

No. 19-1212

IN THE

Supreme Court of the United States

CHAD F. WOLF, ACTING SECRETARY OF HOMELAND
SECURITY, ET AL.,

Petitioners,

v.

INNOVATION LAW LAB, ET AL.,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF FOR *AMICI CURIAE*
THE LAREDO PROJECT AND THE
NATIONAL IMMIGRANT JUSTICE CENTER
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae the Laredo Project (a pro bono initiative of Jones Day) and the National Immigrant Justice Center (“NIJC”) are committed to expanding access to justice for asylum seekers in removal proceedings. *Amici* have represented or assisted thousands of migrants who have entered the United States through, or have been detained in, Laredo, Texas. *Amici* have witnessed the degradation of access to justice for asylum seekers subject to the so-called Migrant Protection Protocols (“MPP”) at Laredo.

Jones Day, a global law firm, launched the Laredo Project in 2017. Over 1,250 Jones Day attorneys and staff have devoted over 280,000 pro bono hours to this initiative. Initially, the Laredo Project focused on providing pro se counseling and pro bono representation to the women in Immigration and Customs Enforcement custody at the Laredo Detention Center. Partners, associates, and support staff from Jones Day offices across the nation operated a full-time office in Laredo. They visited the detention center on a near-daily basis; provided Know Your Rights presentations to more than 5,000 migrants at the facility; prepared detainees for “credible fear” interviews with asylum officers; and represented clients in bond and removal proceedings.

¹ Pursuant to Rule 37.2(a), both counsel of record received timely notice of intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part, and no person or entity other than *amici*, its members, or its counsel made a monetary contribution to fund its preparation or submission.

Jones Day’s partner in this work was (and is) NIJC, a program of the Heartland Alliance for Human Needs and Human Rights. NIJC is a Chicago-based not-for-profit organization that provides legal representation and consultation to low-income immigrants, refugees, and asylum seekers. Each year, NIJC represents hundreds of individuals before the immigration courts, the Board of Immigration Appeals, and the federal appellate courts. NIJC consults on or co-counsels a number of Laredo Project cases, and NIJC also accepts client referrals from the Laredo Project.

In 2019, the government expanded MPP to the Laredo and Rio Grande Valley sectors of the southwest border. Newly-arrived migrants seeking asylum at or around the Laredo port of entry were barred from entering the United States and were instead sent to Nuevo Laredo, the Mexican city directly across the border. The Laredo Project and NIJC pivoted in response to these legal and logistical changes. *Amici*’s practices in Laredo now focus on providing pro bono representation and pro se counseling to asylum seekers subject to MPP who have claims pending in the Laredo Immigration Hearing Facility (“LIHF”). The LIHF is a “tent court”—a facility constructed of tents and shipping containers, where migrants present their claims over video-conference to the immigration judges of the San Antonio Immigration Court (and, occasionally, the Fort Worth Immigration Adjudication Center). The Laredo Project and NIJC represent more migrants appearing at the LIHF than any other legal services provider.

As some of the very few lawyers practicing at the LIHF, the attorneys of the Laredo Project and NIJC have had front-row seats to the deterioration of access

to justice under MPP at Laredo. Kidnapping is so prevalent in Nuevo Laredo that migrants waiting (or passing through) there face a significant risk of missing immigration hearings—because they may be held hostage by a cartel. Asylum seekers located in Mexico often struggle to locate attorneys who will represent them across the border in United States immigration court. And even when asylum seekers manage to find representation for proceedings at LIHF, their lawyers—such as those at the Laredo Project and NIJC—face serious obstacles providing representation because the migrants generally cannot meet their attorneys in person, have limited (or no) ability to receive or review documents, and have insufficient access to privacy and working phones.

Amici have dedicated themselves to bolstering access to justice for migrants who are detained or are in immigration proceedings in Laredo. *Amici* are committed to ensuring that asylum seekers with meritorious claims are able to obtain relief. Consequently, *amici* have a strong interest in this matter—and a strong interest in safeguarding access to justice from the deleterious effects of MPP.

SUMMARY OF ARGUMENT

Access to justice “is the right conservative of all other rights, and lies at the foundation of orderly government.” *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Access to justice includes the ability to (1) appear at the courthouse and (2) obtain the assistance of counsel. U.S. Institute of Peace, *Necessary Condition: Access to Justice* § 7.8, <https://tinyurl.com/y6gsq2ac>; see also *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (“[T]he right of [physical] access to the courts . . . [is] protected by the Due Process Clause.”); *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993) (an alien’s right to representation by counsel of the alien’s choice is “an integral part of the procedural due process to which the alien is entitled”) (quotation marks omitted); *Leslie v. Att’y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010) (same); *Frech v. U.S. Att’y Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007) (same); *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th Cir. 2004) (same); *Saakian v. INS*, 252 F.3d 21, 24 (1st Cir. 2001) (same); *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) (same). MPP corrodes these twin pillars of access to justice.

