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The Migrant Protection Protocols: Two Administrations, One Outcome

The Trump Administration first launched the Migrant Protection Protocols— colloquially known as the “Stay in Mexico” or “Remain in Mexico” policy – in December of 2018 in response to a perceived “humanitarian and security crisis at our southern border.”¹ The policy, referred to as an “executive branch initiative,” was implemented to reduce the flow of immigrants into the United States.² Since their introduction, the Migrant Protection Protocols (“MPP”) has caused nothing but confusion to onlookers and an insurmountable setback to immigrants and refugees from Central and South America. When the Biden Administration transitioned into office, many Americans expected Biden to quickly address immigration. Two years into the new administration there have not been any major policy changes, and the efforts to repeal MPP have been blocked by the courts. The attempted changes to MPP have not substantively increased protections available to immigrants but have instead shifted how immigrants can seek asylum upon arrival at the Southern border.

To examine the impact that MPP has had on immigrants since its implementation, the policy must be examined in the context of immigration law at large. Implementing MPP did not require new legislation because it is simply an implementation of immigration policies already established within the United States. The Trump Administration took a previously unheard-of approach

¹ Department of Homeland Security, *Secretary Nielsen Announces Historic Action to Confront Illegal Immigration*, DEPARTMENT OF HOMELAND SECURITY ARCHIVED CONTENT (Dec. 20, 2018), <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>; Calvin Woodward & Colleen Long, *AP Fact Check: Trump and the Disputed Border Crisis*, AP NEWS (Jan. 9, 2019), <https://apnews.com/article/immigration-north-america-donald-trump-ap-top-news-border-security-3bf581a53684440b92121bb1b8ae43a9>.

² Oral Argument at (00:58), *Innovation Law Lab v. McAleenan*, No. 19-15716 (9th Cir. May 7, 2019). <https://www.youtube.com/watch?v=hTCCAkGaTEI>.

to interpret long-standing immigration statutes to disrupt immigration along the border. The Biden Administration continued to utilize Trump-era immigration policy beginning in January of 2021. Under both administrations, the United States Department of Homeland Security (“DHS”) has utilized MPP to prevent asylum seekers from entering the United States before being granted asylum. The ways in which the two administrations approached the problem differed, but the impact on asylum seekers did not change.

A thorough introduction to MPP and broader American immigration law will be followed by an analysis of the last two years of immigration policy. The Trump and Biden administrations have both implemented MPP, and their strategies will each be examined. Ultimately the real-world impacts felt by immigrants will be discussed in light of the pandemic and recent court orders that continue to change the legal landscape along the southern border.

I. What are the Migrant Protection Protocols (MPP)?

In order to understand the impact of MPP, it is important to understand what exactly MPP entails. Created as a reaction to the “humanitarian and security crisis at [the United States/Mexico] border”, MPP was a set of protocols created by the Trump Administration to slow immigration in the United States by restricting entry to asylum seekers who turned themselves in at the southern border.³ Among other directives, MPP gives DHS the power to return asylum seekers to Mexico while their asylum applications are being processed. MPP did not face congressional or judicial review before its implementation.⁴

MPP is not a traditional law as it was not passed through the House or Senate. Regardless, proponents claim it is backed by statutory authority. Those in opposition to MPP assert that the

³ Woodward & Long, *supra* note 2.

⁴ The Trump Administration announced and implemented MPP without *any* review, which those who oppose MPP allege is a violation of the Administrative Procedures Act, an act which requires “notice and opportunity for comment prior to the promulgation of a rule.”; 5 U.S.C. § 553(b), (c).

executive branch is overstepping its boundaries by introducing such substantial changes to immigration policy without legislative approval.⁵ The judicial branch has weighed in on MPP, and while they did not discuss the process that brought it to fruition, the Supreme Court of the United States (“SCOTUS”) has required the enforcement of the policy.⁶

No matter how fleshed out a policy is, it is useless if it is not legally enforceable. Secretary McAleenan asserts 8 C.F.R. § 235(b)(2)(C) of the Immigration and Nationality Act (“INA”), as amended by Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) and codified in 8 U.S.C., gives DHS the authority to implement MPP.⁷ Congress passed IIRIRA in 1996 as a comprehensive update to the INA and included additional language on removal proceedings for asylum seekers. With anti-Latinx sentiments from its conception, it is unsurprising to some that sections of IIRIRA were used to expedite removal proceedings. Per § 235 of IIRIRA, immigrants who are facing expedited removal proceedings may be returned if they are “third-party nationals arriving in the United States by land from Mexico” during their removal proceedings.⁸

Further, support for the legality of MPP comes from immigration jurisprudence. The Northern District of California

⁵ Uriel J. García, *Texas judge’s order to revive “remain in Mexico” policy misinterprets immigration law, migrant advocates say*, The Texas Tribune (Aug. 16, 2021).

<https://www.texastribune.org/2021/08/16/migrant-protection-protocols-judge-ruling/>.

⁶ *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 152438 (N.D. Tex. Aug. 13, 2021).

⁷ Kevin K. McAleenan, *Implementation of the Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY (Jan 28, 2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/Implementation%20of%20the%20Migrant%20Protection%20Protocols.pdf>; Inadmissible [undocumented immigrants] and expedited removal, 8 C.F.R. § 235 (2017).

⁸ McAleenan, *supra* note 7; 8 C.F.R. § 235 .

further attests that 8 U.S.C. 1225 § (b)(2)(C) includes language giving the Attorney General the ability to “return the [immigrant arriving on land from a foreign territory contiguous to the United States] to that territory pending a proceeding.”⁹ Only immigrants who are “not clearly and beyond a doubt entitled to be admitted,” such as asylum seekers, are subject to this form of a removal process.¹⁰

To better understand MPP it is necessary to look at immigration policy as it applies to asylum seekers. Under IIRIRA, immigrants arriving to the United States fall into two categories – immigrants as described in 8 U.S.C. § 1225(b)(1) or immigrants who fall into the parameters of 8 U.S.C. § 1225(b)(2).¹¹ Section 1225(b)(1) includes only immigrants who are determined inadmissible by immigration officers because of either fraud, misrepresentation, or lack of proper documentation.¹² For the purpose of MPP, an asylum seeker who arrives at the border without both proper identification and visa paperwork will be classified as a § 1225(b)(1) immigrant. Section 1225 (b)(2) simply covers all other immigrants who are not subject to § 1225(b)(1).¹³

As the name of the code implies, IIRIRA applies to immigrants who are coming to the United States with no legal status. Many of whom are coming to the United States to seek asylum.¹⁴ All

⁹ 8 U.S.C. § 1225; *Innovation Law Lab v. McAleenan*, No. 19-15716 at 5 (9th Cir.)

¹⁰ *Innovation Law Lab v. McAleenan*, No. 19-15716 at 5.

¹¹ *Innovation Law Lab, et al. v. McAleenan et al.*, *appeal docketed*, No. 19-15716 (9th Cir. May 7, 2019).

¹² *Innovation Law Lab v. McAleenan*, No. 19-15716, at 3; 8 U.S.C. § 1225.

¹³ *Innovation Law Lab v. McAleenan*, No. 19-15716, at 4; 8 U.S.C. § 1225.

¹⁴ 8 U.S.C. § 1158 (2008); 8 U.S.C. § 1101(a)(42) (2008). Broadly speaking an asylum seeker is a refugee who is seeking safety in the United States because they fear that they will be persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion in their home country. (8 U.S.C. § 1158). A refugee is a person who is outside of their home country and is unable to safely return. (8 U.S.C. § 1101(a)(42).) Asylum seekers as discussed in this essay are refugees from Central and South America who are

immigrants who are processed under IIRIRA and processed for removal proceedings are removed under 8 U.S.C. § 1229.¹⁵ Immigrants who fall into this category can seek “defensive asylum.”¹⁶ If an immigrant were to have legal status – meaning they do not face immediate removal from the United States – they can apply for “affirmative asylum” instead.¹⁷ The outcome for defensive and affirmative asylum seekers is the same, but the process that they go through is very different. 8 U.S.C. § 1229 includes all defensive asylum seekers.

