



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

The Honorable Joseph R. Biden  
President  
The White House  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

The Honorable Kamala D. Harris  
Vice President  
The White House  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

The Honorable Alejandro Mayorkas  
Secretary  
U.S. Department of Homeland Security  
3801 Nebraska Avenue NW  
Washington, D.C. 20016

The Honorable Merrick B. Garland  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

October 25, 2021

**Re: The American Immigration Lawyers Association Reminds the Administration of the Failures of the Migrant Protection Protocols**

Dear President Biden, Vice President Harris, Secretary Mayorkas, and Attorney General Garland:

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 that your administration is moving forward with the re-implementation of the Migrant Protection Protocols or “MPP.” We urge you to immediately issue a new termination memo and set new policies that guarantee meaningful access to asylum at the border. As AILA has previously reported, people subject to MPP face severe obstacles to obtaining legal counsel which can be expected to continue under any new version of MPP. Under MPP’s prior iteration, migrants and their attorneys faced extreme dangers and hardships in navigating this policy. Finally, as the Vice President previously recognized as a senator, the use of tent courts at the border violates due process and respondents’ right to a fair day in court and should not be used again.

Within the first month of MPP’s initial roll-out, it was clear that it was a policy designed to prevent asylum seekers from making claims for protection. In February 2019, AILA raised our concerns that MPP uses a more stringent standard for asylum seekers to request protection in the United States than the one authorized by Congress in expedited removal.<sup>1</sup> Under prior MPP guidance, asylum seekers were returned to Mexico to await their court proceedings unless they demonstrated they were “more likely than not” to be persecuted on account of a protected ground or tortured if returned to Mexico.<sup>2</sup> MPP blocked access to counsel because attorneys were denied

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<sup>1</sup> *AILA Policy Brief: “Remain in Mexico” Plan Sows Chaos, Puts Asylum Seekers at Risk* (AILA Doc. No. 18122112), (February 1, 2019) available at <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-remain-in-mexico-plan-chaos>

<sup>2</sup> *Id* at page 2.

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the opportunity to participate in these refoulement screening interviews.<sup>3</sup> Further, a recently leaked report, apparently authored by the DHS Civil Rights and Civil Liberties (CRCL) Office, noted time and again that border agents returned to Mexico individuals and children with significant medical conditions despite “guiding principles” issued to protect them.<sup>4</sup>

AILA’s policy brief predicted that by returning the majority of migrants enrolled in MPP to Mexico, they would encounter substantial barriers to obtaining legal representation. In the past, attorneys reported how they faced interrogations, arrests, and travel restrictions by the Mexican and U.S. governments in attempting to serve people in MPP.<sup>5</sup> The facts bore this out. By the conclusion of the program, representation rates for people subject to MPP were as low as 7.5 percent.<sup>6</sup> Recognizing these significant barriers, if your administration does re-implement MPP, AILA expects that very few attorneys will step forward and accept MPP cases.

By MPP’s six-month mark, it became increasingly clear that the prior administration had no plans to address any of the access to counsel and due process concerns built into the program. Asylum & Refugee National Committee wrote to then-DHS Acting Secretary Kevin McAleenan with specific examples of how AILA attorneys were consistently blocked from representing their clients.<sup>7</sup> AILA attorneys reported that their clients were rendered homeless or forced to live in unsafe Mexican government administered shelters. Many clients did not have access to a regular, dedicated, and private phone line. This made attorney communications with their clients, a key component of any attorney/client relationship, sporadic, at best. Attorneys struggled to complete an asylum application properly and accurately.<sup>8</sup> The simple step of printing and signing an application while in Mexico was a challenge. Under former MPP, it was also a challenge to timely file and prepare for hearings. If your administration follows through on a plan to expedite<sup>9</sup> six months or less, you will again put respondents, including those represented by counsel, at a severe disadvantage and compromise their right to a fair hearing.

In that same letter, AILA’s asylum committee also expressed concern about the extensive time and costs required to represent someone outside of the U.S. along with the disruption to the rest of their practice, if they chose to travel to the U.S./Mexico border to take MPP cases. The unclear ethical rules governing the provision of legal representation in Mexico by a U.S. licensed attorney continue to present an additional hurdle for attorneys to represent people subject to

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<sup>3</sup> *Id* at page 3.

