No. 21-954

IN THE
Supreme Court of the United States

JOSEPH R. BIDEN, JR., ET AL.,
Petitioners,

v.

STATE OF TEXAS, STATE OF MISSOURI,
Respondents.

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

BRIEF OF *AMICI CURIAE* 61 IMMIGRATION ADVOCACY AND LEGAL SERVICE ORGANIZATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are 61 nonprofit organizations that serve noncitizens and defend their rights. *Amici* include both national advocacy organizations and local direct service providers who aid and advocate for migrant families. *Amici* have a strong interest in the legal regimes that impact the rights and welfare of noncitizens arriving at the southwest border, including those who have been and may be subject to "Migrant Protection Protocols" ("MPP" or "Remain in Mexico"). A full listing of *amici* appears in the Appendix.

Justice Action Center ("JAC") is a nonprofit organization dedicated to advancing the civil and human rights of immigrants through a combination of impact litigation and storytelling. It provides support to select nonprofit organizations that have immigrant members or provide direct legal services to immigrant communities. As an organization litigating on behalf of immigrant communities in numerous jurisdictions nationwide, with active litigation on Remain in Mexico, JAC has a strong interest in the accurate application of immigration and administrative laws throughout the federal courts and the correction of legal errors that cause untold human suffering.

The Refugee and Immigrant Center for Education and Legal Services ("RAICES") is a nonprofit

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[1] The parties have filed blanket consents to the filing of amicus briefs. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

organization headquartered in San Antonio, Texas. Founded in 1986 as the Refugee Aid Project by community activists in South Texas, RAICES has grown to be the largest immigration legal services provider in Texas. RAICES's mission is to promote justice by providing robust legal services, social programs, bond assistance, and advocacy to support underserved migrant children, families, and refugees in Texas. RAICES serves tens of thousands of clients each year through its Legal Department, which provides direct representation and litigation services. As part of these programs and services, RAICES represents migrants subjected to Remain in Mexico and actively litigates Remain in Mexico.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit's decision is an unjustified departure from precedent that perpetuates a humanitarian crisis at the southwest border. The decision's disregard of the October 29 Memorandum distorts the States' claims, abandons hornbook administrative law, and creates a novel and untenable one-strike-and-you're-out standard for agency action. Pet. App. 257a. The Fifth Circuit's erroneous determination that the October 29 Memorandum had "no legal effect," Pet. App. 5a, allowed the court to elide the "substantial and unjustified human cost" of Remain in Mexico that the agency found outweighed any potential benefit *Id.* at 260a. *Amici* bear witness to those human costs, which must not be swept aside by legal errors. The consequences of those errors are devastating; the "human cost" of Remain in Mexico increases every day the reinstated policy remains in effect. See *id.* The stories of those suffering under the reinstated policy compel the conclusion that allowing

the injunction to stand is not only unwarranted, it is also inhumane.

ARGUMENT

I. THE FIFTH CIRCUIT'S REFUSAL TO CONSIDER THE OCTOBER 29 MEMORANDUM DEFIES LAW AND REASON WITHOUT REGARD FOR THE HUMAN COST

A. The Fifth Circuit's decision is fatally flawed

The decision below suffers from at least three fatal flaws. First, it mischaracterizes the States as challenging the *merits* of to the decision to terminate MPP even though the Complaint expressly challenged the procedural validity of the Department of Homeland Security's ("DHS") decision-making through "the June 1 Memorandum." Compare Pet. App. 21a ("The States are challenging DHS's *Termination Decision*—not any particular memo that DHS might have written in the past or might write in the future"), with, *e.g* First Amended Complaint at ¶¶ 101–06, 109–12, 116–18, *Texas* v. *Biden*, No. 2:21-cv-67 (N.D. Tex. June 3, 2021) (consistently challenging the "June 1 Memorandum" and nowhere mentioning the "Termination Decision"). The court effectively rewrote the States' claims to reach its result. Pet. App. 21a n.2 (finding that even the States "misunderstand[]" their own claims).

Second, the Fifth Circuit's holding that the October 29 Memorandum had "zero legal effect" defies nearly a century of precedent establishing that § 706(2)(A) of the Administrative Procedure Act permits an aggrieved party to challenge the process and explanation of an agency decision, but not to substitute its judgment for the agency's. See *SEC* v. *Chenery*

Corp. (*Chenery I*), 318 U.S. 80, 88 (1943) (refusing to allow courts to "intrude upon the domain" of agency decision-making or substitute the court's "determination of policy or judgment" for the agency's); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."); *United States* v. *Garner*, 767 F.2d 104, 116 (5th Cir. 1985) ("the central focus of the arbitrary and capricious standard is on the rationality of the agency's 'decisionmaking,' rather than its actual decision"); *Fed. Commc'ns Comm'n* v. *Prometheus Radio Project,* 141 S. Ct. 1150, 1158 (2021).