Under MPP in Laredo, Texas, migrants must risk life and limb to attend immigration hearings. In Nuevo Laredo, across the river, kidnapping is a booming business. Twenty-six percent of *amici*’s clients under MPP at Laredo have been kidnapped at least once since being forced to return to Mexico. Yet, for a migrant to attend a hearing at the LIHF, it is impossible to avoid the risk. There is no way to reach the LIHF without passing through Nuevo Laredo.

Numerous other obstacles—from gang shootouts to lack of notice—make it extremely difficult to attend

hearings at LIHF. Those obstacles are frequently insurmountable. Indeed, 53% of migrants under MPP have missed at least one hearing. Most of those migrants were removed *in absentia*, without an opportunity to present their claims.

Migrants under MPP also struggle to retain counsel. Legal representation is the single most important factor affecting the outcome of an asylum claim, but counsel is largely unavailable to migrants in Mexico pursuing asylum claims across the border. Only 7% of migrants under MPP are represented. And fewer than 1% of pro se migrants under MPP have obtained relief. MPP's obstruction of access to counsel makes asylum relief impossible for the vast majority of asylum seekers subject to MPP.

Further, even when a migrant under MPP retains counsel, the attorney faces numerous challenges presenting the migrant's claims. *Amici*, for instance, cannot travel to Nuevo Laredo due to the extreme danger, so Laredo Project and NIJC attorneys typically cannot meet their clients in person before appearing in court. Mailing documents is usually impossible, and phone communication is often limited. Yet attorneys are tasked with establishing trust and building a case. MPP hinders this work—and generally impedes asylum seekers' access to justice.

ARGUMENT

I. Asylum Seekers Must Risk Kidnapping in Order to Appear for Proceedings at the Laredo Immigration Hearing Facility.

Violence is endemic in Nuevo Laredo, the Mexican city directly across the border from Laredo. The U.S. State Department assesses the state of Tamaulipas, where Nuevo Laredo is located, as posing the highest possible safety risk (Level 4)—the same level as conflict-ridden countries such as Syria and Afghanistan. U.S. State Dep’t, Bureau of Consumer Affairs, Mexico Travel Advisory (Sept. 8, 2020), <https://tinyurl.com/ybfbd2em>; Maria Verza, *In Nuevo Laredo and elsewhere, many migrants are stuck in Tamaulipas’ lawless limbo*, PITTSBURGH POST-GAZETTE (Nov. 18, 2019), <https://tinyurl.com/y4c9gd95>. “Organized crime activity—including gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault—is common along the northern border” of Tamaulipas, where “[h]eavily armed members of criminal groups . . . operate with impunity.” U.S. State Dep’t, *supra*. The State Department advises United States citizens not to travel to Tamaulipas at all, *id.*, but the government remits asylum seekers—who are often traumatized, poor, and defenseless—to Nuevo Laredo under MPP.

In Tamaulipas, cartels and common criminals prey on asylum seekers. “In Nuevo Laredo, the Cartel del Noreste kidnaps asylum seekers outside shelters, [immigration] offices, at bus stations, and in transit between those locations.” Strauss Center, *Migrant Protection Protocols: Implementation and Consequences*

for *Asylum Seekers in Mexico* 34 (May 2020), <https://tinyurl.com/y9c968qz>. The cartel targets migrants “on the assumption that most asylum seekers in the MPP program have US relatives who can be extorted.” Human Rights Watch, *US: Investigate ‘Remain in Mexico’ Program* (June 2, 2020), <https://tinyurl.com/y38bl9jt>. “After being physically apprehended, asylum seekers are typically taken to warehouses or other locations where they are held until people pay their ransom, which is usually thousands of dollars.” Strauss Center, *supra*, at 34.

Pastor Diego Robles, of Nuevo Laredo, observed last year that kidnapping had “become big business.” Ed Vulliamy, *Kidnappers prey with ‘total impunity’ on migrants waiting for hearings in Mexico*, THE GUARDIAN (Feb. 18, 2020), <https://tinyurl.com/tuqbzm6>. He explained: “It is worse in Tamaulipas than other border states, and worse in Nuevo Laredo than anywhere else in Tamaulipas. There’s no formula to the abductions and disappearances—they are kidnapped, beaten, women violated; most return, but not all.” *Id.* (emphasis added).

