No. 21A21

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES ET AL.,
Applicants,
v.
TEXAS, ET AL.,
Respondents.

ON EMERGENCY APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NON-PROFIT ORGANIZATIONS AND FORMER IMMIGRATION JUDGES AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW
Suite 200
Washington, DC 20005

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
HUMAN RIGHTS FIRST
805 15th Street, NW
Suite 900
Washington, DC 20005

Karen Musalo
Counsel of record
Blaine Bookey
Anne Dutton
CENTER FOR GENDER & REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
(415) 703-8202
musalok@uchastings.edu

Melissa Crow
SOUTHERN POVERTY LAW CENTER
1101 17th Street, NW, Suite 705
Washington, DC 20036

Gracie Willis
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Ave.
Suite 340
Decatur, GA 30030

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE*

Amici the American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Inc., Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, National Immigration Law Center, Southern Poverty Law Center, and the Round Table of Former Immigration Judges respectfully move for leave to file a brief as *amici curiae* in support of Applicants' request for a stay; to file the enclosed brief without 10 days' advance notice to the parties of *Amici*'s intent to file; and to file in the unbound format on 8½-by-11-inch paper. *See* Sup. Ct. R. 37.2(a). Respondents do not oppose the filing of this brief, and the Government takes no position on it.

1. Statement of Movants' Interest. Prospective *Amici* seek leave to file the attached brief to explain errors in the factual findings underpinning the permanent injunction issued by the district court, which orders the Applicants to reinstate the Migrant Protection Protocols ("MPP"). In light of their extensive experience in the field of asylum research and practice in general, and MPP in particular, *Amici* respectfully submit that their unique perspective "may be of considerable help to the Court." Sup. Ct. R. 37.1.

Prospective *Amici* have a substantial interest in the issues presented in this case, which implicate the opportunities for asylum seekers to access their statutory and constitutional rights. The ability of asylum seekers to pursue protections in the

* No counsel for any party authored the *amici* brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission.

United States as guaranteed under domestic and international law is core to the mission of each organization. The outcome of this litigation is thus of great importance to *Amici*.

Prospective *Amici* have also litigated numerous cases involving the rights of asylum seekers and immigrants, including those addressing MPP specifically. *See, e.g.*, *Innovation Law Lab v. Mayorkas*, 3:19-cv-807 (N.D. Cal.); *Nora v. Mayorkas*, 1:20-cv-993 (D.D.C.); *Immigrant Defenders Law Center v. Mayorkas*, 2:20-cv-09893 (C.D. Cal.); *Immigrant Defenders Law Center v. DHS*, 2:21-cv-00395 (C.D. Cal.). Moreover, they have investigated conditions for migrants in Mexico and the operation of MPP in practice, and have authored reports that appear in the administrative record ("AR"). *See, e.g.*, AR 374, 557, 590, 639.

2. Statement Regarding Brief Form and Timing. Given the expedited consideration of the stay application, *Amici* respectfully request leave to file the enclosed brief in support of the stay application without ten days' advance notice to the parties of intent to file and to file in unbound format on 8 ½ by 11 in paper.. *See* Sup. Ct. R. 37.2(a). The court of appeals denied the Government's emergency motion for a stay on August 19, 2021. The application for stay was filed with this Court on August 20, 2021. That same day, this Court ordered a response by August 24, 2021 at 5 p.m. On August 20, 2021, counsel for *Amici* gave notice to all parties of the intent to file an *amici* brief in support of a stay. *Amici* filed a similar brief in proceedings before the Fifth Circuit. Respondents gave their consent on August 20, 2021. On August 21, 2021, Applicants indicated they take no position on this motion. The above justifies

the request to file the enclosed brief without 10 days' advance notice to the parties of intent to file and in unbound format.

CONCLUSION

The Court should grant leave to file the accompanying *amici* brief in support of a stay; to file the enclosed brief without 10 days' advance notice to the parties of *Amici*'s intent to file; and to file in unbound format on 8½-by-11-inch paper.

