

COMMENT

REMAIN IN MEXICO: THE MIGRANT PROTECTION PROTOCOLS' FAILURE TO PROTECT*

I. INTRODUCTION

Only days before the 2018 midterm election, President Donald Trump called immigrants, or asylum seekers, fleeing violence an “invasion.”¹ It was not unusual for Trump to use this type of pejorative language—Trump had publicly used demeaning terms such as “predator” and “killer” to refer to immigrants at the southern border not once or twice, but over 500 times.² Though Trump insisted his intention was not to create division,³ political commentators have noted that the repetitive use of dehumanizing rhetoric was a purposeful tool used to engender a view of immigrants as a threat to the safety of the United States.⁴ Trump responded to his base’s support for one of his headline issues by enacting measures aimed at undercutting immigration flow and attacking the asylum system.⁵ Specifically, the Trump administration was determined to decrease the rate of migration across the southern border.⁶ Among the myriad of changes

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1. Eugene Scott, *Trump’s Most Insulting – and Violent – Language Is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019, 3:21 PM), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/> [<https://perma.cc/Y6GN-VP8K>].

2. John Fritze, *Trump Used Words Like ‘Invasion’ and ‘Killer’ to Discuss Immigrants at Rallies 500 Times: USA Today Analysis*, USA TODAY (Aug. 21, 2019, 10:18 AM), <https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/> [<https://perma.cc/9LPM-NYU5>].

3. Scott, *supra* note 1.

4. Fritze, *supra* note 2. (“Trump does nothing by accident. . . . The use of repetition – a propaganda mainstay – points to an intention by Trump to impose a way of thinking about his designated targets.” (internal quotation marks omitted)).

5. See JESSICA BOLTER, EMMA ISRAEL & SARAH PIERCE, *FOUR YEARS OF PROFOUND CHANGE: IMMIGRATION POLICY DURING THE TRUMP PRESIDENCY* (Migration Policy Institute, ed. 2022), <https://www.migrationpolicy.org/research/four-years-change-immigration-trump> [<https://perma.cc/F3XX-2HDY>] (providing overview of immigration policies over Trump’s presidential term, including travel bans, immigration enforcement, and deferred action programs); see also ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, *END OF ASYLUM 67–86* (2021) (discussing various measures Trump enacted to decrease the rate of asylum grants).

6. See *Grant Rates Plummet as Trump Administration Dismantles U.S. Asylum System, Blocks and Deports Refugees*, HUMAN RIGHTS FIRST (June 11, 2020), <https://humanrightsfirst.org/library/grant-rates-plummet-as-trump-administration-dismantles-u-s-asylum-system-blocks-and-deports-refugees/>

to immigration policy the government made to migrants' detriment, the Migrant Protection Protocols (MPP), which unjustly kept asylum seekers in Mexico until their hearing date, was one of the most brutal.⁷ Immigration advocates were quick to challenge the program as a violation of the Immigration and Nationality Act ("INA")⁸ and international law.⁹

Joe Biden, in his acceptance speech for the Democratic Party's presidential nomination, promised to undo Trump's immigration policies and restore the asylum system.¹⁰ In fact, one of President Biden's first actions was to end new MPP enrollments.¹¹ However, in the first year of his presidency, Biden largely failed to move beyond words and make any of his promises on immigration a reality.¹²

For one, Biden's attempt to end the MPP was thwarted when the District Court for the Northern District of Texas enjoined its termination in August 2021 based on Administrative Procedure Act (APA)¹³ violations. This action forced the Biden administration to reinstate the program.¹⁴ In October 2021, DHS attempted to defend the MPP's termination in a second memorandum explaining their agency action.¹⁵ However, because the injunction remained in effect, the government reinstated the MPP in December 2021.¹⁶ Recent reports suggest that the MPP's reimplementation is plagued by the same legal and due process violations symbolic of the program's first iteration.¹⁷

[<https://perma.cc/Z6W5-UXPA>] (recording asylum grant rates decrease by nearly 37% from fiscal years 2016 to 2020).

7. *See id.* ("Only 4.1% of asylum seekers and migrants in attendance at their MPP hearings were granted relief.")

8. Pub. L. No. 414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 and 18 U.S.C.).

9. *See* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 5, at 66–67.

10. John Burnett, *Biden Pledges to Dismantle Trump's Sweeping Immigration Changes – But Can He Do That?*, NPR (Sept. 14, 2020, 5:00 AM), <https://www.npr.org/2020/09/14/912060869/biden-pledges-to-dismantle-trumps-sweeping-immigration-changes-but-can-he-do-tha> [<https://perma.cc/34ZJ-7HSJ>].

11. *See* Memorandum from David Pekoske, Acting Sec'y of U.S. Dep't of Homeland Sec., to Troy Miller, U.S. Customs & Border Prot., Tae Johnson, U.S. Immigr. & Customs Enf't, & Tracey Renaud, U.S. Citizenship & Immigr. Servs. on Immigration Enforcement Policies, (Jan. 20, 2021) https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [<https://perma.cc/9B9L-P7V4>].

12. Burnett, *supra* note 10 (documenting the Biden administration's pledge to end Title 42, MPP, etc.).

13. 5 U.S.C. §§ 551, 553–59, 701–06.

14. *See* Texas v. Biden, 554 F. Supp. 3d 818 (N.D. Tex. 2021).

15. DEP'T OF HOMELAND SEC., EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS 1–2 (2021), https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf [<https://perma.cc/8WYJ-UZUS>].

16. *See* Memorandum from Robert Silvers U.S. Dep't of Homeland Sec., to U.S. Customs & Border Prot., U.S. Immigr. & Customs Enf't & U.S. Citizenship & Immigr. Servs., Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols (Dec. 2, 2021), https://www.dhs.gov/sites/default/files/2022-01/21_1202_ply_mpp-policy-guidance_508.pdf [<https://perma.cc/D5AZ-QKJ2>].

17. Jihan Abdalla, *'Remain in Mexico 2.0': How Did the Trump-Era Policy Get Revived?*, ALJAZEERA (Jan. 7, 2022), <https://www.aljazeera.com/news/2022/1/7/remain-in-mexico-how-did-a-trump-era-policy-get-revived> ("Immigration advocates say no . . . the Biden administration 'can't solve the fundamental problem that those who are stuck in northern Mexico with almost no resources and little safety are going to have a very difficult time finding US lawyers to help them with their asylum cases.'" (quoting Aaron Reichlin-Melnick, policy counsel at the American Immigration Council)).

This Comment proceeds in four sections. Section II provides an overview of the MPP from inception under the Trump administration to reimplemention under the Biden administration. Section III discusses the MPP's legal flaws and posits that it violates not only the INA and the United States' international legal obligations, but also the Constitution's Due Process Clause. Finally, Section IV concludes that the MPP should be terminated immediately and, in compliance with INA provisions, asylum seekers awaiting their proceedings in Mexico should be paroled into the United States.

II. OVERVIEW

A. Migrant Protection Protocols

1. History and Implementation of the MPP

Under the INA, when Customs and Border Protection (CBP) apprehends an asylum seeker at or within one hundred miles of a land border, the CBP official must give the asylum seeker a “credible fear” interview before either deporting them through expedited removal proceedings or allowing them to pursue their asylum claim in full removal proceedings.¹⁸ In a credible fear interview, asylum seekers must convince CBP officials that there is a “significant possibility” that they would be persecuted in their home country on account of their race, religion, nationality, membership in a particular social group, or political opinion.¹⁹ If the migrant presents evidence that they have a credible fear of persecution or torture in their home country, the case is then transferred to an immigration judge for a full hearing and determination of asylum eligibility.²⁰ Meanwhile, the asylum seeker is usually paroled into the United States for the pendency of their proceedings.²¹

In December 2018, the Trump administration's announcement of a new program—the MPP, also known as the “Remain in Mexico” program, radically altered the aforementioned process.²² Under the MPP, the Department of Homeland Security (DHS) required asylum seekers who had successfully completed a credible fear interview and been found to have had a credible fear of persecution or torture, to return to Mexico to wait until their hearing with instructions to return to a specific port of entry at a later date.²³ The Trump administration claimed the measure was necessary to address a

18. 8 U.S.C. § 1225 (b)(1)(B).

19. 8 C.F.R. §§ 208.30(b), (e)(1), (e)(2) (2022); *see also Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> [<https://perma.cc/SR9Y-DFY8>] (May 31, 2022).

20. 8 C.F.R. § 208.30(f)(1).

21. 8 C.F.R. §§ 208.30(f)(2), 212.5(c).

