

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 OF YOUNG CENTER FOR IMMIGRANT
CHILDREN'S RIGHTS, KIDS IN NEED OF
DEFENSE, CENTER FOR THE HUMAN RIGHTS OF
CHILDREN, ANGRY TIAS AND ABUELAS OF THE
RIO GRANDE VALLEY, CHILDREN'S DEFENSE
FUND, FIRST FOCUS ON CHILDREN, SAVE THE
CHILDREN ACTION NETWORK, AND SAVE THE
CHILDREN FEDERATION, INC. AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici serve immigrant children and their families who are and have been subjected to the so-called Migrant Protection Protocols (“MPP”). *Amici*, who provide legal and social services to these children and their families experiencing trauma while living in dangerous conditions in Mexico under MPP, are well-suited to assist the Court in understanding the policy’s impact on asylum-seeking² children through their personal stories. *Amici* have directly interacted with the children whose stories are highlighted in this brief. The children’s stories will illustrate that MPP fails to meet the United States’ legal obligations to afford asylum-seeking children with critical, child-specific protections and procedures.

Young Center for Immigrant Children’s Rights is a federally appointed independent Child Advocate for unaccompanied and separated immigrant children in eight locations in the U.S., and advocates with federal agencies to consider children’s best interests in every decision.

Kids in Need of Defense is a national nonprofit organization dedicated to providing free legal

1. Pursuant to Supreme Court Rule 37.6, 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.

2. *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.

representation and protection to immigrant and refugee children in the U.S. who are unaccompanied by or separated from a parent or legal guardian, and face removal proceedings in immigration court.

Center for the Human Rights of Children at Loyola University Chicago School of Law advances and protects the rights of children with the belief that children's rights are human rights, and engages in interdisciplinary scholarship and applied research to address critical issues affecting the lives of children.

Angry Tias and Abuelas of the Rio Grande Valley is a network of concerned women located at the Texas-Mexico border that provides basic necessities for health and safety and support for human dignity and justice to individuals and families seeking asylum at our borders.

Children's Defense Fund is a national nonprofit child advocacy organization that has worked relentlessly for more than 40 years to ensure a level playing field for all children and champions policies that lift children out of poverty, protect them from abuse and neglect, and ensure their access to health care, quality education, and a moral and spiritual foundation.

First Focus on Children is a national bipartisan children's advocacy organization dedicated to making children and families the priority in federal policy and budget decisions, and advocates for immigration policies that promote the health, safety, and well-being of children and families.

Save the Children Federation, Inc., in the U.S. and around the world, gives children a healthy start in life, the opportunity to learn and protection from harm.

Save the Children Action Network, founded in 2014 as the political advocacy arm of Save the Children, is building bipartisan support to make sure every child has a strong start in life.

SUMMARY OF ARGUMENT

The Migrant Protection Protocols (“MPP”), the unlawful policy forcing asylum-seekers to remain in Mexico while awaiting hearings on their claims for immigration relief, specifically harm children whom Congress has directed the Executive Branch to protect. This brief illustrates these specific harms through the stories of actual children subjected to MPP.

MPP forces nearly all asylum-seekers to remain in Mexico to await their immigration hearings in violation of federal law and international treaties that prohibit the return of asylum-seekers to countries where they face danger, persecution, threats, or harm. MPP uniquely affects children by failing to consider children’s best interests or provide the necessary procedural safeguards to ensure their safety and due process during the pendency of their immigration proceedings. The consequences are devastating.

Until MPP, the United States had for decades implemented basic procedural safeguards to avoid returning asylum-seekers to danger before or while their protection claims were decided. Children and their

families who were 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 placed in family detention or permitted to reside in the interior of the U.S. while resolving their immigration cases. In many cases, *pro bono* legal service providers and lawyers offered children and families in family detention basic information about the immigration process. These trained *pro bono* service providers and lawyers often recognized when a child had an independent claim for immigration relief, including a distinct asylum claim.