MPP specifically targets asylum seekers along the southern border of the United States, nearly all of whom are immigrants seeking defensive asylum, meaning their claim to asylum is their defense against removal from the United States.¹⁸ Asylum as a defense is allowed under 8 U.S.C. § 1229 for those who “were apprehended in the United States or at a U.S. Port of Entry (“POE”) without proper legal documents.”¹⁹ Secretary Neilson “introduced [MPP] as an alternative” response to an increase of immigrants “who lack visas or other valid entry documents”

fleeing violence and persecution in their home countries. The persecution that an asylum seeker fears does not have to be persecution by the government (8 U.S.C. § 1101). “Particular social groups” includes being a member of the LGBTQIA+ community.;

¹⁵ Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA), 8 U.S.C. § 101 - § 671 (1996); *Innovation Law Lab v. McAleenan*, No. 19-15716, at 4.

¹⁶ U.S. Citizenship and Immigration Services, *Obtaining Asylum in the United States* (Sep. 16, 2021), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states>.

¹⁷ *Id.*

¹⁸ Department of Homeland Security, *Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY ARCHIVED CONTENT, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

¹⁹ *Id.*

arriving at the southern border.²⁰ Only immigrants seeking defensive asylum are subject to MPP.²¹

Previous to the implementation of MPP, once an immigrant was determined to be subject to removal under 8 U.S.C. §1225 (a) or (b), they were placed into removal proceedings under 8 U.S.C. §1229 (a) or (b).²² Asylum seekers subject to 8 U. S. C. §1229 removal proceedings were either processed for expedited removal, or, if the immigrant was found to have “credible fear”²³ of persecution, they would be detained or paroled until their hearing in front of an immigration judge.²⁴ Section 1229(b) is the statute for expedited removal, or immigrants determined to likely not have an asylum claim, and §1229(a) is the statute for standard removal proceedings, or for immigrants who are found to have credible fear.²⁵ Both processes of expedited and standard removal are still in use under MPP, asylum seekers themselves are just in a different physical location during the process. Expedited removal proceedings under § 1229(b) greatly limit the rights an immigrant

²⁰ Harrington, Ben, *Asylum Processing at the Border: Legal Basics*, CONGRESSIONAL RESEARCH SERVICE (Mar. 19, 2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10582>.

²¹ Megan Proudfoot, *Explainer: The Migrant Protection Protocols*, NATIONAL IMMIGRATION FORUM, (Aug. 25, 2021), <https://immigrationforum.org/article/explainer-the-migrant-protection-protocols/>; Fact Sheet: U.S. Asylum Process, NATIONAL IMMIGRATION FORUM (Jan 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/>.

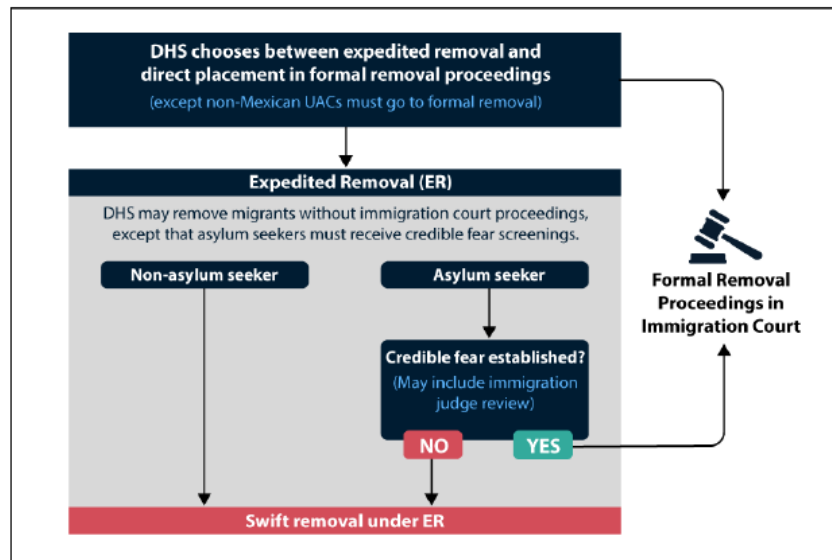
²² Immigration and Nationality Act (INA), 8 U.S.C. § 12 (2021).

²³ (*Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Jul. 15, 2015), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>.) DHS defines credible fear as “a “significant possibility” that you can establish in a hearing before an Immigration Judge that you have been persecuted or have a well-founded fear of persecution on account of your race, religion, nationality, membership in a particular social group, or political opinion if returned to your country.”

²⁴ Fact Sheet: U.S. Asylum Process, *supra* note 21; *Questions and Answers: Credible Fear Screening*, *supra* note 23.

²⁵ INA 8 U.S.C. § 12; 8 U.S.C. § 1229.

has; their case is heard by a DHS official rather than a judge, they do not have the right to a lawyer, and there is no right to an appeal of the decision.²⁶



MPP refers to the process of apprehending asylum seekers at the border, processing them and classifying them as 1225(a) immigrants, placing them into 1229(a) expedited removal proceedings, and returning them to Mexico to wait for their removal hearing in front of an Enforcement and Removal Operations (ERO) official. For a visual of this explanation, see below.²⁷

II. Timeline of MPP

²⁶ Shouse California Law Group, “Expedited Removal” And Deportation Under U.S. Immigration Law, SHOUSE LAW GROUP, <https://www.shouselaw.com/ca/immigration/deportation-defense/expedited-removal/>.

²⁷ Harrington, Ben, *Asylum Processing at the Border: Legal Basics*, CONGRESSIONAL RESEARCH SERVICE (Mar. 19, 2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10582>.)

Considering the complexity of immigration law, MPP was implemented – and then amended – very quickly. How MPP today is being used looks different from MPP at its implementation. Understanding this timeline is vital to contextualize the experiences of asylum seekers who were subject to MPP. The impact felt by immigrants due to transition of the Trump and Biden administrations will be discussed after a timeline of MPP is established.

The timeline of MPP is complicated and compact – the policy itself has been implemented, rescinded, then reinstated since the Trump Administration first announced MPP in December of 2018.²⁸ As it stands presently in November of 2021, the Biden Administration is simultaneously acting in good faith to reinstate the policy while DHS has made its intentions to terminate MPP clear.²⁹

The origins of MPP can be traced as far back as April of 2018 when the Trump Administration enacted what is now known as the “Zero Tolerance Policy.”³⁰ The Zero Tolerance Policy required that

²⁸ Kirstjen Nielsen, *Policy Guidance for Implementation of the Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY (Jan 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.

²⁹ Oriana Gonzalez, *Biden Administration Prepared to Restart Trump’s “Remain-in-Mexico” Policy*, AXIOS (Oct 15, 2021), <https://www.axios.com/biden-reinstate-trump-remain-in-mexico-policy-dfd33373-fab0-45f5-956b-bd13b0f52ea2.html>; Jean King, Executive Office of Immigration Review, PM 21-20, Cancellation of Policy Memorandum 19-12 (May 14, 2021); Alejandro N. Mayorkas, *Termination of the Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY (Oct 29, 2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf

³⁰ National Immigrant Justice Center, *A Timeline of the Trump Administration’s Efforts to End Asylum* (Jan 11, 2021), <https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2021-01/01-11-2021-asylumtimeline.pdf>; John V. Kelly, *Inspector General, Special Report – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, UNITED STATES DEPARTMENT OF JUSTICE (Sep 27, 2018),

federal prosecutors prioritize the criminal prosecution of all immigrants – including asylum seekers – for “illegal entry.”³¹ DHS did not have the skills or resources to handle the sudden influx of work thrust upon them. In order to compensate, DHS turned to a practice called “metering” to stem the flow of immigrants into the United States.³² “Metering” is the practice of turning asylum seekers back at ports of entry to wait in Mexico until U.S. Customs and Border Patrol (“CBP”) has “available space” for the immigrant.³³ The Zero Tolerance Policy led to systematic separation of children from their families at the border – children were not prosecuted criminally – which in turn resulted in scrutiny of the situation at the border from the Office of Inspector General.³⁴

The Special Review conducted by the Inspector General showed that DHS had been metering immigrants since April of 2018 despite no legal authority to do so.³⁵ While DHS and CBP were never instructed to meter immigrants, it is suspected the practice has been ongoing as far back as 2016, and it set the backdrop against which MPP were implemented.³⁶

An immigration agreement reached in December of 2018 between López Obrador, the President of Mexico, and the United States allowed the forced return of Central Americans to Mexico under MPP. DHS released a memo stating its intent to implement

<https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>

³¹ National Immigrant Justice Center, *supra* note 30 at 22, 23; Karl A. Racine, *Memorandum for Federal Prosecutors Along the Southwest Border*, OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES (Apr 6, 2018), <https://observatoriocolef.org/iniciativas/memorandum-for-federal-prosecutors-along-the-southwest-border/>.