22. *Secretary Kirstjen M. Nielson Announces Historic Action to Confront Illegal Immigration*, U.S. DEP'T OF HOMELAND SEC. (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielson-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/8NVN-CFKR>] [hereinafter DHS Historic Action]; Lauren Gambardella, Current Development, *70,000 Returned to Mexico Through the Migrant Protection Protocols: Just Bad Policy or Illegal As Well?*, 35 GEO. IMMIGR. L.J. 983, 983 (2021).

23. DHS Historic Action, *supra* note 22; *see also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 5, at 63; *The “Migrant Protection Protocols.”* AM. IMMIGR. COUNCIL (Jan. 7, 2022),

“crisis” of unmeritorious asylum claims.²⁴ DHS sent close to seventy thousand asylum seekers back to Mexico between the program’s implementation in January 2019 and its temporary suspension in early 2021.²⁵

Citing an “obscure” provision of the INA, Section 235(b)(2)(C), Secretary Kirstjen Nielsen announced that the program would be implemented effective immediately.²⁶ Those placed in the program were not from Mexico, had no ties to Mexico, and in some cases were pregnant, disabled, or had chronic health conditions which were exacerbated by the lack of access to medical care in MPP camps.²⁷ The wait for asylum seekers placed in the MPP could be months or even years,²⁸ and stretched even longer when the program was “indefinitely suspended” due to the COVID-19 pandemic in March 2020.²⁹

<https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>
<https://perma.cc/C99W-A74T> [hereinafter Am. Immigr. Council].

24. DHS Historic Action *supra* note 22 (“We will confront this crisis head on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. ‘Catch and release’ will be replaced with ‘catch and return.’”). The administration relied on two statistics for the proposition that asylum claims at the southern border rose dramatically: (1) credible fear claims had increased two thousand percent over the five years prior to the MPP’s implementation, and (2) nine out of ten asylum claims are denied. *Id.* However, DHS failed to consider other factors that may have contributed to the increase in asylum seekers at the border. *See* Gambardella, *supra* note 22, at 985. DHS also did not recognize other circumstances that may account for high denial rates in immigration court, such as restrictive performance standards imposed on immigration judges under the Trump administration. *See EOIR Performance Plan*, U.S. DEP’T OF JUSTICE, <http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf> [<https://perma.cc/8QK6-V9QD>]. (last visited Jan. 15, 2023); *see also* Tal Kopan, *Justice Department Rolls out Case Quotas for Immigration Judges*, CNN (Apr. 2, 2018), <https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html> [<https://perma.cc/GU67-MVWU>]. For a discussion of DHS’s statistical errors in evaluating the MPP, *see* Brief of the Am. Statistical Ass’n as Amicus Curiae Supporting Respondents, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212).

25. Am. Immigr. Council, *supra* note 23.

26. DHS Historic Action, *supra* note 22; Yael Schacher, *Issue Brief: MPP as a Microcosm: What’s Wrong with Asylum at the Border and How to Fix It*, REFUGEES INT’L (Feb. 11, 2022), <https://www.refugeesinternational.org/reports/2022/2/10/mpp-as-a-microcosm-whats-wrong-with-asylum-at-the-border-and-how-to-fix-it> [<https://perma.cc/63XN-VJ3Q>];

27. *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUM. RTS. WATCH (Jan. 29, 2020, 10:00 AM), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program> [<https://perma.cc/B4Y7-QTR9>] (“In August and September 2019, Human Rights Watch researchers interviewed ten asylum seekers with disabilities or chronic health conditions who faced obstacles to accessing basic services as they were waiting in Mexico.”); Memorandum from Robert Silvers, Dep’t of Homeland Sec., Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols, *supra* note 16 (Dec. 2, 2021) (“Inadmissible noncitizens encountered at the Southwest Border at ports of entry or within 96 hours of crossing between ports of entry are subject to placement in MPP if they are nationals of any country in the Western Hemisphere other than Mexico.”).

28. *Id.*; Am. Immigr. Council, *supra* note 23 (“Despite the possibility that those with pending cases might have to wait two to three years in Mexico before a hearing, the Trump administration refused calls to admit those in MPP with pending cases into the United States.”).

29. Am. Immigr. Council, *supra* note 23 (“On March 23, 2020, in response to the COVID-19 pandemic, both DHS and EOIR suspended MPP 1.0 hearings across the border, and the courts that carried out MPP hearings temporarily shut down. . . . Finally, on July 17, 2020, DHS and EOIR formally admitted that the program would be indefinitely suspended during the pandemic.”).

2. Impact on Asylum Seekers

Asylum seekers enrolled in the MPP experienced a dramatically reshaped asylum process. The MPP devastated the asylum system at the southern border in four ways by (1) making the process of seeking asylum more dangerous, (2) increasing the procedural difficulty of winning asylum, (3) making it less likely that asylum seekers would receive notice of their hearings, and (4) decreasing asylum seekers' access to counsel. First, the program placed asylum seekers in extreme danger, putting them at risk of rape, kidnapping, and assault, for the duration of their claim's adjudication.³⁰ Under the MPP, DHS sent asylum seekers awaiting their final hearings to border regions that the State Department ranks at the same level of danger as active combat zones.³¹ Asylum seekers were often kidnapped on their journeys to attend their hearings in the United States.³² Their stories, which showcase the MPP's brutality, abound:

Nora, a Salvadoran asylum seeker, suffered brutal attacks under MPP despite asking U.S. border officers for protection, “th[inking she and her three-year old son] would be safe.” Nora and her son were abducted twice in Mexico and held hostage for ransom. The only place Nora could find to stay was a squalid tent encampment in the dangerous Mexican city across the border from where her MPP hearing would be held. After Nora was returned under MPP, three men grabbed her just outside the encampment, blindfolded her, and “took turns raping her over several hours, in front of her son, before dumping the two of them on the side of a road.”³³

Second, assuming that asylum seekers could escape the ever-present danger while waiting in the border regions, the program posed significant procedural and logistical

30. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 5, at 61; Am. Immigr. Council, *supra* note 23 (“[T]here were at least 1,544 publicly documented cases of rape, kidnapping, assault, and other crimes committed against individuals sent back under MPP.”).

31. Gambardella, *supra* note 22, at 984 (quoting Brief for Respondents at 6, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212)); *see also Mexico International Travel Information*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Mexico.html#Tamaulipas%20state> [<https://perma.cc/3QX6-YKN7>] (Aug. 17, 2022); *Afghanistan Travel Advisory*, U.S. DEP'T OF STATE, (Jan. 18, 2022), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/afghanistan-advisory.html> [<https://perma.cc/9GGV-9DTV>]; *Iran Travel Advisory*, U.S. DEP'T OF STATE (Nov. 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/iran-travel-advisory.html> [<https://perma.cc/N95J-RXK7>]; *Libya Travel Advisory*, U.S. DEP'T OF STATE, (Feb. 7, 2022), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/libya-travel-advisory.html> [<https://perma.cc/M9T9-VQY5>]; *Syria Travel Advisory*, U.S. DEP'T OF STATE (Aug. 2, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/syria-travel-advisory.html> [<https://perma.cc/T2BY-G233>] (noting that all four countries are placed at Level 4: Do Not Travel); *see also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 5, at 62.

32. Gambardella, *supra* note 22, at 984; *see also* SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 5, at 62 (noting that “Human Rights First [a nonprofit human rights organization] documented more than 1,000 cases of rape, kidnapping, assault, extortion, and other crimes against migrants forced to remain in Mexico”).

33. Brief of Nongovernmental Organizations and Law School Clinics as Amici Curiae in Support of Respondents at 3–4, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212) (alteration in original) (quoting Miriam Jordan, *'I'm Kidnapped': A Father's Nightmare on the Border*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/us/border-migrants-kidnapping-mexico.html> [<https://perma.cc/LD8X-XA4R>]).

hurdles for asylum seekers traveling to attend their hearings in the United States.³⁴ The MPP forced asylum seekers to travel to their designated ports of entry late into the night and to cross the border for morning hearings as early as 4:30 am.³⁵

That arduous process was the reality for lucky asylum seekers who had received notice of the date and time of their hearing.³⁶ Unfortunately, DHS failed to provide some asylum seekers with adequate notice of the charges against them, as well as the date, time, and place of their hearings.³⁷ Many asylum seekers who lived in migrant shelters lacked permanent addresses in Mexico and, as a result, their Notices to Appear, containing their hearing dates and times, frequently did not reach them.³⁸ DHS issued notices that listed asylum seekers' addresses as shelters where they had neither stayed nor knew anything about; some even listed "Facebook" as the physical mailing address for the hard-copy notice.³⁹ Even if asylum seekers were able to file an address with the immigration court, hearing notices for asylum seekers often did not contain correct information about the location of the hearing itself.⁴⁰ In some cases, the notice listed the wrong address for the hearing, directing asylum seekers to a court in Harlingen, Texas, while the actual hearing site was a tent in Brownsville.⁴¹ When nine asylum seekers scheduled for hearings did not appear at the correct locations because their Notices to Appear directed them to a different court, all nine were eventually ordered removed as a result of not appearing for their hearing.⁴²

Fourth, the program failed to provide any meaningful access to counsel.⁴³ Asylum seekers in the MPP were *seven times less likely* than asylum seekers living in the United States to find an attorney to represent them because of the difficulty in finding a lawyer and maintaining contact with them without being present in the United States—compounded by the fact that asylum seekers did not have stable contact information or a consistent place to meet with their attorneys.⁴⁴ Further, U.S. lawyers were often unable or unwilling to travel to Mexico to work with MPP asylum seekers because of security concerns or the inherent difficulty in attempting to work with clients across a border.⁴⁵ Even if they possessed the means, U.S. attorneys were often afraid to

34. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 5, at 61–63.