August 23, 2021

Respectfully submitted,

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW
Suite 200
Washington, DC 20005

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
HUMAN RIGHTS FIRST
805 15th Street, NW Suite 900
Washington, DC 20005

Karen Musalo
Counsel of record
Blaine Bookey
Anne Dutton
CENTER FOR GENDER & REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
(415) 703-8202
musalok@uchastings.edu

Melissa Crow
SOUTHERN POVERTY LAW CENTER
1101 17th Street, NW
Suite 705
Washington, DC 20036

Gracie Willis
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Ave.
Suite 340
Decatur, GA 30030

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are non-profit organizations[2] and former immigration judges with extensive experience in U.S. asylum and immigration law, including close familiarity with the Migrant Protection Protocols ("MPP"). Together these organizations have engaged in asylum work and research for decades and worked to ensure that asylum seekers are afforded access to their statutory and constitutional rights in alignment with international standards. *Amici* thus have a strong interest in the issues in this case that impact their core missions and expertise.

SUMMARY OF ARGUMENT

Amici submit this brief in support of the application of the U.S. Government ("Government") to stay the district court injunction in this matter pending disposition of the expedited appeal in the Fifth Circuit Court of Appeals and, if necessary, pending the filing and disposition of a petition for a writ of certiorari in this Court.

On June 1, 2021, Secretary of the Department of Homeland Security ("DHS") Alejandro Mayorkas issued a memorandum terminating the Migrant Protection Protocols ("MPP"). MPP forcibly returned people seeking asylum in the United States to

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* curiae or its counsel made a monetary contribution to the preparation or submission of this brief. In writing, counsel for Respondents consented to the filing of this brief, and Applicants indicated that they do not take a position on the filing.

[2] *Amici* non-profit organizations are the American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Inc., Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, National Immigration Law Center, Southern Poverty Law Center, and former Immigration Judges.

dangerous conditions in Mexico while their cases progressed through U.S. courts. As documented in the administrative record ("AR"), MPP was a humanitarian catastrophe: asylum seekers were murdered, raped, kidnapped, extorted, and compelled to live in squalid conditions where they faced significant procedural barriers to meaningfully presenting their protection claims. In proceedings below, the district court and the Fifth Circuit ignored these serious and intractable problems, which DHS acknowledged in ending MPP, and ordered DHS to abandon its chosen methods of border management and reinstate MPP.

DHS's decision to terminate MPP was neither arbitrary nor capricious. The court of appeals' decision adopted two incorrect factual findings from the district court: that MPP effectively (1) deterred migration, indicated by increased arrivals following MPP's suspension in January 2021; and (2) reduced meritless asylum claims, indicated by the high rates of *in absentia* removal orders issued to MPP enrollees. *See Texas v. Biden*, No. 21-10806, 2021 WL 3674780, at *4, *10, *12 (5th Cir. Aug. 19, 2021) ("Fifth Circuit Order"), *denying stay of Texas v. Biden*, No. 2:21-cv-67, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021) ("District Court Order"). Working off these facts, the Fifth Circuit denied a stay of the district court's injunction, concluding that Texas and Missouri were likely to succeed on the merits of their claim that the termination of MPP was arbitrary and capricious because DHS did not consider the asserted benefits of MPP or adequately explain its concern over high rates of *in absentia* removal orders. Fifth Circuit Order at *10-12.

The injunction cannot stand and a stay is warranted because the district court's underlying factual findings are clearly erroneous and based on a highly selective review of the record, as well as a flawed reading of the termination memorandum. *Rewis v. United States,* 445 F.2d 1303, 1304 (5th Cir. 1971). DHS's decision to terminate MPP is supported by substantial evidence in the record, which cannot be overcome by the lower courts' attempt to "substitute [their] judgment for that of the agency." *Public Citizen v. EPA*, 343 F.3d 449, 455 (5th Cir. 2003). As such, the Applicants are likely to succeed on the merits of their claim, meeting this prong of the standard for a stay.[3]

ARGUMENT

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

The Fifth Circuit incorrectly held that the district court did not clearly err in finding that suspending MPP "contributed to [a] border surge," District Court Order at *9, and that Secretary Mayorkas ignored "prescient" warnings that a "surge" would occur if MPP were terminated, District Court Order at *19. Data in the administrative record shows the clear error of the lower courts' conclusions.