³² Kelly, *supra* note 30.

³³ *Id.* at 6; National Immigrant Justice Center, *supra* note 30, at 21.

³⁴ *Id.*

³⁵ *Id.* at 4, 5.

³⁶ Kelly, *supra* note 30, at 21; *Id.* at 6.

MPP within the next month.³⁷ Like metering, MPP forced asylum seekers to wait in Mexico “pending removal proceedings under § 240 of the [INA].”³⁸ The implementation of MPP resulted in a flurry of legal action as well as confusion on behalf of other immigration entities such as U.S. Immigration and Customs Enforcement (“ICE”). To try and clear the air around MPP, subsequent memorandums with additional guidance were released in February of 2019 and DHS posted additional updates periodically through the year.³⁹

Innovation Law Labs, a non-profit group that sought a preliminary injunction from the Northern District of California to prevent the enforcement of MPP filed the first legal challenge against it on February 14, 2019.⁴⁰ Innovation Law Labs filed suit against DHS in an attempt to get a ruling from the courts finding MPP unconstitutional. They presented a variety of different legal arguments against MPP including procedural errors, unlawfulness under 8 U.S.C., and human rights violations. Innovation Law Lab continued as the named party for the major legal battles against MPP going forward until the United States (SCOTUS) found their case moot and dismissed the complaint in July 2021.⁴¹

³⁷ *Secretary Nielsen Announces Historic Action to Confront Illegal Immigration*, *supra* note 1; Clare Ribando, Seelke, *Mexico’s Immigration Control Efforts*, CONGRESSIONAL RESEARCH SERVICE (June 27, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF10215/21>, pages 2, 3.

³⁸ Kirstjen M. Nielson, *Policy Guidance for Implementation of the Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf, at 1.

³⁹ *Id.*; McAleenan, *supra* note 8; *Department of Homeland Security Content Archive*, DEPARTMENT OF HOMELAND SECURITY, <https://www.dhs.gov/archive/content>.

⁴⁰ *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110 (N.D. Cal. 2019).

⁴¹ Supreme Court of the United States, *No. 19-1212*, SUPREME COURT OF THE UNITED STATES DOCKET (Jul. 23, 2021), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1212.html>

Though the Innovation Law Lab case is the largest lawsuit opposing MPP, other legal actions have been taken as well. *Al Otro Lado*, a class action case filed in 2017 over metering that got tangled with MPP due to overlapping timelines, was heard in the 9th Circuit Court of Appeals in March of 2020.⁴² Litigation bridging the pandemic and MPP was filed in March of 2020 with the District Court in Washington, D.C. granting a preliminary injunction allowing minors to remain in the United States while waiting for an asylum official to hear their cases.⁴³ Both lawsuits ultimately did not change MPP or its implementation.⁴⁴

The transition from the Trump Administration to the Biden Administration in January 2021 meant that several lawsuits against the DHS became moot as the Biden Administration implemented their own immigration policy. Just hours into the Biden Administration on January 20, 2021, DHS announced that it would “cease adding individuals into the [MPP] program.”⁴⁵ However, individuals who had been removed from the United States were not granted relief at that time as DHS stated that “MPP participants should stay where they are.”⁴⁶ Five months later on June 1, 2021, DHS confirmed the termination of MPP by the Biden Secretary of

⁴²*Lado v. Wolf*, 952 F.3d 999 (9th Cir. 2020).

<https://law.justia.com/cases/federal/appellate-courts/ca9/19-56417/19-56417-2020-03-05.html>; National Immigrant Justice Center, *supra* note 30, at 11.

⁴³ P.J.E.S. v. WOLF et al, No. 1:2020cv02245 - Document 80 (D.D.C. 2020).
<https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2020cv02245/221085/80/>

⁴⁴Clara Long & Andrea Sawyer, “*We Can’t Help You Here*,” HUMAN RIGHTS WATCH (Jul. 2, 2019),
<https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>

⁴⁵ *DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program*, DEPARTMENT OF HOMELAND SECURITY, (Jan. 20, 2021),
<https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

⁴⁶ *Id.*

DHS.⁴⁷ At that time DHS did not offer additional insight into future immigration reform or instructions for the 25,000 migrants who had been returned to Mexico to await their hearings.⁴⁸

Unfortunately, the termination of MPP was temporary as SCOTUS “permanently enjoined and restrained [the Biden Administration] from implementing or enforcing” the MPP termination memorandum in August of 2021.⁴⁹ Texas and Missouri argued that in terminating MPP, the Biden Administration had overstepped its boundaries and forced Texas to accept immigrants into the state when Texas did not want to. Both states allege that the suspension of MPP will result in an increase of human-trafficking incidents that “both Texas and Missouri will be forced to spend significantly more resources” on, and that the “influx of unlawful immigrants . . . entering and remaining in Texas and Missouri” would force both states to “expand more taxpayer resources” on social support for migrants.⁵⁰ Texas and Missouri successfully argued that “there is no monetary remedy for these increased costs and thus they constitute irreparable injury.”⁵¹ SCOTUS granted a preliminary injunction ordering the Biden Administration to, “in good faith,” reimplement MPP.⁵²

⁴⁷ Alejandro N. Mayorkas, *Termination of the Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY, (June 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

⁴⁸ Rafael Carranza, *The U.S. Sent Back More than 71,000 Migrants under “Remain in Mexico.” Where Are They Now?*, THE ARIZONA REPUBLIC (Aug 30, 2021), <https://www.azcentral.com/story/news/politics/immigration/2021/08/30/what-happened-migrants-sent-back-mexico-under-migrant-protection-protocols/5610610001/>.

⁴⁹ *Biden v. Texas*, 210 L.Ed.2d 1014 (U.S. 2021).

⁵⁰ *Id.* at 8.

⁵¹ *Id.*

⁵² Proudfoot, *supra* note 21; *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 152438 (N.D. Tex. Aug. 13, 2021) at 21.

While still acting in good faith compliance with the SCOTUS's order, the secretary of DHS released dual memorandums on October 31, 2021, once again terminating MPP.⁵³ One memorandum explicitly terminated MPP while the other went into extensive detail behind the extermination, making sure to address areas that were seen as lacking in the first attempt to terminate.⁵⁴ Due to the order by the SCOTUS to reimplement MPP, the new termination attempt by DHS is not meaningful until additional legal action is taken to enforce the termination.⁵⁵

II. The Trump Administration's MPP Rollout

After surveying the process of MPP's implementation from start to finish it is time to take several steps backward and examine how the Trump Administration managed MPP. Put simply, when implemented by the Trump Administration MPP flipped the traditional process of placing asylum seekers into removal proceedings on its head by changing who made determinations of what class of asylum seekers immigrants are sorted into; 8 U.S.C.

⁵³ *DHS Announces Process to Address Individuals in Mexico with Active MPP Cases*, DEPARTMENT OF HOMELAND SECURITY, (Feb. 11, 2021), <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp>; Mayorkas, *Termination of the Migrant Protection Protocols*, *supra* note 47.

