention conditions and have better access to legal and social services. Additionally, non-profit organizations would be able to provide legal orientation programs and some limited legal representation free of charge.

Few Legal Services Providers Are Able to Represent Asylum Seekers in Mexico

Even if an asylum seeker has the resources to seek legal representation, legal services providers are scarce and cannot possibly meet the need presented by the [thousands](#) of people subject to Remain in Mexico.¹⁰ [According to DHS](#), asylum seekers subject to the policy are “provided with a list of legal services providers in the area which offer services at little or no expense to the migrant.”¹¹ This is the [same list](#) given to respondents who are located in the U.S. and consists solely of organizations based on the U.S. side of the border near the immigration court where their hearings will take place.¹² The list is not tailored for asylum seekers marooned in Mexico and contains organizations that are not able to travel to Mexico and conduct consultations or provide legal representation. It is also incredibly difficult for attorneys to represent asylum seekers subject to Remain in Mexico involved with representing someone outside of the country. Frequent travel to Mexico for U.S.-based attorneys is often not possible or unsustainable due to the exorbitant travel costs and disruption to their representation of other clients in the United States. The result is that most attorneys simply cannot represent asylum seekers subject to Remain in Mexico.

Remain in Mexico Impedes Communications Between Asylum Seekers and Their Attorneys

If an asylum seeker subject to Remain in Mexico is able to find an attorney in the U.S. who can represent them, the mere fact that the migrant is located in Mexico with so few resources means that the effectiveness of that representation could be compromised. Competent and ethical representation of an

⁹ AILA and Advocates Send Letter Urging Secretary Nielsen to End the Migrant Protection Protocols Policy, AILA Doc. No. 19020631 (February 6, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/aila-and-advocates-send-letter-urging-secretary>. See also Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process* (August 2019), available at <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf>.

¹⁰ Over 55,000 people have been subject to the Remain in Mexico policy. Maria Verza, *Migrants thrust by US officials into the arms of the cartels*, Washington Post (November 16, 2019), available at https://www.washingtonpost.com/world/the_americas/migrants-thrust-by-us-officials-into-the-arms-of-the-cartels/2019/11/16/92003c6e-08ba-11ea-ae28-7d1898012861_story.html.

¹¹ Department of Homeland Security, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

¹² See EOIR, *List of Pro Bono Legal Services Providers*, available at <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>.

asylum seeker is an involved and lengthy process that requires constant communication between the client and the attorney. The Model Code of Professional Responsibility requires that attorneys reasonably communicate with and zealously represent their clients.¹³

AILA's Asylum and Refugee Committee estimated that representing an asylum seeker in immigration court takes between 40-80 hours of work, with an estimated 35 hours of face-to-face communication with the client.¹⁴ By marooning asylum seekers in Mexico, Remain in Mexico makes it significantly more difficult for attorneys to communicate with their clients: face-to-face meetings are expensive and thus either rare or impossible; video conferencing is rare, as is the internet speeds needed to support it; a client may not have regular access to a phone, and if they are able to find one, do not have space where they can have a confidential conversation; and international phone calls are expensive and phone coverage can be spotty.¹⁵

One of the most critical aspects of representing an individual in asylum proceedings is being able to build trust between the client and the attorney. Most asylum seekers have experienced severe trauma and suffer from some form of psychological distress, making face-to-face communication essential for building trust. This type of relationship is necessary for clients to feel comfortable disclosing sensitive information and traumatic details to the attorney. Such specific, detailed information is required for asylum officers and judges to find an individual credible and ultimately grant relief. Again, frequent travel to Mexico for U.S.-based attorneys is unsustainable, which means the ability of attorneys to build trust will be compromised. Given these circumstances, U.S. attorneys may refuse to take on cases subject to Remain in Mexico out of legitimate concerns about being able to fulfill their ethical duties of competence.