<sup>4</sup> “A Leaked US Government Report Documents How Children With “Crippled” Legs And Epilepsy Were Forced Into the “Remain in Mexico” Program, BuzzFeed News, (October 20, 2021) available at <https://www.buzzfeednews.com/article/hamedaleaziz/leaked-report-remain-in-mexico-children>

<sup>5</sup> *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>

<sup>6</sup> “*Factsheet: The Migrant Protection Protocols*,” The American Immigration Council (October 6, 2021), available at <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

<sup>7</sup> “*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>

<sup>8</sup> “*Lawyers struggle to remotely represent asylum-seekers in ‘Remain in Mexico’ program*,” the World, (March 2, 2020) available at <https://www.pri.org/stories/2020-03-02/lawyers-struggle-remotely-represent-asylum-seekers-remain-mexico-program>

<sup>9</sup> *State of Texas, v. Biden*, Civil Action No. 2:21-cv-00067-z, “*Defendants’ First Supplemental Notice of Compliance with Injunction*” (October 14, 2021) available at <https://www.courtlistener.com/docket/59815977/111/state-of-texas-v-joseph-r-biden/>

MPP.<sup>10</sup> Beyond the logistics, there was the simple fact that MPP strips attorneys of their most important tool. Namely, the ability to gain their clients trust and help them feel some measure of stability and safety as they proceed with their case. No amount of teleconferencing or WebEx technology can fix the fact that at the conclusion of a hearing, clients are returned to danger and may not live to see their next scheduled date.

Finally, the announcement of the reopening of tent facilities in Laredo and Brownsville<sup>11</sup> demonstrates how resistant this administration is to accepting the lessons learned from the past. In March 2020, then-Senator Kamala Harris, along with Senators Elizabeth Warren (D-MA) and Jeff Merkley (D-OR), wrote to the Department of Justice and Department of Homeland Security about the concerns with the lack of transparency at the tent courts and noting how little opportunity attorneys had to meet in a safe space with their clients, among other issues.<sup>12</sup> For example, AILA members reported that the tent court contractors frequently limited the attorney-client preparation time to 30 or 45 minutes and attorneys were not allowed to bring in their laptops or cell phones to the tent courts. Further, nothing has changed about the fact that these locations require asylum seekers to remain in extreme danger in Nuevo Laredo and Matamoros, Mexico. Both cities continue to be designated by the U.S. State Department with a level four “Do Not Travel” warning due to high rates of crime and kidnapping.<sup>13</sup>

AILA applauded your initial decision to terminate MPP but that commitment is undermined by your failure to issue a new termination memo. We urge you to speak clearly and honestly with the American public and stakeholders about the consequences of re-implementing this failed procedure. The production of new internal policy guidance cannot keep attorneys and their clients safe or sanitize this flawed policy that fundamentally compromises the U.S. commitment to asylum and humanitarian protection. Should you require any additional information or clarification, please contact Gregory Z. Chen at (202) 507-7615 or by email at [gchen@aila.org](mailto:gchen@aila.org) or Jennifer Ibanez Whitlock at (202)-507-7533 or by email at [jwhitlock@aila.org](mailto:jwhitlock@aila.org).

Sincerely,

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<sup>10</sup> “*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>

<sup>11</sup> “*Construction underway on ‘Remain in Mexico’ court facility in Laredo*,” Border Report, (October 19, 2021) available here <https://www.borderreport.com/hot-topics/immigration/exclusive-construction-underway-on-remain-in-mexico-court-facility-in-laredo/>

<sup>12</sup> “*Senators Raise Concerns That DHS-Operated “Tent Courts” Violate Asylum Seekers’ Due Process Rights*,” (AILA Doc. No. 20030333), (March 3, 2020) available at <https://www.aila.org/infonet/senators-raise-concerns-that-dhs-operated-tent>

<sup>13</sup> “*Mexico Travel Advisory*”, U.S. Department of State, (accessed October 21, 2021) available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html>

Cc: Ambassador Susan Rice, Domestic Policy Council  
Esther Olavarria, Domestic Policy Council  
Advisor Jake Sullivan, National Security Council  
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