⁵⁴ *Id.*

⁵⁵ Graham, Dave, *U.S. Still Seeking Agreement from Mexico on Return of Asylum Seekers*, REUTERS (Nov. 24, 2021), <file:///C:/Users/doty/Juris-M/storage/8TJZXUQQ/biden-may-restart-trumps-remain-mexico-policy-by-next-week-axios-2021-11-24.html>; Kight, Stef W., *Scoop: Biden Restarting Trump's "Remain in Mexico" Policy*, AXIOS (Nov. 24, 2021), <https://www.axios.com/biden-restart-trump-remain-mexico-49d43ad0-41d3-4e09-8fe5-a90dd62b78ea.html>). As of November 24, 2021, MPP has not been reinstated due to hesitancy on behalf of Mexico to reimplement the policy. Talks between the two governments are ongoing, and the Mexican government is looking for more support from the United States before they allow asylum seekers to be returned to Mexico. It is possible that "President Biden will start turning asylum seekers back to Mexico" as soon as early December 2021.

§ 1229(a) or 1229(b). Original memos from DHS did not allude to this, but it became clear with time that DHS had broken traditional protocol.⁵⁶

On January 28, 2019, a memorandum from Secretary McAleenan discussed the legal bias DHS had to create such a policy and offered a few, sparse directions to CBP and ICE.⁵⁷ DHS officials were simply told to “return the [asylum seeker] to the contiguous country from which they arrived” without violating non-refoulement principles, Convention Against Torture & Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”), or returning an immigrant who would “more likely than not be persecuted” once in Mexico.⁵⁸

On February 12, 2019, the Office of Directors of Enforcement and Removal Operations (“ERO”) and the principal Legal Advisor of ICE simultaneously released guidance for practical applications of MPP. CBP and ICE agents were directed to return immigrants to Mexico at various Ports of Entry (“POE”) – San Ysidro being the first – and give them directions⁵⁹ about their removal proceedings.⁶⁰ Asylum seekers are to present at their

⁵⁶ Long & Sawyer, *supra* note 44; Brief for Local 1924 as Amici Curiae Supporting Appellees, Innovation Law Lab et. al v. Kevin K. McAleenan, Acting Secretary of Homeland Security, et. al, No. 19:15716.

⁵⁷ McAleenan, *supra* note 7, at 3.

⁵⁸ *Id.*

⁵⁹ It is unclear if the directions need to be written, or if oral suffices. It is also unclear what language the directions need to be given in, or what languages they might be available in. Asylum seekers speak Spanish, Nahuatl, Mam, K’iche’, and a variety of other languages. There are no language requirements to be a CBP officer.

⁶⁰ Nathalie R. Asher, *Migrant Protection Protocols Guidance*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Feb. 12, 2019), <https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf>; Ronald D. Vitiello, *Implementation of the Migrant Protection Protocols*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Feb. 12, 2019), <https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf>; Nielson, *supra* note 28 at 2.

designated POE at a designated time.⁶¹ They will then be processed into the United States by CBP, paroled into ICE custody for the duration of their hearing, and ERO will maintain physical custody of asylum seekers until they are returned to Mexico.⁶²

Section 292 of INA states that in removal proceedings, immigrants have the “privilege of being represented . . . by counsel” of their choosing and at their expense.⁶³ To remain compliant with INA, Secretary Nielson stated that immigrants shall be at their designated immigration court “not later than one hour before [their] scheduled hearing.”⁶⁴ The Trump Administration made no other attempts to allow, let alone encourage, contact between immigrants forced into MPP and legal counsel.

Under the Trump Administration MPP strived to limit immigration to the United States as much as possible.⁶⁵ A member of the National Security Council under President Trump stated that they wanted to “persistently [present undocumented immigrants] with multiple unsolvable dilemmas to impact their calculus” when they embark on their trip to the United States border.⁶⁶ Stephen Miller, a White House immigration advisor under President Trump, specifically encouraged the changes in MPP that allowed CBP agents to question asylum-seekers instead of U.S. Citizenship and Immigration Services (“US/CIS”) asylum officers because Miller

⁶¹ Nielson, *supra* note 28 at 2..

⁶² *Id.*

⁶³ Immigration and Nationality Act, 8 § 12 (1952).

⁶⁴ Nielsen, *supra* note 28, at 3.

⁶⁵ *Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY ARCHIVES (Jan. 24, 2019),

<https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

⁶⁶ Julia Ainsley, *Miller Wants Border Agents to Screen Migrants to Lower Asylum Numbers*, NBC NEWS, (July 29, 2019),

<https://www.nbcnews.com/politics/immigration/stephen-miller-wants-use-border-agents-screen-migrants-cut-number-n1035831>; Letter from Al Otro Lado and 107 additional organizations 2021).

<https://whistleblower.org/letter/ngo-letter-on-urgent-actions-the-biden-administration-must-take-following-supreme-court-decision-on-mpp/>.

believed they were too relaxed in administering the “credible fear” screenings, the first step to asylum in the United States.⁶⁷

When a person is seeking asylum without proper documentation – a process which is legal in the United States – the first thing that happens to separate them from other classes of undocumented immigrants is that they are shown to have “credible fear of persecution,” or to have a “credible fear” that caused them to come to the United States through a credible fear interview.⁶⁸ As defined by 8 U.S.C. § 1225, “credible fear of persecution” is that there “is a significant possibility ... that the [immigrant] could establish eligibility for asylum under [8 U.S.C. §] 1158.”⁶⁹ An immigrant must be a refugee, or someone who is unable to return to their “country of nationality” because of a “well-founded fear of persecution on account of race, religion, nationality, membership to a particular social group, or political opinion,” to establish their eligibility for asylum.⁷⁰

CIS asylum officers are trained specifically to give credible fear interviews. An immigrant that is found to have “credible fear” is not automatically granted asylum in the United States, but rather is directed towards the asylum pipeline of immigration proceedings.⁷¹ The lack of documentation means that they are still subject to expedited removal proceedings.⁷² Prior to the implementation of MPP, asylum seekers subject to 8 U. S. C. § 1229 removal proceedings were either processed for expedited removal, or, if the immigrant was found to have “credible fear” of persecution, they would be detained or paroled until their hearing

⁶⁷ *Id.*

⁶⁸ 8 U.S.C. § 1225.

⁶⁹ *Id.*

⁷⁰ In the context of MPP, the most common “particular social group” refers to individuals who identify as LGBTQIA+, “Political opinion” includes forced, threatened, or coercive family planning measures in the context of refugees; 8 U.S. Code § 1158; 8 USC § 1101.

⁷¹ 8 U.S.C. § 12 (2021).

⁷² Asylum Division, *Affirmative Asylum Procedures Manual (AAPM)* 1, 37 (May 2016).

in front of an immigration judge.⁷³ CIS asylum officers find around 90% of asylum seekers eligible to apply for asylum after their credible fear interview.⁷⁴

The implementation of MPP under the Trump Administration expanded the powers of U.S. Customs and Border Protections (“CBP”), a law enforcement agency, and allowed them to exercise discretion on individual asylum cases. CBP agents were given the discretion to decide whether a person or their family should be funneled into MPP with only “extremely truncated” guidance “lacking in basic safeguards.”⁷⁵ CBP agents – who were not required to use interpretation services – did not have to take into account basic considerations like if “the individual has a legal status in Mexico... a place to reside... or whether the individual could be gravely harmed in ways that may not amount to persecution or torture.”⁷⁶

Since MPP has been implemented, CBP officers have been conducting credible fear interviews. This change alone dramatically reduces the rate of people eligible to apply for asylum. Estimates show that somewhere between 1-13% passed their credible fear interview in 2020.⁷⁷ Even this number is likely an overestimate because it has been reported that only 40% of migrants who expressed fear of returning to Mexico were given the

⁷³ *Innovation Law Lab v. Nielsen*, No. 19-15716, 2019 U.S. App. LEXIS 10926 (9th Cir. Apr. 12, 2019).

⁷⁴ Ainsley, *supra* note 66.

⁷⁵ American Immigration Council, *The “Migrant Protection Protocols”*, AMERICAN IMMIGRATION COUNCIL (Oct. 6, 2021), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>, at 3; *Innovation Law Lab v. Nielsen*, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 18.

⁷⁶ *Innovation Law Lab v. Nielsen*, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 18.

