

No. 21-954

IN THE
Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES,
ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

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

**BRIEF OF THE UNITED STATES CONFERENCE
OF CATHOLIC BISHOPS, CATHOLIC LEGAL
IMMIGRATION NETWORK, INC.,
AND CATHOLIC CHARITIES USA
AS *AMICI CURIAE* SUPPORTING PETITIONERS**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. MPP Forsakes Vulnerable Refugees Seeking Access to Protection By Subjecting Them to Further Danger.	5
II. MPP Is Immoral and Illegal.	12
CONCLUSION	28

TABLE OF AUTHORITIES

Page(s)

Cases

<i>DHS v. Regents of the Univ. of Cal.</i> , 140 S. Ct. 1891 (2020).....	22
<i>Innovation Law Lab v. Wolf</i> , 951 F.3d 1073 (9th Cir. 2020), <i>vac'd</i> <i>as moot</i> , 5 F.4th 1099 (9th Cir. 2021).....	20
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Statutes

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Pub. L. No. 96-212, §202(e), 94 Stat. 102 (1980).....	18
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<i>Catechisms of the Catholic Church</i>	14, 15
<i>CLINIC Condemns the Biden Administration's Decision to Restart MPP and Doubles Down on Its Call for Termination, in Support of Asylum Seekers</i> , CLINIC (Dec. 2, 2021), https://tinyurl.com/2p8azht6	23
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<i>Tania Guerrero, “Out of sight, out of mind:” Six Stories of Asylum Seekers and Migrants Under MPP, CLINIC (Jan. 28, 2020), https://tinyurl.com/2p93rnsd</i>	7
<i>Tania Guerrero, Seven Migrant Protection Protocols stories from Estamos Unidos: Asylum Project, CLINIC (Nov. 18, 2019), https://tinyurl.com/59ztwsv3</i>	7
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INTEREST OF *AMICI CURIAE*¹

Amici are motivated by the teachings of the Catholic Church, which include a central belief that every person is imbued with an inviolable dignity, and that all human life, created in the image and likeness of God, is sacred. It is through this lens that the Church stands “against every attempt to evaluate the person according to utilitarian and power-based criteria.” Pope Benedict XVI, *General Audience*, Vatican (Feb. 6, 2013), <https://tinyurl.com/y4nw34u4>. These teachings extend to migrants seeking refuge in a foreign land. Since the beginning of his pontificate, Pope Francis has consistently spoken out on the issue of migration and condemned the growing “globalization of indifference” facing those who flee violence, persecution, and other life-threatening circumstances. Alessandro Speciale, *Pope Francis Decries “Globalization of Indifference,”* Wash. Post (July 8, 2013), <https://tinyurl.com/y4bu6wyg>.

It is these elements of persecution and physical danger that give rise to a legal right to obtain protection under domestic and international law. Perpetuating the Migrant Protection Protocols (“MPP”) is contrary to such law and the long-established teachings of the Church, as it subjects those fleeing violence and danger in their home country to similar—or greater—harm in Mexico. The policy has strained the already-limited resources of nonprofit organizations serving

¹ Pursuant to this Court’s Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

migrants in communities along the U.S.–Mexico border, many of which organizations are Catholic and run by, or otherwise affiliated with, the various dioceses of the region. Given their strong presence along the border, Catholic entities consistently bear witness to the ongoing human suffering brought on by MPP. *Amici* object to the endangerment and arbitrary return of individuals seeking asylum in the United States.

The United States Conference of Catholic Bishops. The United States Conference of Catholic Bishops (the “Conference” or “USCCB”) is a nonprofit corporation whose members are the active Cardinals, Archbishops, and Bishops of the United States and the U.S. Virgin Islands. On behalf of the Christian faithful, the USCCB advocates and promotes the pastoral teachings of the Church in a broad range of areas, from the free expression of ideas and the rights of religious organizations and their adherents, to fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the value of human life from conception to natural death, and care for immigrants and refugees. When lawsuits touch upon important tenets of Catholic teaching, the Conference has filed *amicus curiae* briefs to assert its view, most often in this Court. In so doing, the Conference seeks to further the common good for the benefit of all.

The Catholic Legal Immigration Network, Inc. The Catholic Legal Immigration Network, Inc. (CLINIC), is the nation’s largest network of non-profit immigration legal services providers, with nearly 450 affiliates in 49 states. Through its *Estamos Unidos* project, CLINIC previously served asylum seekers in Ciudad Juarez, Mexico, who were impacted by the first iteration of MPP. CLINIC continues to conduct

systemic advocacy related to access to due process and asylum, including for those subject to MPP, based on information gathered from its network and partners and provides legal training and support on issues related to asylum.