First, border encounters had been rising before the Government suspended MPP. From April through December 2020, border encounters increased from 17,106

[3] The harms to asylum seekers in Mexico and due process violations occasioned by MPP detailed in this brief also support the public interest prong. The public has an interest in ensuring compliance with international obligations to refugees that have been incorporated into domestic law.

to 74,018, a 333% increase. AR669. Rather than a sudden surge once MPP was suspended in January 2021, "[s]ince April 2020, the number of encounters at the southwest border has been steadily increasing." AR622; *see* AR631 ("[M]igration started to increase in April 2020."). By December 2020, border encounters were already at their highest since summer 2019 during the "surge" that MPP was allegedly designed to restrain. AR669. Thus, the district court's finding that Secretary Mayorkas disregarded the possibility that "the suspension of the MPP . . . would lead to a resurgence" of border crossings, District Court Order at *19, was clearly erroneous. The "resurgence" had already occurred months earlier. *See* AR621-27, 628-32; 660-69.

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

By the time MPP was suspended in January 2021, it had been almost entirely replaced by Title 42. From October through December 2020, just 1.2% of border encounters resulted in an MPP enrollment—2,574 of 216,681. AR660. By comparison, 92% of border encounters over that period resulted in an expulsion under Title 42 or other form of removal. AR660. A significant portion of people expelled under Title 42 then immediately crossed the border again, contributing to the increase in border encounters that the district court erroneously blamed on the suspension of MPP.

AR631-32. Furthermore, as the record makes clear, the primary reason that migrants come to the United States is conditions in their home country, not U.S. policy. AR431, 458, 630. The lower courts' conclusions about the effect of terminating MPP rest on the faulty premise that correlation equals causation. *See* District Court Order at *9 ("Since MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed.").

Third, the lower courts' *finding* that "DHS previously acknowledged that 'MPP contribute[d] to decreasing the volume of inadmissible aliens'" crossing the border is not supported by the record and is flatly false. Fifth Circuit Order at *8 (listing this finding of fact); District Court Order at *9 (citing AR555). The document on which the district court relied for this finding merely states that decreased border crossings is a quantitative "metric" for assessing MPP's goals. *See* AR555 ("Goal: MPP provides a deterrent to illegal entry. Metric: MPP implementation contributes to decreasing the volume of inadmissible aliens . . . ."). What the district court claimed was DHS "acknowledg[ing]" MPP's effects was, in fact, a description of how DHS would measure whether MPP was meeting its goals or failing to do so. District Court Order at *9. It was not a *qualitative* assessment of whether those goals were met.

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

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

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

One primary reason for terminating MPP was the "high percentage of [MPP] cases completed through the entry of *in absentia* removal orders." AR4. In reaching its conclusion that there were supposedly "similarly high rates of *in absentia* removals *prior to* implementation of MPP," the district court inappropriately cited to extra-record statistics from the Executive Office for Immigration Review ("EOIR") on the non-detained "*in absentia* rate," and misrepresented the relevant government statistics provided in the record. District Court Order at *21 (emphasis in original). The Fifth Circuit affirmed this clear error. Fifth Circuit Order at *12.

EOIR *in absentia* rates "overstate the rate at which immigrants fail to appear in court." AR565. "*In absentia* rate" is an EOIR statistic produced by dividing annual *in absentia* removal orders by annual "initial case completions." AR563. It does not represent the rate at which people fail to appear in court. AR565. For example, if 10 people are scheduled to appear for a hearing, one person is ordered removed for failure to appear, and no other cases are completed, the *in absentia* rate for that day would be 100%. A 100% "*in absentia* rate," therefore, does not indicate that 100% of the cases *heard* on a given day resulted in *in absentia* orders.