Migrants are especially vulnerable to “abduction as they travel to and from U.S. ports of entry for immigration hearings.” Human Rights First, *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy* 4 (Oct. 2019), <https://tinyurl.com/upomvqw>. The streets near the border are particularly dangerous. Emily Green, *Trump’s Asylum Policies Sent Him Back to Mexico. He Was Kidnapped 5 Hours Later by a Cartel*, VICE NEWS (Sept. 16, 2019), <https://tinyurl.com/y86d8dua>. Migrants must traverse those streets every time they travel to and from an immigration hearing at LIHF.

A family represented by NIJC was abducted from those streets. The family—a husband and wife, their children (ages four and six), and the children’s grandmothers—entered the United States to seek asylum in October 2019. United States immigration officials returned the family to Mexico under MPP, with instructions to report at the international bridge for their initial hearings months later. The family found temporary housing several hours away. The day before their hearing, the mother, father, and children traveled by bus to Nuevo Laredo. Several men at the Nuevo Laredo bus station questioned the family about the purpose of their trip and their destination. Shortly after the family departed the bus station in a taxi, they were kidnapped by a group of armed men who forced them into a vehicle and took them to a house. The kidnappers held the family in squalid conditions with a number of other victims. The kidnappers took all of the family’s belongings, including their cell phones; forced the wife to cook and clean; and compelled the family to take a proof-of-life video that the kidnappers used to demand ransom payments. The children urinated in a bottle in front of everyone in the room because they were not given access to a bathroom. Neither the children nor the parents were given enough to eat or drink. The kidnappers held the family hostage for 16 days, including the date of their hearing. The immigration court issued a removal order in the family’s absence. Only with the help of counsel was the family able to reopen their immigration proceedings.

The two grandmothers were not traveling with the rest of the family because the grandmothers were

given a separate hearing date by the immigration authorities. The grandmothers traveled together to Nuevo Laredo in anticipation of that hearing date. When they arrived, they too were kidnapped by a cartel. The kidnappers were armed and took the victims' phones. They held the grandmothers in a room with a number of other hostages. The captors told one of the elderly victims that if she wanted to eat, she needed to cook, and they forced her to cook for everyone in the house. The kidnappers did not release the grandmothers until after their scheduled hearing date had passed. NIJC subsequently determined that the date the immigration authorities had given the grandmothers was a "dummy date" that was never actually scheduled with the immigration court. The women are now seeking to have their proceedings recommenced so that they may pursue asylum alongside the rest of their family. The entire family remains in Mexico, terrified of the next trip to Nuevo Laredo.

A different NIJC client was abducted *three times* while in Mexico under MPP. In the summer of 2019, she and her eight-year-old daughter presented themselves to United States immigration officials. Although she requested asylum, the officials sent her back to Mexico. They left her and her child on the international bridge with no information about where to stay or what to do while awaiting her first hearing, set for months later. The mother and daughter sought shelter at a hotel near the bridge. Soon, a cartel kidnapped them from the hotel and brought them to a crowded house. Heavily armed cartel members guarded the house, preventing the migrants' escape, and dozens of new hostages arrived each day. The captors confiscated the mother's cell phone and routinely

threatened to kill her eight-year-old child. The mother and daughter could not bathe or change clothes. They were held for about a month, during which time the threats against them escalated. Cartel members threatened to cut the mother's head off and to sell the child to another cartel. The mother and daughter spent every day crying, believing they would not make it out alive.

When the cartel finally released the mother and daughter, a second group of men came to the house and kidnapped them. These captors did not allow the mother and child to eat or sleep, and the child became very ill. After a few days, the captors took the two to an abandoned house, where a group of men sexually assaulted the mother in the presence of her daughter. They threatened to kill both mother and daughter. Soon after, the kidnappers forced mother and daughter across the Rio Grande (while threatening to drown the mother). The mother could not control her sobbing until she encountered a United States immigration official, who she thought would help them. Instead, the immigration authorities sent the woman and her daughter back to Mexico.

In search of relative safety, the mother and child relocated a few hours away from Nuevo Laredo. Yet they had no choice but to return to the city en route to another immigration hearing. And while in Nuevo Laredo, they were kidnapped a third time. This time, they were held for several hours and released late in the night before their hearing. The woman was terrified. And as long as she and her daughter remained in Mexico (until an immigration judge granted them relief from deportation), she was panicked that she and her child might be abducted again.