Catholic Charities USA. Catholic Charities USA (“CCUSA”) is a national membership organization representing more than 167 diocesan Catholic Charities member agencies, which operate more than 2,600 service locations across the country. Their diverse array of social services reached more than 15 million individuals in need last year and included immigration and refugee services. MPP caused CCUSA border agencies to engage with international Catholic partners as it sought to provide basic human-need services to migrants in Mexico. The organization’s Catholic heritage includes the scriptural call to provide hospitality to newcomers as if welcoming Christ himself. CCUSA affirms the inherent dignity bestowed by God on every human person, including immigrants and refugees, no matter the circumstances that compel a person to begin a new life in one of the communities it serves.

SUMMARY OF ARGUMENT

In January 2019, the U.S. Department of Homeland Security (“DHS”) initiated the Migrant Protection Protocols (“MPP”). *See* Pet. App. 217a, 275a. In the words of its implementers, MPP is a “catch and return” policy. Press Release, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration*, U.S. Dep’t of Homeland Sec. (Dec. 20, 2018), <https://tinyurl.com/yc2crsbp>. Hoping to disincentivize refugees from making the journey to the United States, MPP forces certain migrants to return to Mexico, a further leg of their already “dangerous journey,” while they await the lengthy adjudication of their claims. *Ibid.* The conditions in Mexico to which they are returned are dangerous; refugees live in hazardous environments, often face violence at the hands of criminals or Mexican law enforcement, and lack access to basic necessities.

MPP is both immoral and unlawful. It is immoral because asylum seekers and refugees, like all persons, have inviolable dignity and rights; and these asylum seekers and refugees should be welcomed and protected: “[w]e must . . . view [refugees] as persons, seeing their faces and listening to their stories, trying to respond as best we can to their situation. . . . Let us remember the Golden Rule: ‘Do unto others as you would have them do unto you.’” 161 CONG. REC. 138, at H6193 (daily ed. Sept. 24, 2015) (address by Pope Francis). And it is illegal because it violates the United States’ *non-refoulement* obligations by returning migrants to a country in which they face a grave risk of persecution, torture, or other serious human rights violation.

DHS, for its part, eventually came to recognize these fatal flaws in MPP. It saw that the only real solution to MPP’s illegality and inhumanity, while continuing the program, would be to essentially provide a full merits hearing as to each refugee’s claim prior to return to Mexico—a solution that DHS concluded was infeasible. Pet. App. 297a. Separate from *non-refoulement* concerns, DHS also recognized the practical reality that the difficulties individuals face in Mexico severely impede their ability to prepare for their merits hearings. *Id.* at 298a–300a. Accordingly, on June 1, 2021, and again on October 29, 2021, DHS exercised its lawful authority—and indeed duty—to terminate MPP. *Id.* at 257a–360a. Despite the reasoned determination by the Government that the continued use of MPP is improper, DHS has been required to continue to carry out this unlawful and immoral program.

Amici are compelled to speak in support of DHS’s correct decision to terminate MPP. By forcing the most vulnerable among us—asylum seekers—to return to dangerous areas in Mexico pending adjudication of their asylum claims, MPP contravenes core teachings of the Church. MPP is thus intolerable, unlawful, and contrary to Catholic moral principles. *Amici* respectfully urge this Court to reverse the judgment below and permit DHS to end MPP.

ARGUMENT

I. MPP FORSAKES VULNERABLE REFUGEES SEEKING ACCESS TO PROTECTION BY SUBJECTING THEM TO FURTHER DANGER.

Once an asylum seeker is returned to Mexico to await his or her asylum hearing, that asylum seeker is on his or her own. MPP provides no assistance to

asylum seekers turned away at the border and returned to Mexico. Although the Mexican government has promised to provide those returned to Mexico access to education, healthcare, and employment, Press Release, *Migrant Protection Protocols*, U.S. Dep't of Homeland Sec. (Jan. 24, 2019), <https://tinyurl.com/2p9evnj2>, that has been an empty promise. Shelters in cities along the southern border are overcrowded, and many asylum seekers live in sordid and degrading conditions in makeshift tents or on the streets. See Nicole Narea, *The Abandoned Asylum Seekers on the US–Mexico Border*, Vox (Dec. 20, 2019), <https://tinyurl.com/t7auqx8>.

In making a reasoned determination to end MPP, the Secretary of DHS admitted, “[i]n practice . . . there were pervasive and widespread reports of MPP enrollees being exposed to extreme violence and insecurity at the hands of transnational criminal organizations that prey on vulnerable migrants as they waited in Mexico for their immigration court hearings in the United States.” Pet. App. 288a–89a (emphasis added). In particular, the Secretary relied on evidence that showed “that 81% of individuals and families returned to Mexico under MPP did not feel safe in Mexico, and that 48% had been a victim or witness of violence in Mexico.” *Id.* at 290a (emphasis added).