Third, the court invented a one-strike-and-you're-out standard that permitted DHS just one opportunity to terminate a controversial and destructive policy that multiple courts had found likely unlawful. *Innovation L. Lab* v. *Wolf*, 951 F.3d 1073, 1095 (9th Cir. 2020) (concluding that Remain in Mexico "is inconsistent with 8 U.S.C. § 1225(b), and that it is inconsistent in part with 8 U.S.C. § 1231(b)" and "should be enjoined in its entirety"), cert. granted, 141 S. Ct. 617 (2020), vacated and remanded sub nom. *Mayorkas* v. *Innovation L. Lab*, 141 S. Ct. 2842, 210 L. Ed. 2d 955 (2021), vacated as moot sub nom. *Innovation L. Lab* v. *Mayorkas*, 5 F.4th 1099 (9th Cir. 2021). This result ignores a foundational principle of administrative law: if a court initially finds an agency explanation insufficient, the agency may take new action that considers additional factors but ultimately supports the same conclusion. *DHS* v. *Regents of the Univ. of California*, 140 S. Ct. 1891, 1908 (2020) (an agency may "rest on [its challenged decision] while elaborating on its prior reasoning, or issue a new [decision] bolstered by new reasons"); *id.*

at 1934 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (noting that "[c]ourts often consider an agency's additional explanations" made "on remand from a court, even if the agency's bottom-line decision itself d[id] not change"). *SEC* v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 202 (1947); *Federal Commc'n Comm'n* v. *Pottsville Broad. Co.*, 309 U.S. 134, 145 (1940); *Chamber of Com. of U.S.* v. *Sec. & Exch. Comm'n*, 412 F.3d 133, 145 (D.C. Cir. 2005).

B. The Fifth Circuit's Errors Deprived the District Court of the Opportunity to Consider the Agency's Determination that MPP's Human Costs Do Not Outweigh any Purported Benefit

As a consequence of the Fifth Circuit's erroneous approach, the district court had no opportunity to consider the agency's "additional explanations," *Regents,* 140 S. Ct. at 1934, including the cost/benefit analysis of Remain in Mexico the agency conducted in response to the district court's order. That analysis led the agency to conclude that any benefit of Remain in Mexico was outweighed by the substantial "human cost" of the program. Pet. App. 260a. In this matter, it is especially important to allow the Government the opportunity to cure any procedural defect and to re-examine the Remain in Mexico Policy. The human costs of that policy are, demonstrably, unacceptably high. *Amici* work with migrants who have suffered those costs and share their stories:

1. Remain in Mexico Harms Children and Separates Families

Remain in Mexico has delivered thousands of children into danger and has separated families. *"Like I'm Drowning" Children and Families Sent to Harm by*

the US 'Remain in Mexico' Program, Human Rights Watch (Jan. 6, 2021).[2]

For example, **Jonathan**,[3] a young man escaping violence in El Salvador entered the United States with his wife **Daya**, who was seven months pregnant at the time. Separating them, DHS admitted Daya but returned Jonathan to Ciudad Juarez alone. In shock, Jonathan could not stop crying following the separation. "How could they do this to me? Why would they separate us? I promised to always take care of her… that I would always be there for her. We are going to have a girl," he said.

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[2] https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program.

[3] *Amici* have used pseudonyms for all individuals whose stories are shared in this brief. *Amici* extend their gratitude to the many organizations that provided information and client stories for this brief: Cara Pro Bono Project; Catholic Legal Immigration Network, which provided the stories of Jonathan and Daya; Civil Rights Education and Enforcement Center; Detention & Deportation Project at Hofstra University; Diocesan Migrant & Refugee Services; HIAS, which provided the stories of Iris, Rosa, Edwin, Daniel, Victor, and Benjamin; Human Rights First, which provided the stories of Gisela, Gloria, Teresa; Immigrant Defenders Law Center, which provided the stories of Isabel, Chepo, and Raquel; Jewish Family Services of San Diego; Kids in Need of Defense (KIND); Las Americas Immigrant Advocacy Center, which provided the story of Gabriel; The Legal Aid Society in NYC; RAICES's Detained Unaccompanied Children Services Unit and Pre-Removal Unit, which provided the stories of Mario, Roberto, Ian, Hugo, Marvin, and Angel; Taylor Levy Law; Texas Civil Rights Project, which provided the story of Gloria; UnLocal, Inc., which provided the stories of Carlos and Oscar; and The Young Center for Immigrant Children's Rights, which provided the stories of Juan and Johanna.

Remain in Mexico also separates children from their parents or other family members—often as a direct result of the violence inherent in being forced to wait in dangerous border cities. Kids in Need of Defense ("KIND"), *Forced Apart: How the "Remain in Mexico" Policy Places Children in Danger and Separates Families* (Feb. 24, 2020).[4] In some cases, when their parent or guardian is kidnapped, harmed, or otherwise disappears, these children are left in Mexico without anyone to care for them. *Id.* In search of safety, they return to the U.S. border as unaccompanied children. *Id.* Not only do family separations cause untold trauma for children and their parents, but they impair the children's ability to present effective claims for immigration relief in their proceedings. *Id.*

Mario is a Honduran minor who was forced to flee his country. Following a long and difficult journey, Mario and his father **Roberto** attempted to seek safety in the United States. Customs and Border Protection ("CBP") detained them and—without explanation of the program or what was happening to them—enrolled them in Remain in Mexico and returned them to Nuevo Laredo.

Only about four days after being sent back to Mexico, a truck full of cartel members attempted to capture Mario and Roberto. Mario ran, but when he looked back, the gang members and his father were gone. This was the last time Mario saw or heard from his father.

Alone and fearing for his life if he stayed in Nuevo Laredo, Mario fled further into Mexico's interior. He had none of the documentation that CBP had given his father about MPP, nor had he been provided any

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[4] https://supportkind.org/wp-content/uploads/2020/02/MPP-KIND-2.24updated-003.pdf.

information about any hearing dates. So, after working for months to save enough money for another journey, Mario entered the U.S. by himself in September 2020. CBP detained him and designated him an unaccompanied minor. This was the first time Mario learned that—having never received any knowledge of proceedings—he had an *in absentia* removal order because he missed his MPP hearing.

In other cases, the violence inherent in Remain in Mexico forces some parents to make the gut-wrenching decision to separate from their children as the only way to save their lives. **Juan**, a five-year-old Honduran boy who became sick and was kidnapped in the Matamoros encampment, exemplifies this danger characteristic of Remain in Mexico.