The United States government appears indifferent to this risk. In 2019, a Laredo Project client subject to MPP was forced into a vehicle and kidnapped by cartel members. He missed his hearing date because he was being held hostage, but his cousin—who witnessed the kidnapping—informed the court of what had happened. The government nonetheless asked the judge to remove the man *in absentia*. The government’s counsel told the court that kidnapping “is potentially a reality for every respondent.” *Lawyer Defending Trump Policy Makes Stunning Admission*, CNN POLITICS (Mar. 11, 2020), <https://tinyurl.com/vdxxajl>. The immigration judge clarified: “[W]hat I’m hearing from the government is . . . everybody has to take that risk and that chance, and you get kidnapped, you get kidnapped, that’s the risk you take for being in Mexico and wanting to apply for asylum here in the United States.” *Id.* The judge stated: “I don’t think it’s humane [W]e’re talking human beings and lives.” *Id.*

These clients are not outliers. *Twenty-six percent* of *amici*’s clients subject to MPP at Laredo report being kidnapped at least once after being sent back to Mexico. And Doctors Without Borders, which operates in Nuevo Laredo, reports even higher numbers. In the Nuevo Laredo clinic in September 2019, 43.9% of patients who were subject to MPP (18 out of 41) had been recently kidnapped. Doctors Without Borders, *No Way Out: The Humanitarian Crisis for Migrants and Asylum Seekers Trapped Between the United States, Mexico and the Northern Triangle of Central America* 6 (Feb. 2020), <https://tinyurl.com/y5h8p6y6>. “In October, the percentage of kidnapping among

those sent to Mexico under the MPP program increased to 75% (33 of the 44 new patients).” *Id.*

This is a far cry from meaningful access to justice.

II. Half of Migrants Forced to Return to Mexico Under MPP Miss at Least One Immigration Hearing.

Given the frequent kidnappings in Nuevo Laredo, some migrants are physically incapable of attending their immigration hearings because they are in the clutches of a cartel at the appointed time. Other migrants, facing the dangers of kidnapping, sexual assault, and other violent crime, decide not to stay to pursue their asylum claims—even if those claims are *meritorious*. For instance, one Laredo Project client abandoned his asylum claim after he and his daughter narrowly dodged a kidnapping attempt while returning from their first immigration hearing. He decided that nothing could be worse than the danger of Nuevo Laredo. His analysis of the risk—to himself and to his young child—was realistic. They departed from Nuevo Laredo and never got a chance to present their claims under the United States immigration laws.

Other migrants miss immigration hearings because they cannot get back to the port of entry due to other impediments, apart from kidnapping. For instance, one family that the Laredo Project assisted was unable to reach the port of entry because they were obstructed by a shootout between a Mexican cartel and the police. The family members received *in absentia* removal orders due to their absence. Another family, represented by the Laredo Project, was twice blocked from attending immigration hearings by U.S. Customs and Border Protection (“CBP”). The

mother—who had been kidnapped from Nuevo Laredo and raped in front of her children—was suffering from a stress-induced skin condition, and the CBP officer thought the peeling skin on her scalp looked like lice. The officer twice refused to let the family through the border checkpoint, causing the family to miss two different asylum hearings that each had to be reset.

Still other migrants miss their court dates because they do not receive notice of scheduled hearings. Many migrants subject to MPP have no mailing address because homeless shelters in Mexico typically do not accept mail for migrants. Even shelters that accept mail do not generally provide a stable address, since a migrant usually loses her spot (and her address) when she leaves the shelter to appear at a port of entry for a court date. Human Rights Watch, *“We Can’t Help You Here”: US Returns of Asylum Seekers to Mexico* 37 (2019), <https://tinyurl.com/yc3o2942>. And other migrants do not receive hearing notices because they cannot report address changes to the immigration authorities. The EOIR-33 form that applicants use to update their addresses with the Executive Office for Immigration Review (“EOIR”) cannot be filed online, and the mailing instructions and pre-printed outer envelope assume mailing within the United States. U.S. Dep’t of Justice, EOIR-33, Alien’s Change of Address/Phone Number Form (Immigration Court) (rev. Dec. 2019), <https://tinyurl.com/yabze6ys>; U.S. Dep’t of Justice, EOIR, List of Downloadable EOIR Forms (updated Oct. 14, 2020), <https://tinyurl.com/yanpptog>.

The government has instituted a stopgap measure to attempt to provide migrants with notice of their hearings. EOIR directs asylum applicants under MPP

“to check on case status in English and Spanish by calling the Automated Case Information Hotline [(‘EOIR Hotline’)] . . . or visiting EOIR Automated Case Information portal [(‘EOIR Portal’)].” U.S. Dep’t of Justice, Office of Pub. Affairs, *Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings* (updated Nov. 9, 2020), <https://tinyurl.com/y7wackjk>. But the EOIR Hotline is sometimes out of service, and it is missing hearing information for a meaningful number of applicants. The Portal is similarly missing information, and in any event, it is useless for many applicants subject to MPP, who have no internet access while awaiting their hearings in Mexican border towns.

The notice issues, the frequent kidnappings, the safety concerns, and other deterrents have a significant impact on access to justice. Migrants subject to MPP must brave gang shootouts, attempted kidnappings, and potential sexual assault to appear at the port of entry at the designated time. Half do not make it.

