

No. 21-10806

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

State of Texas, State of Missouri,
Plaintiffs-Appellees,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement; United States Immigration and Customs Enforcement; Tracy Renaud, in her official capacity as Acting Director of the United States Citizenship and Immigration Services; United States Citizenship and Immigration Services,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas Amarillo Division No. 2:21-cv-00067-Z (Kacsmaryk, J.)

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF NON-PROFIT ORGANIZATIONS, LAW SCHOOL CLINICS, AND FORMER IMMIGRATION JUDGES IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Counsel listed on following page

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7552

Blaine Bookey
Anne Dutton
Karen Musalo
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 703-8202

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
Human Rights First
805 15th Street, NW, Suite 900
Washington, DC 20005
Telephone: (202) 547-5692

Melissa Crow
Southern Poverty Law Center
1101 17th Street, NW, Suite 705
Washington, DC 20036
Telephone: (202) 355-4471

Gracie Willis
Southern Poverty Law Center
150 E. Ponce de Leon Avenue,
Suite 340
Decatur, GA 30030
Telephone: (404) 521-6700

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record for Amici certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Al Otro Lado, Maywood, CA
- Aldea – The People’s Justice Center, Reading, PA
- American Gateways, Austin, TX
- American Immigration Council, Washington, DC
- American Immigration Lawyers Association, Washington, DC
- Americans for Immigrant Justice, Miami, FL
- Asian Law Alliance, San Jose, CA
- Asylum Access, Oakland, CA
- Asylum Seeker Advocacy Project (ASAP)
- Catholic Charities of Southern New Mexico, Las Cruces, New Mexico
- Catholic Legal Immigration Network, Inc., Silver Spring, MD
- Center for Gender & Refugee Studies, San Francisco, CA
- Central American Resource Center – CARECEN – of California, Los Angeles, CA

- Central American Resource Center of Northern California, San Francisco, CA
- Central American Resource Center – CARECEN, Washington, DC
- Centro Legal de la Raza, Oakland, CA
- Community Legal Services in East Palo Alto, East Palo Alto, CA
- Comunidad Maya Pixan Ixim, Omaha, NE, and San Diego, CA
- Dolores Street Community Services, San Francisco, CA
- East Bay Sanctuary Covenant (EBSC), Berkeley, CA
- Education and Leadership Foundation, Fresno, CA
- Esperanza Immigrant Rights Project, Los Angeles, CA
- Florence Immigrant & Refugee Rights Project, Tucson, AZ
- Florida Legal Services, Inc., Orlando, Florida
- Galveston-Houston Immigrant Representation Project, Houston, TX
- Harvard Immigration and Refugee Clinical Program, Cambridge, MA
- HIAS, Washington, DC
- Human Rights First, New York, NY
- Human Rights Initiative of North Texas, Dallas, TX
- Immigration Center for Women and Children, Los Angeles, CA
- Innovation Law Lab, Portland, OR
- International Mayan League, Piscataway Nation Territory (Washington, DC)
- International Refugee Assistance Project, New York, NY
- Jamal Jbara, Attorney at Law, PC, Long Island City, NY

- Jewish Family & Community Services – East Bay, Concord, CA
- Jewish Family Service of San Diego, San Diego, CA
- Justice Action Center, Los Angeles, CA
- La Raza Community Resource Center, San Francisco, CA
- Latin America Working Group, Washington, DC
- Legal Services for Children, San Francisco, CA
- Madres e Hijos, Buena Vista, CO
- Michigan Immigrant Rights Center, Kalamazoo, MI
- Migrant and Immigrant Community Action Project, St. Louis, MO
- Migrant Center for Human Rights, San Antonio, TX
- Mississippi Center for Justice, Jackson, MS
- National Immigration Law Center, Los Angeles, CA
- National Lawyers Guild – Los Angeles Chapter, Los Angeles, CA
- Northern Illinois Justice for Our Neighbors, Chicago, IL
- Oasis Legal Services, Berkeley, CA
- Open Immigration Legal Services, Oakland, CA
- Oxfam America, Boston, MA
- Pangea Legal Services, San Francisco, CA
- Project Blueprint, Marshfield, MA
- Project Lifeline, Tiburon, CA
- Public Counsel, Los Angeles, CA
- Refugee and Immigrant Center for Education and Legal Services (RAICES), San Antonio, TX
- Rocky Mountain Immigrant Advocacy Network, Westminster, CO
- Round Table of Former Immigration Judges

- SB County Immigrant Legal Defense Center, Santa Barbara, CA
- Southern Poverty Law Center, Montgomery, AL
- Southwestern Law School, Removal Defense Clinic, Los Angeles, CA
- Student Clinic for Immigrant Justice, Inc., Boston, MA
- Sueños Sin Fronteras de Tejas (SSFTX), San Antonio, TX
- Tahirih Justice Center, Falls Church, VA
- The Door, New York, NY
- The Partnership for the Advancement of New Americans (PANA), San Diego, CA
- Washington Office on Latin America (WOLA), Washington, DC
- Witness at the Border, Gahanna, OH
- Women’s Refugee Commission (WRC), Washington, DC
- Yasrebi Law, San Francisco, CA

Pursuant to Fed. R. App. P. 26.1, Amici state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in either of the Amici.

Dated: September 27, 2021

/s/ Blaine Bookey
Blaine Bookey

Prospective Amici Curiae the American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Inc., Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, National Immigration Law Center, Southern Poverty Law Center, the Round Table of Former Immigration Judges, and sixty-one other law school clinics and non-profit organizations respectfully request the Court's permission to file a brief as amici curiae in support of Defendants-Appellants and reversal.

Counsel for Defendants-Appellants have stated in writing that they consent to the filing of this motion. Counsel for Plaintiffs-Appellees have indicated in writing that they do not oppose the filing of this motion.

Prospective Amici seek leave to file the attached brief to explain errors in the factual findings underpinning the permanent injunction issued by the district court, which orders Defendants to reinstate the Migrant Protection Protocols ("MPP"). In light of their extensive experience in the field of asylum research and practice in general, and MPP in particular, Prospective Amici respectfully submit that their

brief will assist the Court in its evaluation of the claims presented in this appeal.

The **American Immigration Council** is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has previously appeared as amicus before administrative and federal courts, including the Fifth Circuit Court of Appeals, on issues relating to the interpretation of federal immigration laws and policies.

The **American Immigration Lawyers Association** ("AILA") is a national, nonpartisan, and non-profit organization comprised of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent asylum seekers, U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace.

The **Catholic Legal Immigration Network, Inc. (CLINIC)** is the nation's largest network of non-profit immigration legal services

providers, with over 400 affiliates in 49 states. CLINIC's programs serve asylum seekers on both sides of the U.S.-Mexico border. CLINIC's *Estamos Unidos* Asylum Project provides case preparation and referral services to asylum applicants subjected to the MPP in Ciudad Juarez, Mexico. Within the United States, CLINIC engages in a variety of activities to support asylum seekers and their representatives, including its Remote Motion to Reopen Project, which has successfully represented non-citizens, including asylum seekers subjected to MPP, on motions to reopen.

The Center for Gender & Refugee Studies, based at the University of California Hastings College of the Law, advances the human rights of refugees through litigation, scholarship and policy recommendations. In addition, the Center provides technical assistance for attorneys representing asylum seekers nationwide, including in cases of individuals returned to Mexico under the Migrant Protection Protocols, reaching over 8,000 unique asylum cases at all levels of the immigration and federal court system in the past year alone. The Center has appeared as counsel or amicus before nearly every court of appeals, including the Fifth Circuit Court of Appeals, on issues relating

the proper interpretation of U.S. asylum law and represented plaintiffs challenging the MPP program.