Without the opportunity to travel to Mexico and consult with their clients, attorneys are typically required to wait until moments before a scheduled immigration court hearing to meet them face-to-face for the first time. Clients often speak languages other than English, and additional time and resources are required for interpretation services. Given these factors, it is extremely difficult for asylum seekers to relay their story in a full and comprehensible fashion, especially in initial meetings. Waiting until hours – in many circumstances, minutes – before a scheduled immigration court hearing to have direct contact with the client is not enough time for an attorney to build the type of trust discussed above and elicit the necessary details. Additionally, there are practical obstacles to building a case in the moments before court – attorneys and clients may not have access to a private room where they can discuss the case confidentially, or even the ability to use a computer and printer to ensure any last minute information is included in court filings.

In addition to above-mentioned hurdles to counsel, migrants subject to Remain in Mexico at the tent courts have even greater hurdles to accessing legal counsel. For example, in the few cases where a

¹³ Rule 1.4, Communications (2018), In American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct, *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/; Preamble(2018), American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct, *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

¹⁴ These averages are the result of a survey completed between March 11, 2019 to March 15, 2019 of the members of the AILA Asylum and Refugee Committee, who, collectively, have represented thousands of asylum seekers. *See AILA Sends Letter to DHS Acting Secretary Detailing MPP's Barriers to Counsel*, AILA Doc. No. 19060336 (June 3, 2019), *available at* <https://www.aila.org/infonet/aila-sends-letter-to-dhs-acting-secretary-mpp>.

¹⁵ *See* Patrick Timmons, *Squalid migrant shantytowns forms in Mexican border city*, May 14, 2019, *available at* https://www.upi.com/Top_News/World-News/2019/05/14/Squalid-migrant-shantytown-forms-in-Mexican-border-city/5501557701209/.

migrant is able to find representation, AILA has found that some attorneys of record have not been able to meet with their clients for more than [30 minutes](#) on the day of the hearing, despite the fact that clients are required to show up at the ports of entry hours prior to the hearing.¹⁶

Denial of Observer and Legal Orientation Access to Secretive Tent Courts

DHS had stated that it will allow public access to the tent courts, subject to some restrictions such as requiring requests for access to be submitted five days in advance. In September 2019, for example, then-Acting Department of Homeland Security Secretary Kevin McAleenan [tweeted](#) that the public and media would have access to the facility. However, as detailed in an October 7, 2019 [letter](#) sent by AILA and several other organizations, DHS has consistently denied access to attorney observers and non-governmental organizations (NGOs).

DHS has restricted access to the port courts to clients and their attorneys of record that have a representation agreement on file. At one time, even support staff for attorneys of record (i.e. interpreters and paralegals) [were restricted](#) from entering the tent court hearings.¹⁷ As a result, DHS is preventing nonprofit organizations from interviewing migrants for potential pro bono services, and even preventing nonprofits from providing basic legal orientation programs to migrants. Similarly, DHS has refused tent court access to attorney observers from non-governmental organizations (NGOs) seeking to tour the facilities and observe hearings from inside the tent facilities. As far as we are aware, only one NGO has been allowed inside the tent facilities for a tour before the courts were functioning.

During the week of September 16, representatives from AILA, the National Immigrant Justice Center, Women's Refugee Commission, and Amnesty International attempted to observe proceedings inside the facilities and were denied entrance by ICE officers and/or contractors. Some officers indicated that the denial of access was due to orders from ICE headquarters, and others indicated that CBP was responsible. Following the September visit, AILA [sent a letter](#) to DHS, ICE, CBP, DOJ, and EOIR requesting information about the tent courts and access to the tent court, to which DHS has not responded.¹⁸

Prior to AILA representatives traveling to Brownsville last week, AILA once again contacted CBP and ICE to request access to the tent facilities. ICE indicated that CBP controlled all access to the tent courts, and that they did not have a contact at CBP that could help AILA request access. Despite several phone calls and emails to CBP over a fourteen-day period leading up to the delegation's trip, AILA only received a reply from CBP the day before AILA representatives were scheduled to visit the tent facilities. CBP denied access to AILA and stated that the "facility is not available for in-person public access at this time."¹⁹

Observing Remain in Mexico hearings from the court locations where the judges are sitting is not an adequate substitute for being allowed to access the tent facilities holding the migrants. Observation from a

¹⁶ Camilo Montoya-Galvez, "Farce of due process": Lawyers denounce new border tent courts for migrants, CBS News (September 19, 2019), available at <https://www.cbsnews.com/news/asylum-seeker-tent-courts-at-border-denounced-by-attorneys-as-farce-of-due-process/>.