Juan's mother **Johanna** was sold to and raped by a human trafficker as a child. She escaped after four years and gave birth to Juan, her joy. Johanna's sole mission became protecting Juan from the abuse that she experienced as a child. To that end, in October 2019, they fled violence in Honduras for the U.S.—but, under Remain in Mexico, they were instead returned to wait in Matamoros.

The camp where they sought refuge was in an area controlled by a Mexican cartel. One day when Juan and Johanna neared the camp after going to a local store, a group of men attempted to kidnap Johanna. In narrowly escaping, Juan was injured, scarring his face. Over time, Juan grew sick and lost his appetite, but medical treatment was unavailable to him in Matamoros. Then, Juan and Johanna were kidnapped and held for two months. After being released, with no other option to save her child, Johanna made the agonizing choice to send Juan to the U.S. border alone to seek protection as an unaccompanied minor.

Following the pain of their separation and the trauma he had survived, Juan constantly cried, called for his mother to return, and wet the bed at night.

These stories are common and inevitable because Remain in Mexico compels vulnerable people to remain in indisputably dangerous locations—many of which are on the State Department's Do Not Travel list due to crime and kidnapping.[5] "[K]idnappings and attacks are frequently perpetrated by cartels that exercise control over territory in Mexico and target asylum seekers and migrants for kidnappings, extortion, and other attacks, often with the complicity of Mexican police and immigration officers." *Any Version of "Remain in Mexico" Would be Unlawful, Inhumane, and Deadly*, Human Rights First, at 2 (Sept. 2021).[6] Migrants in particular are obvious and vulnerable targets for abuse and violence at the border. *"We Can't Help You Here" US Returns of Asylum Seekers to Mexico*, Human Rights Watch (July 2, 2019).[7]

2. Remain in Mexico Enables Human Trafficking

Remain in Mexico originally promised to reduce human trafficking and protect vulnerable populations. DHS, *Migrant Protection Protocols* (Jan. 24, 2019) ("MPP will help . . . decrease the number of those taking advantage of the immigration system, and the ability of smugglers and traffickers to prey on

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[5] https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

[6] https://www.humanrightsfirst.org/sites/default/files/MPPUnlawfulInhumaneandDeadly.pdf.

[7] https://www.hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf.

vulnerable populations . . . .").[8] In practice, Remain in Mexico has the opposite effect, exposing people to unconscionable risk of kidnapping, trafficking, and rape. From the start of Remain in Mexico in 2019 through February 19, 2021, "there were at least 1,544 publicly reported cases of murder, rape, torture, kidnapping, and other violent assaults against asylum seekers and migrants forced to return to Mexico" under this program that purports to provide "[p]rotection." *Forced Returns to Mexico: At Least 1,544 Publicly Reported Cases of Murder, Rape, Torture, Kidnapping & Other Violent Assaults*, Human Rights First (2021).[9]

When CBP officials returned **Gisela**, a 28-year-old-asylum seeker from Honduras, to Ciudad Juárez from the El Paso port of entry, a trafficker kidnapped her as she left a Mexican migration office. For three unbearable months, she was raped and forced into sexual slavery. Gisela managed to escape, but only when one of her captors offered to assist her to leave in exchange for sex. She hid at a Juárez church shelter after her brave escape, but even then men continued to stalk the church in search of her.

Carlos and his toddler **Oscar** fled political persecution in Venezuela and were placed in MPP in September 2019. While forced to wait in Mexico, Carlos accepted a job from a man who turned out to belong to a drug cartel. The cartel trafficked Carlos, threatening to sell Oscar on the black market if Carlos didn't work 17-hour days without pay fixing cars for the cartel. Terrified of the fate awaiting Oscar, Carlos

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[8] https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

[9] https://www.humanrightsfirst.org/campaign/remain-mexico.

did as he was told. Doing his best to keep Oscar safe while working grueling hours for dangerous people, Carlos put Oscar to sleep in dirty cars while he worked, until he was able to escape with his son.

At his first MPP court appearance and following a *non-refoulement* interview (to address potential persecution or torture), the government still sent Carlos and his son back to Mexico despite clear evidence of trafficking. Terrified of the cartel, Carlos and Oscar went into hiding. Both Carlos and Oscar are deeply affected by the trauma they survived and continue to suffer from Remain in Mexico.

Unfortunately, Carlos and Oscar are not alone in having experienced this kind of terror. In July 2019, **Iris** and her 11-year-old daughter **Rosa** entered the U.S. through El Paso, Texas and presented themselves to CBP. Having experienced violence in both their home country of Honduras and traveling through Mexico, Iris told CBP she feared returning to both places. CBP nonetheless returned Iris and her daughter to Mexico under MPP.

In Mexico, there was no food, shelter, or humanitarian relief available for them. Iris and Rosa did their best to survive, but—as they were recognizable as migrants and easy targets—locals began harassing and threatening them at gunpoint. Months of stalking forced Iris and Rosa into hiding until their MPP court date. At her next MPP hearing, Iris again stated she was afraid to return to Mexico, but still was not given a fear interview and was again returned. Just days later, Iris and Rosa were abducted.

While they were kidnapped, one of the assailants violently raped Iris in the same room as her young daughter. Prioritizing minimizing her daughter's

trauma, Iris told Rosa to hide in the corner and cover her ears.

After four days, Iris saw an unlocked door and escaped with Rosa, immediately fleeing to the United States to present themselves to CBP and seek safety. Iris again disclosed her fear of returning to Mexico—and both Iris and Rosa recounted their kidnapping to the asylum officer. Iris's request to be removed from MPP was denied, and again CBP returned them to Mexico.

