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**United States Court of Appeals**  
*for the*  
**Fifth Circuit**

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Case No. 21-10806

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.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO

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**BRIEF FOR *AMICI CURIAE* YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS, KIDS IN NEED OF DEFENSE, SAVE THE CHILDREN FEDERATION, INC. AND SAVE THE CHILDREN ACTION NETWORK, ANGRY TIAS AND ABUELAS OF THE RIO GRANDE VALLEY, CENTER FOR THE HUMAN RIGHTS OF CHILDREN AT LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW, FIRST FOCUS ON CHILDREN AND CHILDREN'S DEFENSE FUND IN SUPPORT OF APPELLANT AND REVERSAL**

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The undersigned counsel of record certifies that—in addition to the persons and entities listed in the appellees’ Certificate of Interested Persons—the following listed 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.

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## **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* provide legal and social services to immigrant children and their families who are and have been subjected to the so-called Migrant Protection Protocols (“MPP”). Therefore, *amici* are well-suited to assist the Court in understanding the policy’s impact on asylum-seeking children<sup>2</sup> through their personal stories. *Amici* have directly interacted with the children whose stories are highlighted in this brief.

## **SUMMARY OF ARGUMENT**

MPP specifically harmed children whom Congress directed the Executive Branch to protect. MPP forced nearly all asylum-seekers to remain and await their immigration hearings in Mexico, where they faced danger, persecution, threats, or harm. MPP uniquely affected children by failing to consider their best interests or provide necessary procedural safeguards to ensure their safety and due process during the pendency of their immigration proceedings. The consequences were devastating. Secretary Mayorkas’s determination to discontinue the program, based partially on concerns “whether conditions faced by some MPP enrollees in Mexico,

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have provided written consent for the filing of this brief.

<sup>2</sup> *Amici* use “asylum-seekers” and “asylum-seeking children” to refer to immigrant children seeking safety through various forms of humanitarian relief, including but not limited to asylum, under U.S. law.

including the lack of stable access to housing, income, *and safety*, resulted in the abandonment of potentially meritorious protection claims” (emphasis added),<sup>3</sup> is well-founded, particularly with regard to children in MPP.<sup>4</sup> In mandating the government to continue to inflict these harms, the District Court neglected the administrative record and overstepped the appropriate bounds of equitable relief.

Until MPP, the U.S. had for decades implemented basic procedural safeguards to avoid returning asylum-seekers to danger while their protection claims were pending. Children and their families apprehended seeking protection in the U.S. were generally processed for expedited removal and given credible-fear interviews with asylum officers. After receiving a positive credible-fear determination, they were placed in full removal proceedings and either put in family detention or paroled into the U.S. while resolving their immigration cases. In many cases, *pro bono* legal service providers offered those in family detention basic information about the

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<sup>3</sup> Memorandum from Alejandro Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec., to Troy Miller, Acting Comm’r, U.S. Customs and Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. and Customs Enf’t, and Tracy Renaud, Acting Dir., U.S. Citizenship and Immigr. Servs. 4 (June 1, 2021)

[https://www.dhs.gov/sites/default/files/publications/21\\_0601\\_termination\\_of\\_mpp\\_program.pdf](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf) (“Mayorkas Memo”).

<sup>4</sup> The program itself, however, was implemented without any administrative record to speak of and without analysis of the hardships children in MPP and their families could face. As the stories in this brief show, it was in enacting MPP, rather than in its decision to end the program, that the government failed to consider critical, child-specific factors.

immigration process. These lawyers often recognized when a child had an independent claim for immigration relief, including a distinct asylum claim.

MPP turned the system upside down: It effectively prevented immigration officers from hearing the credible fears of asylum-seeking children and their families before sending these asylum-seekers—who already fled danger in their countries-of-origin—to dangerous conditions in Mexico to await their immigration proceedings without meaningful access to counsel. Under MPP, asylum-seekers had to affirmatively assert their fears of persecution in Mexico. But asylum-seeking children and their families were often unaware they could volunteer such concerns, and the few who were referred for a *non-refoulement* assessment were not provided access to counsel or a chance to appeal a negative determination.

Worse yet, back in Mexico, many children and their families lived in dangerous, unsanitary, inhumane encampments along the border. They frequently lacked access to running water, electricity, food, and basic medical care. Children and their families witnessed, feared, and often fell victim to brutal violence, kidnapping, and cartel warfare. As Secretary Mayorkas recognized, these threats precluded many families from even attending their MPP hearings, undermining the program's entire rationale.

Even of those who could attend their MPP hearings, the vast majority lacked counsel—and the “tent courts” along the border were not safe or confidential spaces

to disclose harm. No one informed children about their right to file an asylum application separately from their parent or guardian based on their unique claims. The hearing procedures also failed to account for the unique needs and vulnerabilities that children, especially traumatized ones, face navigating complex legal proceedings.

MPP further compounded the physical and psychological trauma that many children already experienced in their countries-of-origin. This trauma has long-term consequences on their brain development, health, educational outcomes, and psychological well-being.