In particular, through December 2020, 53% of migrants under MPP had missed at least one hearing.² TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, <https://tinyurl.com/rzef29p> (last visited Jan. 19, 2021) (considering only migrants who have had at least one hearing). The absences were generally fatal to the applicants’ claims. In response to absences by migrants

² By contrast, in FY 2018, more than 89% of migrants who were allowed to remain in the United States appeared for all scheduled immigration hearings. Human Rights First, *Fact Check: Asylum Seekers Regularly Attend Immigration Court Hearings* (Jan. 25, 2019), <https://tinyurl.com/y5j3mocs>.

subject to MPP at all border courts, including Laredo, the immigration courts have issued 27,916 *in absentia* removal orders and 2,905 *in absentia* terminations or other closures. *Id.* The removal orders rendered the migrants subject to them inadmissible to the United States for a period of 10 years. *See* 8 U.S.C. § 1229a(b)(5), (7). Thus, tens of thousands of asylum applicants have been unable or unwilling to present their claims under the inhumane conditions of MPP—and are barred from most types of immigration relief for years to come.

III. MPP Significantly Restricts Access to Counsel.

Asylum seekers who manage to attend their hearings at LIHF face another serious impediment to presenting their claims: It is almost impossible to find an attorney to represent asylum seekers subject to MPP at Laredo. Having counsel is the “single most important factor affecting the outcome of an asylum case.” Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. Mich. J.L. Reform 1001, 1015 n.51 (2015) (quoting Am. Bar Ass’n Comm’n on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases: Executive Summary ES-7* (2010)). That factor cuts against the vast majority of asylum seekers under MPP.

Legal representation is extraordinarily important in asylum cases. Presenting any asylum claim is daunting. Asylum seekers must prepare the Application for Asylum and for Withholding of Removal (Form

I-589), which comprises over one hundred questions and fourteen pages of instructions. This form must be completed and submitted in English, yet most asylum seekers have little or no English proficiency. See U.S. Dep't of Justice, EOIR, *Statistics Yearbook: Fiscal Year 2018*, at 18 (updated Aug. 30, 2019), <https://tinyurl.com/t3v39le> (reporting that 89% of immigration court cases required translation services). Furthermore, successful asylum applicants generally support their claims with evidence such as police reports, medical records, identification documents, and photographs—but asylum seekers frequently flee with little more than the clothes on their backs. And even those who bring documentation may have it stolen. If kidnapped, as many are, asylum seekers often are stripped of their possessions, including documents and photos (in hard copy or stored electronically on their cell phones). And asylum seekers frequently have reason to fear that friends and family back home will face persecution if they help the asylum seekers to gather documentation. Additionally, migrants often find it difficult or impossible to locate translators and to pay for the required certified translation of documents and affidavits.

All of these challenges are compounded by asylum applicants' reactions to trauma. Having fled extreme violence in search of safety, many asylum seekers experience post-traumatic stress disorder ("PTSD") and other mental health challenges. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457, 461 (2016). "Avoiding painful topics is common among trauma survivors, and when asy-

lum seekers do open up, their memories can flood together.” Ardalan, *supra*, at 1020. Asylum applicants who experience trauma are less likely to recall the details of their persecution consistently over time, and are more likely to recall memories in overgeneralized terms or to minimize the importance and intensity of their trauma. Carol M. Suzuki, *Unpacking Pandora’s Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 *Hastings Race & Poverty L.J.* 235, 257 (2007); Pub. Interest Pro Bono Ass’n, *Working with Survivors of Abuse: A Trauma Informed Approach* 2 (Oct. 7, 2020), <https://tinyurl.com/y8also7m>. “None of these things [is] a reliable measure of whether a survivor is truthful, and yet they are the very things an immigration judge will typically point to as evidence that an asylum seeker is not credible.” Paskey, *supra*, at 461-62.

Asylum seekers subject to MPP—especially in Laredo—are also likely to have experienced recent trauma while being forced to wait in Mexico. According to Doctors Without Borders, 79.6% of patients treated in Nuevo Laredo during the first nine months of 2019 reported being the victims of violence. Doctors Without Borders, *supra*, at 26. This fresh trauma—experienced by an applicant who is still in Mexico and not yet out of danger—can make it particularly difficult to complete a lengthy and complex asylum application.

Lawyers are seldom therapists, but they can help a traumatized asylum applicant to assemble a coherent narrative history. Lawyers are the best way (and often the only feasible way) for an asylum seeker to

collect official documentation without the involvement of the applicant's vulnerable friends or family; coordinate fact affidavits from witnesses in the applicant's home country; retain an expert to prepare a country-conditions report regarding the state of human rights in the applicant's country of origin; coordinate certified English translations of materials in Spanish, indigenous languages, and other languages; and complete the asylum application—a filing that in most of the Laredo Project's cases spans 300-350 pages. In addition, for asylum seekers forced to remain in Mexico subject to MPP, an attorney is often the only way to ensure that the applicant knows of all hearings and scheduling changes. *See supra* Part II. The Laredo Project, for instance, employs a dedicated support staff member who checks the hearing status of every client every day. An attorney can also communicate with counsel for the government or with the immigration court should scheduling issues arise.