MPP turns the system on its head: it effectively prevents 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 home countries—to dangerous conditions in Mexico to await their immigration proceedings without meaningful access to counsel. Under MPP, asylum-seekers must affirmatively assert their fears of persecution in Mexico. But asylum-seeking children and their families often do not know they can (and should) volunteer such concerns. Those who affirmatively tell a border agent that they fear persecution in Mexico may be referred for a *non-refoulement* assessment by an asylum officer. However, the few asylum-seekers who receive such assessments are not provided with language-appropriate information, access to counsel, or a chance to appeal a negative *refoulement* assessment determination before they are hurried back across the border.

Worse yet, back in Mexico, many children and their families live in dangerous, unsanitary, and inhumane encampments along the border. They have frequently lacked access to running water, electricity, food, and basic medical care. Children and their families witness, fear, and often fall victim to brutal violence, kidnapping, and cartel warfare.

When children ultimately attend their MPP hearings, the vast majority lack counsel—and the “tent courts” along the border are not safe or confidential spaces to disclose harm. No one informs children about their statutory right to file an asylum application separately from their parent or guardian based on their unique claims. The hearing procedures also fail to account for the unique needs and vulnerabilities that children, especially traumatized ones, face navigating complex legal proceedings. During MPP hearings, immigration judges do not consider children’s distinct asylum claims, and rarely ask children to testify. MPP’s lack of procedural safeguards for children contravenes the basic standards of due process that Congress adopted by incorporating the principle of *non-refoulement* into federal law.

MPP is traumatic for children and further compounds the physical and psychological trauma that many 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:

- Ana fled her sexually abusive father and threats to her life after she reported him to the police in Honduras.³ Because of MPP, 16-year-old Ana was expected to volunteer her story in a tent court, where she had no privacy and no attorney to advise her about what information would be relevant.
- Six-year-old Oscar and his father were forced to separate from his mother and younger brother at the border, because U.S. Customs and Border Patrol (“CBP”) arbitrarily decided to permit his mother and brother to enter, but to return Oscar and his father to Mexico. While in Mexico, Oscar’s father was kidnapped and held ransom by a cartel.
- 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 a scar on his face.
- Erick, a teenager, fled Honduras after years of abuse and sexual-orientation discrimination. He attended multiple MPP hearings, but he was afraid to discuss his sexuality in open tent hearings and in front of his mother.
- Sisters 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, at which point the judge

3. *Amici* use pseudonyms for the minor children in this brief.

told them that their father would speak for them, denying the girls a fair opportunity to present their personal claims.

- Seventeen-year-old Mateo fled El Salvador with his family after gang members killed his older brothers and attacked him. While living in an encampment under MPP, Mateo learned that gangs were threatening to steal children. His family struggled to find food, water, and clothes; Mateo became ill after bathing in the river.

It is unreasonable to expect children to seek asylum, much less meet the evidentiary burdens needed to win asylum, while subjected to these conditions. To end the inhumane treatment of migrant children and prevent further violations of international and U.S. law, the Court should affirm the decision of the Ninth Circuit.

ARGUMENT

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

The United States has long been committed to protecting asylum-seeking children. It codified this commitment in its prohibition against 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*.⁴ As a

4. 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., Protocol

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.⁵ To meet these obligations, asylum laws, policies, and procedures must take into account each child’s safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity.⁶ Where a child faces serious risks elsewhere, asylum is often the best guarantee of the child’s safety and well-being.⁷

Relating to the Status of Refugees art. I, Jan. 31, 1967, 19 U.S.T. 6223, 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); International Covenant on Civil and Political Rights (ICCPR) art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; ratified by United States June 8, 1992); UNGA, Exec. Comm. of the High Comm’r’s Programme, *Note on International Protection*, U.N. Doc. A/AC.96/951, ¶ 16 (Sept. 13, 2001).