Less than a week later, Iris was recaptured by her previous abductors. This time, she was able to save Rosa by helping her hide before the attackers broke into their home at gunpoint. The kidnappers abducted Iris, but not Rosa, taking her to a warehouse where she was sex trafficked and gang raped. After another courageous escape, Iris's agony and worry were tempered when she learned that Rosa had managed to flee to the United States as an unaccompanied minor.

Between the trauma they suffer and the horror they witness, the true scale of violence inflicted upon those subjected to Remain in Mexico is unknown—but it is surely greater than the unconscionable volumes of harm that have already been documented.

3. Remain in Mexico Heightens Risks to the Most Vulnerable Migrants

Despite offering to exclude "individuals from vulnerable populations,"[10] Remain in Mexico routinely endangers the most vulnerable individuals among us—including pregnant women, mothers with infants, individuals with disabilities or health conditions, and

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[10] https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols

LGBTQ individuals. See, *e.g.*, *"We Can't Help You Here" US Returns of Asylum Seekers to Mexico*, Human Rights Watch at 30–33 (July 2, 2019) (describing vulnerable populations as "likely to face greater challenges" at the border and in the asylum process).[11] Indeed, the U.S. State Department has documented pervasive violence against women, LGBTQ individuals, and people with disabilities. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2020 Country Reports on Human Rights Practices: Mexico*.[12]

For instance, DHS returned **Gloria**, an asylum seeker from Honduras, to Matamoros under Remain in Mexico. In retelling her experience, she shared stories of the abuse she suffered in Mexico because she is a lesbian. For example, a few blocks from the makeshift tent camp in Matamoros where she stayed, passers-by who discovered she was a lesbian hit her in the face, busting her lip. On another occasion, men at the camp threatened to rape her, saying they would "teach us [lesbians] to like men."

Additionally, the "Guiding Principles" implementing Remain in Mexico assured that noncitizens with known physical or mental health issues were "not amenable" to being returned under the program.[13] Despite this express policy purporting to exempt individuals with health issues, members of this vulnerable group frequently have been returned to Mexico, exacerbating the danger they already face.

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[11] https://www.hrw.org/sites/default/files/report_pdf/us_mexico0719_web2.pdf.

[12] https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/.

[13] https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf

Teresa, a 27-year-old asylum seeker, survived beatings and torture by members of a Nicaraguan paramilitary force. In addition to post-traumatic panic attacks, Teresa sustained severe back injuries. The lasting damage was so serious that, while in CBP custody after fleeing to the United States, Teresa required a wheelchair and treatment by a CBP physician. Although this obvious physical health issue, known to CBP, should have led to her exemption from Remain in Mexico, she was nonetheless returned to Mexico under the program.

As these and other stories demonstrate, Remain in Mexico not only fails to exempt or protect vulnerable populations—it exposes them to even greater harm. See also Alyssa Isidoridy, et al., *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process*, at 9–10 (Aug. 2019)[14]; Jessica Eller et al., *Migrant Protection Protocols: Implementation and Consequences for Asylum Seekers in Mexico*, 218 U. Tex. Austin Strauss Ctr. Int'l Sec. & l. 26 (May 2020);[15] Adam Gabbatt, *'Like a child': the disabled migrant stranded and alone in Mexico*, The Guardian (Jul. 28, 2019).[16]

4. Remain in Mexico Endangers Black Migrants

Black migrants are especially vulnerable to violence, targeted abuse, and racism while forced to Remain in Mexico. See, *e.g.*, S. Priya Morley et al., *"There is a Target on Us" – The Impact of Anti-Black Racism on*

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[14] https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf.

[15] https://repositories.lib.utexas.edu/handle/2152/81991

[16] https://www.theguardian.com/us-news/2019/jul/27/mexico-disabled-migrant-stranded-trump?CMP=Share_iOSApp_Other.

African Migrants at Mexico's Southern Border (2021) at 46 (explaining that "the racism, as well as xenophobia and gender-based discrimination, in Mexico continues to impact African and other Black migrants in the country").[17]

Isabel, an Afro-Cuban woman with epilepsy, is a survivor whose story illustrates the well-documented experience of anti-Black racism migrants often experience in Mexico. Having been persecuted by authorities in Cuba because she is a lesbian, Isabel fled for safety in the United States. In December of 2020, she was placed in MPP and returned to Mexico. Isabel confronted regular racist intimidation, homophobic slurs, and violent threats during her time in Mexico. Isabel is still stuck and in danger, waiting on the results of her request for humanitarian parole based on threats and discrimination she has experienced in Mexico because she is Black and LGBTQ. See also Jonathan Blitzer, *How the U.S. Asylum System is Keeping Migrants at Risk in Mexico*, The New Yorker (Oct. 1, 2019) (telling the story of Tania, a Black indigenous migrant who experienced regular public abuse under Remain in Mexico).[18]

5. Remain in Mexico Disadvantages Indigenous Language Speakers

Indigenous language speakers in particular suffer compounded harm under Remain in Mexico. While MPP focuses most of its language access resources on Spanish-speaking migrants, at least 40 languages are spoken among Remain in Mexico enrollees. TRAC, *40*

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[17] https://imumi.org/attachments/2020/The-Impact-of-Anti-Black-Racism-on-African-Migrants-at-Mexico.pdf.

[18] https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico.