Human Rights First is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest U.S. programs for pro bono legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to indigent asylum applicants, including some subject to MPP. Human Rights First has conducted research, issued reports, and provided recommendations to the U.S. government on MPP and that program's impact on asylum seekers.

The **Justice Action Center** ("JAC") is a non-profit organization whose mission is to use a combination of storytelling and litigation to advocate for unseen and overlooked immigration issues. In doing so, JAC ensures that the richness and diversity of the immigrant experience is heard both inside and outside the courtroom. As an organization working on behalf of immigrant communities, JAC has a strong interest in protecting constitutional and statutory rights for

asylum seekers. In addition, JAC has litigated issues relating to the constitutional and statutory violations immigrants in the MPP program experienced.

The **National Immigration Law Center** (“NILC”) is a national non-profit legal organization dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Employing litigation, policy advocacy, and technical assistance and legal support to advance its mission, NILC focuses on issues affecting the security and well-being of immigrant communities, such as those related to discriminatory enforcement practices and immigrants’ access to justice and due process. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, including the right of access to the U.S. asylum system, and has advanced laws and policies that reinforce the nation’s values of equality, due process, opportunity, and justice.

The **Round Table of Former Immigration Judges** includes retired immigration judges and former members of the Board of Immigration Appeals (“Board”), which have combined centuries of experience in these roles. The Roundtable includes a former Board

Chair and former Assistant Chief Immigration Judge. All members were appointed to serve in immigration courts around the United States and on the Board by the Executive Office for Immigration Review (“EOIR”). Due to their service, they have extensive expertise in immigration law, including asylum and withholding of removal proceedings and can offer this Court a unique perspective on the issues before it in this case.

The **Southern Poverty Law Center** (“SPLC”) is a not-for-profit organization that is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. SPLC’s Immigrant Justice Project is currently engaged in impact litigation to promote and protect the rights of asylum seekers at our southern border, including those subjected to the Migrant Protection Protocols (MPP). As co-counsel in *Innovation Law Lab v. Mayorkas*, 19-cv-00807 (N.D. Cal.) (challenging legality of MPP on behalf of directly impacted individuals and legal service organizations) and *Immigrant Defenders v. Mayorkas*, Case No. 2:20-cv-09893 (C.D. Cal.) (challenging implementation of MPP on behalf of

directly impacted individuals and legal service organizations), SPLC has firsthand knowledge of the ways in which MPP deprives individuals of meaningful access to the U.S. asylum process.

Prospective Amici have litigated numerous cases involving the rights of asylum seekers and immigrants and addressing the MPP specifically. *See, e.g., Innovation Law Lab v. Mayorkas*, 3:19-cv-807 (N.D. Cal.); *Nora v. Mayorkas*, 1:20-cv-993 (D.D.C.); *Immigrant Defenders Law Center v. Mayorkas*, 2:20-cv-09893 (C.D. Cal.); *Immigrant Defenders Law Center v. DHS*, 2:21-cv-00395 (C.D. Cal.). Prospective Amici have also investigated conditions for migrants in Mexico and operation of MPP in practice, and have authored reports that appear in the administrative record (“AR”). *See, e.g., AR 374, 590, 639.*

Sixty-one other law school clinics and non-profit organizations join the above-listed organizations in this brief. These organizations engage in asylum representation, litigation, research, and support; the issues presented in this case are thus highly relevant to their work. These organizations are:

1. Al Otro Lado, Maywood, CA
2. Aldea – The People’s Justice Center, Reading, PA

3. American Gateways, Austin, TX
4. Americans for Immigrant Justice, Miami, FL
5. Asian Law Alliance, San Jose, CA
6. Asylum Access, Oakland, CA
7. Asylum Seeker Advocacy Project (ASAP)
8. Catholic Charities of Southern New Mexico, Las Cruces, New Mexico
9. Central American Resource Center – CARECEN – of California, Los Angeles, CA
10. Central American Resource Center of Northern California, San Francisco, CA
11. Central American Resource Center – CARECEN, Washington, DC
12. Centro Legal de la Raza, Oakland, CA
13. Community Legal Services in East Palo Alto, East Palo Alto, CA
14. Comunidad Maya Pixan Ixim, Omaha, NE, and San Diego, CA
15. Dolores Street Community Services, San Francisco, CA
16. East Bay Sanctuary Covenant (EBSC), Berkeley, CA
17. Education and Leadership Foundation, Fresno, CA
18. Esperanza Immigrant Rights Project, Los Angeles, CA
19. Florence Immigrant & Refugee Rights Project, Tucson, AZ
20. Florida Legal Services, Inc., Orlando, Florida
21. Galveston-Houston Immigrant Representation Project, Houston, TX
22. Harvard Immigration and Refugee Clinical Program, Cambridge, MA
23. HIAS, Washington, DC

24. Human Rights Initiative of North Texas, Dallas, TX
25. Immigration Center for Women and Children, Los Angeles, CA
26. Innovation Law Lab, Portland, OR
27. International Mayan League, Piscataway Nation Territory
(Washington, DC)
28. International Refugee Assistance Project, New York, NY
29. Jamal Jbara, Attorney at Law, PC, Long Island City, NY
30. Jewish Family & Community Services – East Bay, Concord, CA
31. Jewish Family Service of San Diego, San Diego, CA
32. La Raza Community Resource Center, San Francisco, CA
33. Latin America Working Group, Washington, DC
34. Legal Services for Children, San Francisco, CA
35. Madres e Hijos, Buena Vista, CO
36. Michigan Immigrant Rights Center, Kalamazoo, MI
37. Migrant and Immigrant Community Action Project, St. Louis, MO
38. Migrant Center for Human Rights, San Antonio, TX
39. Mississippi Center for Justice, Jackson, MS
40. National Lawyers Guild – Los Angeles Chapter, Los Angeles, CA
41. Northern Illinois Justice for Our Neighbors, Chicago, IL
42. Oasis Legal Services, Berkeley, CA
43. Open Immigration Legal Services, Oakland, CA
44. Oxfam America, Boston, MA
45. Pangea Legal Services, San Francisco, CA
46. Project Blueprint, Marshfield, MA
47. Project Lifeline, Tiburon, CA
48. Public Counsel, Los Angeles, CA

49. Refugee and Immigrant Center for Education and Legal Services (RAICES), San Antonio, TX
50. Rocky Mountain Immigrant Advocacy Network, Westminster, CO
51. SB County Immigrant Legal Defense Center, Santa Barbara, CA
52. Southwestern Law School, Removal Defense Clinic, Los Angeles, CA
53. Student Clinic for Immigrant Justice, Inc., Boston, MA
54. Sueños Sin Fronteras de Tejas (SSFTX), San Antonio, TX
55. Tahirih Justice Center, Falls Church, VA
56. The Door, New York, NY
57. The Partnership for the Advancement of New Americans (PANA), San Diego, CA
58. Washington Office on Latin America (WOLA), Washington, DC
59. Witness at the Border, Gahanna, OH
60. Women's Refugee Commission (WRC), Washington, DC
61. Yasrebi Law, San Francisco, CA

All prospective Amici have a substantial interest in the issues presented in this case, which implicate the opportunities for asylum seekers to access their statutory and constitutional rights. Indeed, the ability of asylum seekers to pursue protections in the United States as guaranteed under domestic and international law is core to the missions of each organization. The outcome of this litigation is thus of great importance to Prospective Amici who respectfully submit their

perspective could aid the Court in its consideration. Accordingly, Prospective Amici respectfully request the Court's leave to file the attached brief.