5. 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).

6. 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>.

7. 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>.

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.⁸ Children are developmentally distinct from adults because children’s brains continue to develop well into their twenties.⁹ According to the Department of Justice (“DOJ”), a child’s perception, memory, recall, and other capacities develop with age, yet even older children vary in cognitive abilities.¹⁰ Cultural and linguistic differences may further hinder communication and comprehension as a child is interviewed.¹¹

Moreover, 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.¹²

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

9. Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, in 45 *Journal of Adolescent Health* 216 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/>.

10. 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*”).

11. *Id.* at 4.

12. See *E.A.C.A. v. Rosen*, No. 20-3216, 2021 WL 97447, at *9-10 (6th Cir. Jan. 12, 2021).

Children must depend on parental support and scarce resources for legal, medical, and educational services.

Furthermore, trauma history may exacerbate the gap that a child must bridge to participate in immigration proceedings. Many children seeking immigration relief have suffered trafficking, abuse, or other violence. In particular, 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.¹³ DOJ guidance notes that a trauma history may “interfere with a child’s ability or willingness to report information about violent incidents.”¹⁴ Children who have experienced trauma may have piecemeal or nonlinear memories of the harm they suffered, making it time-consuming to develop and corroborate their claims.¹⁵ Because many asylum-seeking children have suffered immense trauma, it may be difficult for them to discuss private and painful experiences in a formal adversarial proceeding without privacy or any child-sensitive interviewing procedures, as is the case in MPP.¹⁶ For many children, the asylum

13. 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>.

14. *Child Forensic Interviewing* at 5.

15. *Id.*

16. See Jodi A. Quas & Thomas D. 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*”).

process is the first time they discuss their experiences, and it requires procedures and an environment that account for their age, development, and trauma history.

Courts have long recognized the unique needs of children and the need to account for them to allow children’s meaningful participation in immigration proceedings.¹⁷ And 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*.¹⁸

MPP, however, is a dangerous departure from this long-standing legal recognition of asylum-seeking children’s vulnerabilities and needs. As discussed below, MPP’s procedural shortcuts and indifference to children’s unique needs deny them the opportunity to meaningfully seek asylum.

II. MPP VIOLATES *NON-REFOULEMENT* PRINCIPLES BY DENYING CHILDREN DUE PROCESS

MPP deprives asylum-seeking children of basic procedural safeguards and due process in contravention of

17. 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).

18. U.S. Citizenship & Immigr. Serv., 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.

the Nation's obligation to protect asylum-seekers against *refoulement*.¹⁹ First, MPP prevents children from being heard on their fear of harm in Mexico, resulting in them being sent to danger and persecution there. Next, removal proceedings under MPP fail to provide child-sensitive considerations and procedures to ensure that children have a fair opportunity to tell their stories and seek immigration relief. Many children are forced to participate in tent hearings without counsel, and under intimidating and often adversarial conditions that are not conducive to volunteering intensely personal information. Immigration judges rarely ask children questions regarding their claims, and children are not informed about their right to pursue independent claims for asylum and other relief. The procedural failures put asylum-seeking children at a severe disadvantage and prevent them from sharing their own unique experiences.

A. MPP Denies Children Their Right To Be Heard on Their Fears of Returning To Danger in Mexico

At MPP's initial "screening" stage, CBP fast-tracks asylum-seekers into MPP unless they affirmatively volunteer their fears of returning to Mexico.²⁰ If an asylum-seeker affirmatively expresses such fear, the

19. *Cf.* 8 U.S.C. § 1231; Foreign Affairs Reform and Restructuring Act of 1998, § 2242(a), Pub. L. No. 105-277, Div. G., Title XXI, 112 Stat. 2681 (codified as note to 8 U.S.C. § 1231).