Languages Spoken Among Asylum Seekers with Pending MPP Cases (Apr. 26, 2021).[19] For indigenous language speakers who are not fluent in Spanish, an additional layer of vulnerability is created because of language barriers, cultural differences, and discrimination. See U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2020 Country Reports on Human Rights Practices: Mexico* (2021) ("[I]ndigenous women were among the most vulnerable groups in society. They often experienced racism and discrimination and were frequently victims of violence").[20] This creates additional hardship for indigenous language speakers' safety and survival in Mexico.

Ian fled Guatemala with his five-year-old son **Hugo**. After Ian and Hugo entered the United States, CBP took them into custody and interviewed Ian. Ian told them he spoke Quiche and asked for an interpreter, but they refused and proceeded in Spanish, which Ian does not understand fluently. "The CBP officer asked me if I had fear of returning to Guatemala. Since they did not provide me with a Quiche interpreter, . . . I did not understand how they used the word 'fear'. [] They also did not ask if I had fear to return to Mexico. [] I told them there was danger in my country, that we were running for our life from political threats [and] I would die if I returned. They did not explain anything to me."[21]

CBP took them to Tijuana by bus and left them there without any resources or shelter. There, Ian and Hugo

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[19] https://trac.syr.edu/whatsnew/email.210426.html.

[20] https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/.

[21] Declaration of Ian, on-file with his RAICES attorney.

were stopped and held in a car by Mexican police officers who extorted them, beat Ian, then threw him out of the car and threw Hugo on top of him. Ian reported the police brutality to his Immigration Judge at his next hearing and said that he was afraid to return to Mexico. Nonetheless they were both returned to Mexico.

6. Remain in Mexico Impedes Fair Hearings

Ultimately, the dangers inherent in being forced to wait in unsafe Mexican border towns directly undermines immigrants' ability to fairly and effectively pursue their claims for immigration relief. *Fully End the Migrant Protection Protocols: Ensure Safety for All Subjected to Horrific Policy*, Human Rights First (2021).[22] Where migrants have been victims of threats, violence, or kidnapping, it often causes them to miss MPP hearings and, therefore, receive *in absentia* removal orders through no fault of their own. *Id.* As a former asylum officer who participated directly in Remain in Mexico stated, "the implementation is calculated to prevent individuals from receiving any type of protection or immigration benefits in the future." *Email from Asylum Officer to USCIS Management, After August 8, 2019 Meeting with Management Concerning the Officer's Refusal to Participate in the Migrant Protection Protocols (Remain in Mexico) Program* 3 (Nov. 12, 2019).[23] Remain in Mexico creates the cruel circumstances that

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[22] https://www.humanrightsfirst.org/sites/default/files/FactsheetFullyEndMPP.pdf.

[23] https://www.washingtonpost.com/context/read-the-email-former-asylum-officer-blasts-trump-s-remain-in-mexico-policy/bd0e07ea-2b91-4d5b-9bc1-4fb01500359a/?itid=lk_inline_manual_7.

frequently result in severe miscarriages of justice. Alyssa Isidoridy, et al., *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process*, Human Rights First (2019).[24]

For example, fleeing violence and political and religious persecution in Honduras, **Marvin** crossed the border with his five-year-old son **Angel** through the river in Piedras Negras. After being detained for six days in the United States, they were enrolled in Remain in Mexico and released in Nuevo Laredo with an MPP hearing notice. The same day they were returned to Mexico, cartel members kidnapped Marvin and Angel. For four days, the kidnappers tortured Marvin until he gave them his sister's phone number. After a few more days and his sister's ransom payment, Marvin and Angel were finally released. While awaiting their hearing, they were kidnapped again by cartel members. This time, they were held for six days until they managed to escape. Compounding the trauma of having been kidnapped twice, they missed their MPP hearing because they were abducted and thus were ordered removed *in absentia*.

Similarly, **Chepo** and his minor daughter **Raquel** fled harm in El Salvador, where Chepo faces continuing threats, to seek asylum in the United States. They presented themselves at the U.S.-Mexico border on February 26, 2019 and were detained for approximately two days before CBP returned them to Mexico. While awaiting their proceedings in Mexico, they were not provided any resources or support for their survival, safety, or welfare. Raquel became gravely ill. A doctor at a local pharmacy advised that

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[24] https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf.

Raquel needed a CT scan or an ultrasound, which were only available at the local hospital. However, the hospital refused to provide them any service because they were not Mexican citizens or residents. Raquel's condition worsened. Her stomach pain was so severe that she cried for two or three days straight and began vomiting. They returned to the hospital but were again refused services.

Faced with a Hobson's choice, Chepo made the agonizing decision to bring Raquel back to El Salvador as the only way to get her the care that would save her life. The doctors in El Salvador who performed emergency surgery on Raquel told Chepo that she had nearly died from necrotizing pancreatitis. As a result, they missed their MPP hearing and received an *in absentia* removal order.

These and thousands of other accounts of violence under Remain in Mexico "are not isolated events, but amount to systematic trends." Tom K. Wong, *Seeking Asylum: Part 2*, U.S. Immigration Policy Center Oct. 29, 2019 at 9. They illustrate the "significant and unjustified human cost" of MPP articulated in the October 29 Memorandum that the Fifth Circuit erroneously ignored.

II. THE FIFTH CIRCUIT'S ERRORS HAVE DEVASTATING CONSEQUENCES

As a result of the Fifth Circuit's errors, Remain in Mexico has been reinstated ("MPP 2.0") despite its incurable flaws. The consequences have been devastating. Under MPP 2.0, migrants continue to be subject to dangerous conditions that threaten their safety and make it impossible for them to obtain fair hearings.