⁷⁷ American Immigration Council, *Policies Affecting Asylum Seekers at the Border*, AMERICAN IMMIGRATION COUNCIL (Jan. 29, 2020) at 4, https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf.

required fear-screening interview.⁷⁸ The change in procedure changes the amount of training required and the language proficiency of the officer conducting the interview and the setting of the interview itself, all of which factor into the ability of the asylum seeker to communicate with the officer interviewing them.

⁷⁹

CBP agents had no prior knowledge or experience in asylum cases, and until December of 2018, it was a long-standing policy for CIS agents to meet with asylum seekers to conduct their credible fear interview and make the decision regarding their subsequent detention. As an agency trained in law enforcement, CBP officers lack the knowledge or skills to conduct a “credible fear” interview.⁸⁰ As a result, the interviews themselves changed substantially under MPP.

Before the implementation of MPP asylum seekers had the right to speak with an attorney, had the right to a 48-hour rest period before the interview, had the right to an interpreter, and had the right to appeal the CIS asylum officer’s decision for judicial review.⁸¹

None of these rights are accessible to asylum seekers under MPP. On the contrary, immigrants are “not permitted to consult with counsel either before or after the interview.”⁸² The decision of an officer can be reviewed by a supervisor. That review is final, even if circumstances change for the worse while the asylum seeker is in Mexico.⁸³

According to MPP, only asylum seekers who “voluntarily express fear of harm in Mexico” are entitled to an interview with a

⁷⁸ *Id.*, at 4.

⁷⁹ Long & Sawyer, *supra* note 44.

⁸⁰ *Id.*

⁸¹ Long & Sawyer, *supra* note 44; Innovation Law Lab v. Nielsen, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 18.

⁸² Innovation Law Lab v. Nielsen, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 18.

⁸³ Innovation Law Lab v. Nielsen, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 18, 19.

CIS asylum officer.⁸⁴ Asylum seekers report that even when they do express fear CBP agents do not act on the expression.⁸⁵ Many agents perform only cursory interviews, struggle to speak or understand Spanish, fail to explain the purpose of the interview to immigrants, and ignore protocol even when fear is expressed and understood.^{86,87} It is estimated that even without prompting by CBP agents 84% of asylum seekers placed in MPP express “fear of persecution in Mexico,” but only 5% are then exempted from MPP and allowed to remain in the United States.⁸⁸

In summary, the Trump Administration rolled out MPP in such a disastrous manner that a union of CIS employees filed an amicus brief against the Department of Homeland Security, their employer.⁸⁹ In the brief CIS agents who typically conduct “credible fear” and “reasonable fear” screenings ask the 9th Circuit to affirm the preliminary injunction that had been granted by the Northern District of California.⁹⁰ In the brief the union argues that not only is the MPP against American immigration precedent, but it forces asylum seekers into unsafe situations with no benefits for the

⁸⁴ Long & Sawyer, *supra* note 44, at 28.

⁸⁵ Innovation Law Lab v. Nielsen, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 18; *Policies Affecting Asylum Seekers*, *supra* note 77 at 4, Brief for Local 1924 as Amici Curiae Supporting Appellees, *supra* note 56.

⁸⁶ One plaintiff in “Innovation Law Lab” reported that the CBP agent replied “Honduras wasn’t safe, Mexico wasn’t safe, and the U.S. isn’t safe either” when the plaintiff explain he did not feel safe in Tijuana. (See page 20).

⁸⁷ Innovation Law Lab v. Nielsen, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 19–21.

⁸⁸ Long & Sawyer, *supra* note 44, at 30.

⁸⁹ *Id.* at 29; Brief for Harold Hongju Koh, et al., as Amici CURIAE FORMER U.S. GOVERNMENT OFFICIALS IN SUPPORT OF APPELLEES AND AFFIRMANCE, Innovation Law Lab v. Kevin K. McAleenan, 951 F.3d 1073, *appeal docketed*, (No. 19-15716) (9th Cir. June 26, 2019).

⁹⁰ Brief for Harold Hongju Koh, et al., as Amici CURIAE FORMER U.S. GOVERNMENT OFFICIALS IN SUPPORT OF APPELLEES AND AFFIRMANCE, Innovation Law Lab v. Kevin K. McAleenan, 951 F.3d 1073, *appeal docketed*, (No. 19-15716) (9th Cir. June 26, 2019).

parties involved.⁹¹ The union makes many of the same arguments made above – MPP does not allow asylum seekers adequate opportunities to present their case to a qualified official, Mexico is not a safe place to wait indefinitely until the asylum case is heard, and MPP works only to make the process of applying for asylum more inefficient than it already was.⁹²

A. Contradictions within MPP and its implementation

There were five groups exempt from MPP: 1) unaccompanied children; 2) citizens or nationals of Mexico; 3) individuals processed for expedited removal under 8 C.F.R. § 235; 4) individuals with “special circumstances” such as physical or mental health issues or violent criminal backgrounds; and 5) individuals who CIS Asylum Officers determined were “more likely than not” to face torture or persecution in Mexico.⁹³

Several non-governmental organizations who work to provide legal services to asylum seekers filed a complaint against DHS seeking a preliminary injunction to end MPP on February 14, 2019. Innovation Law Labs questioned the legal authority DHS had to implement MPP, questioned the actions of DHS and CBP in following the stated principle of MPP, and requested relief for asylum seekers who were being sent back to some of the most dangerous cities in Mexico to wait indefinitely for a court date.⁹⁴ After a series of appeals, there currently is no such injunction in place.

In the lawsuit, plaintiffs discuss the fact that DHS’s implementation of MPP contradicts itself. Of the exempt groups, individuals being processed for expedited removal are exempt from MPP.⁹⁵ Asylum seekers who present at the border missing

⁹¹ *Id.* at 4, 16, 20.

⁹² Koh et al., *supra* note 90 at 2, 3.

⁹³ The “Migrant Protection Protocols,” *supra* note 75, at 3; 8 C.F.R. § 235 *supra* note 7.

⁹⁴ Innovation Law Lab v. Nielsen, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019); Long & Sawyer, *supra* note 44.

⁹⁵ The “Migrant Protection Protocols,” *supra* note 75, at 2.

essential documentation to enter, such as a passport or immigration papers, are automatically processed for expedited removal under 8 C.F.R. § 235.⁹⁶ Thus, the population expressly targeted by MPP “is precisely the population to whom the expedited statute applies.”⁹⁷ This did not stop DHS from enforcing MPP under the Trump administration.

III. Biden Administration

The Biden Administration inherited a set of immigration policies that were at odds with promises he made during his presidential campaign.⁹⁸ Biden quickly addressed immigration policy; DHS suspended all new enrollments in MPP the same day he took office.⁹⁹ By February, an official plan had been announced to wind down MPP once and for all.¹⁰⁰ This positive momentum did not last long though, and many immigration promises have not been realized by the Biden Administration.

Starting with the first policy move by DHS, many of the immigration reforms the Biden Administration has taken are not as helpful for immigrants as they appear on the surface. While DHS suspended new enrollment in MPP on President Biden’s first day in office, it did nothing to change the status of the thousands of asylum seekers who had already been removed to Mexico.¹⁰¹ Similarly, while the failed attempt to terminate MPP was an

⁹⁶ 8 U.S.C. § 240 (2011).

⁹⁷ *Innovation Law Lab v. Nielsen*, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 16.

⁹⁸ *The Biden Plan for Securing Our Values as a Nation of Immigrants*, JOE BIDEN FOR PRESIDENT: OFFICIAL CAMPAIGN WEBSITE (no date), <https://joebiden.com/immigration/>.

⁹⁹ The “Migrant Protection Protocols,” *supra* note 75, at 6.

¹⁰⁰ Julian Reséndiz, *DHS Unveils Website Where Asylum-Seekers Waiting in Mexico Can Check Eligibility to Enter U.S.*, BORDERREPORT, (Feb. 18, 2021), <https://www.borderreport.com/hot-topics/immigration/breaking-us-to-begin-processing-registered-asylum-seekers-on-feb-26-in-el-paso/>; The “Migrant Protection Protocols,” *supra* note 75, at 6.