This brief provides these and other vivid illustrations of MPP's harmful impact on children:

- 16-year-old Ana fled her sexually abusive father and threats to her life after she reported him to the police in Honduras.<sup>5</sup> Because of MPP, she was expected to volunteer her story in a tent court, where she had no privacy and no attorney to advise her.
- Five-year-old Juan fled violence in Honduras with his mother, a human-trafficking survivor. While subjected to MPP, Juan became severely ill and narrowly escaped an attempted kidnapping that left his face scarred.

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<sup>5</sup> *Amici* use pseudonyms for the minor children in this brief.

- Erick, a teenager, fled Honduras after years-long abuse and sexual-orientation discrimination. He attended multiple MPP hearings but was afraid to discuss his sexuality in open tent hearings and in front of his mother.
- Alejandra and Rosa, ages 9 and 11, were unable to present their own distinct asylum claims during MPP proceedings with their abusive father. In three hearings, the girls were only allowed to say their names and ages.

It is unreasonable to expect children to seek asylum, much less meet the evidentiary burdens needed to win asylum, while subjected to these conditions. The Government acted appropriately in discontinuing a program that inflicted such harms. The Court should reverse.

## **ARGUMENT**

### **I. ASYLUM-SEEKING CHILDREN CANNOT BE HEARD WITHOUT PROCEDURAL SAFEGUARDS AND CHILD-SENSITIVE CONSIDERATIONS**

The U.S. has long committed to protecting asylum-seeking children. Federal legislation prohibits sending asylum-seekers to a country where they would likely face persecution based on protected grounds, torture, or other specified harms—the

principle of *non-refoulement*.<sup>6</sup> As a signatory to the United Nations Convention on the Rights of the Child, the U.S. agreed to be part of a global effort to advance the “best interests” of children, and to afford children appropriate protections from child-specific forms of persecution and other harms.<sup>7</sup>

To meet these obligations, asylum laws, policies, and procedures must consider each child’s safety, wishes, right to family integrity, liberty, developmental needs, and identity.<sup>8</sup> Where a child faces serious risks elsewhere, asylum is often the best guarantee of the child’s safety and well-being.<sup>9</sup>

Congress has recognized that children’s unique needs and vulnerabilities warrant heightened procedural protections to ensure that they have a fair opportunity to be heard on their protection claims.<sup>10</sup> Children are developmentally distinct from

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<sup>6</sup> See 8 U.S.C. § 1231(b)(3). In addition, the *non-refoulement* obligation is set forth in treaties ratified by the U.S. See, e.g., U.N. Protocol Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223 (U.S. Treaty), 606 U.N.T.S. 267; Convention against Torture art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987; ratified by United States Oct. 21, 1994).

<sup>7</sup> See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; see also U.N. Comm. on the Rts. of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 74, CRC/GC/2005/6 (Sept. 1, 2005).

<sup>8</sup> See Subcomm. on Best Interests, Interagency Working Grp. on Unaccompanied and Separated Children, *Framework for Considering the Best Interests of Unaccompanied Children* 4-5 (2016), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf>; see also *Texas v. Biden*, No. 21-cv-00067 (N.D. Tex. June 22, 2021), ECF No. 61, Administrative Record (“AR”) at 196.

<sup>9</sup> See U.N. High Comm’r for Refugees, *UNHCR Guidelines on Determining the Best Interest of the Child* 102 (Nov. 2018), <https://www.refworld.org/docid/5c18d7254.html>.

<sup>10</sup> See Trafficking Victims Protection Reauthorization Act (“TVPRA”), 8 U.S.C. § 1232 (2008).

adults because children's brains, including their perception, memory, recall, and other capacities, continue to develop well into their twenties.<sup>11</sup>

Beyond that, cultural and linguistic differences may further hinder communication and comprehension as a child is interviewed.<sup>12</sup> And a child's ability to establish eligibility for asylum and other relief often depends on individual and institutional actors beyond children's control. Because children are neither financially nor emotionally self-sufficient, they depend on adults to facilitate their participation in a legal system designed for adults.<sup>13</sup> Children must depend on parental support and scarce resources for legal, medical, and educational services.

A child's trauma history may exacerbate their difficulties in immigration proceedings. Many asylum-seeking children have suffered trafficking, abuse, or other violence. Child migration from Central America has been conclusively connected to gang violence, the erosion of human rights, violence in the home, and other grave danger and serious harm in their countries-of-origin.<sup>14</sup> Children who

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<sup>11</sup> Sara Johnson et al., *Adolescent Maturity and the Brain*, in 45 J. Adolesc. Health 216 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/>.

<sup>12</sup> Chris Newlin et al., *Child Forensic Interviewing: Best Practices*, Juvenile Justice Bulletin (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, Washington, D.C.), Sept. 2015, at 3-4, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf> ("Child Forensic Interviewing").

<sup>13</sup> See *E.A.C.A. v. Rosen*, 9856 F.3d 499, 506 (6th Cir. 2021).