Dated: September 27, 2021

Respectfully submitted,

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7552

/s/ Blaine Bookey
Blaine Bookey
Anne Dutton
Karen Musalo
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 703-8202

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
Human Rights First
805 15th Street, NW, Suite 900
Washington, DC 20005
Telephone: (202) 547-5692

Melissa Crow
Southern Poverty Law Center
1101 17th Street, NW, Suite 705
Washington, DC 20036
Telephone: (202) 355-4471

Gracie Willis
Southern Poverty Law Center
150 E. Ponce de Leon Avenue,
Suite 340
Decatur, GA 30030
Telephone: (404) 521-6700

Counsel for Amici

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing motion and attached brief via the Court's ECF filing system.

Dated: September 27, 2021 /s/ Blaine Bookey
Blaine Bookey

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with Fed. R. App. P. 27(d)(2)(A) because it contains 1,783 words, as measured by Microsoft Word software. The motion also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

Dated: September 27, 2021 /s/ Blaine Bookey
Blaine Bookey

No. 21-10806

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

State of Texas; State of Missouri,

Plaintiffs - Appellees,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; United States of America; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, U.S. Customs and Border Protection; United States Customs and Border Protection; Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement; United States Immigration and Customs Enforcement; Tracy Renaud, in her official capacity as Acting Director of the United States Citizenship and Immigration Services; United States Citizenship and Immigration Services,

Defendants - Appellants.

On Appeal from the United States District Court for the Northern District of Texas Amarillo Division No. 2:21-cv-00067-Z (Kacsmayk, J.)

BRIEF OF NON-PROFIT ORGANIZATIONS, LAW SCHOOL CLINICS, AND FORMER IMMIGRATION JUDGES IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

Counsel listed on the following page

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7552

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
Human Rights First
805 15th Street, NW, Suite 900
Washington, DC 20005
Telephone: (202) 547-5692

Blaine Bookey
Anne Dutton
Karen Musalo
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 703-8202

Melissa Crow
Southern Poverty Law Center
1101 17th Street, NW, Suite 705
Washington, DC 20036
Telephone: (202) 355-4471

Gracie Willis
Southern Poverty Law Center
150 E. Ponce de Leon Avenue,
Suite 340
Decatur, GA 30030
Telephone: (404) 521-6700

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record for Amici certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Al Otro Lado, Maywood, CA
- Aldea – The People’s Justice Center, Reading, PA
- American Gateways, Austin, TX
- American Immigration Council, Washington, DC
- American Immigration Lawyers Association, Washington, DC
- Americans for Immigrant Justice, Miami, FL
- Asian Law Alliance, San Jose, CA
- Asylum Access, Oakland, CA
- Asylum Seeker Advocacy Project (ASAP)
- Catholic Charities of Southern New Mexico, Las Cruces, New Mexico
- Catholic Legal Immigration Network, Inc., Silver Spring, MD
- Center for Gender & Refugee Studies, San Francisco, CA
- Central American Resource Center – CARECEN – of California, Los Angeles, CA
- Central American Resource Center of Northern California, San Francisco, CA

- Central American Resource Center – CARECEN, Washington, DC
- Centro Legal de la Raza, Oakland, CA
- Community Legal Services in East Palo Alto, East Palo Alto, CA
- Comunidad Maya Pixan Ixim, Omaha, NE, and San Diego, CA
- Dolores Street Community Services, San Francisco, CA
- East Bay Sanctuary Covenant (EBSC), Berkeley, CA
- Education and Leadership Foundation, Fresno, CA
- Esperanza Immigrant Rights Project, Los Angeles, CA
- Florence Immigrant & Refugee Rights Project, Tucson, AZ
- Florida Legal Services, Inc., Orlando, Florida
- Galveston-Houston Immigrant Representation Project, Houston, TX
- Harvard Immigration and Refugee Clinical Program, Cambridge, MA
- HIAS, Washington, DC
- Human Rights First, New York, NY
- Human Rights Initiative of North Texas, Dallas, TX
- Immigration Center for Women and Children, Los Angeles, CA
- Innovation Law Lab, Portland, OR
- International Mayan League, Piscataway Nation Territory
(Washington, DC)
- International Refugee Assistance Project, New York, NY
- Jamal Jbara, Attorney at Law, PC, Long Island City, NY
- Jewish Family & Community Services – East Bay, Concord, CA
- Jewish Family Service of San Diego, San Diego, CA
- Justice Action Center, Los Angeles, CA
- La Raza Community Resource Center, San Francisco, CA

- Latin America Working Group, Washington, DC
- Legal Services for Children, San Francisco, CA
- Madres e Hijos, Buena Vista, CO
- Michigan Immigrant Rights Center, Kalamazoo, MI
- Migrant and Immigrant Community Action Project, St. Louis, MO
- Migrant Center for Human Rights, San Antonio, TX
- Mississippi Center for Justice, Jackson, MS
- National Immigration Law Center, Los Angeles, CA
- National Lawyers Guild – Los Angeles Chapter, Los Angeles, CA
- Northern Illinois Justice for Our Neighbors, Chicago, IL
- Oasis Legal Services, Berkeley, CA
- Open Immigration Legal Services, Oakland, CA
- Oxfam America, Boston, MA
- Pangea Legal Services, San Francisco, CA
- Project Blueprint, Marshfield, MA
- Project Lifeline, Tiburon, CA
- Public Counsel, Los Angeles, CA
- Refugee and Immigrant Center for Education and Legal Services (RAICES), San Antonio, TX
- Rocky Mountain Immigrant Advocacy Network, Westminster, CO
- Round Table of Former Immigration Judges
- SB County Immigrant Legal Defense Center, Santa Barbara, CA
- Southern Poverty Law Center, Montgomery, AL
- Southwestern Law School, Removal Defense Clinic, Los Angeles, CA
- Student Clinic for Immigrant Justice, Inc., Boston, MA

- Sueños Sin Fronteras de Tejas (SSFTX), San Antonio, TX
- Tahirih Justice Center, Falls Church, VA
- The Door, New York, NY
- The Partnership for the Advancement of New Americans (PANA), San Diego, CA
- Washington Office on Latin America (WOLA), Washington, DC
- Witness at the Border, Gahanna, OH
- Women’s Refugee Commission (WRC), Washington, DC
- Yasrebi Law, San Francisco, CA

Pursuant to Fed. R. App. P. 26.1, Amici state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in any of the Amici.