¹⁰¹ DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program, *supra* note 45.

essential step forward in protecting the rights of asylum seekers, another Trump-era policy has remained in effect that utilizes the COVID-19 pandemic to stop immigrants from crossing into the United States.¹⁰²

The Biden Administration inherited MPP with approximately 25,000 immigrants enrolled and waiting for their court dates in Mexico.¹⁰³ DHS collaborated with numerous international programs in an effort to begin to process the backlog of asylum seekers.¹⁰⁴ DHS created a website for asylum seekers stranded in Mexico and instructed MPP enrollees to register virtually.¹⁰⁵ Registration determined immigrants' eligibility to be processed into the United States to await future court dates.¹⁰⁶ Despite the lack of resources like electricity and internet, three days after the announcement of the program nearly half of the 25,000 immigrants stranded in Mexico had enrolled.¹⁰⁷

The official estimate of 25,000 active MPP enrollees left in Mexico does not account for tens of thousands more whose cases were dismissed "in absentia," or dismissed without the immigrant present in court.¹⁰⁸ It is estimated that 28,000 of the 71,000 total

¹⁰² American Immigration Council, *A Guide to Title 42 Expulsions at the Border* (Oct 15, 2021), <https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border>.

¹⁰³ DHS Announces Process to Address Individuals in Mexico with Active MPP Cases, *supra* note 53.

¹⁰⁴ Reséndiz, *supra* note 100; Alberto Cabezas, *UN Agencies Begin Processing at Matamoros*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Feb. 24, 2021), <https://www.unhcr.org/news/press/2021/2/6035b7db4/un-agencies-begin-processing-matamoros.html>.

¹⁰⁵ DHS Announces Process to Address Individuals in Mexico with Active MPP Cases, *supra* note 53.

¹⁰⁶ Reséndiz, *supra* note 100.

¹⁰⁷ Cabezas, *supra* note 104.

¹⁰⁸ Kevin Sieff, *Asylum Seekers Missed Court Dates, Removed from MPP Remain in Mexico Program*, THE WASHINGTON POST (Apr. 24, 2021), <https://www.washingtonpost.com/world/2021/04/24/mexico-border-migrant-asylum-mpp/>.

MPP cases were dismissed *in absentia*.¹⁰⁹ Immigration courts make no differentiation on *why* an immigrant was not present at their court date, the case is simply dismissed.¹¹⁰ Further, cases that are being processed under 1229 (b), or MPP cases, do NOT have easy access to appeal the decision.¹¹¹

Asylum seekers missed their cases for several reasons completely out of their control such as being given paperwork with the incorrect date, being refused transport to the correct court, or being kidnapped while waiting in Mexico.¹¹² Finally, on June 23, 2021, the Biden Administration addressed these *in absentia* cases. DHS announced that asylum seekers whose cases had been dismissed *in absentia* could join those with pending MPP cases and register online to restart their asylum application.¹¹³

The Biden Administration has continued to respond to legal action against MPP by fighting a series of lawsuits. In April 2021, the state of Texas and the state of Missouri filed a suit against President Biden and DHS looking to reinstate MPP and requesting injunctive relief to enjoin defendants from acting on the *Memorandum of Termination of MPP*.¹¹⁴ Texas and Missouri allege that the termination of MPP was unlawful and had resulted in a “migrant surge” that “inflicted serious costs” on both states.¹¹⁵ On August 24, 2021, SCOTUS denied an appeal by the Biden

¹⁰⁹ Sieff, *supra* note 108.

¹¹⁰ *Id.*

¹¹¹ 8 U.S.C. § 1229.

¹¹² human rights first, *Fully End the Migrant Protection Protocols: Ensure Safety for All Subjected to Horrific Policy*, (Apr 2021) at 1-5, <https://www.humanrightsfirst.org/sites/default/files/FactsheetFullyEndMPP.pdf>.

¹¹³ DHS Announces Process to Address Individuals in Mexico with Active MPP Cases, *supra* note 53.

¹¹⁴ Texas and Missouri v. Biden et al., No. 2:21-CV-00067-Z, (N.D. Tex., filed on April 13, 2021) at 390.

¹¹⁵ Texas and Missouri v. Biden et al., No. 2:21-CV-00067-Z, (N.D. Tex., filed on April 13, 2021).

Administration to overturn the Fifth Circuit’s injunction to enjoin DHS in reimplementing MPP.¹¹⁶

Pursuant to the August 2021 SCOTUS decision, the Biden Administration has been required to file monthly updates to the Court to show they are compliant in the “good faith” attempt by DHS to reinstate MPP.¹¹⁷ DHS reported that in September 2021 they expelled a total of 98,476 noncitizens, 3,859 of which were expelled under 8 U.S.C. § 1225.¹¹⁸

Meanwhile, the United States and Mexico have not reached an agreement about fully reimplementing MPP. Without the approval of Mexican authorities, the United States is barred from sending third-party nationals seeking asylum in the United States to a different country.¹¹⁹ Mexico has been hesitant to allow reimplementation of MPP without further support from the United States, citing concerns that doing so will violate Convention Against Torture & Other Cruel, Inhuman, or Degrading Treatment of Punishment.

A. Title 42

The impact of MPP has been devastating to immigrants seeking entry into the United States. Unfortunately, it has not been the only legal barrier faced by immigrants who plan to seek asylum in the United States. The COVID-19 pandemic has triggered the use of little-known law known as Title 42 by both the Trump and Biden administrations. Title 42, officially § 265 of 42 U.S.C. Title

¹¹⁶ Order in Pending Case, *Biden, et al., v. Texas et al.*, (Aug 24, 2021). https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf.

¹¹⁷ *Texas and Missouri v. Biden et al.*, No. 2:21-CV-00067-Z, (N.D. Tex., filed on April 13, 2021); *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 U.S. Dist. LEXIS 152438 (N.D. Tex. Aug. 13, 2021) at 1.

¹¹⁸ *Texas and Missouri v. Biden et al.*, No. 2:21-CV-00067-Z, Defendant’s Monthly Report Pursuant to Court’s Injunction, (Sep. 15, 2021).

¹¹⁹ Camilo Montoya-Galvez, *Biden Must Revive Trump-Era Remain-in-Mexico Program after Supreme Court Ruling*, CBS NEWS (Aug. 25, 2021), <https://www.cbsnews.com/news/supreme-court-remain-in-mexico-ruling-biden-trump/>.

42 – The Public Health and Welfare, gives the Executive office the ability to stop individuals from entering the United States if there is a serious risk of them infecting others with a communicable disease.¹²⁰

At the start of the COVID-19 pandemic (hereafter the pandemic or COVID-19) the Center for Disease Control and the Department of Health and Human Services issued emergency regulations limiting “individuals who had been in Coronavirus Impacted Areas.”¹²¹ The orders did not apply to “U.S. Citizens, lawful permanent residents, and their spouses and children, nor to...U.S. Military personnel or those who arrive at a port of entry with valid travel documents.”¹²² DHS officers also had discretionary authority to allow exemptions for anyone not already covered.¹²³

If the discriminatory categorization of individuals is not clear enough, DHS admitted in a memo released in October of 2020 that the order was “being used to turn away refugees and asylum seekers.”¹²⁴ Unlike MPP, CBP seems to have no exceptions to who can be turned away.¹²⁵ Since the Title 42 program has been put into place, more than 1.13 million immigrants have been expelled from the country. This is approximately 60.5% of those apprehended at the border being removed from the United States under Title 42 alone with no formal removal process at all.

¹²⁰ A Guide to Title 42, *supra* note 102, at 1.

¹²¹ *Id.* at 2,3.

¹²² *Id.* at 3; *Notice of Order Under § 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists*, FEDERAL REGISTER 17060, <https://www.federalregister.gov/documents/2020/03/26/2020-06327/notice-of-order-under-sections-362-and-365-of-the-public-health-service-act-suspending-introduction>.

¹²³ A Guide to Title 42, *supra* note 102, at 2; The Public Health and Welfare, 42 U.S.C. § 1 & 2.

¹²⁴ A Guide to Title 42, *supra* note 102, at 2.

¹²⁵ *Id.* at 3.