<sup>14</sup> U.N. High Comm'r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 9-11 (Mar. 13, 2014), <https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html>.

have experienced trauma may have piecemeal or nonlinear memories of the harm they suffered, complicating the process of developing and corroborating their claims.<sup>15</sup> It may be difficult for such children to discuss private and painful experiences in a formal adversarial proceeding without privacy or child-sensitive interviewing procedures, as is the case in MPP.<sup>16</sup> For many, the asylum process is the first time they discuss their experiences.

Children need an environment and process cognizant of their age, development, and trauma history.<sup>17</sup> Courts have long recognized that children require unique treatment to ensure their meaningful participation in immigration proceedings.<sup>18</sup> U.S. Citizenship and Immigration Services (“USCIS”) trains asylum officers that “children’s needs are different from adults due to their developmental needs, their dependence, including in legal matters, and their vulnerability to harm” and provides *child-specific interviewing procedures*.<sup>19</sup>

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<sup>15</sup> *Child Forensic Interviewing* at 5.

<sup>16</sup> See Jodi Quas & Thomas Lyon, *Questioning Unaccompanied Immigrant Children*, Society for Research in Child Development (Oct. 2019), <https://www.srcd.org/research/questioning-unaccompanied-immigrant-children-lessons-developmental-science-forensic> (“*Questioning Unaccompanied Immigrant Children*”).

<sup>17</sup> AR240-41, 261.

<sup>18</sup> See, e.g., *Mejilla-Romero v. Holder*, 614 F.3d 572, 573 (1st Cir. 2010); A-D-, AXXX XXX 526 (BIA May 22, 2017) (unpublished).

<sup>19</sup> U.S. Citizenship & Immigr. Servs., U.S. Dep’t of Homeland Sec., *RAIO Combined Training Program: Children’s Claims* § 2.4.2 (2019), [https://www.uscis.gov/sites/default/files/document/foia/Childrens\\_Claims\\_LP\\_RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Childrens_Claims_LP_RAIO.pdf).

## II. MPP DENIED CHILDREN DUE PROCESS

MPP is a dangerous departure from the long-standing legal recognition of asylum-seeking children’s vulnerabilities and needs. As the Mayorkas Memo recognized, “the design and operation of the program” raised substantial questions about “whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief.”<sup>20</sup> In particular, “the conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety,” contributed to DHS’s decision to end the program, based on compelling evidence in the administrative record.<sup>21</sup> Nowhere were those deficiencies more acute than in MPP’s indifference to children’s unique needs, which denied them the opportunity to meaningfully seek asylum.

### A. MPP Denied Children Their Right to Be Heard on Their Fears of Returning to Danger in Mexico

MPP prevented children from expressing their fear of harm in Mexico, resulting in them being sent to danger and persecution there. At MPP’s initial “screening” stage, CBP fast-tracked asylum-seekers into MPP unless they affirmatively volunteered their fears of returning to Mexico. If they did, Department of Homeland Security (“DHS”) policy required that CBP refer the asylum-seeker for a *non-refoulement* assessment to determine whether it was likely that they would

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<sup>20</sup> Mayorkas Memo at 4.

<sup>21</sup> *Id.*; see also AR209, 222-229.

face persecution or torture in Mexico. If the asylum-seeker received a negative determination, they were placed in MPP.<sup>22</sup> These procedures were inadequate to ensure that children had an opportunity to be heard on their fears of returning to Mexico.

**i. Children in MPP Faced Dangerous and Inhumane Conditions in Mexico**

More than 16,000 children, including nearly 500 infants, were sent back to dangerous, inhumane, and unsanitary conditions in Mexico under MPP.<sup>23</sup> Many children in MPP lived in makeshift tent encampments, where the air smelled of feces and was thick with smoke from near-constant fires.<sup>24</sup> Children and families were crowded in these camps with no or limited access to running water, electricity, food, medical care, or other necessities. Humanitarian organizations on the ground provided food, medical care, and other services in the camps; nonetheless, some children went to bed hungry.<sup>25</sup> The “crowded, unsanitary and often dangerous

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<sup>22</sup> See U.S. Customs & Border Prot., MPP Guiding Principles (2019) at 1-2, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>.

<sup>23</sup> See Kristina Cooke et al., *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, Reuters, Oct. 11, 2019, <https://www.reuters.com/article/us-usa-immigration-babies-exclusive-idUSKBN1WQ1H1>.

<sup>24</sup> See Nomaan Merchant, *Tents, Stench, Smoke: Health Risks Are Gripping Migrant Camp*, Associated Press, Nov. 14, 2019, <https://apnews.com/article/337b139ed4fa4d208b93d491364e04da>.