A. MPP 2.0 Continues to Return Vulnerable Individuals Who Should be Exempted from the Program

Acknowledging that the original MPP exemption categories were too narrowly constructed and applied, DHS added classes of particularly vulnerable migrants that officers are instructed to exempt from MPP 2.0. Memorandum from U.S. Dep't of Homeland Security on Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols 2 (Dec. 2, 2021).[25] Migrants exempted from MPP 2.0 are those "with a known mental or physical health issue, including a disability or a medical condition related to pregnancy"; those with "particular vulnerabilities given their advanced age"; and those "at increased risk of harm in Mexico due to their sexual orientation or gender identity." *Id.* at 4–5.

In practice, however, these MPP 2.0 exemptions are narrowly and inconsistently applied. As a result, migrants who should be exempted from MPP 2.0 because of a particular vulnerability are nevertheless returned to danger in Mexico.

Edwin, a young man from Nicaragua born with cognitive disabilities that make speech and comprehension difficult, is one example. At 22-years-old, Edwin was detained while trying to reach his mother, who was in the U.S. In the ten days he was detained, he was denied access to personal hygiene items and a shower. He was also not allowed to call his mother or a lawyer.

Edwin was put into MPP 2.0 and returned to Matamoros. Because of his disability, he did not

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[25] https://www.dhs.gov/sites/default/files/2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf.

understand the information provided to him regarding his upcoming court hearings, but managed to figure out his first hearing date. On his way to court in early March 2022, he was traveling with three other men in MPP 2.0, and they were kidnapped. The kidnappers tortured the men for about seven days. Having missed their hearings, all men were ordered removed *in absentia*.

Upon escape, Edwin and the other men found themselves in Monclova, Coahuila—over three hundred miles from Matamoros—and were too afraid to report their kidnapping to the police because of the threats the kidnappers had made. They were, however, able to find contact information for a nonprofit organization, which they called and told what had happened to them. Edwin explained he had not been able to find a lawyer, and he expressed that he was desperate and terrified. Since that call, the nonprofit staff has searched persistently but has not been able to locate Edwin or any of the other men. They fear the men have once again been kidnapped.

Daniel is another migrant with disabilities who was nevertheless returned to danger in Mexico. Daniel is a 34-year-old Colombian man with a hearing disability who has been diagnosed with depression and anxiety. Upon being returned to Tijuana, Mexican police extorted and violently attacked him, breaking his hearing device. As a result, he suffers from incessant dizziness, intense headaches, communication difficulties, and a lack of stability. Daniel cannot afford even basic medications that would mitigate his symptoms while he seeks a way to access and afford comprehensive care.

Victor, a 43-year-old asylum-seeker, was also returned to Tijuana despite a serious health issue.

Victor was a taxi driver in Caracas, Venezuela, and was hit by a stray bullet one day while driving. The gunshot wound damaged his kidneys, requiring long-term medical treatment and nutritional adjustments. Despite explaining to officials the nature of his condition and the pain he experiences without proper treatment, Victor remains in a shelter in Tijuana, where the food and medical assistance are inadequate to keep him healthy. He continues to seek a lawyer as he awaits his hearing.

B. Migrants Continue to Face Serious Danger in Mexico

Border towns in Mexico continue to be dangerous places where attacks on migrants are brutal and relentless. According to the U.S. State Department, Ciudad Juárez is often the site of turf battles between criminal organizations—and Tamaulipas, the state in which Matamoros and Nuevo Laredo are located, remains on the State Department's "Do Not Travel" list. Mexico Travel Advisory, U.S. Dep't of State (Mar. 16, 2022).[26] Mexican security forces remain helpless to stop the kidnapping, extortion, and murder of migrants by cartels, and continue to collaborate with the cartels in such crimes. See June S. Beittel, Cong. Rsch. Serv., R41576, *Mexico: Organized Crime and Drug Trafficking Organizations* 11 (2020) (describing how "[p]olice corruption has been so ubiquitous that law enforcement officials sometimes carry out the violent assignments from [drug trafficking organizations] and other criminal groups" but arrests of corrupt police rarely lead to convictions and purges

[26] https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html.

of police have not solved the problem)[27]; Alfredo Peña & Mark Stevenson, *History of Abuse for Mexican Police Unit in Migrant Massacre*, AP News, Feb. 10, 2021.[28]

Migrants stand out from the local population, and their vulnerability makes them common targets for kidnapping and extortion by cartels in Mexico. See Parker Asmann, *With U.S. Policy, Mexico Crime Groups See Double the Opportunity in Northbound Migrants*, InSight Crime, Jan. 17, 2022.[29] As of January 13, 2022, a human rights organization tracked 8,705 cases of rape, kidnapping, or violent assault against asylum-seekers forced to wait in Mexico under MPP. Julia Neusner, Kennji Kizuka, & Ana Ortega, *A Shameful Record: Biden Administration's Use of Trump Policies Endangers People Seeking Asylum*, Human Rights First (2022).[30] This number grows every day as immigrants' rights organizations like *amici* hear new stories from migrants who have endured unimaginable violence in Mexico.

In recognition of the dangers migrants face in Mexico, DHS has instructed its officers to proactively and affirmatively ask questions regarding fear of return to Mexico to all individuals encountered, and not to return any individual who demonstrates a reasonable possibility of persecution on account of a protected ground or torture in Mexico. Policy Guidance

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[27] https://sgp.fas.org/crs/row/R41576.pdf.

[28] https://apnews.com/article/police-mexico-victoria-massacres-texas-ea8622410ccdc3fc9b0eb11dd974b8a8.

[29] https://insightcrime.org/news/us-policy-mexico-crime-groups-opportunity-migrants/.