35. Brief of Nongovernmental Organizations and Law School Clinics as Amici Curiae in Support of Respondents, *supra* note 33, at 9–10.

36. Gambardella, *supra* note 22, at 985.

37. *Id.*

38. SCHOENHOLTZ, RAMJI-NOGALES & SCHRAG, *supra* note 5, at 63.

39. See Debbie Nathan, *U.S. Border Officials Use Fake Addresses, Dangerous Conditions, and Mass Trials to Discourage Asylum-Seekers*, THE INTERCEPT (Oct. 4, 2019, 7:00 AM), <https://theintercept.com/2019/10/04/u-s-border-officials-use-fake-addresses-dangerous-conditions-and-mass-trials-to-discourage-asylum-seekers/> [<https://perma.cc/4WLP-TAM8>].

40. See Gambardella, *supra* note 22, at 985 (citing *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRACIMMIGR. (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587/> [<https://perma.cc/Z3AL-288L>]).

41. Nathan, *supra* note 39.

42. *Id.*

43. See Gambardella, *supra* note 22, at 985–86.

44. *Id.* at 985–86.

45. *Id.*

take MPP cases because they received threats due to their work.⁴⁶ Because of these difficulties, the representation rate among MPP asylum seekers plummeted to as low as 7.5%.⁴⁷

The few attorneys who did try to assist asylum seekers were overwhelmed and unable to prepare statements or evidence with their clients.⁴⁸ Asylum seekers were only allowed into the United States on the day of the hearing, had to go straight to court, and were allowed only one hour with their attorney to prepare,⁴⁹ making in-person preparation meetings prior to the day of the hearing impossible. Applicants could not meet with their attorneys unless they had already filed notices of representation, and often could not communicate with their attorneys from Mexico as they may not have had access to phones, internet, or adequate finances.⁵⁰ MPP asylum seekers were unable to work and make money, find housing, or access health care and school for their children, much less prepare their asylum cases.⁵¹ Because of the difficulty of finding counsel and inability to attend their hearings, seventy-two percent of asylum cases were denied not on the merits, but as *in absentia* hearings, where an order of removal is issued simply because the asylum seeker did not attend their hearing.⁵²

Consequently, MPP asylum seekers had a 0.8% case grant rate—rendering a difficult process nearly impossible.⁵³ And in the long list of denials, often *in absentia* denials, meritorious claims were undoubtedly abandoned or denied because applicants were unable to carry on in the face of violence, danger, and seemingly insurmountable procedural and logistical obstacles.⁵⁴

B. Legal Challenges to the MPP

1. Procedural History

Immigration advocates were quick to challenge the program. The first lawsuit resulted in a federal district court grant of a preliminary injunction against the MPP on April 8, 2019.⁵⁵ The court found that (1) the MPP illegally applied provisions aimed at one class of applicants under the statute to another class; (2) the MPP violated the

46. Brief of Nongovernmental Organizations and Law School Clinics as Amici Curiae in Support of Respondents, *supra* note 33, at 14.

47. *Details on MPP (Remain in Mexico) Deportation Proceedings (through December 2020)*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, <https://trac.syr.edu/phptools/immigration/mpp> [https://perma.cc/743Q-DZ3U] (last visited Jan. 15, 2023).

48. Am. Immigr. Council, *supra* note 23.

49. *Id.*

50. Brief of Nongovernmental Organizations and Law School Clinics as Amici Curiae in Support of Respondents, *supra* note 33, at 15–17.

51. *Id.* at 18.

52. *Id.* at 21.

53. See Brief for Respondents at 8, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212).

54. Brief of Nongovernmental Organizations and Law School Clinics as Amici Curiae in Support of Respondents, *supra* note 33, at 12.

55. Order Granting Preliminary Injunction in *Innovation L. Lab, et al., v. Nielson, et al.*, Case 3:19-cv-00807-RS (N.D. Cal. 2019), [https://perma.cc/ZK4K-LZ9C].

international principle of nonrefoulement⁵⁶ by not providing protective procedures of those who could face torture or persecution in the country to which they were returned; (3) the procedures the MPP enacted around the United States' international nonrefoulement obligations violated the APA because the agency failed to explain the departure from prior norms; (4) the MPP's implementation violated the APA because there was no notice or comment period; and, finally (5) the MPP was arbitrary and capricious, and the government's asserted justifications were not connected to their stated design of compliance with nonrefoulement obligations.⁵⁷ Following the district court's order, the Ninth Circuit Court of Appeals granted the government's motion for an emergency stay.⁵⁸ However, after a hearing on the injunction, the Ninth Circuit affirmed the district court's grant of the preliminary injunction.⁵⁹ The court of appeals analyzed the MPP on two grounds: first, whether the MPP correctly relied on and interpreted 8 U.S.C. § 1225(b),⁶⁰ and second, whether the MPP was consistent with the United States's nonrefoulement obligations.⁶¹ Because it found that the plaintiffs had shown a likelihood of success on the merits of their claim, the Ninth Circuit lifted the emergency stay and the Trump administration was enjoined from continuing to implement the MPP.⁶² However, less than two weeks later, the United States Supreme Court stayed the preliminary injunction and the MPP remained in place.⁶³ The Court did not grant certiorari to hear the case on the merits until October 2020,⁶⁴ and the case was set for argument on March 1, 2021.⁶⁵

2. *Mayorkas v. Innovation Law Lab*

a. Statutory Authority

In *Mayorkas v. Innovation Law Lab*, one of the central issues was the purported statutory authority for the MPP.⁶⁶ The Trump administration found their justification for the MPP in Section 235 of the INA, codified in 8 U.S.C. § 1225(b)(2)(C).⁶⁷ The statute at issue, 8 U.S.C. § 1225, provides procedures for immigrants who arrive at the border without documentation.⁶⁸ Section 1225(b)(1) provides a process involving screening and

56. *See infra* Part II.B.2.b.

57. *Id.*

58. *Innovation L. Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

59. *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1077 (9th Cir. 2020).

60. *Id.* at 1082.

61. *Id.* at 1087.

62. *Id.* at 1095.

63. *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020).

64. *Wolf v. Innovation L. Lab*, 141 S. Ct. 617 (2020).

65. *Mayorkas v. Innovation Law Lab*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/mayorkas-v-innovation-law-lab/> [<https://perma.cc/E3LA-XXNN>] (last visited Jan. 15, 2023).

66. Brief for Respondents, *supra* note 53.

67. Brief for Petitioners at 7, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212); 8 U.S.C. § 1225.

68. *See* 8 U.S.C. § 1225.

a credible fear interview for undocumented migrants.⁶⁹ When DHS finds no credible fear, the migrant is placed in expedited removal proceedings with no hearing or judicial review.⁷⁰ However, should the migrant pass the credible fear interview, they are entitled to further judicial consideration in full removal proceedings.⁷¹ Alternatively, DHS can use its prosecutorial discretion to place the applicant in full proceedings at any time, even without a positive credible fear determination.⁷² In contrast, Section 1225(b)(2) includes the language that the government relied on in the implementation of the MPP:

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title . . .

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.⁷³

Subparagraph C allows for removal of certain migrants to territory “contiguous to the United States.”⁷⁴ While Section (b)(1) provides procedures for those entering without valid documentation,⁷⁵ Section (b)(2) applies to “other aliens.”⁷⁶ “Other” applicants under Section (b)(2) may be placed in full removal proceedings, but under subparagraph C, the government is allowed to return those applicants to Mexico or Canada for the pendency of the proceedings.⁷⁷

Respondents argued that the statute definitively established two nonoverlapping categories of applicants—those subject to the provisions and protections of Section (b)(1) and those included in Section (b)(2).⁷⁸ The Supreme Court had previously recognized the mutually exclusive nature of the Section (b)(1) and (b)(2) provisions,⁷⁹ as had the

69. 8 U.S.C. § 1225(b)(1).

70. 8 U.S.C. § 1225(b)(1)(A)(i) (“[T]he officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.”).