<sup>25</sup> See, e.g., Human Rights Watch, “Like I’m Drowning”: Children and Families Sent to Harm by the US “Remain in Mexico” Program 70 (2021), [https://www.hrw.org/sites/default/files/media\\_2021/01/mexico0121\\_web.pdf](https://www.hrw.org/sites/default/files/media_2021/01/mexico0121_web.pdf)

conditions in tent encampments in Mexico are hazardous to child health and family wellbeing”<sup>26</sup>—as Secretary Mayorkas recognized as a basis for ending the program.<sup>27</sup>

While in Mexico, many children in MPP witnessed and fell victim to crime, violence, abuse, and family separation, as amply documented in the record.<sup>28</sup> Criminal groups often targeted asylum-seekers along the border because asylum-seekers, who had no protective community ties in Mexico, may have had networks of families and friends in the U.S. who could pay their ransoms.<sup>29</sup> In other instances, criminal groups and other opportunistic actors targeted asylum-seekers because of anti-immigrant sentiment.<sup>30</sup> Because they were often fleeing gangs in the Northern

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(“*Like I’m Drowning*”); Lucy Bassett, et al., *Living in a Tent Camp on the US/Mexico Border* 5-6, 13 (Univ. of Va. Batten Global Pol’y Ctr., Apr. 27, 2020), <https://gpc.batten.virginia.edu/our-work/publications/living-tent-camp-usmexico-border-experience-women-and-children-matamoros> (“*Living in a Tent Camp*”).

<sup>26</sup> Kelly Edyburn & Shantel Meek, *Seeking Safety and Humanity in the Harshest Immigration Climate in a Generation*, Social Policy Report, at 43 (2021).

<sup>27</sup> Mayorkas Memo at 4.

<sup>28</sup> AR374–421, AR422, AR457.

<sup>29</sup> See Stephanie Leutert, et al., *Migrant Protection Protocols: Implementation and Consequences for Asylum Seekers in Mexico* 32 (U. Tex. Austin Strauss Ctr. for Int’l Sec. & Law, No. 218, 2020), <https://repositories.lib.utexas.edu/handle/2152/81991> (“*Migrant Protection Protocols*”).

<sup>30</sup> See, e.g., *id.* at 33; *Like I’m Drowning* at 26.

Triangle of Guatemala, El Salvador, and Honduras, some children and their families were targeted by those same gangs in Mexico.<sup>31</sup>

These dangers pervaded children's daily lives while they awaited adjudication of their asylum claims. Their parents often did not send them to schools in the border cities,<sup>32</sup> and many were uncomfortable even taking their children to restrooms due to reports of sexual assault within the encampments.<sup>33</sup>

## **ii. The MPP Process Returned Children to Danger and Harm in Mexico**

Under MPP, asylum-seekers had to affirmatively assert their fears of persecution in Mexico.<sup>34</sup> Yet, children and their families often arrived at the border scared and unfamiliar with MPP and the complicated asylum system, unaware that they could (and should) volunteer such concerns. It is unreasonable to expect asylum-seekers, particularly children, to volunteer this painful information.

Even if asylum-seekers were able to receive a *non-refoulement* assessment, they were not given adequate time to prepare for their interviews, even though they

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<sup>31</sup> See U.S. Dep't of State, Mexico 2018 Human Rights Report at 19 (2018); see also *Like I'm Drowning* at 26.

<sup>32</sup> See *Living in a Tent Camp* at 23.

<sup>33</sup> See *id.* at 19-20, 25.

<sup>34</sup> *Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1089 (9th Cir. 2020), cert. granted, 141 S. Ct. 617 (2020), vacated as moot, 2021 WL 2520313 (June 21, 2021).

were required to meet a heavy burden.<sup>35</sup> Many times, they lacked language-appropriate information that explained the purpose of the interview.<sup>36</sup> Asylum-seekers were expected to participate in this process shortly after arriving at the border after often grueling, months-long journeys to get there.<sup>37</sup> Moreover, asylum-seekers could not appeal negative determinations.<sup>38</sup>

As a result of these inadequate procedures, and as the following stories show, MPP returned many children to extreme danger and violence in Mexico.

**a. Jorge—Child Fleeing Violent Gangs Subjected to MPP With His Mother Even Though They Were Kidnapped in Mexico on Their Way to the Border**

Jorge, a four-year-old boy, lived with his mother and grandparents in El Salvador, where violent gangs often sought to control Salvadoran police officers by

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<sup>35</sup> Cf. Policy Memorandum, USCIS, PM-602-0169, *Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols*, at 3 (Jan. 28, 2019), <https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>; AR226, 470-71.

<sup>36</sup> *Examining the Human Rights & Legal Implications of DHS's "Remain in Mexico" Policy: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec.*, 116th Cong. 100 (2020) (statement of Columban Center for Advocacy & Outreach) ("Examining MPP House Hearing"); see AR196. The complete transcript of this House hearing appears at AR204-373.

<sup>37</sup> See Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico* 11 (2019), [https://www.humanrightsfirst.org/sites/default/files/A\\_Sordid\\_Scheme.pdf](https://www.humanrightsfirst.org/sites/default/files/A_Sordid_Scheme.pdf); cf. *Examining the Human Rights & Legal Implications of DHS's "Remain in Mexico" Policy: Hearing Before the Subcomm. on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec.*, 116th Cong. 126 (2020) (statement of the International Refugee Assistance Project).

<sup>38</sup> *Examining MPP House Hearing*, 116th Cong. 149 (2020) (statement of Douglas Stephens, Government Accountability Project).

attacking their families. Because Jorge's close relatives are members of the Salvadoran police force, gang members forcibly entered the family's home and killed Jorge's grandmother. Gang members threatened Jorge's uncle and mother. In August 2019, Jorge and his mother fled to the U.S.