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

Department of Homeland Security (“DHS”) policy requires that CBP refer the asylum-seeker for a *non-refoulement* assessment to determine whether it is more likely than not that they will face persecution or torture in Mexico.²¹ If the asylum-seeker receives a negative determination, they are placed in MPP.²² CBP does not consider the fear of return to an asylum-seeker’s country-of-origin that serves as the underlying basis for an asylum claim. These procedures are inadequate to ensure that asylum-seeking children have an opportunity to be heard on their fears of returning to Mexico.

i. Children in MPP Face Dangerous and Inhumane Conditions in Mexico

More than 16,000 children, including nearly 500 infants, have been sent back to dangerous, inhumane, and unsanitary conditions in Mexico under MPP.²³ Many children in MPP live in makeshift tent encampments, where the air smells of feces and is thick with smoke from near-constant fires.²⁴ Children and families have been crowded in these camps with no or limited access

21. *Id.* at 1-2.

22. *Id.* at 2.

23. 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>.

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

to running water, electricity, food, medical care, or other necessities. Humanitarian organizations on the ground have provided food, medical care, and other services in the camps; nonetheless, some children go to bed hungry.²⁵ The “crowded, unsanitary and often dangerous conditions in tent encampments in Mexico are hazardous to child health and family wellbeing.”²⁶

While in Mexico, many children in MPP witness and fall victim to crime, violence, abuse, and family separation. Criminal groups often target asylum-seekers along the border because asylum-seekers, who have no protective community ties in Mexico, may have networks of families and friends in the U.S. who can pay their ransoms.²⁷ In

25. 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 (“*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*”).

26. Kelly L. Edyburn & Shantel Meek, *Seeking Safety and Humanity in the Harshes Immigration Climate in a Generation: A Review of the Literature on the Effects of Separation and Detention on Migrant and Asylum-Seeking Children and Families in the United States During the Trump Administration*, Social Policy Report, at 43 (forthcoming 2021).

27. 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*”).

other instances, criminal groups and other opportunistic actors target asylum-seekers because of anti-immigrant sentiment.²⁸ Because they are often fleeing gangs in the Northern Triangle of Guatemala, El Salvador, and Honduras, some children and their families are targeted by those same gangs, which have a strong presence in Mexico.²⁹

These dangers impact the daily lives of children while they await adjudication of their asylum claims. Out of fear, migrant parents often do not send their children to schools in the border cities.³⁰ That fear pervades even the most routine tasks, such as charging their cellular phones at a charge location within the encampment. Parents do not even feel comfortable taking their children to restrooms due to reports of sexual assault within the encampments and fear of going to places in the border cities due to gang and other criminal activity.³¹

ii. The MPP Process Returns Children To Danger and Harm in Mexico

Under MPP, asylum-seekers must affirmatively assert their fears of persecution in Mexico: It is DHS policy to not even ask.³² Yet, children and their families often arrive

28. See, e.g., *id.* at 33; *Like I'm Drowning* at 26.

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

30. See *Living in a Tent Camp* at 23.

31. See *id.* at 19-20, 25.

32. Pet. App. 28a.

at the border scared and unfamiliar with MPP and the complicated asylum system and do not know that they can (and should) volunteer such concerns while they are being processed by border patrol officers. It is unreasonable to place the burden on asylum-seekers, particularly children, to volunteer painful information regarding their fears of violence and persecution in Mexico. Moreover, some asylum-seekers do not receive *non-refoulement* assessments even when requested.³³

Even if asylum-seekers are able to receive a *non-refoulement* assessment, they are not given adequate time to prepare for their interviews, and may not know that they should express their fears of returning to Mexico, even though they are required to meet a heavy burden.³⁴ Many times, they lack language-appropriate information that explains the purpose of the interview.³⁵ Asylum-seekers are expected to participate in this process after they have been traveling, sometimes for months, to arrive at a point of entry.³⁶ Reports from the field show that

33. *Like I'm Drowning* at 47.

34. 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>.

35. *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).