71. 8 U.S.C. § 1225(b)(2).

72. *See id.*

73. *Id.*

74. *Id.* § 1225(b)(2)(C); Gambardella, *supra* note 22, at 992.

75. 8 U.S.C. § 1225(b)(1).

76. *Id.* § 1225(b)(2).

77. *Id.* § 1225(b)(2)(C).

78. Brief for Respondents, *supra* note 53, at 26.

79. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (“Section 1225(b) divides . . . applicants into two categories.”).

Board of Immigration Appeals (BIA) in a series of cases.⁸⁰ The definitive factor as to which category a migrant is placed in, Respondents argued, is the basis for inadmissibility.⁸¹ Section (b)(1) applied to applicants who were inadmissible because of either fraud or misrepresentation, or because they lacked the proper documentation.⁸² On the other hand, Section (b)(2) applicants were “other aliens,” or those who did not possess characteristics that would automatically place them in the Section (b)(1) category.⁸³ Therefore, Respondents argued the statute sets out a simple formula—an applicant is subject to either Section (b)(1) or (b)(2)’s process depending on their basis for inadmissibility.⁸⁴ Therefore, the subsections of (b)(2), including the contiguous territory provision, only apply to (b)(2) applicants and not to (b)(1) applicants, who exist in a category of their own.⁸⁵

b. International Law

Respondents also argued that the MPP violated international law, specifically prohibitions on refoulement.⁸⁶ The principle of nonrefoulement is an international obligation imposed on States that prevents them from returning a migrant to a country where they could be persecuted because of their race, religion, nationality, membership in a political social group, or political opinion, or where they may be tortured with the consent or acquiescence of the government.⁸⁷ The United States, though not a party to the 1951 Refugee Convention, is a party to the 1967 Protocol Relating to the Status of Refugees,⁸⁸ which is implemented in the Refugee Act of 1980,⁸⁹ and includes a nonreturn provision.⁹⁰

Section 1231(b)(3) of the Refugee Act of 1980 mirrors the language of the 1951 Refugee Convention and states that the Attorney General cannot deport a migrant to a location where their life or freedom would be threatened on the basis of race, religion,

80. See *Matter of M-S-*, 27 I. & N. Dec. 509, 510 (BIA 2019) (citing *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 524 (BIA 2011)).

81. Brief for Respondents, *supra* note 53, at 26.

82. *Id.* at 16 (citing 8 U.S.C. §§ 1182(a)(7), (a)(6)(C)).

83. See *id.* at 26.

84. See *id.*

85. *Id.*

86. Brief for Respondents, *supra* note 53, at 24.

87. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137 (“No Contracting State shall expel or return (‘refouler’) a refugee in any matter whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, December 10, 1984, 1465 U.N.T.S. 85.

88. U.N. High Comm’r for Refugees, State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol; see also Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267.

89. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.).

90. 8 U.S.C. § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”); see also 8 U.S.C. § 1521.

nationality, membership in a particular social group, or political opinion— withholding removal for those who may face direct persecution.⁹¹

Additionally, Article 3 of the Convention Against Torture (CAT) provides that a person shall not be returned to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture” with the consent or acquiescence of the government.⁹² The United States implemented this portion of the CAT through the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).⁹³ Under FARRA’s mandate, Article 3 of the CAT was codified in 8 USC Section 1231(b)(3),⁹⁴ which, mirroring the CAT’s language, states that the Attorney General cannot deport a migrant to a location where their life or freedom would be threatened on the basis of race, religion, nationality, membership in a particular social group, or political opinion.⁹⁵

The respondents in *Innovation Law Lab* argued that the MPP violated international law, as the principle of nonrefoulement, to which the United States is bound, “prohibits the return of noncitizens to a risk of persecution or torture.”⁹⁶ Specifically, the MPP violated the CAT and the withholding statute when it returned asylum seekers to places where they would be tortured or persecuted without granting them due process protections.⁹⁷ It did so by changing the standard of withholding of removal to a “more-likely-than-not burden,” a high burden for a summary proceeding, without affording applicants the protections of counsel, notice of their rights, or a meaningful hearing.⁹⁸ DHS failed to comply with the law by not providing affirmative notice of the availability of protection under international law to arriving asylum seekers.⁹⁹ Relying on an asylum seeker to understand the law and provide information about their fear of return, without knowing their right to protection, effectively denies the asylum seeker the protection Section 1231(b)(3) mandates.¹⁰⁰ Further, even if an asylum seeker received an interview, they were held to a high evidentiary standard of showing persecution based on a protected ground, but unlike full proceedings, there was no right to counsel for most of the MPP’s implementation, and no opportunity to present evidence

91. 8 U.S.C. § 1231(b)(3)(A); *see also* Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 137.

92. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, December 10, 1984, 1465 U.N.T.S. 85. This treaty, which entered into force on June 26, 1987, has 154 States parties. *Id.*

93. Pub. L. No. 105-277, Div. G, Subdiv. B, Title XXII, Ch. 3, Subch. B § 2242, 112 stat. 2681, 2681-822-268123 (codified at 8 U.S.C. § 1231 (2012)).

94. 8 U.S.C. § 1231(b)(3).

95. *Id.*

96. *See* Brief for Respondents, *supra* note 53, at 3; Convention Relating to the Status of Refugees, art. 3, July 28, 1951, 606 U.N.T.S. 267 (officially adopted in 8 U.S.C. § 1231(b)(3)); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, December 10, 1984, 1465 U.N.T.S. 85 (officially adopted in the Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231).

97. Brief for Respondents, *supra* note 53, at 26.

98. *See id.* at 13–14, 34–36.

99. *See id.* at 32.

100. *See id.* at 32–39.

or witnesses.¹⁰¹ To receive protection against being returned to potential torture or persecution in Mexico, asylum seekers were then forced to meet a standard without the procedural protections that may come with full proceedings, instead of being allowed into the United States while awaiting a hearing.¹⁰² Because of these shortcomings, Respondents argued that the MPP violated the obligation of nonrefoulement.¹⁰³

Although Respondents brought up due process concerns regarding the obligation of nonrefoulement, their brief did not fully address the wider due process concerns around the actual, final immigration hearing itself.¹⁰⁴ The due process issues that permeate the MPP were raised to the Court in an amicus brief, however, where the American Bar Association argued that the MPP violated the statutory right to representation in removal hearings.¹⁰⁵

3. Government's Argument in Support of the MPP

The Government maintained that the MPP was a lawful exercise of authority under 8 U.S.C. § 1225.¹⁰⁶ The MPP—according to the Government—follows the text of the INA “to the letter.”¹⁰⁷ It claimed that the MPP’s only determinative factor is whether the migrant fits the description of a migrant in Section 1225(b)(2)(A)—that is, that the migrant be an applicant not entitled to admission.¹⁰⁸ It further claimed that Sections (b)(1) and (b)(2) described different procedures available to DHS, rather than different classes of applicants, and thus argued that the choice of whether to apply Section (b)(2)(C) was merely a discretionary enforcement decision under DHS’s control.¹⁰⁹ Any exception to the Section (b)(2)(C) application carved out in Section (b)(2)(B)(ii), they stated, merely “clarifies the ambiguity” of an overlap between procedures, rather than places any proscription on DHS’s behavior.¹¹⁰ Ultimately, the government viewed Sections (b)(1) and (b)(2) as interconnected, with the former being a smaller subset of

101. *See id.* at 34.

102. *See id.* at 34–35.

103. *See* Brief for Respondents, *supra* note 53. Respondents also argued that the MPP violated the APA’s notice and comment requirements for rule making. *Id.* at 61. Although the District Court agreed with Respondents that the MPP violated the APA, the 9th Circuit upheld the injunction on other grounds and did not reach the APA question. *Id.* Although the Circuit Court did not address the question, Respondents argued that the APA provided another basis for upholding the injunction and declaring the MPP unlawful. *Id.* at 61.

104. *Id.* at 35–36.

105. Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 8, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212) (citing 8 U.S.C. § 1362 (“In any removal proceedings before an immigration judge ... the person concerned shall have the privilege of being represented ... by such counsel.”)).

106. *See* Brief for Petitioners, *supra* note 67, at 20–28, *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (No. 19-1212). Although the issue is now moot, the Government also maintained that the preliminary injunction restricting the implementation of the MPP was overbroad, and further, that the MPP was a lawful exercise of agency authority under the APA. *See id.*

107. *See id.* at 21.

108. *See id.* at 22.