Dated: September 27, 2021

/s/ Blaine Bookey
Blaine Bookey

TABLE OF CONTENTS

TABLE OF AUTHORITIES	vi
INTEREST OF AMICI CURIAE	1
INTRODUCTION	1
ARGUMENT	4
I. The Record Does Not Support the District Court’s Conclusion that Terminating MPP Contributed to a Border Surge.....	4
II. The Record Does Not Support the District Court’s Conclusions Regarding MPP <i>In Absentia</i> Rates and Their Root Causes.....	8
A. The Record Establishes that a 44% <i>In Absentia</i> Rate for Individuals in MPP is an Unacceptably High Number	8
B. The Record Documents Systemic Deficiencies in MPP that Contributed to the High Rate of <i>In Absentia</i> Removal Orders	12
III. The District Court Disregarded Extensive Record Evidence That Undermines a 2019 DHS Assessment of MPP.....	24
IV. The District Court Made a Key Factual Error in Discounting Secretary Mayorkas’s Conclusions About the Effect of the COVID-19 Pandemic.....	27
CONCLUSION	30
CERTIFICATE OF SERVICE	32
CERTIFICATE OF COMPLIANCE	32
APPENDIX	App-1

TABLE OF AUTHORITIES

Cases

<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	30
<i>Public Citizen, Inc. v. EPA</i> , 343 F.3d 449 (5th Cir. 2003).....	4, 24
<i>Rewis v. United States</i> , 445 F.2d 1303 (5th Cir. 1971).....	4
<i>Texas Coal. of Cities for Utility Issues v. F.C.C.</i> , 324 F.3d 802 (5th Cir. 2003).....	2
<i>Texas v. Biden</i> , No. 2:21-cv-67, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021).....	passim

Regulations

8 C.F.R. § 1239.1	19
-------------------------	----

Other Authorities

Caldwell, <i>Judges Quietly Disrupt Trump Immigration Policy in San Diego</i> , WALL STREET JOURNAL (Nov. 28, 2019), https://www.wsj.com/articles/judges-quietly-disrupt-trump-immigration-policy-in-san-diego-11574942400	21
<i>Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases</i> , TRANSACTIONAL RECORDS ACCESS CLEARING HOUSE (Dec. 19, 2019), https://trac.syr.edu/immigration/reports/587	22
<i>COVID-19 in Mexico</i> , CENTERS FOR DISEASE CONTROL AND PREVENTION, https://wwwnc.cdc.gov/travel/notices/covid-3/coronavirus-mexico	29

Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (July 17, 2020), <https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings>28

EOIR Operational Status, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <https://www.justice.gov/eoir-operational-status>28

Mexico’s COVID-19 Monitoring System, EMBASSY OF MEXICO IN THE UNITED STATES, <https://embamex.sre.gob.mx/eua/index.php/en/2016-04-09-20-40-51/tourism/1760-mexico-s-covid-19-monitoring-system> .29

INTEREST OF AMICI CURIAE

Amici are 70 non-profit organizations, law school clinics, and a coalition of former immigration judges with extensive experience in U.S. asylum and immigration law, including deep familiarity with the Migrant Protection Protocols. The full list of Amici is available in the Appendix.¹ Together these organizations have engaged in asylum representation, litigation, and research for decades and worked to ensure that asylum seekers are afforded access to their statutory and constitutional rights in alignment with U.S. law and international standards. Amici thus have a strong interest in the issues in this case that impact their core missions and expertise.

INTRODUCTION

Amici submit this brief in support of Defendants-Appellants, who are officials and agencies of the U.S. Government (“Government”), and reversal of the district court order.

On June 1, 2021, Secretary of the Department of Homeland

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. In writing, counsel for Appellants consented to the filing of this brief, and counsel for Appellees indicated that they do not oppose this filing.

Security (“DHS”) Alejandro Mayorkas issued a memorandum terminating the Migrant Protection Protocols (“MPP”). MPP forcibly returned people seeking asylum in the United States to dangerous conditions in Mexico while their cases progressed through U.S. courts. As documented in the administrative record, MPP was a humanitarian catastrophe: asylum seekers were murdered, raped, kidnapped, extorted, and compelled to live in squalid conditions where they faced unprecedented barriers to meaningfully presenting their protection claims.

In proceedings below, the district court ignored these serious and intractable problems, which DHS acknowledged in ending MPP and which were extensively documented prior to the policy’s termination, to find that the termination of MPP violated the Administrative Procedure Act (“APA”). The district court thus ordered DHS to abandon its chosen methods of border management and reinstate MPP. In so holding, the court exceeded its “narrow and deferential” standard of review in APA cases. *Texas Coal. of Cities for Utility Issues v. F.C.C.*, 324 F.3d 802, 811 (5th Cir. 2003).

DHS’s decision to terminate MPP was neither arbitrary nor

capricious. The district court's decision to the contrary rests on two incorrect factual findings: that MPP effectively (1) deterred migration, indicated by increased arrivals following MPP's suspension in January 2021; and (2) reduced meritless asylum claims, indicated by the high rates of *in absentia* removal orders issued to those subject to MPP. *See Texas v. Biden*, No. 2:21-cv-67, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021) ("District Court Order"). Working off these erroneous facts, the district court concluded that the termination of MPP was arbitrary and capricious because DHS did not consider these asserted—but nonexistent—benefits of MPP or adequately explain its concern over high rates of *in absentia* removal orders. *Id.* at *18-21. In fact, the record makes clear that Secretary Mayorkas did consider the prior administration's claims of MPP's "efficacy" and concluded that MPP's predominant effect was in impeding access to the asylum process and preventing a concerning number of people with legitimate claims from securing asylum.

DHS's decision to terminate MPP is supported by substantial evidence in the record, which cannot be overcome by the district court's attempt to "substitute [its] judgment for that of the agency." *Public*

Citizen, Inc. v. EPA, 343 F.3d 449, 455 (5th Cir. 2003). The district court’s decision cannot stand because it is grounded in clearly erroneous factual findings, a highly selective reading of the record, and a flawed understanding of the termination memorandum. *Rewis v. United States*, 445 F.2d 1303, 1304 (5th Cir. 1971). Therefore, Amici respectfully request that this Court reverse the district court’s order.

ARGUMENT

I. The Record Does Not Support the District Court’s Conclusion that Terminating MPP Contributed to a Border Surge

The district court’s findings that suspending MPP “contributed to [a] border surge,” District Court Order at *9, and that Secretary Mayorkas ignored “prescient” warnings that a “surge” would occur if MPP were terminated, *id.* at *19, are unsupported by the record evidence. A review of the administrative record shows the clear error of the court’s conclusions.

First, border encounters had been rising before the Government suspended MPP. From April through December 2020, border encounters increased from 17,106 to 74,018, a 333% increase. Administrative Record (“AR”) 669. Rather than a sudden surge once MPP was

suspended in January 2021, “[s]ince April 2020, the number of encounters at the southwest border ha[d] been steadily increasing.” AR622; *see* AR631 (“[M]igration started to increase in April 2020.”). By December 2020, border encounters were already at their highest since summer 2019 during the “surge” that MPP was allegedly designed to restrain. AR669. Thus, the district court’s finding that Secretary Mayorkas disregarded the possibility that “the suspension of the MPP . . . would lead to a resurgence” of border crossings, District Court Order at *19, was clearly erroneous. The “resurgence” had already occurred months earlier. *See* AR621-27, 628-32; 660-69.

Second, although MPP was officially suspended in January 2021, for all intents and purposes, MPP had already been suspended much earlier—in March 2020—when the Trump administration created the Title 42 expulsion policy. *See* AR622 (explaining Title 42). Under Title 42, the vast majority of individuals encountered at the border, including those who would otherwise have been subjected to MPP, were expelled without processing under Title 8. AR662.

By the time MPP was suspended in January 2021, it had been almost entirely replaced by Title 42. From October through December

2020, just 1.2% of border encounters resulted in an MPP enrollment—2,574 of 216,681. AR660. By comparison, 92% of border encounters over that period resulted in an expulsion under Title 42 or other form of removal. AR660. A significant portion of people expelled under Title 42 then immediately crossed the border again, inflating the number of encounters at the border—an increase the district court erroneously blamed on the suspension of MPP. AR632 (explaining that “encounters” does not refer to unique individuals since “as many as 1/3 of [encounters] are repeat encounters with the same person”).