36. See Human Rights First, *A Sordid Scheme: The Trump Administration's Illegal Return of Asylum Seekers to Mexico* 11

some *non-refoulement* interviews were conducted over the telephone, and at times in the middle of the night or early in the morning.³⁷ Contrary to government policy, some asylum-seekers have been denied the opportunity to have their *non-refoulement* assessments conducted by asylum officers trained on conducting asylum interviews.³⁸ Moreover, asylum-seekers have no way to appeal negative *refoulement* assessment determinations.³⁹

As a result of these inadequacies at the *non-refoulement* assessment stage, and as the following stories show, MPP returns many children to extreme danger and violence in Mexico.

(2019), 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).

37. *Like I'm Drowning* at 48.

38. See Debbie Nathan, *An Asylum Officer Speaks Out Against the Trump Administration's "Supervillain" Attacks on Immigrants*, *The Intercept*, Sept. 13, 2019, <https://theintercept.com/2019/09/13/asylum-interview-immigration-trump/>.

39. *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. 149 (2020) (statement of Douglas Stephens, Esq., Government Accountability Project).

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

For instance, 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 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. His grandfather fled the country, and 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, she prayed for the bullets to pass over them, and they eventually fled the scene. Following these events, Jorge and his mother sought protection in the U.S.

Upon arrival, border officials briefly processed them, gave them a court date, and 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. Forced to return to 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. The men took them away in a vehicle. 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 she 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. She sought help from a therapist. 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, and then a tooth infection. Jorge and his mother remain in Mexico because of MPP.

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

Juan, a five-year-old Honduran boy who became sick and, along with his mother, 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 and dehumanization 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. After being sent to Matamoros under MPP, Juan and his mother stayed in the encampment. The area, however, was controlled by a Mexican cartel. One day near the camp's entrance, a group of men in a vehicle 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 due to the weather conditions in Matamoros, where he endured very hot temperatures during the day and cold temperatures at night. Juan lost his appetite. Although his mother searched for medical assistance, she could not find the medical attention that Juan needed. At one point they were kidnapped for two months. They were released, but Juan's mother felt trapped in the camp because she was petrified that cartel members would attempt to kidnap her again if she ventured from her tent. With no other option to save her son, she separated from Juan, as he sought protection alone from border officials. But for Juan, the trauma did not end; after their separation, he constantly cried, called for his mother to return, and wet the bed at night.

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

Once in MPP, asylum-seekers are forced to wait in Mexico for months to attend removal proceedings held in

tents just across the U.S. border.⁴⁰ While asylum-seekers are asked to provide a written account of the basis for their claim in their asylum application, a tent-court hearing is the first opportunity for many asylum-seekers to meaningfully articulate their fears of returning to their countries-of-origin.⁴¹ Ignoring the realities of the unique needs and vulnerabilities of children, these tent hearings place children in circumstances that make it nearly impossible to tell their stories.

For starters, the morning hearings in the U.S. typically begin at 9 a.m.; however, asylum-seeking children and their families are often required to arrive at the international bridge between 3 and 4 a.m.⁴² This means that these children must leave their tents in the dark to walk and wait on the Mexican side of the border—the same places where asylum-seekers become victims of robbery, sexual assault, kidnapping, extortion, and other crimes.⁴³ Because of these dangers, many asylum-seekers never make it to their hearings.⁴⁴ Children and their families who fail to attend their hearings face termination of their cases and orders of removal in absentia.⁴⁵

40. *See Migrant Protection Protocols* at 18-21.

41. *See id.* at 20-21.

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

43. *See Migrant Protection Protocols* at 33-35.

44. *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/>.

45. *Migrant Protection Protocols* at 21.