For asylum seekers, these types of legal assistance are critical. In general, an asylum applicant with representation is multiple times more likely than a pro se applicant to obtain relief. *See* TRAC Immigration, *Asylum Representation Rates Have Fallen Amid Rising Denial Rates* (Nov. 28, 2017), <https://tinyurl.com/y8fn2pzt>; Ardalan, *supra*, at 1003 & n.6; Samantha Balaban et al., *Without A Lawyer, Asylum-Seekers Struggle With Confusing Legal Processes*, NPR (Feb. 25, 2018), <https://tinyurl.com/yayysqgp>. In a survey of asylum decisions issued in FY 2018, 39.9% of represented asylum applicants obtained some form of immigration relief, compared to only 11.3% of applicants who were unrepresented. *See* TRAC Immigration, *Asylum Decisions*, <https://tinyurl.com/yamrfjo3>

(last visited Jan. 19, 2021) (filtered for FY 2018). In FY 2017, those numbers were 47.9% for asylum seekers with counsel and only 11.4% for asylum seekers without counsel. *See id.* (filtered for FY 2017). And in FY 2016, those numbers were 55.5% for asylum seekers with counsel and only 11.2% for asylum seekers without counsel. *See id.* (filtered for FY 2016).³

The differences are even more stark for migrants who are forced to remain in Mexico subject to MPP. Among migrants under MPP whose cases have been decided, only 0.65% of unrepresented individuals were granted some form of relief, compared to 25.3% of individuals who were represented by an attorney. TRAC Immigration, *Details on MPP, supra*. Consid-

³ The data for FY 2019 and FY 2020 are not entirely reliable because thousands of asylum cases have been omitted. *See* TRAC Immigration, *Asylum Decisions*, <https://tinyurl.com/yamrfjo3> (“8,649 Asylum Applications Disappeared From EOIR Data during FY 2019-21”) (last visited Jan. 19, 2021); TRAC Immigration, *After EOIR Fixes Most Egregious Data Errors, TRAC Releases New Asylum Data—But with a Warning* (Sept. 16, 2020), <https://tinyurl.com/y3q4rzou> (discussing missing data). Nonetheless, the data that are available indicate that in FY 2019 and FY 2020, an asylum seeker with representation was approximately twice as likely to obtain relief as an asylum seeker without representation. *See* TRAC Immigration, *Asylum Decisions, supra* (filtered for FY 2019, showing that 33.7% of represented migrants obtained some form of relief, compared with 16% of unrepresented migrants; and filtered for FY 2020, showing that 31.3% of represented migrants obtained some form of relief, compared with 18% of unrepresented migrants). These statistics were generated by the Transactional Records Access Clearinghouse using EOIR data; EOIR-generated statistics do not straightforwardly address the issue. *See* Jeffrey S. Chase, *EOIR’s New Math* (Dec. 12, 2020), <https://tinyurl.com/ycbjxl4>.

ering Laredo alone, only 1.2% of unrepresented migrants under MPP were granted some form of relief, compared to 56.8% of individuals who were represented by an attorney. *Id.* (Over half of those successful migrants were represented by *amici*.) Representation by counsel is crucial.

Yet MPP makes it extraordinarily difficult for a migrant to find or retain counsel. Asylum seekers who remain in the United States generally relocate to cities and towns across the country, and their cases are assigned to the courts near where they reside. Human Rights Watch, *We Can't Help You Here, supra*, at 34. By contrast, under MPP, asylum cases are concentrated at particular ports of entry, “overwhelming the limited number of immigration attorneys who practice there.” *Id.* The number of available attorneys is further reduced because many immigration practitioners in the United States are unable—logistically or otherwise—to provide services to migrants across the border in Mexico. *Id.* Further, some attorneys may be hesitant to place themselves at the potential receiving end of a cartel’s demand for ransom. (The Laredo Project uses non-traceable “burner” phones for client communications, so that cartels cannot identify Laredo Project attorneys and target them for extortion.) And Mexican attorneys cannot substitute for counsel in the United States because attorneys in Mexico are typically neither licensed nor otherwise able to provide representation in United States courts.