[30] https://www.humanrightsfirst.org/sites/default/files/ShamefulRecord.pdf.

at 2. Immigrants' rights organizations, however, have documented cases of migrants who feared return to Mexico based on past violence but were nonetheless returned to Mexico. In fact, every migrant returned to Mexico interviewed by a human rights organization in December 2021 had been the victim of violence or criminal targeting by police or other Mexican government officials. Julia Neusner & Ana Ortega Villegas, *"Nothing Humane About This Process": Biden Administration Launches "Remain in Mexico" Revamp at El Paso Port of Entry*, Human Rights First (2021).[31]

Stories from migrants enrolled in MPP 2.0 reveal that the changes intended to prevent the return to Mexico of migrants at particular risk of violence there have not been effective. **Gabriel's** experience is one such story. Fleeing his native Nicaragua, he crossed into Mexico over its southern border and almost immediately was stopped by Mexican police, who robbed him of his belongings, including his Nicaraguan identification card and his money. The police officers threatened him, telling him they would find him if he ever reported the robbery.

Shortly after, Gabriel was kidnapped by two men, who drove him to a house and forced him into a confined space where he was trapped for over a month. The kidnappers told him he would be released if he paid them 500,000 Mexican pesos—about 24,000 U.S. dollars. Gabriel's brother in Nicaragua attempted to obtain the money, but could not successfully gather such a large amount. In the many weeks while Gabriel was kidnapped, the kidnappers kept him blindfolded and regularly beat him. He lived in squalid conditions

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[31] https://www.humanrightsfirst.org/blog/nothing-humane-about-process-biden-administration-launches-remain-mexico-revamp-el-paso-port.

with little food and was forced to sleep on the floor. The kidnappers regularly insulted him and subjected him to humiliating treatment, such as forcing him to use the bathroom in front of them. They threatened him with death on multiple occasions.

Finally, after nearly 40 days, the kidnappers drove Gabriel to Chiapas and abandoned him on a street corner. A generous stranger took him in for a short period of time, giving him some money to continue his travel north. Because he had been robbed and threatened by Mexican police before, Gabriel did not file a police report about his kidnapping. He eventually traveled to the U.S.-Mexico border, and was given a *non-refoulement* interview. Yet despite his fear of violence in Mexico, he was put into MPP and was sent to Ciudad Juarez.

Another example is the story of **Benjamin**, a 25-year-old man from the Indigenous Miskitu community of Nicaragua, which is plagued by violent land conflict. Because of his high school education and Indigenous identity, he was perceived as a resistance organizer challenging the seizure of his community's land. He accordingly was threatened so persistently that he was forced to flee the country. Upon arriving in Mexico, Benjamin witnessed violence, and experienced it himself—he was robbed, but too afraid of the Mexican police to file a report. He discussed his fear of Mexico in his *non-refoulement* interview, but the officers did not listen: he was put into MPP 2.0 and returned to Ciudad Juárez.

Kidnapping, police brutality, robbery, extortion, violence, and discrimination are among the extraordinary risks migrants face in public spaces in Mexico—but migrant shelters, too, are often a site of danger and deprivation. Shelters are often migrants'

only options for refuge in Mexico, yet many of them are unsanitary and unsafe. The Leona Vicario shelter is one such example. Located in Ciudad Juárez, it was opened by the Mexican government in 2019 during the first iteration of MPP, and it has become the largest federally-operated migrant center in Mexico. It is now where most migrants in MPP with hearings in El Paso stay.

One migrant, **Mateo**, had been at Leona Vicario for over two months, after being put into MPP 2.0 in December 2021.[32] In his *non-refoulement* interview, Mateo told the officer he had been robbed several times in Mexico, including by Mexican police. Nonetheless, he failed the interview and was returned to the shelter where he awaits his next court date. He described squalid conditions including insufficient food supplies, freezing temperatures, unsanitary bathrooms, and broad disregard of basic COVID-19 precautions, such as quarantining those who had been infected and ensuring staff wear masks. He reported that one of the guards repeatedly berates the migrants, while another guard told a migrant at the shelter that if he didn't follow the shelter's rules the guard would "disappear" him.

Gabriel—the asylum-seeker who was kidnapped for over a month in Mexico—faced routine discrimination and harassment from the shelter employees. The employees confiscated his Bible, as well as his phone, because he had an electronic copy of the Bible.

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[32] Mateo's story was recounted in a news article. John Washington, *Catastrophic Asylum Program "Remain in Mexico" Could Get Even Worse, Depending on the Supreme Court*, The Intercept, (Mar. 2, 2022,), https://theintercept.com/2022/03/02/remain-in-mexico-asylum-biden-mpp-supreme-court/.

Gabriel's inability to practice his religion has only compounded his trauma.

Whether in a public or private space, migrants forced to wait in Mexico cannot escape harm. By sending migrants to Mexico, MPP 2.0 denies them the ability to live in safety and meet their basic needs while they await their court proceedings.

C. Barriers to Access to Counsel and Language Access Persist Under MPP 2.0

In an attempt to cure the procedural problems inherent in Remain in Mexico, DHS has instructed its officials to "ensure that those processed into MPP have reasonable and meaningful opportunities to access legal information in a language they understand and to access counsel or legal representation for *non-refoulement* interviews and removal proceedings." Policy Guidance at 6. But MPP's procedural problems have proven to be incurable.