The termination memorandum did not cite the EOIR *in absentia* rate for MPP. It used an entirely different statistic, calculating that 44% of all MPP cases ever filed ended with an *in absentia* removal order. AR4. This is nearly three times higher than

the 17% of non-detained removal cases filed inside the United States that end with an *in absentia* order. AR564.

Even if the termination memorandum *had* used the EOIR method cited by the district court, the conclusion would have been the same. The EOIR *in absentia* rate for MPP cases was 63%—27,802 MPP cases ended with an *in absentia* removal order, AR634, out of 44,014 initial case completions. AR555. This is far greater than the EOIR non-detained *in absentia* rate cited by the lower courts. Fifth Circuit Order at *12; District Court Order at *21.

Using either the district court's or the termination memorandum's calculation method, the rate at which people were unable to attend court hearings was unacceptably higher under MPP than for people inside the United States. Therefore, the Secretary's reliance on that fact was neither arbitrary nor capricious, and was supported by the record.

B. The Record Documents Systemic Deficiencies in MPP that Contribute to Higher *In Absentia* Removal Orders

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

The Fifth Circuit held that the Government "cherry-pick[ed]" statistics in finding *in absentia* rates troubling. Fifth Circuit Order at *12 n.5. But the lower courts' quick dismissal of the *in absentia* problems with MPP ignores voluminous evidence in the record regarding MPP's perils. The record contains irrefutable evidence of the dangers faced by asylum seekers in Mexico as well as systemic barriers to obtaining protection in MPP proceedings, resulting in many *in absentia* orders. DHS ignored these due process violations when initiating MPP, but later correctly acknowledged

them in conducting an internal "Red Team" review in November 2019. *See* AR3-4; AR196-200. Secretary Mayorkas' conclusion that the *in absentia* rate is troubling and raises questions is amply supported by the record.

The termination memorandum, in a portion neither the district court nor the court of appeals discussed, referred to concerns about "whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief." AR4. And it also expressed concerns about "whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety" were driving the high *in absentia* rate. AR4.

The administrative record makes clear the factual basis for those concerns. From the moment individuals and families were returned to Mexico under MPP, many faced unrelenting violence that threatened their lives and blocked their access to protection in the United States. There are at least 1,544 public reports of murder, rape, kidnapping, and other violent attacks against asylum seekers and migrants returned to Mexico under MPP. AR595. Médecins Sans Frontières reported that 75% of its patients returned to the border city of Nuevo Laredo under MPP in October 2019 alone were kidnapped. AR485. Many asylum seekers in MPP have been targeted because of their race, nationality, gender, sexual orientation, or other protected characteristics. AR604. And the true scale of violence caused by MPP is surely far greater, as most individuals and families returned to Mexico under MPP have not spoken with human rights investigators or journalists.

The danger to and harm experienced by those in MPP was a direct result of the policy itself. *See* AR358 (statement by Asylum Officer whistleblower to Congress that MPP "actively places asylum seekers in exceptionally dangerous situations"). To reach U.S. immigration courts, asylum seekers and other migrants in MPP were repeatedly forced to run a gauntlet of kidnapping and assault—unconscionable violence no one attending a non-MPP immigration court hearing in the United States would face. AR469, 485. For example, the record shows asylum seekers were routinely assaulted and kidnapped near the ports of entry while traveling to or from their MPP hearings. AR485, 374-421 (collected reports of violence towards individuals in MPP); AR472 (woman sexually assaulted in front of her child after both were kidnapped on their way to the port of entry to attend their immigration court hearing; both missed hearing as a result); AR290 (mother and her 9-year-old deaf and mute daughter kidnapped at knife-point blocks from the port of entry through which CBP returned the family to Mexico; reported being raped and repeatedly beaten while held for ransom).