Along their journey to the border, Jorge and his mother were kidnapped by gang members in Mexico. The gang hid them in a stash house with other hostages, threatening to kill them if their family refused to pay their ransom. Jorge's father, who has lived in the U.S. since Jorge's birth, paid the ransom. As Jorge and his mother were being released from the stash house, a different gang arrived and started firing gunshots. Jorge's mother covered him with her body, praying the bullets would pass over them, and they eventually fled the scene.

Upon their arrival at the border, border officials sent them back to Matamoros under MPP. The border officials ignored Jorge's mother when she told them about the kidnapping in Mexico and the gang violence in El Salvador. In Mexico, Jorge and his mother lived in a temporary tent at times, and sometimes they slept on bedding in the street. One night when they went to the bathroom, a group of men kidnapped them. Jorge witnessed the men rape his mother before the men left them in Reynosa, more than fifty miles away. Jorge's mother managed to find local police and was sent to a hospital. Eventually, Jorge and his mother made it to a shelter.

In November 2019, Jorge and his mother attended an immigration hearing, where their attorney advocated for their protection in the U.S. based on their experiences in Mexico and El Salvador. They underwent a *non-refoulement* assessment, but received a negative determination and were again sent back to Mexico. Jorge showed signs of trauma, such as fighting and other unusual behavior. His mother suffered from depression, nightmares, and suicidal thoughts. After gang members entered their shelter in December 2019, Jorge stopped eating, and his mother stayed in bed. Jorge and his mother eventually relocated to a small apartment. Later, Jorge became ill with an infection that caused his fingernails to fall out.

**b. Juan—Child Fleeing Violence Who Became Ill from Conditions in the Camp and Was Kidnapped for Months**

Juan, a five-year-old Honduran boy who became sick and was kidnapped in the Matamoros encampment, provides another example of the danger of being forced to wait in Mexico. Juan's mother was sold to and raped by a human trafficker as a child. She escaped after four years, and gave birth to Juan. He became her joy, and her sole mission was to protect him from the abuse that she experienced as a child.

In October 2019, they fled Honduras for the U.S. after a man stalked and threatened to kill Juan's mother. Juan and his mother were sent to Matamoros under MPP. The area, however, was controlled by a Mexican cartel. One day near the camp's entrance, a group of men attempted to kidnap Juan's mother when she

returned from a convenience store with Juan. She quickly grabbed Juan, and they fell to the ground. Juan injured his cheek during the fall, leaving a scar on his face. Following these events, his mother was afraid to leave the camp for any reason.

Juan became ill in Matamoros and lost his appetite. His mother could not find the medical attention that Juan needed. At one point, they were kidnapped for two months. After being released, Juan's mother was too afraid to leave the camp, fearful that they would be kidnapped again. With no other option to save her son, she separated from Juan, as he sought protection alone from border officials. After their separation, he constantly cried, called for his mother to return, and wet the bed at night.

**B. MPP Denied Children Their Right to Be Heard on Their Fears of Returning to Their Countries-of-Origin**

DHS was aware that removal proceedings under MPP failed to provide child-sensitive considerations and procedures to ensure that children had a fair opportunity to tell their stories and seek immigration relief.<sup>39</sup> Once in MPP, asylum-seekers were forced to wait in Mexico for months to attend removal proceedings held in tents just across the U.S. border.<sup>40</sup> While asylum-seekers were asked to provide a written account of the basis for their claim in their asylum application, a tent-court hearing was the first opportunity for many asylum-seekers to meaningfully articulate their

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<sup>39</sup> See AR196.

<sup>40</sup> See *Migrant Protection Protocols* at 18-21.

fears of returning to their countries-of-origin.<sup>41</sup> Ignoring the realities of the unique needs and vulnerabilities of children, these tent hearings placed children in circumstances that made it nearly impossible to tell their stories.

For starters, the morning hearings in the U.S. typically began at 9 a.m.; however, asylum-seeking children and their families were often required to arrive at the international bridge between 3 and 4 a.m.<sup>42</sup> This meant that these children had to leave their tents in the dark to walk and wait on the Mexican side of the border—the same places where asylum-seekers became victims of robbery, sexual assault, kidnapping, extortion, and other crimes.<sup>43</sup> Because of these dangers, many asylum-seekers never made it to their hearings, as DHS recognized.<sup>44</sup> Children and their families who failed to attend their hearings faced termination of their cases and orders of removal in absentia.<sup>45</sup>

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<sup>41</sup> *See id.* at 20-21.

<sup>42</sup> *See id.* at 20; *see also Like I'm Drowning* at 26.

<sup>43</sup> *See Migrant Protection Protocols* at 33-35.

<sup>44</sup> *See Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, Transactional Records Access Clearinghouse at Syracuse Univ. (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587/>; Mayorkas Memo at 4.

<sup>45</sup> *Migrant Protection Protocols* at 21.