First, it is difficult for lawyers to identify and contact individuals in Mexico who need representation, and asylum-seekers routinely lack accurate and sufficient information on their rights and available resources. See *Human Rights Fiasco: The Trump Administration's Dangerous Asylum Returns Continue*, Human Rights First (2019).[33] Many asylum-seekers report they did not know they could seek an attorney until well into their cases, and those who did know to seek an attorney were not able to contact one. On the first day of MPP 2.0 hearings in San Diego, legal observers interviewed men and women being put into MPP and sent back to Tijuana, who until then did

[33] https://www.humanrightsfirst.org/sites/default/files/HumanRightsFiascoDec19.pdf.

not know they could contact an attorney to help stop them from being sent to Mexico. Very few migrants in MPP successfully retain counsel: At its wind-down, just nine percent of migrants in the original implementation of MPP had a lawyer, and high barriers to access to counsel persist in MPP 2.0. Muzaffar Chishti & Jessica Bolter, *Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, but Faces Similar Challenges*, Migration Policy Institute (Dec. 2, 2021).[34]

Second, even if lawyers and asylum-seekers manage to connect, the barriers to providing effective representation are often insurmountable. Lawyers often cannot safely travel to the Mexican border towns where their clients are living, and migrants often lack a sufficiently private space and reliable connection to call their lawyer when in-person meetings are not possible. Migrants may risk forfeiting their spot at a shelter or being the victim of a violent attack each time they go to an internet cafe to send their lawyer important documents. These factors prevent lawyers from gathering crucial client information and developing a trusting relationship with their client, which in turn prejudices migrants' cases.

Third, legal services providers are concerned that there is a lack of expeditious and comprehensive *non-refoulement* interviews under MPP 2.0. For example, the port of entry in Laredo has only two office spaces available for migrants to use for consultations and *non-refoulement* interviews, which means only two migrants can have confidential phone access at a time. The result is that migrants must either wait for long periods of time at the port of entry just to speak with

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[34] https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico

counsel or complete a *non-refoulement* interview, or else be rushed through the process, perhaps without speaking with counsel or fully understanding the process.

Such was the case of Pedro, a migrant subjected to MPP 2.0, who told the immigration judge that he feared returning to Mexico.[35] DHS guidance instructs that asylum-seekers should be given at least 24 hours to prepare for a *non-refoulement* interview and contact attorneys. DHS, however, scheduled his *non-refoulement* interview for later that day. Since the hearing was in the afternoon, that gave the asylum-seeker only a few hours to prepare for his *non-refoulement* interview—far short of the 24 hours to which he was entitled.

Fourth, although DHS has instructed asylum officers to confirm that migrants understand the *non-refoulement* interview process and ensure appropriate language and disability access, Policy Guidance at 8, migrants are still denied access to information and interpreters in their best language. The result is that migrants—who are usually unrepresented—are kept in the dark throughout some or all of their proceedings, or unfairly prejudiced because they could not fully understand or communicate.

On the first day of MPP 2.0 hearings in San Diego, for example, one asylum-seeker was alone in the back of the courtroom, holding the documents she had been given by the court. She blurted out in her native language: "I don't understand anything. It's all in

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[35] Pedro's story was recounted in a news article. John Washington, Catastrophic Asylum Program "Remain in Mexico" Could Get Even Worse, Depending on the Supreme Court, The Intercept (Mar. 2, 2022) https://theintercept.com/2022/03/02/remain-in-mexico-asylum-biden-mpp-supreme-court/.

English." Other asylum-seekers have reported being ordered to sign documents that were not in their native language and that they did not understand.

These and countless other examples illustrate that there is no way to continue the Remain in Mexico program without subjecting migrants to needless violence, suffering, and unfair process. Each day the injunction persists, the Fifth Circuit's legal errors increase the "significant and unjustified human cost" of MPP articulated in the October 29 Memorandum, which have already been endured by far too many.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court below.

Respectfully submitted,

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Appendix

Appendix: *Amici*

ADL (Anti-Defamation League)
Advocating Opportunity
American Immigration council
American Immigration Lawyers Association (AILA)
Asylum Seeker Advocacy Project (ASAP)
Austin Region Justice for Our Neighbors
Bellevue Program for Survivors of Torture
Central American Resource Center of Northern CA - CARECEN SF
Coalition for Humane Immigrant Rights (CHIRLA)
Columbia Law School Immigrants' Rights Clinic
Community Legal Services in East Palo Alto
Diocesan Migrant & Refugee Services, Inc. (DMRS)
Doctors for Camp Closure
Families Belong Together
Fellowship Southwest
First Focus on Children
Florence Immigrant & Refugee Rights Project
Florence Immigrant & Refugee Rights Project
Haitian Bridge Alliance
HIAS, Inc.
Human Rights First
Human Rights Initiative of North Texas
Immigrant Defender's Law Center
Immigrant Law Center of Minnesota
Innovation Law Lab
Instituto para las Mujeres en Migracion (IMUMI)
International Refugee Assistance Project
Justice Action Center
Jewish Activists for Immigration Justice Western MA
Jewish Family Service of San Diego
Just Neighbors

Justice For Our Neighbors - North Central Texas
Justice for Our Neighbors El Paso
Justice in Motion
La Raza Community Resource Center
Las Americas Immigrant Advocacy Center
Lawyers for Good Government
Madres e Hijos
McCrummen Immigration Law Group
Mississippi Center for Justice
National Council of Jewish Women
National Justice for Our Neighbors
New York Justice for Our Neighbors, Inc.
North Carolina Justice Center
Oasis Legal Services
Oxfam America
Public Counsel
Rainbow Bridge Asylum Seekers
Refugee and Immigrant Center for Education and Legal Services
Robert F. Kennedy Human Rights
Save the Children Action Network
Student Clinic for Immigrant Justice
Sunita Jain Anti-Trafficking Initiative
Tahirih Justice Center
Texas Civil Rights Project
UnLocal
Vera Institute of Justice
Washington Office on Latin America (WOLA)
Witness at the Border
Women's Refugee Commission
Young Center for Immigrant Children's Rights