109. *See id.*

110. *See id.* at 27.

the latter, rather than as two categories that exist in exclusion of each other.¹¹¹ The Government also argued that removal proceedings were necessarily tied to status in the Section (b)(2) category, such that if a migrant was placed in full removal proceedings, as they are in the MPP, this signals an implicit move from Section (b)(1) to Section (b)(2).¹¹²

Turning to the arguments that the MPP fails to comply with the United States's obligations of nonrefoulement, the Government argued that the MPP was not subject to Section 1231(b)(3)(A)'s provisions because the MPP mandated "return pending" removal as distinct from procedures around removal, which are subject to protections under international law.¹¹³ Alternatively, the Government argued that even if the MPP was subject to restrictions due to nonrefoulement, asylum seekers were nonetheless granted a credible fear interview when they expressed a fear of return to Mexico; therefore, this process was sufficient to satisfy the United States's obligation of nonrefoulement.¹¹⁴

C. *The MPP Under President Biden*

1. Initial Termination and Preliminary Injunction

As the case against the MPP wound its way through the courts and was finally set for argument before the Supreme Court, the climate within which the MPP's legality would be decided was changing quickly.¹¹⁵ Immigration was a hotly contested issue throughout the 2020 election, with both candidates promising to deliver the results their bases wanted.¹¹⁶ With the inauguration of President Joe Biden in January 2021, it seemed that a more open immigration policy had won.¹¹⁷ Then-Acting Secretary of Homeland Security David Pekoske issued a memorandum on January 20, 2021, ending new MPP

111. *See id.*

112. *See id.*

113. *See id.* at 34.

114. *See id.* at 34–35.

115. *See* ImmigrationHub, *Analysis: The Role of Immigration in the 2020 Election Cycle*, IMMIGRATIONHUB <https://theimmigrationhub.org/analysis-the-role-of-immigration-in-the-2020-election-cycle> (last visited Jan. 15, 2023).

116. *See* BallotPedia, *2020 Presidential Candidates on Immigration*, BP https://ballotpedia.org/2020_presidential_candidates_on_immigration [<https://perma.cc/2E3A-9ZAV>] (last visited Jan. 15, 2023) (stating 2020 presidential candidates' differing positions on immigration issues).

117. *See* Franco Ordonez, *On Immigration, Biden Goes Big In Opening Bid to Congress*, NPR (Jan. 1, 2023), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958626092/on-immigration-biden-goes-big-in-opening-bid-to-congress> [<https://perma.cc/K6J4-N9EH>] ("President-elect Joe Biden plans to send a sweeping immigration proposal to Congress after he is sworn into office on Wednesday, a bill that would provide a path to citizenship for an estimated 11 million undocumented immigrants living in the United States. . . . Separate from the bill, Biden also plans to sign executive actions on Wednesday to reverse Trump's travel ban on a group of primarily Muslim nations, repeal Trump's hardline immigration enforcement orders, stop construction of his wall on the southern border with Mexico, among other measures.").

enrollments.¹¹⁸ Shortly thereafter, DHS began processing MPP enrollees for entrance into the United States.¹¹⁹

On June 21, 2021, the Supreme Court granted the Government's motion to vacate the judgment in *Innovation Law Lab* and remanded the case to the Ninth Circuit.¹²⁰ On remand, the Court instructed the court of appeals to direct the District Court to vacate as moot the April 8, 2019 order granting a preliminary injunction.¹²¹ Meanwhile, over 13,000 former MPP enrollees were paroled into the United States.¹²²

However, this was not the end of the MPP. Texas and Missouri brought suit against the Biden administration's termination of the program, alleging violations of the APA, the Constitution, and an agreement between the States and the President.¹²³ The U.S. District Court for the Northern District of Texas granted the requested injunction against the Biden administration's termination of the MPP on August 13, 2021.¹²⁴ On August 19, 2021, the Fifth Circuit Court of Appeals refused to issue a stay, calling the termination of the MPP "arbitrary and capricious" and supporting the lower court's order that the Government set out to, "in good faith," implement the MPP once again.¹²⁵ The Fifth Circuit held that the Government had failed to make a showing on all four required factors under *Nken v. Holder*¹²⁶ to merit a grant of a stay.¹²⁷

The Fifth Circuit relied on eight facts the District Court found sufficient to show that the plaintiff States would suffer harm should the MPP be terminated: (1) the government would have to release migrants, (2) the MPP had decreased the volume of arrivals at the border, (3) the termination of the MPP had contributed to a "surge" of new arrivals, (4) enforcement encounters had increased due to the end of the program, (5) termination of the program would mean that undocumented migrants would apply for driver's licenses that would presumably burden the states' systems, (6) more undocumented migrants would burden school systems, (7) more undocumented migrants

118. Memorandum from Acting Secretary Pecoske on Immigration Enforcement Policies, *supra* note 11.

119. U.S. Department of Homeland Security, *DHS Announces Process to Address Individuals in Mexico with Active MPP Cases* (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases> [<https://perma.cc/EC99-5ATW>].

120. *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842, 2842 (2021).

121. *Id.*

122. *Coalition Letter, RE: Urgent Actions the Biden Administration Must Take Following Supreme Court Decision on MPP*, WOMEN'S REFUGEE COMM., ET. AL. (Aug. 30, 2021), <http://www.womensrefugeecommission.org/research-resources/urgent-actions-the-biden-administration-must-take-following-supreme-court-decision-on-migrant-protection-protocols-mpp/> [<https://perma.cc/C6Z3-F5SA>].

123. *Texas v. Biden*, 554 F. Supp. 3d 818 (N.D. Tex. 2021), *enforced in part*, No. 2:21-CV-067-Z, 2021 WL 539984 (N.D. Tex. Nov. 18, 2021), *aff'd* 20 F.4th 928 (5th Cir. 2021), *rev'd and remanded*, 142 S. Ct. 2528 (2022).

124. *Id.*

125. *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021).

126. 556 U.S. 418 (2009).

127. *Id.* at 545. The four factors laid out in *Nken v. Holder* are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunkskill*, 481 U.S. 770, 776 (1987)).

would impose costs on the healthcare and benefits systems, and (8) more undocumented migrants would increase crime rates.¹²⁸ It then summarily determined that the harm was actual and imminent, traceable to the MPP's termination, and that an injunction was a sufficient—indeed, a necessary—remedy.¹²⁹

Next, the court then turned to whether the MPP violated the APA, which requires a change in administrative procedures be “reasonable and reasonably explained.”¹³⁰ The change in question was largely based on a June 1, 2021 DHS memorandum that officially terminated the MPP.¹³¹ The June memorandum officially ending the MPP did not consider several factors, according to the court, including: (1) States’ legitimate reliance interests, (2) the MPP’s benefits, (3) potential alternatives to the MPP, and (4) Section 1225 implications.¹³² In reference to the Government’s argument, the court simply stated that “[t]he Government offers a hodgepodge of counterarguments to justify the June 1 Memorandum’s omissions. None is persuasive.”¹³³

In contrast to the weight the court gave to the States’ supposed injury, it determined that the Government had shown no injury, but only the possibility of what the court called “self-inflicted” harms.¹³⁴

On August 24, 2021, the Supreme Court relied on this analysis in a short order denying the government’s motion for a stay, leaving the lower court’s injunction of the MPP’s termination in place.¹³⁵ On December 2, having reached an agreement with the Mexican government, DHS released a memorandum containing guidance on reimplementing the MPP, in keeping with the district court order enjoining termination and requiring DHS to implement the program in “good faith.”¹³⁶ Following this guidance, new MPP enrollments began again even as opposition from a variety of nonprofits, think tanks, and advocates mounted.¹³⁷

128. *Biden*, 10 F.4th 538 at 546–47.

129. *Id.* at 547–49.

130. *Fed. Commc’ns Comm’n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (“The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.”); *see also* 5 U.S.C. § 706(2)(A) (requiring a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

131. *Biden*, 10 F.4th at 543; *see also* Memorandum from Alejandro N. Mayorkas, Secretary, Dep’t Homeland Sec., to Troy Miller, U.S. Customs & Border Prot., Tae Johnson, U.S. Immigr. & Customs Enf’t, & Tracey Renaud, U.S. Citizenship & Immigr. Servs., Termination of the Migrant Protection Protocols Program (June 1, 2021), <https://go.usa.gov/x6s7E> [<https://perma.cc/5UQ9-YCM7>].

132. *Biden*, 10 F.4th at 553.

133. *Id.* at 555.

134. *Id.* at 558.

135. Order Denying the Government’s Request for Stay, No. 21A21, *Biden v. Texas* (2021) (Alito, J.), https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf [<https://perma.cc/33GT-GQXS>].

136. Memorandum from Robert Silvers, Dep’t of Homeland Sec., Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols, *supra* note 16 (Dec. 2, 2021).

137. *See* Austin Kocher, *Biden Expands MPP, UK Debates Offshoring, Ireland Offers Path to ‘Regularisation’, and More*, AUSTIN KOCHER (Dec. 6, 2021), <https://austinkocher.substack.com/p/biden-expands-mpp-uk-debates-offshoring> [<https://perma.cc/G8NG-FF2L>].