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

The tent hearings are conducted via video teleconferencing (“VTC”), making it very difficult for children to understand what is occurring during their hearings.⁴⁶ The immigration judge, government lawyer, and interpreter are located in a courtroom sometimes hundreds of miles away from the tent where the asylum-seekers are.⁴⁷ The immigration judge appears on a video screen.⁴⁸ The interpreter sits next to the judge.⁴⁹ Asylum-seekers can hear the government lawyer’s voice, but they cannot see the lawyer’s face.⁵⁰ Children must listen to the interpreter and try to understand what is being said and who is speaking. At the same time, it is difficult to hear and understand interpreters.⁵¹ The tent hearings are rife with

46. 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>.

47. Alicia A. 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>.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Examining the Human Rights & Legal Implications of DHS’s “Remain in Mexico” Policy: Hearing Before the Subcomm.*

technical glitches and connectivity issues.⁵² Given their age and lack of understanding of the legal process, children are reluctant to speak up about these challenges.⁵³

Immigration judges rarely ask children any questions during these hearings and, even if they do, the tent courtrooms are inappropriate places for children to tell their private stories. The hearings are adversarial; the government lawyer argues for asylum-seekers to be sent back to their countries-of-origin.⁵⁴ Furthermore, the tent hearings lack privacy. As an asylum-seeker explains the reasons why she fears returning to her country-of-origin, roughly twenty-five other asylum-seekers are in the same room.⁵⁵ The hearings include parents, who may be unaware of a child's sexual orientation or other basis for persecution, and the hearings can include individuals who would share a child's traumatic testimony with people in the

on Border Sec., Facilitation & Operations of the H. Comm. on Homeland Sec., 116th Cong. 18, 23 (2020) (statement of Laura Peña, American Bar Association).

52. *Id.* at 23.

53. Young Center, *Immigration Hearings by Video: A Threat to Children's Right to Fair Proceedings* (Jan. 2020).

54. *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.

55. *See 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. 140 (2020) (statement of the National Immigrant Justice Center).

child’s country-of-origin. This environment falls far short of the welcoming, supportive, and empathetic environment that increases immigrant children’s responsiveness to questions about their traumatic experiences.⁵⁶

Compounding the difficulties of safely arriving at hearings and navigating a complex legal system with no procedural protections, asylum-seekers in MPP rarely have critical access to counsel largely because it is very difficult to retain U.S. immigration counsel or *pro bono* counsel in Mexico.⁵⁷ Children, due to their developmental needs, dependence, and vulnerabilities, are severely impacted by lack of access to counsel.⁵⁸

56. See, e.g., *Questioning Unaccompanied Immigrant Children*; Lisa Aronson Fontes, *Interviewing Immigrant Children for Suspected Child Maltreatment*, *J. of 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).

57. 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/>.

58. 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

ii. MPP Fails To Ensure That Children Are Able To Pursue Independent Asylum Claims

MPP hearings also deny 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.⁵⁹ In MPP, however, border officials and immigration judges generally fail to consider that possibility, treating children solely as “derivative” riders on a parent’s claim. As the stories below illustrate, judges particularly fail 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. Consequently, judges fail 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 do not know that they can pursue independent asylum claims, much less articulate those claims in their written asylum applications. As a result, children who face persecution on separate protected grounds are denied a fair opportunity to be heard.

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).

59. See 8 C.F.R. §§ 1208.3, 1208.13 (2020).

a. Erick—Teenager Fleeing Physical and Verbal Abuse Based on His Sexual Orientation With No Privacy To Describe Persecution in the 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. Eventually, 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 denied safe entry into the U.S. and were thrown into MPP. Over the course of several months, 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 walked back across the bridge 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 the 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 own case 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. Following these events,

Ana suffered from depression, anxiety, night terrors, and poor sleep. She 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 and the torching of one of the family's taxicabs. 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, their parents made the difficult decision to flee El Salvador. The girls and their father arrived at the border in September 2019; they were forced to return to Matamoros after being placed in MPP.