By April of 2021, the Biden Administration had removed more immigrants under Title 42 than the Trump Administration did in 2020.¹²⁶ The onset of the pandemic resulted in a virtual halt of MPP as the current interpretation of Title 42's public health provision allowed the deportation of immigrants to become even more widespread. In 2020 the Trump Administration deported an estimated 185,884 migrants, the majority of which would have been deported during the COVID-19 pandemic, and thus under Title 42.¹²⁷ Biden deported 300,000 immigrants within his first 100 days in office under Title 42, and close to 1.3 million by his tenth month.¹²⁸

There is no longer support from the Center for Disease Control or Department of Health and Human Services of Title 42, and both groups have said that expelling immigrants to refugee camps is more likely to spread COVID-19 than allowing immigrants to seek asylum in the United States.¹²⁹ The Biden Administration has claimed they are using Title 42 as a measure to

¹²⁶ *Id.* at 4.

¹²⁷ Nowrasteh, Alex, *President Trump Reduced Legal Immigration. He Did Not Reduce Illegal Immigration*, CATO AT LIBERTY (Jan. 20, 2021), <https://www.cato.org/blog/president-trump-reduced-legal-immigration-he-did-not-reduce-illegal-immigration>; Syracuse University, *TRAC Immigration Data*, Transaction Records Access Clearinghouse (November 2021) <https://trac.syr.edu/immigration/>.

¹²⁸ Johnson, Jake, *With 300,000 deported in First 100 Days, Rights Group Warns Biden 'Well on Track to Repeat' Obama Failures*, COMMON DREAMS (Apr. 27, 2021), <https://www.commondreams.org/news/2021/04/27/300000-deported-first-100-days-rights-group-warns-biden-well-track-repeat-obama>; *Number of confirmed deportations and expulsions under Biden*, UNITED WE DREAM (Oct. 18, 2021), <https://unitedwedream.org/protect-immigrants-now/biden-stop-deportations-now/?source=social.tw>; *TRAC Immigration Data*, *supra* note 127.

¹²⁹ Johnson, *supra* note 128 at 7; Human Rights First, *Human Rights Travesty: Biden Administration Embrace of Trump Asylum Expulsion Policy Endangers Lives, Wreaks Havoc*, (Aug. 2021) at 1, https://www.humanrightsfirst.org/sites/default/files/HumanRightsTravesty_FIN_AL.pdf.

deter immigrants from crossing into the United States, but the data shows it is having the opposite effect; “before the pandemic began, just 7% of people arrested at the border had crossed the border more than once, but by October 2020, 40% of all people arrested had crossed the border multiple times that year.”¹³⁰

The Biden Administration did attempt to end the harmful MPP but has only “embraced and escalated the Trump Administration’s Title 42 policy.”¹³¹ Title 42 is effectively mirroring MPP in its ability to systematically turn asylum seekers away at the border with no consequence to CBP, DHS, or any other agency in the United States. In October of 2021 there had been “7,647 reports of kidnappings and other attacks on people blocked or expelled under Title 42,” a number that exceeds the 1,500 accounts of violence activists have attributed to immigrants returned to Mexico under MPP.¹³² DHS’s attempt of repackaging MPP under the guise of Title 42 has not gone unnoticed.

B. Lack of Legal Representation

Aside from the obvious horrors of MPP, there are other more insidious ways it has impeded asylum seekers’ ability to present their case for asylum to DHS officials. One of the most devastating is the abysmal number of immigrants who were not represented when they appeared in immigration court – in December of 2020, 97% of immigrants did not have an attorney when they were in front of DHS officials for their deportation

¹³⁰ *A Guide to Title 42*, supra note 102, at 7.

¹³¹ Human Rights Travesty, supra note 129, at 2.

¹³² *Id.* at 6, 8; human rights first, “*Illegal and Inhumane*”: *Biden Administration Continues Embrace of Trump Title 42 Policy as Attacks on People Seeking Refuge Mount*, (Oct. 2021),

<https://www.humanrightsfirst.org/sites/default/files/IllegalandInhumane.pdf>;

human rights first, *Reported Attacks During the Biden Administration Against Asylum Seekers and Migrants Who Are Stranded in and/or Expelled to Mexico*, (Oct. 2021),

<https://www.humanrightsfirst.org/sites/default/files/AttacksonAsylumSeekersStrandedinMexicoDuringBidenAdministration.10.21.2021.pdf>.

hearings.¹³³ In comparison, 91% of asylum seekers had legal representation in 2018, the year before MPP was implemented.¹³⁴

MPP is directly to blame for the dramatic reversal in representation. The majority of legal representation for asylum seekers is provided *pro bono*.¹³⁵ When immigrants are returned to Mexico to await their hearing, they do not have the chance to meet with an attorney beforehand. If immigrants had managed to obtain an attorney on their own while in Mexico, they were supposedly given one hour to consult with the attorney before an immigration official heard their case, which is not nearly enough time for an attorney to put together a case for the immigration official who is hearing it.¹³⁶ Additionally, immigrants are only permitted to meet with attorneys before the hearing if the attorney has previously filed a notice of representation with the court.¹³⁷ DHS has gone so far as to prevent attorneys from communicating with MPP immigrants by deploying armed guards to prevent contact.¹³⁸

Another factor preventing attorneys from meeting with immigrants that are in Mexico is the fact that non-profit organizations that pay the *pro bono* attorneys are grant-funded, and the grants specify that the attorneys can only work with clients that are in the state that has given the non-profit the grant.¹³⁹ The grant funding does not allow for attorneys to work outside of the state or

¹³³ Brief for Biden et al., as Amici Curiae Supporting Respondents, David Pecoske, et al., v. Innovation Law Lab, et al., No. 19-1212 (U.S. 2021) at 58, 20; *TRAC Immigration Data*, *supra* note 127.

¹³⁴ Pecoske, *supra* note 133, at 19; *TRAC Immigration Data*, *supra* note 127.

¹³⁵ Pecoske, *supra* note 133, at 14, 15.

¹³⁶ Nathalie R. Asher, *U.S Customs and Immigration Enforcement, Migrant Protection Protocols Guidance*, DEPARTMENT OF HOMELAND SECURITY (February 12, 2019) at 3, <https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf>; Pecoske, *supra* note 133, at 17.

¹³⁷ Pecoske, *supra* note 133, at 15.

¹³⁸ *Id.*

¹³⁹ *Innovation Law Lab v. Nielsen*, No. 3:19-CV-00807 (N.D. Cal. filed Feb 14, 2019), at 25-30.

county specified in each grant. If attorneys were to try to work remotely – the attorney being physically present in a specified state while the immigrant is in Mexico – it provides a barrier because the technology can prevent effective communication. Many immigrants do not have access to a reliable cell phone service, let alone computers, video technology, or the internet in general.¹⁴⁰ Many shelters that are housing immigrants ban the use of cell phones as a security measure against gang violence present in the towns where immigrants are waiting for their court dates.¹⁴¹

IV. Consequences; Decreased asylum rates, violence, desperation

The number of barriers being placed in front of immigrants has led to a dramatic drop in the number of asylum cases being granted. As discussed previously, this drop starts with the number of immigrants being referred to an asylum official decreasing with the takeover of CBP in the questioning of asylum seekers under MPP. In 2020, of the 42,012 MPP cases that were complete, only 521 were granted relief.¹⁴² In August of 2021, less than 2% of all MPP applicants were granted some form of protection in the United States.¹⁴³ Previous to the implementation of MPP, around 28% of asylum applications were accepted - 14 times higher than the current acceptance rate under MPP.¹⁴⁴

The asylum application process has never been quick, typically lasting six months or more, but MPP has extended the timeframe by several months.¹⁴⁵ While the original goal of MPP was to expedite the removal process, MPP has had the opposite effect: immigration courts are currently facing a 1.3 million case backlog.¹⁴⁶ Some immigrants have been waiting in Mexico since

¹⁴⁰ Pecoske, *supra* note 133, at 16.

¹⁴¹ *Id.*

¹⁴² The “Migrant Protection Protocols,” *supra* note 75, at 1.

¹⁴³ Proudfoot, *supra* note 21; *TRAC Immigration Data*, *supra* note 127.