2. Biden Administration Response

The Biden administration addressed the problem of terminating the MPP in two ways—first by appealing the district court’s determination that the action was arbitrary and capricious, and second, by issuing additional memoranda that explained and supported the agency actions.¹³⁸

a. October 29 Memoranda

The Biden administration attempted to bolster their original rationale for the termination decision with a set of memoranda released on October 29, 2022. These memoranda described a robust investigation of the MPP and the agency’s explanation for its termination, in accordance with the district court’s instructions.¹³⁹ In short, the Secretary once again determined that the MPP should be terminated.¹⁴⁰ In doing so, the finding that the MPP contributed to a decrease in migration was weighed as a positive result, but was outweighed by the “substantial and unjustifiable human costs” on asylum seekers.¹⁴¹

The October memorandum acknowledged that the MPP was not the “best” strategy for securing the border or protecting victims of persecution.¹⁴² Citing evidence that asylum seekers in the MPP experienced violence, the explanation found that, ultimately, the United States was not able to “ensure the safety and security of those returned to Mexico.”¹⁴³ Because migrants were unable to access counsel or travel to courts separated by an international border, the program was a failure.¹⁴⁴

Importantly, the memoranda cited the fact that Mexico was unwilling to enter into the agreement with the United States again without improvements to the program.¹⁴⁵ This negative impact on diplomatic relations with Mexico, coupled with the costs to asylum seekers, led the Secretary to conclude that “there are inherent problems with the program . . . that no amount of resources can sufficiently fix. . . . [T]he benefits of MPP are far outweighed by the costs of . . . the program . . . in whatever form.”¹⁴⁶

However, despite the memoranda and the Secretary’s findings, DHS was still obligated to comply with the district court’s order to “enforce and implement MPP in *good faith*,” until the MPP can be “lawfully rescinded in compliance with the APA.”¹⁴⁷

138. See *infra* Part II.C.2.

139. Memorandum from Alejandro N. Mayorkas, U.S. Dep’t Homeland Sec., Termination of the Migrant Protection Protocols, *supra* note 131; see also U.S. DEP’T OF HOMELAND SEC., EXPLANATION OF THE DECISION TO TERMINATE THE MIGRANT PROTECTION PROTOCOLS 2 (2021).

140. Memorandum from Alejandro N. Mayorkas, U.S. Dep’t of Homeland Sec., Termination of the Migrant Protection Protocols, *supra* note 131, at 2.

141. *Id.* at 2.

142. *Id.*

143. *Id.* at 3.

144. See *id.*

145. *Id.*

146. *Id.* at 4.

147. *Id.* at 2 (quoting *Texas v. Biden*, 554 F. Supp. 3d 818, 857 (N.D. Tex. 2021)), *aff’d*, 20 F.4th 928 (5th Cir. 2021), *rev’d and remanded*, 142 S. Ct. 2528 (2022).

The memoranda included the caveat that the decision to terminate would be implemented absent a final judicial decision to vacate the injunction, which still required DHS to implement and enforce the MPP.¹⁴⁸

b. Appeal

The Biden administration also appealed the district court's order to the Fifth Circuit. In a decision issued December 13, 2021, the Fifth Circuit denied the administration's request to vacate the lower court's injunction, which required DHS to reimplement the MPP.¹⁴⁹ In doing so, the court held that the October 29 memoranda had no impact on the question of whether the initial termination of the MPP was lawful.¹⁵⁰ Accordingly, the Biden administration restarted the program, sending asylum seekers back to Mexico under the MPP in late January 2022.¹⁵¹ The Biden administration filed a petition for a writ of certiorari to the U.S. Supreme Court to address the questions of whether the INA mandates the continued use of the MPP, and whether DHS's termination of the MPP was a lawful exercise of agency power.¹⁵² Arguing that Section 1225 of the INA does not compel the use of the contiguous-territory provision, and that the October 29 termination memoranda were an appropriate termination of the MPP, the Biden administration requested certiorari.¹⁵³ The petition was granted on February 18, 2022, and the case was set for arguments in April 2022.¹⁵⁴

III. DISCUSSION

A. The MPP is a Violation of the INA

The MPP is not authorized by the INA, based on a plain reading of the statute, as well as precedential decisions and congressional intent, all of which support an interpretation that does not give the government authority to remove asylum seekers to Mexico for the pendency of their proceedings. Therefore, the INA does not actually expressly authorize holding asylum seekers outside the U.S. border as the Trump administration purported as justification in the provision. The MPP violates the INA in two ways. First, both a plain reading of the statute and congressional intent reveal that the section of the INA that applies to aliens from any contiguous territory is not directed at asylum seekers. Second, the section of the INA purportedly authorizing the MPP does not apply to the category of asylum seekers.

148. *Id.* at 4.

149. *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021).

150. *See id.* at 1004 (“[T]he Government says it can do all of this by typing up a new ‘memo’ and posting it on the internet. . . . We hold the Government is wrong.”).

151. Sandra Sanchez, *MPP Restarts in South Texas but Most Asylum Seekers Choose to Wait in Mexico Interior*, BORDER REPORT (Jan. 24, 2022, 4:19 PM), <https://www.borderreport.com/hot-topics/immigration/mpp-restarts-in-south-texas-but-most-asylum-seekers-choose-to-wait-in-mexico-interior/> [<https://perma.cc/X4QQ-C8A3>].

152. Petition for Writ of Certiorari, *Biden v. Texas*, 142 S. Ct. 2528 (No. 21-953) (Dec. 2021).

153. *Id.* at 1.

154. *Biden v. Texas*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/biden-v-texas-2/> [<https://perma.cc/M3G4-7XY3>] (last visited Jan. 15, 2023).

1. Distinct Categories of Applicants Under the Statute

First, the entire justification for the MPP is based on a misapplication of a rarely invoked provision of the INA—the “contiguous territory” clause.¹⁵⁵ As the Ninth Circuit pointed out in *Innovation Law Lab v. Wolf*, Section 1225 of the INA makes a clear distinction between categories of applicants who fall into subsection 1225(b)(1) and those who fall into 1225(b)(2).¹⁵⁶

When the BIA previously addressed the question of whether Section 1225 delineates different procedural processes for different categories of migrants, the board clarified that Section 1225 indeed describes two different and distinct categories of applicants.¹⁵⁷ The BIA articulated different classes based on circumstances of admissibility which lead to different outcomes—one category is composed of those “not clearly admissible” and who are granted removal proceedings only after passing a credible fear interview, and the second group is comprised of those who are inadmissible and may be given either expedited or full proceedings.¹⁵⁸ Therefore, the BIA clearly viewed the statute as mandating a mutually exclusive classification system, not a nested system where all migrants first fall under Section (b)(1), then are subject to additional subclassifications.¹⁵⁹ Although the Government, in *Innovation Law Lab*, argued that the institution of full removal proceedings indicated that migrants “moved” to a different category, this was a new implication that DHS had never before read into the statute.¹⁶⁰ Rather, in *Matter of E-R-M*,¹⁶¹ the BIA determined that the government may place Section (b)(1) applicants in full removal proceedings simply based on their authority under Section 1229(a) to institute removal proceedings, and this action does not mean or require that the applicant be taken out of the Section (b)(1) category.¹⁶² The government gives DHS prosecutorial discretion over removal proceedings that are not dependent on Section (b)(2).¹⁶³ As the Ninth Circuit pointed out, although in practice both classes of migrants could be placed in full proceedings, expressly because both categories provide a path to full proceedings, the fact that a migrant is placed into full proceedings does not signal that they have somehow changed categories in order to do so.¹⁶⁴

This was not the first time the question of how to interpret this portion of the INA had been before the Supreme Court.¹⁶⁵ The Court in *Jennings v. Rodriguez*¹⁶⁶ held that a correct reading of the statute mandated two categories of applicants: the Court explicitly stated that applicants “fall into one of two categories,” specifically Section

155. 8 U.S.C. § 1225(b)(2)(C).

156. 951 F.3d 1073, 1083 (9th Cir. 2020).

157. *Matter of M-S-*, 27 I. & N. Dec. 509, 510 (BIA 2019).

158. *Id.* (citing *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 524 (B.I.A. 2011)).

159. *See id.*

160. Brief for Petitioners, *supra* note 67, at 40.

161. 25 I. & N. Dec. 520, 524 (B.I.A. 2011).

162. *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 524 (B.I.A. 2011).

163. Brief for Respondents, *supra* note 53, at 3.

164. *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1084 (9th Cir. 2020).

165. *See id.* at 1083 (citing *Jennings v. Rodriguez*, 138 S.Ct. 830, 837 (2018)).

166. 138 S. Ct. 830 (2018).