Amici have seen this structural problem in Laredo. The Laredo Project considered providing assistance across the border in Nuevo Laredo, but determined that it was far too dangerous. When Laredo Project attorneys took an exploratory trip across the border,

the local pastor with whom they were scheduled to meet (who ran a shelter for migrants) was missing; he had been kidnapped by cartel members, reportedly because he attempted to stop them from kidnapping Cuban asylum seekers. See Premier Christian News, *Still no sign of pastor one year after kidnapping* (Aug. 3, 2020), <https://tinyurl.com/yaefrzaq>; Premier Christian News, *Mexico: Commission calls for update three months after Pastor kidnapping* (Nov. 4, 2019), <https://tinyurl.com/yxl45swa>. Given the danger—which the State Department assesses as the same level as Syria and Afghanistan, see U.S. State Dep’t, *supra*—Jones Day could not send its attorneys to Nuevo Laredo. To *amici*’s knowledge, not a single organization operates an office in Nuevo Laredo offering pro bono legal representation in the United States immigration courts.

Without a physical presence, pro bono and other legal services providers can be hard to find. EOIR gives migrants the San Antonio Immigration Court List of Pro Bono Legal Services Providers, but for migrants at Laredo it is of little use. The list provides migrants with names of non-profit organizations that operate in the San Antonio Immigration Court—few (if any) of which offer services for proceedings at LIHF. The Laredo Project is not on the list because it is not a non-profit organization (but rather a pro bono initiative of Jones Day) and because it does not operate in the San Antonio Immigration Court. The non-profits on the list will sometimes provide migrants with the phone number for the Laredo Project, but many migrants fall between the cracks. Of the 13,425 migrants subject to MPP in Laredo, fewer than 1,500 have contacted the Laredo Project.

Further, the Laredo Project and other legal services providers are unable to represent all who do manage to locate them. The Laredo Project, for instance, has generally conducted about 25 assessments weekly (until the border closed in March 2020), but has the capacity to accept only 2-3 individuals or families as clients each week. If the migrants' cases were dispersed across the United States (as immigration cases are outside of MPP), then the migrants would have access to many more attorneys all over the country. But under MPP, migrants' cases are concentrated in just a small handful of courts near the border. The need is overwhelming and the available attorneys are few.

The statistics regarding access to counsel under MPP are jarring. Migrants outside of MPP (i.e., those residing in the United States while their hearings are pending) are often able to retain counsel. Studies have calculated representation rates among asylum seekers ranging from 37% to over 80%. *See, e.g.,* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 6-8, 15-16 (2015); TRAC Immigration, *Asylum Decisions and Denials Jump in 2018* (Nov. 29, 2018), <https://tinyurl.com/yd2ool7t>. But migrants subject to MPP (i.e., those forced to remain in Mexico while their hearings are pending) are almost always unrepresented. *Among migrants subject to MPP thus far, only 7% have been represented by counsel. See* TRAC Immigration, *Details on MPP, supra*. This makes the statutory right to retain counsel for immigration proceedings, *see* 8 U.S.C. § 1229a(b)(4)(A), largely theoretical.

This Court has recognized that the “right to be heard [is], in many cases, of little avail if it d[oes] not comprehend the right to be heard by counsel.” *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). But for the vast majority of asylum applicants subject to MPP, retaining counsel is, as a practical matter, impossible. The very operation of MPP prevents it.

IV. MPP Impedes Counsel’s Presentation of Asylum Claims.

Even when a migrant subject to MPP at Laredo is able to retain counsel, providing that legal representation is a challenge. For safety reasons, *amici* cannot travel to Nuevo Laredo. At the same time, because of MPP, *amici*’s clients are not allowed to visit *amici*’s law offices in the United States. Attorneys are forced to put together a case without meeting their clients in person. This is extraordinarily difficult. When clients suffer from PTSD, in-person meetings are particularly important for attorneys seeking to establish trust, to understand their clients’ experiences, and to prepare clients for cross-examination by the government’s lawyer and questioning from the immigration judge.

Almost all communication occurs over the phone. But migrants huddling in border towns in Mexico are often unable to use their phones. Frequent power outages disrupt cell service and prevent phone-charging. For many clients, internet service on their phones is sporadic or nonexistent, which limits communication over WhatsApp (an instant messaging app). Migrants often have insufficient funds to purchase cellular data or minutes. Phone theft is common. And, to limit potential communication with cartels, many shelters

have policies preventing migrants from accessing their phones except during specific two-hour time periods, into which migrants must squeeze all communication (legal and otherwise), and during which they have no privacy. What is more, sometimes lawyers cannot communicate with clients over the phone at all, because the clients have been kidnapped by a cartel, which seizes their phones and does not give them back. See This American Life, *The Out Crowd* (Nov. 15, 2019), <https://tinyurl.com/rvzjttd>; Miriam Jordan, *'I'm Kidnapped': A Father's Nightmare on the Border*, N.Y. TIMES (Dec. 21, 2019), <https://tinyurl.com/y4fbz44c>; *supra* Part I.