¹⁴⁴ Fact Sheet: U.S. Asylum Process, *supra* note 21.

¹⁴⁵ *Id.*

¹⁴⁶ Carranza, *supra* note 48.

the beginning of the program, early 2018, with no end in sight.¹⁴⁷ The American Immigration Council predicts there is a “possibility that those with pending cases might have to wait 2-3 years in Mexico before a hearing.”¹⁴⁸ Thousands of immigrants are stuck in limbo as they wait for further instructions from the Biden Administration on what they can do to get their case in front of a court.

The constant return of immigrants to Mexico has created a desperate situation at the refugee camps that have sprung up near the POEs where immigrants are being returned. Several of the POEs immigrants are being returned to are some of the most dangerous cities in Mexico, cities that have been given a level 4 threat evaluation¹⁴⁹ by the U.S. State Department.¹⁵⁰ This is the same threat level as countries like Afghanistan, Iraq, and Syria.¹⁵¹ The danger is not lost on the State Department, nor is it misunderstood by DHS. Asylum officers are aware they are

¹⁴⁷ *Id.*; Letter from Al Otro Lado and 107 additional organizations, *supra* note 66.

¹⁴⁸ The “Migrant Protection Protocols,” *supra* note 75, at 5.

¹⁴⁹ The United States State Department assigns each country a risk level between 1 & 4, 1 being the safest and 4 being the most dangerous places for Americans to be with a blanket advisory from the State Department to avoid travel to these areas. The State Department looks at risk indicators such as health, crime, terrorism, kidnapping or hostage taking, civil unrest, and natural disasters. Via the State Department Website, “Traveling to high-risk areas puts you at increased risk for kidnapping, hostage-taking, theft, and serious injury.” (*High-Risk Area Travelers*, U.S. DEPARTMENT OF STATE (Nov. 6, 2019), <https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/high-risk-travelers.html>; *Travel Advisory Update: Frequently Asked Questions*, U.S. DEPARTMENT OF STATE (Apr. 19, 2021), <https://travel.state.gov/content/dam/NEWTravelAssets/pdfs/Travel%20Advisory%20Update%20-%20%20Frequently%20Asked%20Questions.pdf>.)

¹⁵⁰ human rights first, *Delivered to Danger - 1500 Harmed after MPP Return* (Feb 19, 2021), <https://www.humanrightsfirst.org/campaign/remain-mexico>.

¹⁵¹ *Id.*

“literally sending people back to be raped and killed” under MPP removals.¹⁵²

Over 9,000 acts of violence against those removed to Mexico under MPP have been reported, but Human Rights First believes this number is a “minimal figure.”¹⁵³ Human Rights First estimated that 83% of asylum seekers who returned to Mexico “suffered attacks or threats” in July 2021.¹⁵⁴ This figure increases for those with marginalized identities such as members of the LGBTQ community. An estimated 89% of asylum seekers who identify as LGBTQ report physical assaults or threats of assault while in Mexico.¹⁵⁵

Asylum seekers are directed to arrive at the designated POE by 4:30 AM the day of their hearing, and many others travel to POEs the night before in an attempt to enter the United States.¹⁵⁶ Gang members have quickly learned that immigrants on their way to POEs are at their most vulnerable. Hundreds of asylum seekers have been kidnapped and held for ransom while traveling to the POEs.¹⁵⁷ For many the trek to the border is the only time they leave where they are staying – immigrants are terrified of the violence

¹⁵² *Id.*

¹⁵³ “Illegal and Inhumane,” *supra* note 132; Human Rights Travesty, *supra* note 129; Albinson Linares, “*We Live in Fear*”: *Over 6,000 Migrants in Mexico Have Been Violently Attacked*, Noticias Telemundo & NBC NEWS (Aug 26, 2021), <https://www.nbcnews.com/news/latino/-live-fear-6000-migrants-mexico-violently-attacked-rcna1783>.

¹⁵⁴ Linares, *supra* note 153.

¹⁵⁵ *Id.*

¹⁵⁶ “Illegal and Inhumane,” *supra* note 132; Sieff, *supra* note 108; human rights first, *Human Rights First Tracker of Reported Attacks During the Biden Administration Against Asylum Seekers and Migrants Who Are Stranded in and/or Expelled to Mexico* (Oct. 21, 2021), <https://www.humanrightsfirst.org/sites/default/files/AttacksonAsylumSeekersStrandedinMexicoDuringBidenAdministration.10.21.2021.pdf>.

¹⁵⁷ Attacks on Asylum Seekers, *supra* note 156; Sieff, *supra* note 108.

they might encounter outside of shelters, cramped apartments, or even the confines of their tents.¹⁵⁸

The desperation is clear for many MPP participants who have been expelled to Mexico. Shelter space is so sparse that immigrants who leave to attend their immigration court dates lose their spot to another while they are gone.¹⁵⁹ With no ability to apply for employment while in Mexico due to their legal status, the majority of immigrants do not have a source of income.¹⁶⁰

Faced with unbearable and inhumane living situations many immigrants have turned to other, more dangerous ways to enter the United States. In September 2021, 30 known immigrant deaths resulted from an attempt to cross the border via the Yuma Desert in Arizona.¹⁶¹ At least one of the immigrants who died had returned to the border after having previously been expelled by DHS under MPP policies.¹⁶² MPP restrictions at ports of entry are also “driving an increase in dangerous attempts to reach the United States by sea,” causing additional serious injuries and death.¹⁶³

Attempts to re-enter the United States have risen due to MPP. Since its implementation, DHS reports that “more than one-quarter of individuals enrolled in MPP were subsequently re-encountered attempting to enter the United States” a second time.¹⁶⁴ Immigrants feel they have no other choice but to attempt the dangerous journey alone, or to put their trust into often violent

¹⁵⁸ Attacks on Asylum Seekers, *supra* note 156; Long & Sawyer, *supra* note 44; Human Rights Travesty, *supra* note 129.

¹⁵⁹ Sieff, *supra* note 108.

¹⁶⁰ Carranza, *supra* note 48.

¹⁶¹ “Illegal and Inhumane,” *supra* note 132, at 22.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ The “Migrant Protection Protocols,” *supra* note 75, at 6; Alexander N. Mayorkas, *Termination of Migrant Protection Protocols*, DEPARTMENT OF HOMELAND SECURITY (Oct. 29, 2021) at 4, https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf.

and ruthless smugglers to get themselves and their families to a safe place.¹⁶⁵

When all is said and done, more than 71,000 immigrants have been returned to Mexico under MPP, and over a million under Title 42, with no end in sight for many asylum seekers caught in limbo.¹⁶⁶ There have been more than 9,000 *reported* cases of kidnappings and other violent assaults of asylum seekers who were expelled to Mexico.¹⁶⁷ Returning asylum seekers to Mexico decreases their access to legal advice, healthcare, and basic physical safety all while increasing the time spent in removal proceedings. While the Trump and Biden Administrations might have approached the growing number of immigrants seeking asylum at the border differently, the results have been the same – an ever-increasingly desperate situation for families that fled their homes looking for a better life.

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| CBP | <i>US Customs and Border Protection</i> |
| DHS | Department of Homeland Security |
| ERO | Enforcement and Removal Operations |
| IIRIRA | Illegal Immigration Reform and Immigrant Responsibility Act of 1996 |
| ICE | US Immigration and Customs Enforcement |
| INA | Immigration and Nationality Act |
| MPP | Immigrant Protection Protocols |

¹⁶⁵ “Illegal and Inhumane,” *supra* note 132, at 23.

¹⁶⁶ Carranza, *supra* note 48; Dan Friedman, Hias, *Title 42: Over a Million Expulsions and No End in Sight* (Sep 23, 2021).

<https://www.hias.org/blog/title-42-over-million-expulsions-and-no-end-sight>.

¹⁶⁷ *Delivered to Danger*, *supra* note 149; Attacks on Asylum Seekers, *supra* note 156.

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|--------|---|
| POE | Port(s) of Entry |
| SCOTUS | Supreme Court of the United States |
| US/CIS | US citizenship and immigration services |

Glossary