In Matamoros, the girls' father found a small room to rent, but the girls were unable to attend school. The girls were rarely allowed to leave the little room they were living in 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 totality of the conditions under MPP—the dangerous and inhumane conditions in Mexico, the hearing process with inadequate procedural safeguards, and the constant fear of being forced to return to danger in their countries-of-origin—is traumatic for children, causing long-term harm to their mental health. 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.⁶⁰

60. *See Questioning Unaccompanied Immigrant Children.*

MPP compounds this trauma, and fails to consider the specific needs of traumatized children. Many migrant “children have high levels of anxiety, depression, and PTSD.”⁶¹ Research shows that exposure to trauma and violence negatively impacts children’s brain development, health, educational outcomes, and psychological well-being.⁶²

MPP also subjects asylum-seeking children to the trauma of separation or the possibility of separation from their families, including when parents are kidnapped.⁶³ In some instances, parents with fears of returning to Mexico and their countries-of-origin are separated from their children based on arbitrary decisions by immigration officials. Such separation causes children deep sadness and stress, and often irreparable harm. A reliable, supportive relationship with a parent or caregiver serves the vital role of mitigating the dangers and harms of highly stressful and traumatic experiences.⁶⁴ Traumatized children may

61. Julie M. 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*”).

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

63. 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>.

64. *Oversight of the Customs and Border Protection’s Response to the Smuggling of Persons at the Southern Border:*

be at serious risk of “toxic stress or prolonged serious stress in the absence of buffering relationships.”⁶⁵ 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.⁶⁶

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

Mateo, a budding teenage artist and avid soccer player, is an animal lover who once nursed a bird back to health. When he was ten years old, Mateo’s mother withdrew him from school in El Salvador because gangs extorted and recruited schoolchildren. Instead, he had to work five days a week loading cement blocks onto construction trucks from the early morning to the evening. 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 in their hometown. Gang members abducted and killed Mateo’s two brothers in 2016 and 2019. Several

Hearing Before the Senate Comm. on the Judiciary, 116th Cong. (2019) (testimony of Julie Linton, American Academy of Pediatrics).

65. *Providing Care for Children* at 6.

66. Jack P. 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).

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.

In July 2019, Mateo and his family fled the threats to their lives from the gangs. After arriving at the border, they were initially detained, and then 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, sending his brother to the hospital and leaving Mateo with stomach problems.

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 Mateo's and his family's 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 older 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.

B. Oscar—Child Fleeing Death Threats Separated from His Family at the Border Based on CBP’s Arbitrary Processing Decision

Oscar, a six-year-old Salvadoran boy, and his father were separated from Oscar’s mother and younger brother for nearly eight months based on a CBP agent’s unsupervised and arbitrary decision to separate the family. Oscar’s father served in the Salvadoran military for three years before retiring to work for a private company. Oscar’s mother, a homemaker, cared for Oscar and his little brother. But their home was abruptly damaged after a group of men forcibly entered it searching for Oscar’s father. The men assaulted and threatened Oscar’s father because of his military service, destroying his military credentials. After fleeing El Salvador, the family was separated at the border because a CBP agent improperly told them that only one parent and one child could enter into the U.S. He offered no explanation for his arbitrary decision. Oscar and his father were returned to Matamoros under MPP while his mother and brother entered the U.S., despite the entire family arriving and presenting themselves together. In Mexico, Oscar’s father was kidnapped and held for ransom for several days by Mexican cartel members.

CONCLUSION

The violence and significant trauma that asylum-seeking children and their families faced in these stories are not unique. Standing alone, each story belies the very principles of human decency that the U.S. has long committed to upholding. Taken together, these stories clearly illustrate that MPP violates the U.S.'s commitment to protecting asylum-seeking children. Sending children into real danger in Mexico and subjecting them to serious risk of *refoulement* to their countries-of-origin is clearly not in their best interests. It is the opposite. The Court should affirm the decision of the Ninth Circuit.

Respectfully submitted.

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