It is particularly challenging to establish trust over the phone. When first calling the Laredo Project, migrants are often worried that the phone number really belongs to a government official, who can deny relief, or to a cartel member, who can inflict harm. Even after that initial fear subsides, it is extraordinarily difficult for many migrants to relate their most painful memories to an attorney whom they have never met face-to-face. One Laredo Project client, who likely suffers from PTSD, was kidnapped and raped in front of her children after being returned to Mexico under MPP. Her attorneys did not learn about the sexual assault until their fourth or fifth phone conversation, during which she repeatedly had to stop talking because the events were so painful to recall. Laredo Project attorneys were not able to get the full story until they flew to meet her in Monterrey—a safer location several hours away from Nuevo Laredo. If the client had remained in Nuevo Laredo, her attorneys may not have learned the full story of the abuse she had suffered.

Eliciting client histories can also be difficult (or impossible) because migrants frequently struggle to find private locations to talk on the phone. One client called the Laredo Project from a broom closet in a shelter because she was concerned that the pastor who ran the shelter was working with a cartel and might use against her the information she shared over the phone. Another Laredo Project client disclosed a family-based persecution claim during an initial interview (based on the murder of his uncle by gang members and the gang's subsequent threats and extortion of his entire family). He did not disclose until three days before his final hearing that he had also been the victim of a brutal sexual assault by five men who made clear that they attacked him because he was gay. The client, who is HIV positive, believed that he contracted HIV during the assault. He was reluctant to disclose this information over the phone because he had no privacy; he feared what his roommates would do if they found out about his sexuality or his HIV status.

The challenges persist at the hearing stage at LIHF. There is virtually no way to mail documents to clients in Nuevo Laredo, so in the very brief time before a hearing starts, attorneys must review with their clients (and obtain signatures on) the I-589 Application for Asylum, a detailed document with over one hundred questions. Attorneys are allotted a total of one hour to meet with their clients before a hearing—but, because some of this time is taken up with security and movement within the LIHF, as a practical matter *amici* frequently can speak with their clients for only half an hour. After the meeting, lawyers and clients are separated and are not allowed to sit

next to each other. This prevents lawyers from receiving last-minute preparatory information about their clients' cases. LIHF also prevents attorneys from performing last-minute research or preparation—government attorneys have full access to the internet and to electronic devices, but migrants' attorneys at LIHF are prohibited from bringing laptops or cellphones into the hearing and private-meeting spaces. Greg Chen et al., *After AILA Attends Tour of the Laredo Tent Court, Questions Still Abound*, THINK IMMIGRATION (Jan. 30, 2020), <https://tinyurl.com/y6dl6knb>. Further, when a client's case is called, there is no opportunity to confer with the client quietly and privately during the hearing. The proceedings at LIHF are held in shipping containers, where the microphones pick up every sound and convey any conversations or whispers to the immigration judge and government attorney in the immigration court.

Even eliciting coherent and clear testimony can be a challenge because migrants in the LIHF are exhausted. The United States government generally directs migrants to report to immigration authorities on the international bridge by 4:30 a.m. on the day of a hearing. See, e.g., Joel Rose, *Few Asylum-Seekers Winning Cases Under 'Remain in Mexico' Program*, NPR (Dec. 19, 2019), <https://tinyurl.com/y5ebw7cj>. “[S]helters in [Nuevo Laredo] refuse to unlock their doors until the light of day because it’s notoriously dangerous outside,” *id.*, so many asylum seekers spend the entire night on the bridge. Due to cartel activity, the migrants cannot get up to get food or go to the bathroom. When it is cold, or when it rains, they cannot seek shelter. One Laredo Project client spent a cold February night on the bridge with her

three-year-old child. An NIJC client spent a thirty-degree night on a sidewalk by the bridge, watching over her small daughter, waiting to appear in court. She arrived for her hearing having slept for only ten minutes while standing up. She had a severe headache and was worried because she could not focus on her case. Yet she had no choice but to proceed: This was her only opportunity to present her claim for asylum, and her only opportunity to access justice.

* * *

“If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.” *Hardy v. United States*, 375 U.S. 277, 293-94 (1964) (Goldberg, J., concurring) (quoting Learned Hand, J.). But MPP at Laredo limits migrants to only the stingiest ration. Migrants must risk kidnapping and sexual assault to attend their hearings at LIHF. They may miss a hearing (and be issued an order of removal) through no fault of their own. They are unlikely to find an attorney, making relief almost impossible to obtain. And they must present their testimonies to the court while overwhelmed and exhausted from the journey to the hearing. This is MPP at Laredo—and this is not meaningful access to justice.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

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Respectfully submitted,

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