Furthermore, as the record makes clear, the primary reason that migrants come to the United States is conditions in their home country, not U.S. policy. AR431, 458, 630. The district court’s conclusions about the effect of terminating MPP rest on the faulty premise that correlation equals causation. *See* District Court Order at *9 (“Since MPP’s termination, the number of enforcement encounters on the southwest border has skyrocketed.”).

Third, the district court’s *finding* that “DHS previously acknowledged that ‘MPP contribute[d] to decreasing the volume of inadmissible aliens’” crossing the border is not supported by the record

and is flatly false. District Court Order at *9 (citing AR555). The document on which the district court relied for this finding merely states that decreased border crossings is a quantitative “metric” for assessing MPP’s goals. *See* AR555 (“Goal: MPP provides a deterrent to illegal entry. Metric: MPP implementation contributes to decreasing the volume of inadmissible aliens . . .”). What the district court claimed was DHS “acknowledg[ing]” MPP’s effects was, in fact, a description of how DHS would measure whether MPP was meeting its goals or failing to do so. District Court Order at *9. It was not a *qualitative* assessment of whether those goals were met. Indeed, the same document incorporates a chart depicting *increasing* volume under MPP. *See* AR556. If anything, then, the document relied on by the district court confirms that DHS was previously aware that MPP did *not* “contribute to decreasing the volume of inadmissible aliens.” District Court Order at *9 (citing AR555).

DHS’s decision to terminate MPP in favor of different strategies to manage border arrivals is supported by substantial evidence in the record, which also shows that the suspension of MPP did not materially contribute to an increase in border encounters.

II. The Record Does Not Support the District Court’s Conclusions Regarding MPP *In Absentia* Rates and Their Root Causes

The district court’s holding that the termination of MPP was arbitrary and capricious rests on erroneous factual findings related to the rate of *in absentia* removal orders issued under MPP. First, the court incorrectly found that the *in absentia* rate for MPP was similar to the rate in non-MPP cases, based on its confused reading of extra-record statistics. Second, the district court concluded that MPP’s high *in absentia* rate was caused by people abandoning non-meritorious claims, when in fact the administrative record included extensive evidence—unacknowledged by the district court—showing that the high rate was linked to dangerous conditions in Mexico and the procedural shortcomings of MPP. Reversal is warranted on these points because the administrative record thoroughly supports DHS’s conclusion that the rate of *in absentia* removal orders in MPP was both troublingly high and influenced by safety and procedural challenges.

A. The Record Establishes that a 44% *In Absentia* Rate for Individuals in MPP is an Unacceptably High Number

The Secretary explained in the termination memorandum that one primary reason for terminating MPP was the “high percentage of

[MPP] cases completed through the entry of *in absentia* removal orders,” totaling approximately 44% of cases. AR4. The district court brushed aside this concern on the (incorrect) ground that DHS failed to provide any baseline data to show that a 44% rate was unusually high. District Court Order at *20. The court then went on to provide its own data, inappropriately citing to extra-record statistics from the Executive Office for Immigration Review (“EOIR”) on the “*in absentia* rate” for non-detained cases to conclude that there were supposedly “similarly high rates of *in absentia* removals *prior to* implementation of MPP.” District Court Order at *21 (emphasis in original).

In comparing DHS’s statistic with EOIR data, the district court mixed apples and oranges: the two agencies used different calculation methods. The EOIR *in absentia* rate divides annual *in absentia* removal orders by annual “initial case completions,” meaning the number of cases in which an immigration judge rendered a decision or otherwise “completed” the case. AR563. Because the EOIR calculation does not include pending cases, it fails to account for “the hundreds of thousands of cases each year in which immigrants appear for a hearing while their case wends its way through the lengthy court process,” and thus

“overstate[s] the rate at which immigrants fail to appear in court.”

AR565. For example, if 10 people are scheduled to appear for a hearing, one person is ordered removed for failure to appear, and the other nine people have their cases continued for further proceedings, the EOIR *in absentia* rate for that day would be 100%. A 100% “*in absentia* rate,” therefore, does not indicate that 100% of the cases *heard* on a given day resulted in *in absentia* orders.

DHS’s termination memorandum used an entirely different methodology, calculating that 44% of all MPP cases ever filed ended with an *in absentia* removal order. AR4. And, contrary to the district court’s claim, the administrative record *does* include relevant baseline statistics calculated with the same methodology. This data shows that from 2008 to 2018, 17% of non-detained removal cases filed inside the United States ended with an *in absentia* order. AR564. The *in absentia* rate for MPP cases was thus nearly three times higher than the rate for non-MPP cases. When comparing apples to apples (44% compared to 17%), the record shows that the district court’s finding was erroneous and instead supports DHS’s conclusion that the *in absentia* rate for MPP cases was “unusually high.” District Court Order at *20.

Moreover, if the termination memorandum *had* used the EOIR method cited by the district court, DHS's conclusion would have been the same. The EOIR *in absentia* rate for MPP cases was 63%—27,802 MPP cases ended with an *in absentia* removal order, AR634, out of 44,014 initial case completions. AR555. When calculated using the EOIR method, MPP's *in absentia* rate of 63% is far greater than the EOIR *in absentia* rates chosen as relevant comparators by the district court. District Court Order at *21 (citing EOIR *in absentia* rates of 42% in 2015 and 43% in 2017). Again, when comparing oranges to oranges, (63% to 43%) the extra-record data also shows that the district court's finding was erroneous and supports DHS's conclusion that the *in absentia* rate for MPP cases was “unusually high.” District Court Order at *20.

The district court's finding that MPP *in absentia* rates were similar to non-MPP cases was thus based on an erroneous comparison between two different sets of statistics and an incomplete review of the record. Using either the district court's or DHS's calculation method, the rate at which people were unable to attend court hearings was unacceptably higher under MPP than for people residing inside the

United States. Therefore, the Secretary's reliance on that fact was neither arbitrary nor capricious, and was supported by the record.

B. The Record Documents Systemic Deficiencies in MPP that Contributed to the High Rate of *In Absentia* Removal Orders

In explaining the decision to terminate MPP, DHS explained that the high rate of *in absentia* removal orders raised concerns about “whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief.” AR4. It further expressed concerns about “whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety” were driving the high *in absentia* rate. *Id.*

Rather than engaging with the evidence in the record that supported DHS's concern about the causes of the high *in absentia* rate, the district court entirely ignored this portion of the termination memorandum. Instead, the court incorrectly assumed throughout its opinion that *in absentia* removal orders are a proxy measure for meritless asylum claims, such that the high rate of *in absentia* orders simply shows that many meritless claims were abandoned. *See, e.g.*, District Court Order at *18, *20.

The district court’s quick dismissal of the *in absentia* problems with MPP ignores voluminous evidence in the record regarding MPP’s perils. The record contains irrefutable evidence of the dangers faced by asylum seekers in Mexico as well as systemic barriers to completing proceedings and obtaining protection under MPP, resulting in many *in absentia* orders. Though DHS ignored the warning signs of the harms likely to flow from MPP when initiating the policy, it later correctly acknowledged them in conducting an internal “Red Team” review in October 2019. *See* AR3-4; AR196-200. Secretary Mayorkas’s conclusion that the high *in absentia* rate stemmed from structural problems with MPP and conditions in Mexico—rather than high rates of meritless asylum claims—is amply supported by the record.