**i. The Video-Based, Adversarial, and Non-Private Conditions of MPP Hearings Prevented Children from Understanding the Proceedings and Presenting Their Claims**

The tent hearings were conducted via video teleconferencing (“VTC”), making it very difficult for children to understand what was occurring during their hearings.<sup>46</sup> The immigration judge, government lawyer, and interpreter were located in a courtroom sometimes hundreds of miles away from the tent where the asylum-seekers were. The immigration judge and interpreter appeared on a video screen. Asylum-seekers could hear the government lawyer’s voice, but they could not see the lawyer’s face.<sup>47</sup> Children had to listen to the interpreter and try to understand what was being said and who was speaking. At the same time, it was difficult to hear and understand interpreters. The tent hearings were rife with technical glitches

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<sup>46</sup> Oliver Laughland, *Inside Trump’s Tent Immigration Courts That Turn Away Thousands of Asylum Seekers*, *The Guardian* (Jan. 16, 2020), <https://www.theguardian.com/us-news/2020/jan/16/us-immigration-tent-court-trump-mexico>.

<sup>47</sup> Alicia Caldwell, *Tent Court on the Border: Migrants Face a Judge on a Screen and a Lawyer They Can’t See*, *Wall. St. J.* (Jan. 9, 2020), <https://www.wsj.com/articles/tent-court-on-the-border-migrants-face-a-judge-on-a-screen-and-a-lawyer-they-cant-see-11578565802>.

and connectivity issues.<sup>48</sup> Given their age and lack of understanding of the legal process, children were reluctant to speak up about these challenges.<sup>49</sup>

Immigration judges rarely asked children any questions during these hearings and, even if they did, the tent courtrooms were inappropriate places for children to tell their private stories. The hearings were adversarial; the government lawyer argued for asylum-seekers to be sent back to their countries-of-origin.<sup>50</sup> The tent hearings also lacked privacy, with often twenty-five other asylum-seekers in the same room.<sup>51</sup> This environment fell far short of the supportive, and empathetic environment that increases immigrant children's responsiveness to questions about their traumatic experiences.<sup>52</sup>

Compounding these difficulties, asylum-seekers in MPP rarely had critical access to counsel largely because it was very difficult to retain U.S. immigration

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<sup>48</sup> Examining MPP House Hearing, 116th Cong. 18, 23 (2020) (statement of Laura Peña, American Bar Association); AR221, 226.

<sup>49</sup> Young Center, *Immigration Hearings by Video: A Threat to Children's Right to Fair Proceedings* (Jan. 2020).

<sup>50</sup> Cf. American Immigration Council, *A Guide to Children Arriving at the Border* 8 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_guide\\_to\\_children\\_arriving\\_at\\_the\\_border\\_and\\_the\\_laws\\_and\\_policies\\_governing\\_our\\_response.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf).

<sup>51</sup> See Examining MPP House Hearing, 116th Cong. 140 (2020) (statement of the National Immigrant Justice Center); AR197.

<sup>52</sup> See, e.g., *Questioning Unaccompanied Immigrant Children*; Lisa Aronson Fontes, *Interviewing Immigrant Children for Suspected Child Maltreatment*, J. Psychiatry & L. 294 (2010); cf. Kids in Need of Defense, *Forced Apart: How the "Remain in Mexico" Policy Places Children in Danger and Separates Families* at 2-3 (Feb. 24, 2020).

counsel or *pro bono* counsel in Mexico, as the administrative record reflects.<sup>53</sup> Children, due to their developmental needs, dependence, and vulnerabilities, were severely impacted by lack of access to counsel.<sup>54</sup>

**ii. MPP Failed to Ensure That Children Were Able to Pursue Independent Asylum Claims**

MPP hearings also denied children the opportunity to pursue and be heard on independent asylum claims. By law, children may assert independent asylum claims, separate and distinct from the claims of their parents and guardians.<sup>55</sup> In MPP, however, border officials and immigration judges generally failed to consider that possibility, treating children solely as “derivative” riders on a parent’s claim. As the stories below illustrate, judges particularly failed to appreciate that children may have separate claims for relief that involve sensitive information that a child may be unable to disclose in the presence of their parents or guardians.

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<sup>53</sup> As of November 2020, only 5,148 out of 69,333 asylum-seekers in MPP had counsel. *Details on MPP (Remain in Mexico) Deportation Proceedings*, Transactional Records Access Clearinghouse at Syracuse Univ. (Nov. 2020), <https://trac.syr.edu/phptools/immigration/mpp/>. Data show that legal representation is the single most important factor influencing the outcome of a migrant’s case. See *New Data on Unaccompanied Children in Immigration Court*, Transactional Records Access Clearinghouse at Syracuse Univ. (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/359/>; see also AR197, 441.

<sup>54</sup> See *In re Gault*, 387 U.S. 1, 36 (1967) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him. . . .”) (citation and internal quotation marks omitted), *abrogated on other grounds by Allen v. Illinois*, 478 U.S. 364 (1986).

<sup>55</sup> See 8 C.F.R. §§ 1208.3, 1208.13 (2020).