Those being returned to Mexico by CBP were visually identifiable as returned migrants because they lacked shoelaces, which were confiscated by CBP while they were in border custody. This, along with differences in dialect and physical appearance, made them easy prey for criminals who target migrants. AR475. In implementing MPP, the Government delivered asylum seekers into the hands of highly organized criminal cartels exercising significant control in many regions of Mexico, as well as corrupt Mexican officials. AR374-421. Even with these conditions, only 13% of asylum seekers who received *non-refoulement* screenings were removed from MPP based

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

The record documents many reports of Mexican police officials, both local and federal, directly committing crimes of extortion and kidnapping migrants. AR374, 376, 383, 385, 398, 400, 416-19, 469, 474, 477. These were the same police forces that, according to MPP policy guidance, were supposed to afford migrants in MPP "all legal and procedural protection[s] provided for under applicable domestic and international law." AR152. In one of these incidents a Guatemalan woman reported that Mexican police took her to the airport and deported her to Guatemala when she refused their demands for extortion, although she told them she was afraid to return there and showed them her U.S. immigration court documents. AR376. DHS's internal review of MPP in 2019 recommended that DHS obtain "written assurance [Mexico] will comply with *non-refoulement* obligations." AR198.

The extreme violence, despair, and insecurity people endured under MPP forced many asylum seekers to choose between risking their lives to travel to hearings at unsafe ports of entry, frequently in the middle of the night, or abandoning their claims for humanitarian relief. *See, e.g.*, AR204, 374-421, 472-74. For many asylum

seekers in MPP, the unrelenting threat of violence in Mexico came on top of unbearable living conditions that left them without adequate shelter, access to medicine, or food. *See, e.g.*, AR229 (congressional testimony); AR478 (Human Rights Watch complaint to DHS Office of Inspector General). DHS's own internal review of MPP noted that some migrants were required to give up shelter in Mexico in order to attend U.S. immigration court hearings, rendering them homeless. AR198. DHS's concerns about the proportion of *in absentia* removal orders, a key factor in its decision to terminate MPP, was properly based on these realities, which are thoroughly documented in the record. AR4.

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

The district court failed to consider evidence in the record showing that, by design, MPP obstructed respondents' ability to appear for their hearings, leading to the high rate of *in absentia* removal orders. The Government is required to inform a respondent of the time and place of their removal proceedings via a notice to appear ("NTA"). 8 C.F.R. § 1239.1. But under MPP, the NTA was virtually useless because respondents were unable to independently appear for their hearings. *See generally* AR168. Instead, they had to go to a designated port of entry so that DHS officials could transport them to their hearings. AR168, 491, 434 (detailing how individuals needed to travel through violence-ridden parts of Mexico to arrive at the port of entry at 4 a.m. to be on time for a morning hearing).[4] Moreover, the information regarding

[4] Even when asylum seekers appeared at the border at the correct time, some border officials turned them away, either willfully or carelessly providing them with false

when and where to appear for transport was given on a "tear sheet," a separate document from the NTA, which was only provided in a limited number of languages. AR491. This documentation process was highly criticized, even within the Government. *See* AR196-98 (DHS oversight report recommending improvements to processing, including providing language access and a "comprehensive standardized documentation package").

Compounding these problems, MPP respondents often lacked stable addresses for follow-up communications from DHS and the immigration court. *See* AR198 (DHS report noting that "some migrants must give up shelter space in Mexico when they come to the US for a hearing . . . leaving them without an address" and recommending CBP "create a reliable method of communication"); AR438-39 (describing the widespread problem of incorrect addresses on NTAs); AR286 (documenting an NTA listing "Facebook" as the respondent's address); AR228, 276 (congressional testimony explaining that NTAs often listed the wrong address, the address of a temporary shelter, the address of a shelter where the individual had never resided, or no address at all); AR276 (congressional testimony describing NTAs listing incorrect immigration court locations). When hearings were changed or rescheduled, respondents alone carried the burden to figure that out, despite the challenges of living in tents or shelters (if they were lucky). *See, e.g.*, AR466 (requiring MPP respondents to show up at a port of entry to receive a *new* tear sheet following COVID-19-related hearing suspensions);

---

information. *See, e.g.*, AR439 (Honduran family falsely told they had the wrong court date).