1. Asylum seekers abandoned their claims due to alarming conditions in Mexico, not because their claims lacked merit

The administrative record makes clear the factual bases for DHS’s concerns about conditions in Mexico. From the moment individuals and families were returned to Mexico under MPP, many faced unrelenting violence that threatened their lives and blocked their access to protection in the United States. There are at least 1,544 public reports

of murder, rape, kidnapping, and other violent attacks against asylum seekers and migrants returned to Mexico under MPP. AR595. Médecins Sans Frontières (also known as Doctors Without Borders) reported that 75% of its patients returned to the border city of Nuevo Laredo under MPP in October 2019 were kidnapped. AR485. Many asylum seekers in MPP have been targeted because of their race, nationality, gender, sexual orientation, or other protected characteristics. AR604. And the true scale of violence caused by MPP is surely far greater, as most individuals and families returned to Mexico under MPP have not spoken with human rights investigators or journalists.

The danger and harm experienced by those in MPP was a direct result of the policy itself. *See* AR358 (statement by Asylum Officer whistleblower to Congress that MPP “actively places asylum seekers in exceptionally dangerous situations”). To reach U.S. immigration courts, asylum seekers and other migrants in MPP were repeatedly forced to run a gauntlet of kidnapping and assault—unconscionable violence no one attending a non-MPP immigration court hearing in the United States would have to risk to present their case. AR469, 485.

The record shows asylum seekers were routinely assaulted and

kidnapped near the ports of entry while traveling to or from their MPP hearings. In one case, a mother and her nine-year-old daughter, who is deaf and mute, were kidnapped at knife-point by a group of men while leaving the port of entry following an MPP hearing. AR290. The mother and daughter were held for ransom, during which time they were both repeatedly beaten and raped. *Id.* After family members were able to collect enough money to pay the ransom, they were released to learn that they had been ordered removed *in absentia* during the time they were held hostage. *Id.* The record is replete with similar accounts.

AR472 (woman sexually assaulted in front of her child after both were kidnapped on their way to the port of entry to attend their immigration court hearing; both missed hearing as a result); AR374-421 (collected reports of violence towards individuals in MPP).

Those being returned to Mexico by Customs and Border Protection (“CBP”) were visually identifiable as returned migrants because they lacked shoelaces, which were confiscated by CBP while they were in custody. This, along with differences in dialect and physical appearance, made them easy prey for criminals who target migrants. AR475. In implementing MPP, the Government delivered asylum seekers into the

hands of highly organized criminal cartels exercising significant control in many regions of Mexico, as well as corrupt Mexican officials. AR374-421.

Even with these conditions, only 13% of asylum seekers who received *non-refoulement* screenings were removed from MPP based on their likelihood of persecution or torture in Mexico. AR653. These screening interviews were so notoriously unlikely to result in relief, and so certain to prolong an asylum seeker's detention at the port of entry, that some chose to forego them despite ample evidence of a reasonable fear of return. AR471, 474-75. DHS's own internal review of MPP noted that in some locations CBP was preventing asylum seekers from accessing *non-refoulement* interviews and that some CBP officials were reportedly pressuring United States Citizenship and Immigration Services officials to render negative decisions. AR197.

The record contains numerous reports of Mexican police officials, both local and federal, directly committing crimes of extortion and kidnapping migrants. In one case, Mexican police officers kidnapped a Honduran woman, turning her over to a criminal group. AR376; *see* AR398 (documenting similar kidnapping of Nicaraguan asylum seeker).

In another incident, a Guatemalan woman reported that Mexican police took her to the airport and deported her to Guatemala when she refused their demands for extortion, although she told them she was afraid to return there and showed them her U.S. immigration court documents.

AR376. In still another case, Mexican police abducted a man and demanded \$1,500 in ransom from his family; when the man later expressed fear of return to Mexico to a CBP officer, the officer refused to refer him for a fear screening. AR385; *see* AR416.

The administrative record documents episodes of the Mexican police torturing, AR398, sexually assaulting, AR400, beating, AR416-17, and robbing asylum seekers, AR416-19; *see* AR469, 474, 477. These were the same police forces that, according to MPP policy guidance, were supposed to afford migrants in MPP “all legal and procedural protection[s] provided for under applicable domestic and international law.” AR152. DHS’s internal review of MPP in 2019 recommended that DHS obtain “written assurance [Mexico] will comply with *non-refoulement* obligations.” AR198.

The extreme violence, despair, and insecurity people endured under MPP forced many asylum seekers to choose between risking their

lives to travel to hearings at unsafe ports of entry, frequently in the middle of the night, or abandoning their claims for humanitarian relief. *See, e.g.*, AR204, 374-421, 472-74. For many asylum seekers in MPP, the unrelenting threat of violence in Mexico came on top of unbearable living conditions that left them without adequate shelter, access to medicine, or food. *See, e.g.*, AR229 (congressional testimony); AR478 (Human Rights Watch complaint to DHS Office of Inspector General). DHS's own internal review of MPP noted that some migrants were required to give up shelter in Mexico in order to attend U.S. immigration court hearings, rendering them homeless. AR198. The Secretary's concerns about the proportion of *in absentia* removal orders, a key factor in the decision to terminate MPP, was properly based on these realities, which are thoroughly documented in the record. AR4.

2. Inherent procedural problems with MPP, including lack of notice, led to unusually high *in absentia* rates

The district court ignored evidence in the record showing that, by design, MPP itself obstructed respondents' ability to appear for their hearings, further contributing to the high rate of *in absentia* removal orders. The Government is required to inform a respondent of the time

and place of their removal proceedings via a notice to appear (“NTA”). 8 C.F.R. § 1239.1. But under MPP, even when the NTA had this information, the NTA was virtually useless because respondents were unable to independently travel to their hearings. *See generally* AR168. Instead, they had to go to a designated port of entry so that DHS officials could transport them to their hearings. AR168, 491, 434 (detailing how individuals needed to travel through violence-ridden parts of Mexico to arrive at the port of entry at 4 a.m. to be on time for a morning hearing).

Even when asylum seekers appeared at the border at the correct time, some border officials turned them away, either willfully or carelessly providing them with false information. *See, e.g.*, AR439 (Honduran family falsely told they had the wrong court date). Moreover, the information regarding when and where to appear for transport was given on a “tear sheet,” a separate document from the NTA, which was only provided in a limited number of languages. AR491. This documentation process was highly criticized, even within the Government. *See* AR196-98 (DHS oversight report recommending improvements to processing, including providing language access and a

“comprehensive standardized documentation package”).

Compounding these problems, MPP respondents often lacked stable addresses for follow-up communications from DHS and the immigration court. The administrative record documents immigration officers listing only the city in which the asylum seeker was staying, or writing “Facebook” as the address on the NTA, making future mailings with court dates impossible. AR286, 438-39; *see* AR228, 276 (congressional testimony explaining that NTAs often listed the wrong address, the address of a temporary shelter, the address of a shelter where the individual had never resided, or no address at all); *see also* AR276 (congressional testimony describing NTAs listing incorrect immigration court locations).

Even in cases when the NTA was initially correct, DHS’s internal “Red Team” review of MPP in October 2019 noted that “some migrants must give up shelter space in Mexico when they come to the US for a hearing . . . leaving them without an address” and recommended that CBP create “a more reliable communication method.” AR198. As a result of the inadequacies of notice, people subject to MPP carried the full burden of figuring out if their hearing had been changed or

rescheduled, despite the challenges of living in tents or shelters (if they were lucky). *See, e.g.*, AR466 (requiring MPP respondents to show up at a port of entry to receive a *new* tear sheet following COVID-19-related hearing suspensions); AR311 (congressional testimony detailing inadequate notice when a hearing was advanced at the last minute). Notably, during the first nine months of MPP, immigration judges in San Diego terminated 33% of MPP cases due to inadequate notice or other due process issues. *See* Alicia A. Caldwell, *Judges Quietly Disrupt Trump Immigration Policy in San Diego*, WALL STREET JOURNAL (Nov. 28, 2019), <https://www.wsj.com/articles/judges-quietly-disrupt-trump-immigration-policy-in-san-diego-11574942400>.