Consequently, judges failed to: (i) inform children of their right to pursue independent asylum claims; (ii) elicit testimony from children; (iii) consider a child's claim for asylum separately from their parent's or guardian's claim; and (iv) recognize when a child might have a basis for protection based on abuse or neglect by a parent. Without access to counsel, children and their families often did not know that they could pursue independent asylum claims, much less articulate those claims in their written asylum applications. As a result, children who faced persecution on separate protected grounds were denied a fair opportunity to be heard.

**a. Erick—Teenager Fleeing Abuse Based on His Sexual Orientation With No Privacy to Describe Persecution in Open Tent Hearing**

For example, at age sixteen, Erick fled to the U.S. with his mother because he experienced abuse in Honduras based on his sexual orientation. Erick realized from a young age that he was different from the people around him. He was effeminate and had a “different sexual preference,” but feared coming out to his family and peers because Honduran society does not tolerate homosexuality. Erick was consistently abused, both verbally and physically, because of his sexual orientation. Erick came to fear that, like others in his small town, he would be killed for being gay. Erick's fear and depression became so severe that he attempted suicide. Erick never told his mother that the reason for the abuse was because he is gay. Erick and

his mother sought protection in the U.S. after the killing of her brother and experiencing fear related to a fifteen-year-old family feud in Honduras.

After arriving at the border, Erick and his mother were thrown into MPP. They attended multiple hearings in a tent court. Erick did not understand the asylum process, and he did not give any testimony at the hearings, fearing speaking candidly about his sexual orientation in front of his mother. The testimony provided by Erick's mother at the hearing was confusing because she was nervous. Because Erick had not revealed his sexuality to his mother, her testimony excluded his persecution based on his sexual orientation. Although the immigration judge found that her testimony was credible, Erick and his mother were ultimately ordered removed. They were returned to Mexico. Erick's mother did not continue with the asylum process, but Erick returned and presented himself at the border alone because he knew there could be no safe return to Honduras. Erick was placed in government custody. He then filed a separate asylum application based on sexual orientation persecution, but immigration officials removed him to Honduras based solely on the order entered against him while he was in MPP. He continues to pursue his asylum claim to escape the sexual orientation-based violence he experiences in Honduras.

**b. Ana—Child Fleeing Sexual Assault Who Felt Unsafe  
Telling Her Story at Her MPP Hearing**

Ana, a sixteen-year-old girl, fled Honduras with her mother after Ana was raped by her father. Ana received death threats from both her father and her uncle

for reporting the rape to law enforcement authorities. Ana and her mother appeared at their MPP hearing without counsel, and Ana's mother presented both her and her daughter's case to the immigration judge. Although the immigration judge gave Ana the opportunity to speak, Ana was afraid to do so because the hearing took place in a tent via VTC with no privacy for her to share the details of her private, painful story in a child-appropriate setting. Ana and her mother were ordered removed, without Ana's testimony. After they were sent back across the border, Ana witnessed a group of men attempting to kidnap her friend. Ana subsequently suffered from depression, anxiety, night terrors, and poor sleep, and has been diagnosed with PTSD.

**c. Alejandra and Rosa—Sisters Fleeing Gang Threats Forced to Appear at Hearings with Their Abusive Father, and Prevented from Telling Their Stories of Abuse**

Alejandra, a nine-year-old girl, and Rosa, an eleven-year-old girl, are sisters who were born in El Salvador. When the girls were younger, their paternal grandfather sexually abused them. They also experienced verbal and physical abuse by their father. Because their father had a successful taxicab business, MS-13 gang members targeted the family for extortion and violence, including death threats at gun point. After the gang members alerted the family that they knew every detail of the girls' whereabouts, the family was afraid to let the girls go to school unless they were guarded by their father. In fear for their lives, the girls and their father

fled El Salvador and arrived at the border in September 2019; they were forced to return to Matamoros under MPP.

In Matamoros, the girls' father found a small room to rent, but the girls were rarely allowed to leave it out of fear that they would be harmed or kidnapped. After waiting for four months, the girls and their father attended three tent hearings. During the first hearing, the girls only addressed the court to state their names and ages, after which the immigration judge told them that their father would speak for them. The girls sat in the back of the courtroom and did not sit at the respondents' table. During the second hearing, the judge did not speak directly to the sisters, not even to ask their names. Their father managed to retain counsel, who filed identical applications for protection for each member of the family based on the gang threats. Without separate counsel, the girls could not assert their separate bases for protection arising from the domestic abuse.

Alejandra and Rosa were ultimately ordered removed with their father, and they returned to Matamoros. One day, their father left their apartment and never returned. A family friend brought the two girls to the border alone, where they crossed and were placed in government custody. Eventually, their father resurfaced—he had been assaulted, robbed, and left without a phone for a time. While in government custody, the girls rarely spoke about their father, and indicated that they were afraid of seeing him again because he had been abusive.