(b)(1) applicants and Section (b)(2) applicants.¹⁶⁷ In the Court’s language, the second category is a “catchall provision” for those who are inadmissible, but not for one of the reasons that trigger placement into the category of Section (b)(1) applicants.¹⁶⁸

Applying the reasoning of the BIA cases and the Supreme Court in *Jennings*, Section 1225(b)(1) then is composed of a discrete category of applicants who are inadmissible due to inadequate or nonexistent entry documents.¹⁶⁹ Section 1225(b)(2) states that it applies to “other aliens,” signaling that it encompasses an entirely different group than Section 1225(b)(1).¹⁷⁰ Respondents in *Innovation Law Lab* explained just who these “other” aliens may be (specifically those with fraudulent documents)—those who are inadmissible because of public health reasons, or those who have committed certain crimes.¹⁷¹ Therefore, each Section sets forth distinct categories of applicants.

2. There is No Statutory Authority Under the Contiguous Territory Provision

The INA does not grant executive authority to detain asylum seekers outside the U.S. border for two reasons. First, a plain reading of the statute shows that the contiguous territory provision does not apply to the category of migrants who are seeking asylum—for whom the statute lays out a distinct process that does not include temporary return to another country. Second, Congress intended the provision to apply to a small category of potentially dangerous migrants—not asylum seekers generally.

a. Plain Meaning

Even if there is ambiguity as to the existence of two different classes, a plain reading of the statute’s subparagraphs in Section (b)(2) leads to the inevitable conclusion that the contiguous territory provision does not apply to Section (b)(1) applicants. Section (b)(2) is made up of three parts.¹⁷² Subparagraph A prescribes authority for DHS to place “other aliens” who are not entitled to admission into regular Section 1229(a) removal proceedings (subject to the following subparagraphs B and C).¹⁷³ Subparagraph B describes persons to whom subparagraph A does not apply—including those “to whom paragraph (1) applies.”¹⁷⁴ And finally, the last subparagraph allows those in subparagraph A to be returned to contiguous territory for the pendency of their Section 1229(a) removal proceedings.¹⁷⁵ The structure of Section 1225(b) “reinforces the unambiguous text,” which indicates that Section 1225 grants the Government distinct powers based on separate categories of applicants.¹⁷⁶ This separation is a function of

167. *Id.* at 837.

168. *Id.*

169. See 8 U.S.C. § 1225(b)(1) (“Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled”).

170. *Innovation L. Lab*, 951 F.3d at 1083 (emphasis added).

171. *Id.*

172. See 8 U.S.C. § 1225(b)(2).

173. 8 U.S.C. § 1225(b)(2)(A).

174. 8 U.S.C. § 1225(b)(2)(B)(ii).

175. 8 U.S.C. § 1225(b)(2)(C).

176. See Brief for Respondents, *supra* note 53, at 17.

congressional intent—if Congress had wanted Section (b)(1) applicants to be subject to the contiguous territory provision, it would have written the statute to grant DHS that power.¹⁷⁷ Therefore, any removal authority granted to the government in subparagraph C is only applicable to those described in subparagraph A. Subparagraph A explicitly states that it does not apply to subparagraph B—which includes Section (b)(1) applicants.¹⁷⁸

b. Congressional Intent

Further, evidence of congressional intent behind the statute’s implementation also indicates that the plain reading is a more accurate reflection of the statute’s intended meaning. As the Ninth Circuit has suggested, the contiguous territory clause was likely intended by Congress to apply to undesirable applicants such as those with criminal histories.¹⁷⁹ In fact, looking to the history of the statute, the contiguous territory provision was added in response to *Matter of Sanchez-Avila*,¹⁸⁰ which involved a Mexican national charged with crimes involving controlled substances.¹⁸¹ In direct response to the danger of allowing criminals to stay in the United States while they were granted full removal proceedings, Congress enacted subsection (b)(2)(C) to give authorities at the border discretion to remove those Section (b)(2) applicants deemed dangerous to Mexico while their asylum claim was adjudicated.¹⁸²

The application of subsection (b)(2)(C) to Section (b)(1) applicants therefore is not intuitive—Section (b)(1) applicants are exempt from subsection (2)(B)(ii).¹⁸³ Further, there is no procedure to return Section (b)(1) applicants to Mexico, as there is for Section (b)(2) applicants.¹⁸⁴ If subsection 1225(b)(2)(C) does not then apply to Section (b)(1) applicants, there is no statutory authority to return Section (b)(1) applicants to contiguous territory.¹⁸⁵

Therefore, prior judicial readings of the statute and evidence of congressional intent all indicate that the Trump administration’s application of the contiguous territory subsection twenty-five years after its passage misses the mark intended by the statute’s drafters.

177. *See id.* at 17–21.

178. 8 U.S.C. § 1225(b)(2)(A) (“Subject to paragraphs (B) and (C)”); *id.* § 1225(b)(2)(B) (“Subparagraph (A) shall not apply to an alien (i) who is a crewman, (ii) to whom [§ 1225(b)(1)] applies, or (iii) who is a stowaway.”).

179. *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1087 (9th Cir. 2020).

180. 21 I. & N. Dec. 444 (B.I.A. 1996).

181. *Innovation L. Lab*, 951 F.3d at 1087.

182. *Id.*

183. *See* Brief for Respondents, *supra* note 53, at 11.

184. *Innovation L. Lab*, 951 F.3d at 1084.

185. *Id.* at 1084–85 (“The ‘return-to-a-contiguous-territory’ provision of §1225(b)(2)(C) is thus available only for § (b)(2) applicants. There is no plausible way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government’s longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.”).

B. The MPP Violates the United States' Nonrefoulement Obligation

The MPP also fails to comply with the United States' international legal obligations. As a show of compliance with the United States' obligations under international law, the Government provided an exemption from the MPP for those who could show a likelihood of persecution or torture in Mexico.¹⁸⁶ However, the MPP required asylum seekers to meet the same standard used in full proceedings, without the same safeguards.¹⁸⁷ Asylum seekers bore the full burden for ensuring their rights were protected—officers at the border neither told asylum seekers they had a right to protection nor asked if they have a fear of return.¹⁸⁸

The Trump administration technically complied with the obligation of nonrefoulement because applicants could theoretically request protection against torture or persecution in Mexico. However, the procedures to determine who was likely to experience such harms were woefully inadequate, resulting in a constructive denial of protections under international law.¹⁸⁹

The MPP authorizes “return” to torture or persecution unless the applicant passes a withholding interview, which they will receive only if they proactively express fear of return without being apprised of their rights.¹⁹⁰

Further, there is no right to review included in the swift proceedings at the border—the applicant may be held to the same standard as full proceedings, but the procedural protections normally afforded an asylum seeker in withholding proceedings are stripped away.¹⁹¹ The return of applicants in danger of torture to the country of torture or persecution often resulted in severe consequences.¹⁹² As the respondents pointed out, the record in *Innovation Law Lab* documented a high percentage of asylum seekers subjected to sexual abuse, kidnapping, and violence in Mexico.¹⁹³ Without a meaningful chance to explain their fear of return, asylum seekers in the MPP were deprived of their statutory right to protection under the withholding statute and the United States' implementation of the CAT.

C. The MPP Violates Asylum Seekers' Due Process Rights

Due process under the United States Constitution guarantees notice and a hearing when the government's action may deprive an individual of life, liberty, or property,¹⁹⁴ which includes statutory entitlements.¹⁹⁵ The Due Process Clause of the Constitution

186. See Am. Immigr. Council, *supra* note 23, at 3 (listing seven groups as exempt from the MPP 1.0 process).

187. *Id.*

188. Brief for Respondents, *Mayorkas v. Innovation L. Lab* at 32, 141 S. Ct. 2842 (2021) (No. 19-1212).

189. See *id.* at 26.

190. *Id.* at 13.

191. *Id.* at 34.

192. *Id.* at 6–7.

193. *Id.*

194. U.S. CONST. amend. V.

195. See *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976). The *Mathews* balancing test was later applied in the immigration context. *Landon v. Plasencia*, 459 U.S. 21, 34 (1962).

applies to all “persons” in the United States, irrespective of immigration status.¹⁹⁶ But under the plenary power doctrine, the U.S. government is shielded from claims that immigration laws discriminate against or violate the equal protection rights of non-U.S. citizens.¹⁹⁷ The principle that such broad federal power extends to enforcement decisions at the border such that migrants at the “threshold of initial entry” are not entitled to due process was affirmed by the Supreme Court in 2020.¹⁹⁸ Those in the MPP, however, have actually entered full removal proceedings, which may arguably bestow some slight procedural protections.¹⁹⁹ The INA reflects this idea in mandating that asylum seekers in removal proceedings be allowed to have legal counsel, examine the evidence against them, present evidence in support of their case, and cross-examine the Government’s witnesses.²⁰⁰ Further, the right to counsel may not be satisfied where the applicant has not been given a reasonable amount of time to retain that counsel.²⁰¹ Although the respondents in *Innovation Law Lab* did not raise due process concerns, even if reasonable doubt remains as to the proper interpretation of the statute, an interpretation that authorizes a federal statute to violate the Constitution should be avoided.²⁰²

The government knew of the harm the MPP was causing from the start.²⁰³ The union representing employees of the United States Customs and Immigration Service itself (which provides asylum officers who conduct interviews at the border) spoke out regarding the lack of due process afforded to applicants in the MPP, particularly lack of access to counsel.²⁰⁴ When the MPP was introduced, the U.S. Department of State had

196. *Zadyvas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)). *But see Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018) (limiting due process protections for migrants and finding that due process does not require that migrants be provided with periodic bond hearings while detained).