Other evidence in the administrative record further undermines the district court's assumption that *in absentia* orders are a good indicator of the merits of the underlying case. A comprehensive study of *in absentia* rates shows that many of those ordered removed *in absentia* in non-MPP cases failed to appear due to lack of notice or difficulties accessing and navigating the court process—not because they had meritless cases. *See* AR566-74. The study found that when immigration judges continued hearings for those who did not receive proper notice of

their hearings, rather than ordering their removal *in absentia*, 54% of people appeared at the subsequent hearing. AR566. This further supports the Secretary's concern that the high *in absentia* rate in MPP cases was caused in part by procedural barriers. AR4.

3. Inability to access counsel exacerbated *in absentia* rates

In addition to dangerous conditions in Mexico and procedural problems, MPP also severely limited access to legal representation, another factor associated with *in absentia* orders. AR448, 569-70, 574. Attorneys play a key role in tasks that were especially crucial in the MPP context, including explaining English-language immigration court proceedings, forms, and notices to their clients, maintaining current mailing addresses on file, and ensuring that clients know when and where to show up. AR570. Yet the extensive barriers to representation inherent in MPP meant that only 6% of people subjected to MPP were able to obtain counsel. AR595.² Due in part to the abysmally low representation rate for individuals in MPP, many people placed into

² See also *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRANSACTIONAL RECORDS ACCESS CLEARING HOUSE (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587>.

MPP were ordered removed *in absentia*. See Section II.A. *supra*.

Lack of representation for asylum seekers in MPP also impeded their ability to successfully plead their cases. AR441-42; *cf.* AR570. Asylum seekers without representation struggled to prepare applications in English, understand complex legal issues, and present critical evidence. Few asylum seekers in MPP had regular access to computers, printers, or phones, which are essential to compiling asylum applications and submitting evidence with the required translation into English. See, e.g., AR441-42, 447, 382, 387, 393-94. The legal aid lists the Government provided were primarily in English and listed only lawyers in the United States, many of whom were overwhelmed with requests for representation or were unable to provide representation to people in Mexico. AR196, 441, 447. Many MPP asylum seekers with bona fide claims were denied protection or gave up claims due to lack of legal representation. AR606 (linking to Human Rights Watch report).

None of these systemic failings of MPP were even mentioned by the district court, despite Secretary Mayorkas's acknowledgment of them in his termination memo and their extensive documentation in the administrative record. See AR4. The district court ignored the root

causes of MPP *in absentia* rates cited and documented by DHS in favor of its baseless assumption that the only reason people failed to appear for their hearings was that they had meritless claims. In proceeding this way, the district court overstepped the bounds of its APA review. *Public Citizen*, 343 F.3d at 455.

III. The District Court Disregarded Extensive Record Evidence That Undermines a 2019 DHS Assessment of MPP

In determining whether to terminate MPP, the agency reviewed an administrative record of approximately 700 pages, nearly half of which are devoted to evidence that MPP provided neither “protection” nor adequate “protocol” for asylum seekers. This evidence came from internal government reviews, AR192-201, DHS whistleblowers, AR246-56, 356-64, medical experts, AR239-45, 314-16, 456-62, nongovernmental organizations and affected individuals, AR221-39, 280-314, 316-56, 374-421, 426-51, 589-613, and media reports, AR422-25, 614-20. Relying on this evidence, Secretary Mayorkas concluded that MPP “had mixed effectiveness” and “experienced significant challenges,” and that “any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.” AR3-4.

The district court made no effort to weigh this substantial evidence of MPP’s flaws. Instead, it relied almost entirely on a single October 28, 2019 DHS “assessment” to conclude that Secretary Mayorkas unlawfully “failed to consider several of the main benefits of MPP.” District Court Order at *18; *see also id.* at *5, *6, *9, *18, *20, *21-22 (relying on the assessment at AR682). But many, if not most, of the claims about MPP’s benefits made in the DHS assessment are directly and thoroughly contradicted by other portions of the administrative record. For example, the DHS assessment claimed that “DHS understands that MPP returnees in Mexico are provided access to humanitarian care and assistance, food and housing, work permits, and education.” AR685. A review of the full record shows that this was largely false. *See, e.g.*, AR478 (“In Matamoros, thousands of asylum seekers in the MPP have been forced to live in a makeshift refugee camp with little to no support from the Mexican government.”).³ The District Court’s singular reliance on the assessment is further undermined by the DHS Red Team Report, issued just three days before

³ Another document cited several times by the district court as evidence of MPP’s benefits simply does not say what the court claims it says. *See* Section I, *supra*.

the assessment, which indicated that DHS had not yet established “specific measures of effectiveness . . . to evaluate MPP’s effectiveness and scope.” AR199.

The DHS assessment also stated that MPP caused those without meritorious claims to “voluntarily return home.” AR684. The district court repeatedly relied on this statement as evidence that MPP’s high *in absentia* rate showed that it was deterring meritless claims. *See, e.g.*, District Court Order at *18, *20. But the statement is based only on DHS’s estimation that, of the more than 55,000 people enrolled in MPP in October 2019, only 20,000 people were sheltered near the border while another 900 people had chosen to withdraw their claims as part of a voluntary return program operated by the International Organization for Migration. AR684, 686. The inference drawn by the assessment—that since DHS did not know the whereabouts of 34,000 people, they must have voluntarily returned home because they had weak claims for protection—strains credulity in light of the extensive evidence of the dangerous and unstable living conditions in Mexico. Indeed, the DHS Red Team Report, issued just three days before the DHS assessment, indicates that migrants were required to “give up shelter space in

Mexico when they c[a]me to the US for a hearing.” *See* AR198; *supra* Section II.B. Nothing in the record supports the inference that these unknown whereabouts had any connection to the merits of the underlying asylum claims. Thus, the district court erred in finding that DHS failed to consider “benefits” that DHS had already thoroughly and extensively found did not exist.

IV. The District Court Made a Key Factual Error in Discounting Secretary Mayorkas’s Conclusions About the Effect of the COVID-19 Pandemic

In terminating MPP, the Secretary determined that “the COVID-19 pandemic” led to both the closure of “immigration courts designated to hear MPP cases” and also to “tens of thousands of MPP enrollees . . . living with uncertainty in Mexico as court hearings were postponed indefinitely.” AR4. In light of these conditions, the Secretary concluded that “any benefits the program may have offered are now far outweighed by the challenges, risks, and costs that it presents.” *Id.*

The district court determined that this conclusion was “arbitrary” and “without any merit” because “immigration courts were reopened by the end of April 2021.” District Court Order at *21. However, this was simply wrong. Three out of four courts hearing MPP cases were still

closed as of June 1, 2021,⁴ and MPP itself was separately suspended and subject to reopening based on the progression of the COVID-19 pandemic—not the status of the immigration courts. Under a July 17, 2020 agreement between DHS and EOIR, hearings were suspended indefinitely until: (1) “California, Arizona, and Texas progress to Stage 3 of their reopening;” (2) both the Department of State and Centers for Disease Control and Prevention “lower their global health advisories to Level 2 . . . regarding Mexico in particular,” *and* (3) when “[Mexico’s] ‘stoplight’ system categorizes all Mexican border states . . . as ‘yellow.’” *Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (July 17, 2020), <https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings>. Not only were these criteria unmet when Secretary Mayorkas

⁴ The El Paso Immigration Court, as well as the San Antonio and Harlingen Immigration Courts (which had administrative control over the Laredo and Brownsville Institutional Hearing Facilities), did not reopen until July 6. *See EOIR Operational Status*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, <https://www.justice.gov/eoir-operational-status>.

signed the memorandum, they remain unmet today.⁵

The district court's determination that it was arbitrary for Secretary Mayorkas to consider the continued disruptions caused by COVID-19 when deciding to terminate MPP is thus based entirely on a clearly erroneous factual finding and a fundamental misunderstanding of the reopening criteria.