¹⁷ Laura Lynch and Leidy Perez-Davis, *Searching for Fairness and Transparency – A Firsthand Look at the Port Courts in Laredo and Brownsville*, Think Immigration (September 16, 2019), <https://thinkimmigration.org/blog/2019/09/16/due-process-disaster-in-the-making-a-firsthand-look-at-the-port-courts-in-laredo-and-brownsville/>.

¹⁸ AILA Sends Letter Requesting Information and Access to Port Courts, AILA Doc. No. 19092600 (September 26, 2019), available at <https://www.aila.org/port-courts-letter>.

¹⁹ AILA Sends Letter to Congress Demanding Public Access to Tent Courts, AILA Doc. No. 19111233 (November 12, 2019), available at <https://www.aila.org/advo-media/aila-correspondence/2019/aila-sends-letter-to-congress-demanding-public>.

courtroom that is hundreds of miles away from the actual location of the proceedings will not provide meaningful comprehension of how proceedings are operating from the migrant's point of view. Furthermore, remote observers will not be able to bear witness to any rights violations that may occur when the video teleconference system is malfunctioning or shut off.

Inaccurate and Incomplete Notices to Appear in Remain in Mexico Cases

Notices to Appear (NTAs) issued by DHS in Remain in Mexico cases have contained inaccurate information, including incorrect hearing locations and inaccurate addresses for migrants. [One NTA](#) even listed “Facebook” as the respondent’s address.²⁰ Additionally, some NTAs are incomplete and fail to specify whether the respondent is being charged as an “arriving alien,” an “alien present in the United States who has not been admitted or paroled,” or an alien “admitted to the United States” who is removable. These charges on the NTA are vital to the proceedings because they impact the legal recourses available to the migrant. Despite these serious problems, DHS still pushes for immigration judges to order individuals subject to Remain in Mexico removed *in absentia*. Immigration judges have also said that DOJ has [instructed](#) them to order those who do not appear at their hearing to be removed *in absentia*.²¹

Documents Falsely Indicating a Future Hearing Date

CBP has sent people who have been granted asylum back to Mexico with documents that [falsely indicate](#) that they have an upcoming court hearing.²² The Mexican government has stated that it will not accept people whose cases have been decided and who do not have a future hearing date. This has also happened to migrants who had their cases terminated — meaning a judge closed the case without making a formal decision, usually on procedural grounds. In addition to the safety and due process problems that these fake hearing dates pose, they also pose logistical hurdles, including questions around how and when the migrants will return to the U.S.

DHS Should Immediately End Remain in Mexico and the Use of Tent Courts

Given the deeply troubling nature of the Remain in Mexico policy and its implementation, as well as the potential life-or-death consequences for the migrants, AILA urges DHS to end the Remain in Mexico program and the use of tent courts.

²⁰ Adolfo Flores, *Border Patrol Agents Are Writing “Facebook” As A Street Address For Asylum-Seekers Forced To Wait In Mexico*, BuzzFeed News (September 26, 2019), available at <https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico>.

²¹ Gaby Del Valle, *Trump’s Remain in Mexico Policy Is Causing Asylum-Seekers to Miss Court Dates — and Get Deported*, Vice News (September 24, 2019), available at https://www.vice.com/en_us/article/gyzdp9/trumps-remain-in-mexico-policy-is-causing-asylum-seekers-to-miss-court-dates-and-get-deported.

²² Gustavo Solis, *CBP agents wrote fake court dates on paperwork to send migrants back to Mexico, records show*, The San Diego Union-Tribune (November 7, 2019), available at <https://www.sandiegouniontribune.com/news/immigration/story/2019-11-07/cbp-fraud>.