197. *See Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

198. *Dep’t of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020).

199. *See, e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–51 (1950); *Demore v. Hyung Joon Kim*, 538 U.S. 510, 523 (2003); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *see also J. Nicole Alanko, In-And-Out Justice: How the Acceleration of Families Through Immigration Court Violates Due Process*, 24 U. PA. J. L. & SOC. CHANGE 1, 20 (2021) (discussing due process rights in immigration courts); David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31 (2015) (“Furthermore, though the plenary power doctrine forecloses most direct constitutional challenges against congressional immigration statutes, it is hardly the blank check for the executive that is sometimes suggested. Significant statute-based challenges to executive action remain available, as do procedural due process challenges, at least to deportation proceedings.”).

200. 8 U.S.C. § 1229a(b)(4)(A)–(B).

201. *See, e.g., Matter of C-B-*, 25 I. & N. Dec. 888, 889 (B.I.A. 2012).

202. Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *supra* note 105, at 7 (“MPP cannot be found to be authorized by one federal statute when, by doing so, this Court would be trampling on another federal statute, the Constitution, and lawyers’ ethical obligations.”).

203. Brief of Nongovernmental Organizations and Law School Clinics as Amici Curiae in Support of Respondents, *supra* note 33, at 26–27.

204. American Federation of Government Employees, National Citizenship and Immigration Services Council 119, *Union Representing USCIS Asylum Officers Condemns Re-Implementation of the Migrant Protection Protocols* (Dec. 2, 2021), <https://www.aila.org/File/Related/19091660e.pdf> [<https://perma.cc/T5TG-KLBN>]; *see also Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, SYRACUSE UNIV.: TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587/>

already reported that migrants were subject to abuse from both private actors and the government and were particularly vulnerable to human trafficking.²⁰⁵ But despite those reports, the government continued to implement the program.²⁰⁶

When then-acting DHS Secretary Kevin McAleenan was asked about reports of migrant kidnappings, he admitted that he had received those reports but did not explain if or how the government was considering them in its analysis of whether to send asylum seekers in the MPP back to Mexico.²⁰⁷ Similarly, then-acting DHS Secretary Chad Wolf refused to an offer explanation for why the government continued to enact the MPP in the face of reports of widespread violence.²⁰⁸ As explained in Part II.A.2, asylum seekers were routinely scheduled for hearings for which they did not receive notice.²⁰⁹ Even if they received a Notice to Appear, the hearing information was often incorrect.²¹⁰ And further, asylum seekers' right to counsel was constructively denied due to the difficulty of retaining counsel from Mexico.²¹¹ In rare cases where counsel was available, they were not afforded enough time or access to counsel to prepare an asylum case.²¹² When asylum seekers were forced to return to Mexico, they were denied a meaningful opportunity to be heard—an effective denial of the rights of withholding of removal or protection under the CAT.²¹³ These barriers stripped asylum seekers of their rights under international law as implemented in the United States and their rights under the INA to counsel and to present evidence and witnesses in a full, fair immigration hearing.²¹⁴

Looking forward, the MPP's reimplementation will not adequately address legality concerns. On December 2, 2021, Secretary Mayorkas released guidance on MPP reimplementation, including assurances that this time, applicants would have access to counsel and more fair proceedings.²¹⁵ Any success from this strategy, however, remains to be seen. Asylum seekers, per the memorandum, would be provided with legal resource packets and information on how to find an attorney while remaining in Mexico.²¹⁶ Whether counsel will actually be available and asylum seekers will have meaningful opportunities to meet with their attorneys and prepare their cases, is far from guaranteed.

[<https://perma.cc/33H7-T8X4>] (stating that only four percent of applicants in the MPP from January to July 2019 had counsel).

205. Brief of Nongovernmental Organizations and Law School Clinics as Amici Curiae in Support of Respondents, *supra* note 33, at 25.

206. *Id.* at 26–27. (“The government has continued to implement MPP with full awareness of the persecution and harm that the program inflicts. And as public reports documenting the harms proliferated, the government responded by expanding MPP and accelerating the forcible returns.”).

207. *Id.* at 27.

208. *Id.*

209. *See supra* Part II.A.2.

210. *See supra* Part II.A.2.

211. *See supra* Part II.A.2.

212. *See supra* Part II.A.2.

213. *See supra* Part II.A.2.

214. 8 C.F.R. §§ 1240.7(a), 1240.46(c).

215. *See* Memorandum from Robert Silvers, U.S. Dep't of Homeland Sec., Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols, *supra* note 16.

216. *See id.*

Of greater concern is the seeming reticence of the pro-immigration Biden administration to decisively put an end to the MPP.²¹⁷ The Biden administration has not only reimplemented the program, but expanded it.²¹⁸ Under the new iteration, the MPP applies not only to nationals of Spanish-speaking countries, but now to any “Western Hemisphere” national—including asylum seekers from Haiti and other Caribbean nations.²¹⁹ Despite the Biden administration’s promises to adjudicate claims in less than six months and provide access to counsel, the insurmountable obstacles that asylum seekers face, remain.²²⁰ Many remain trapped in unfamiliar countries without meaningful access to resources, jobs, or the court system—all while living vulnerable to violence and abuse.²²¹

Although the new MPP program promises to afford some slight protections to asylum seekers they lacked in its first iteration, these details will not adequately mitigate the program’s flaws because it is, at its core, unjust. “There is no way to make a fundamentally inhumane program humane.”²²² Therefore, the only way to adequately address the problems of the MPP is to terminate the program fully and finally.

IV. CONCLUSION

The MPP had the devastating effect on asylum seekers at the border the Trump administration intended. The Trump administration also clearly violated the United States’ obligations under the INA, international law, and the Constitution. The United States must provide those within its borders due process of law and the right not to be returned to a country where they will be subjected to torture or persecution (nonrefoulement).

Despite untiring efforts from immigration advocates to see the program declared unconstitutional, the Biden administration has reneged on its election promise to the American people to end one of the most unjust and inhumane programs enacted under the Trump administration. Instead, the government has capitulated to challenges from the states and reimplemented the program, despite more than adequate legal justifications to declare the program unconstitutional. This failure to act has resulted in the continuation of a program that not only deprives asylum seekers of their right to a meaningful hearing on their asylum claims, but also subjects them to risks of persecution,

217. See Franco Ordonez, *On Immigration, Biden Goes Big In Opening Bid to Congress*, NPR (Jan. 20, 2021), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958626092/on-immigration-biden-goes-big-in-opening-bid-to-congress> [<https://perma.cc/K6J4-N9EH>].

218. Aaron Reichlin-Melnick, *Biden Reinstates the ‘Remain in Mexico’ Program: What You Need to Know*, IMMIGR. IMPACT (Dec. 3, 2021), <https://immigrationimpact.com/2021/12/03/biden-reinstates-remain-in-mexico/> [<https://perma.cc/Q9VC-PVNW>].

219. *Id.*

220. Kevin Sieff & Arelis R. Hernandez, *‘Remain in Mexico’ Program Begins in El Paso Amid Skepticism From Advocates*, WASH. POST (Dec. 8, 2021), https://www.washingtonpost.com/immigration/remain-in-mexico-restarts-biden/2021/12/08/33184c3c-570f-11ec-929e-95502bf8cdd5_story.html.

221. *Id.* (“But as the second iteration of MPP neared under Biden, the Mexican government raised a number of humanitarian concerns about migrants who would be processed under the policy, ranging from vaccine access to housing and security.”).

222. Aaron Reichlin-Melnick, *supra* note 218.

torture, or even death. Swift action to end an unlawful program, for which no legal justification exists, is the only ethical response.²²³

223. Between the writing of this piece and publication, the Supreme Court held that the government's termination of the MPP did not violate the INA and that the October 29 memoranda constituted valid final agency action. *Texas v. Biden*, 142 S. Ct. 2528, 2548 (2022). However, the Court did not address the questions of whether the MPP was unlawful as implemented. *Id.* at 2544.