In essence, the district court cherry-picked a handful of unfounded claims about the effects of MPP from a mountain of evidence to the contrary, and then held that Secretary Mayorkas was required nonetheless to accept those claims as incontrovertible fact. This is reversible error. A court may not substitute its judgment for that of the agency, particularly when it does so on the basis of selected assertions of fact that the record shows are not accurate and were, in any event, considered by the Secretary. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S.,*

⁵ *See COVID-19 in Mexico*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://wwwnc.cdc.gov/travel/notices/covid-3/coronavirus-mexico> (showing that Mexico remains at Level 3); *Mexico's COVID-19 Monitoring System*, EMBASSY OF MEXICO IN THE UNITED STATES, <https://embamex.sre.gob.mx/eua/index.php/en/2016-04-09-20-40-51/tourism/1760-mexico-s-covid-19-monitoring-system> (showing that Tamaulipas remains at an "orange" level under the stoplight system).

Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The record is clear that the suspension and cancellation of MPP did not cause an increase in border crossings, and the Secretary had every reason to conclude that the high rate of *in absentia* orders stemmed from conditions that unacceptably limited access to the immigration courts.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court order.

Dated: September 27, 2021

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7552

Respectfully submitted,

/s/ Blaine Bookey

Blaine Bookey
Anne Dutton
Karen Musalo
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 703-8202

Counsel for Amici Curiae
(Additional Counsel on Next Page)

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
Human Rights First
805 15th Street, NW, Suite 900
Washington, DC 20005
Telephone: (202) 547-5692

Melissa Crow
Southern Poverty Law Center
1101 17th Street, NW, Suite 705
Washington, DC 20036
Telephone: (202) 355-4471

Gracie Willis
Southern Poverty Law Center
150 E. Ponce de Leon Avenue,
Suite 340
Decatur, GA 30030
Tel: (404) 521-6700
Fax: (404) 221-5857

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing motion and attached brief via the Court's ECF filing system, which will automatically send an email notification of such filing to the attorneys of record, who are registered CM/ECF users.

Dated: September 27, 2021

/s/ Blaine Bookey

Blaine Bookey

CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 29(a)(5) as it contains 5,669 words, as measured by Microsoft Word software. Additionally, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced, Roman-style typeface of 14-point font.

Dated: September 27, 2021

/s/ Blaine Bookey

Blaine Bookey

APPENDIX

List of Amici Curiae

1. Al Otro Lado, Maywood, CA
2. Aldea – The People’s Justice Center, Reading, PA
3. American Gateways, Austin, TX
4. American Immigration Council, Washington, DC
5. American Immigration Lawyers Association, Washington, DC
6. Americans for Immigrant Justice, Miami, FL
7. Asian Law Alliance, San Jose, CA
8. Asylum Access, Oakland, CA
9. Asylum Seeker Advocacy Project (ASAP)
10. Catholic Charities of Southern New Mexico, Las Cruces, New Mexico
11. Catholic Legal Immigration Network, Inc., Silver Spring, MD
12. Center for Gender & Refugee Studies, San Francisco, CA
13. Central American Resource Center – CARECEN – of California, Los Angeles, CA
14. Central American Resource Center of Northern California, San Francisco, CA

15. Central American Resource Center – CARECEN, Washington, DC
16. Centro Legal de la Raza, Oakland, CA
17. Community Legal Services in East Palo Alto, East Palo Alto, CA
18. Comunidad Maya Pixan Ixim, Omaha, NE, and San Diego, CA
19. Dolores Street Community Services, San Francisco, CA
20. East Bay Sanctuary Covenant (EBSC), Berkeley, CA
21. Education and Leadership Foundation, Fresno, CA
22. Esperanza Immigrant Rights Project, Los Angeles, CA
23. Florence Immigrant & Refugee Rights Project, Tucson, AZ
24. Florida Legal Services, Inc., Orlando, Florida
25. Galveston-Houston Immigrant Representation Project, Houston,
TX
26. Harvard Immigration and Refugee Clinical Program, Cambridge,
MA
27. HIAS, Washington, DC
28. Human Rights First, New York, NY
29. Human Rights Initiative of North Texas, Dallas, TX
30. Immigration Center for Women and Children, Los Angeles, CA
31. Innovation Law Lab, Portland, OR

32. International Mayan League, Piscataway Nation Territory
(Washington, DC)
33. International Refugee Assistance Project, New York, NY
34. Jamal Jbara, Attorney at Law, PC, Long Island City, NY
35. Jewish Family & Community Services – East Bay, Concord, CA
36. Jewish Family Service of San Diego, San Diego, CA
37. Justice Action Center, Los Angeles, CA
38. La Raza Community Resource Center, San Francisco, CA
39. Latin America Working Group, Washington, DC
40. Legal Services for Children, San Francisco, CA
41. Madres e Hijos, Buena Vista, CO
42. Michigan Immigrant Rights Center, Kalamazoo, MI
43. Migrant and Immigrant Community Action Project, St. Louis, MO
44. Migrant Center for Human Rights, San Antonio, TX
45. Mississippi Center for Justice, Jackson, MS
46. National Immigration Law Center, Los Angeles, CA
47. National Lawyers Guild – Los Angeles Chapter, Los Angeles, CA
48. Northern Illinois Justice for Our Neighbors, Chicago, IL
49. Oasis Legal Services, Berkeley, CA

50. Open Immigration Legal Services, Oakland, CA
51. Oxfam America, Boston, MA
52. Pangea Legal Services, San Francisco, CA
53. Project Blueprint, Marshfield, MA
54. Project Lifeline, Tiburon, CA
55. Public Counsel, Los Angeles, CA
56. Refugee and Immigrant Center for Education and Legal Services (RAICES), San Antonio, TX
57. Rocky Mountain Immigrant Advocacy Network, Westminster, CO
58. Round Table of Former Immigration Judges
59. SB County Immigrant Legal Defense Center, Santa Barbara, CA
60. Southern Poverty Law Center, Montgomery, AL
61. Southwestern Law School, Removal Defense Clinic, Los Angeles, CA
62. Student Clinic for Immigrant Justice, Inc., Boston, MA
63. Sueños Sin Fronteras de Tejas (SSFTX), San Antonio, TX
64. Tahirih Justice Center, Falls Church, VA
65. The Door, New York, NY

66. The Partnership for the Advancement of New Americans (PANA),
San Diego, CA
67. Washington Office on Latin America (WOLA), Washington, DC
68. Witness at the Border, Gahanna, OH
69. Women's Refugee Commission (WRC), Washington, DC
70. Yasrebi Law, San Francisco, CA