AR311 (congressional testimony detailing inadequate notice when a hearing was advanced at the last minute).

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

MPP limited access to legal representation. AR429, 448. The extensive barriers to legal representation inherent in MPP meant that only 6% of people subjected to MPP were able to obtain counsel. AR595.[5] Due in part to this abysmally low representation rate for individuals in MPP, many people placed into MPP were ordered removed *in absentia*. *See* Section II.A. *supra*; *see also* AR569-70, 574 (reports documenting that legal representation increases the likelihood that individuals will appear at hearings).

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

[5] *See also Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, Transactional Records Access Clearing House (Dec. 19, 2019), https://trac.syr.edu/immigration/reports/587.

denied protection or gave up claims due to lack of legal representation. AR606 (linking to Human Rights Watch report). None of these systemic failings were even mentioned by the lower courts, despite Secretary Mayorkas' acknowledgment of them in his termination memo. *See* AR4. Ignoring the root causes of MPP *in absentia* rates—as detailed in the record—is reversible error.

III. The Lower Courts Disregarded Extensive Record Evidence that a 2019 DHS Assessment of MPP was Wrong.

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

The lower courts made no effort to weigh this substantial evidence of MPP's flaws. Instead, they relied almost entirely on a single October 28, 2019 DHS "assessment" to conclude that Secretary Mayorkas unlawfully "failed to consider several of the main benefits of MPP." District Court Order at *18; Fifth Circuit Order at *10 ("The June 1 Memorandum also failed to consider DHS's prior factual findings on MPP's benefits."); *see also* District Court Order at *5, *6, *9, *18, *20, *21-22 (relying

on the assessment at AR682). But many, if not most, of the claims about MPP's benefits in the DHS assessment are directly and thoroughly contradicted by other portions of the administrative record. For example, the DHS assessment claims that "DHS understands that MPP returnees in Mexico are provided access to humanitarian care and assistance, food and housing, work permits, and education." AR685. This was largely false. *See, e.g.*, AR478 ("In Matamoros, thousands of asylum seekers in the MPP have been forced to live in a makeshift refugee camp with little to no support from the Mexican government.").[6]

In essence, the Fifth Circuit and the district court "cherry-picked" a handful of positive claims about MPP from a mountain of evidence to the contrary, and they then held that Secretary Mayorkas was required to acknowledge those claims as fact. This is reversible error. A court may not substitute its judgment for that of the agency, particularly when it does so on the basis of selected assertions of fact that the record shows are not accurate and were, in any event, considered by the Secretary. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The record is clear that the suspension and cancellation of MPP did not cause an increase in border crossings, and the Secretary had every reason to conclude that the high rate of *in absentia* orders was founded on conditions that unacceptably limited access to the immigration courts.

CONCLUSION

The Court should grant the stay application.

---

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

August 23, 2021

Respectfully submitted,

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW
Suite 200
Washington, DC 20005

Karen Musalo
Counsel of record
Blaine Bookey
Anne Dutton
CENTER FOR GENDER & REFUGEE STUDIES
200 McAllister Street
San Francisco, CA 94102
(415) 703-8202
musalok@uchastings.edu

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
HUMAN RIGHTS FIRST
805 15th Street, NW
Suite 900
Washington, DC 20005

Melissa Crow
SOUTHERN POVERTY LAW CENTER
1101 17th Street, NW
Suite 705
Washington, DC 20036

Gracie Willis
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Ave.
Suite 340
Decatur, GA 30030

Counsel for Amici Curiae