### III. MPP HAS DEVASTATING LONG-TERM EFFECTS ON CHILDREN

The deplorable conditions under MPP were traumatic for children, causing long-term harm to their mental health.<sup>56</sup> Many migrant children have already suffered traumatic experiences in their countries-of-origin, during their journeys to the U.S., and from their interactions with authority figures.<sup>57</sup> MPP compounded this trauma, and failed to consider the specific needs of traumatized children. Many migrant “children have high levels of anxiety, depression, and PTSD.”<sup>58</sup> Research shows that exposure to trauma and violence negatively impacts children’s brain development, health, educational outcomes, and psychological well-being.<sup>59</sup>

MPP also subjected asylum-seeking children to the trauma of separation or the possibility of separation from their families, including when parents were kidnapped.<sup>60</sup> Such separation causes children deep sadness and stress, and often irreparable harm. A reliable, supportive relationship with a parent or caregiver

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<sup>56</sup> AR240-241, 261.

<sup>57</sup> See *Questioning Unaccompanied Immigrant Children*.

<sup>58</sup> Julie Linton, et al., *Providing Care for Children in Immigrant Families*, *Pediatrics: Official Journal of the American Academy of Pediatrics* (Sept. 2019) at 6, <https://doi.org/10.1542/peds.2019-2077> (“*Providing Care for Children*”).

<sup>59</sup> See, e.g., *id.*; Vidanka Vasilevski & Alan Tucker, *Wide-Ranging Cognitive Deficits in Adolescents Following Early Life Maltreatment*, 30 *Neuropsychology* 239, 240 (2016).

<sup>60</sup> See *Providing Care for Children* at 21, 23; see also Young Center, *The “Migrant Protection Protocols” Are Harming Children and Must End* 1 (Nov. 2019), <https://www.theyoungcenter.org/stories/2019/12/12/the-migrant-protection-protocols-are-harming-children-and-must-end>; AR301, 318.

serves the vital role of mitigating the dangers and harms of highly stressful and traumatic experiences.<sup>61</sup> Traumatized children may be at serious risk of “toxic stress or prolonged serious stress in the absence of buffering relationships.”<sup>62</sup> This risk is alarming because “toxic stress in young children can lead to . . . permanent changes in brain structure and function” and other adverse health effects.<sup>63</sup>

**A. Mateo—Child Fleeing Gangs that Killed His Brothers and Attacked Him Sent to Mexico Where Gangs Threatened to Steal Children in the Camp**

For instance, 17-year-old Mateo and his family fled gang violence in El Salvador. As part of a “campaign of terror,” gang members threatened one of Mateo’s older brothers for publicly evangelizing Christianity; the family regularly attended a Christian church. Gang members abducted and killed Mateo’s two brothers in 2016 and 2019. Several months before the gang members killed Mateo’s second brother, a group of men came to their family’s house looking for Mateo’s brother. When they did not find him, they attacked and beat Mateo. Local authorities ignored the family’s police report.

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<sup>61</sup> *Oversight of the Customs and Border Protection’s Response to the Smuggling of Persons at the Southern Border: Hearing Before the Senate Comm. on the Judiciary*, 116th Cong. (2019) (testimony of Julie Linton, American Academy of Pediatrics).

<sup>62</sup> *Providing Care for Children* at 6.

<sup>63</sup> Jack Shonkoff, et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 *Pediatrics* e232, e236 (2012); cf. American Academy of Pediatrics, *Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health*, 129 *Pediatrics* e224, e225 (2012).

In July 2019, Mateo and his family fled to the border and were sent to Matamoros under MPP. While there, a gang threatened to steal children in the encampment. Mateo's family struggled to find food, water, and clothes. Mateo and his younger brother fell ill after bathing in a river.

Despite their situation, Mateo and his family attended their immigration hearing in the U.S., appearing before an immigration judge via VTC without counsel. Mateo's mother did not understand the interpreter, and the immigration judge never asked Mateo a single question. Mateo said that he felt nervous and afraid to discuss his experiences in such an open setting. The judge denied their asylum petitions in January 2020, and they were sent back to Mexico.

Concerned for her children's safety, Mateo's mother decided to separate from her children. Mateo and his brother crossed the border without her, and they were placed in government custody while their mother remained in Mexico. They continue to seek asylum in the U.S.

Mateo cries whenever he discusses these traumatic events, and he has persistent fears of returning to danger in both Mexico and El Salvador. He has nightmares about being abducted like his brothers. According to a licensed clinical social worker, Mateo has been "profoundly impacted by the series of traumatic events where he had no control," and he suffers from PTSD.

## CONCLUSION

These stories are not unique. Violence, trauma, and inadequate process pervaded MPP, and Secretary Mayorkas was well aware of these problems when he determined that lack of safety, among other factors, interfered with the operation of MPP. These stories, and the many others like them, belie the very principles of human decency that the U.S. has long committed to upholding. They illustrate that MPP, as it was operated, contravened the U.S.'s commitment to protecting and advancing the best interests of asylum-seeking children. The government was more than justified in deciding to terminate MPP.

Dated: September 27, 2021

Respectfully submitted,

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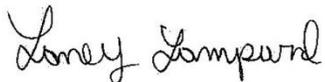
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You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3. Exception: As of July 2, 2018, Anders briefs only require 2 paper copies.

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