Amici—an episcopal conference, a network of charities, and a network of legal service providers that collaborate in providing necessary legal, spiritual, and humanitarian aid to migrants trapped in Mexico under MPP—witness first-hand the experiences of asylum seekers waiting for months in these hazardous and sometimes deadly conditions in Mexico for their

promised asylum hearings. These individual stories show why MPP must end immediately.

Squalid conditions at migrant shelters in Mexico endanger the health and welfare of vulnerable populations within the migrant community, including children. CLINIC's *Estamos Unidos* project worked with families staying at a shelter in Ciudad Juárez with a severe rat infestation. The children at the shelter had to sleep with blankets completely covering their bodies to keep the rats from walking on them. The rat droppings and unsanitary conditions at the shelter caused the children to contract diseases, leading to extreme levels of dehydration and malnutrition as they were unable to keep food down in their fragile state.

The experience of Jorge² further exemplifies these conditions. Jorge fled persecution in Central America and was returned to Mexico under MPP. He described the squalid living conditions at the shelter to his attorney. While there, Jorge witnessed another man ask shelter staff for medical assistance for several

² *Amici* have used pseudonyms for all individuals whose stories are shared in this brief. The stories of Nicole, Xiomara, Rosy, and Virginia were provided by CLINIC. See Tania Guerrero, *Seven Migrant Protection Protocols stories from Estamos Unidos: Asylum Project*, CLINIC (Nov. 18, 2019), <https://tinyurl.com/59ztwsv3>; Tania Guerrero, "Out of sight, out of mind:" *Six Stories of Asylum Seekers and Migrants Under MPP*, CLINIC (Jan. 28, 2020), <https://tinyurl.com/2p93rnsd>; Tania Guerrero, *Already Vulnerable Migrants in Juarez Endangered by COVID-19 Pandemic*, CLINIC (Apr. 20, 2020), <https://tinyurl.com/fb5pmeej>; Tania Guerrero, *After Months of COVID, Migrants Under MPP Are Losing Hope*, CLINIC (Jan. 29, 2021), <https://tinyurl.com/2p9zbj7x>. The stories of Jorge, Alma, and Juan were provided to the USCCB by Catholic shelters and dioceses serving migrants enrolled in MPP.

days. The man appeared visibly ill to those around him but was not given any medical attention. Three days from the last time Jorge had seen the man, others at the shelter began to investigate an odor they believed to be a dead rat. Instead, they discovered the body of the ill man; he had been dead for several days.

Staff at the shelter scrambled to cover up the situation by moving all migrants out of the shelter and using diesel to disinfect the area where the man's body was discovered. When reporters came to the shelter to learn more about the incident, some migrants met with them through a chain-link fence to discuss the events. All those who had been identified as having spoken to journalists were kicked out of the shelter; some were kicked out upon their return from their immigration hearing. Jorge described that a father and son were severely beaten after speaking to the media. He also explained that shelter staff did not offer any significant medical assistance to anyone and that the medic on-site was actually a mechanical engineer.

After the incident, staff took Jorge into a room where a Mexican law enforcement official was present, and he was coerced into signing a document that prohibited him from speaking with anyone about incidents at the shelter. He was not given the opportunity to consult with his attorney. Shelter staff would also confiscate cellphones every night, and they were often not returned to their owners for days; thus, Jorge often missed communications from his attorney. Crime at the shelter was also rampant, and Jorge once had personal belongings stolen from him.

For other migrants, the same actors that caused them to flee their home countries and seek refuge in the United States now terrorize them in Mexico. Nicole's story illustrates this horror. After the murder of her father and threats against her family, Nicole fled Honduras for the United States with her husband and young child, but they now wait in Ciudad Juarez for their chance at asylum. The men who are hunting down Nicole's family are looking for them in Mexico as well. Nicole, her husband, and their child have tried to find a safe place to await their hearing, but to no avail. They have already escaped two kidnapping attempts. At least one attempt has been made on their lives, and while Nicole and her family escaped, she fell and suffered a miscarriage in the process.³

Women and girls are particularly vulnerable to the conditions in Mexico and are therefore uniquely threatened by MPP. For example, Xiomara, a teacher from Honduras, fled her homeland with her teenage daughter as a result of escalating threats from gang members. She and her daughter were sent to Ciudad Juarez pursuant to MPP to await their hearing. In Ciudad Juarez, they were kidnapped by members of a

³ Some stories detailed here were reported during the implementation of MPP 1.0, but “the main shortcomings of the programme are unchanged.” David Agren, *Remain in Mexico: Migrants Face Deadly Peril as Biden Restores Trump Policy*, *Guardian* (Dec. 3, 2021), <https://tinyurl.com/3ffav2y>. While the Government was able to effect some procedural changes to its screening processes under MPP 2.0, it has “limited ability to fix the[] issues” of security, stable and safe housing, health care and other services, and sufficient food plaguing MPP “given that they relate to migrant conditions and access to benefits in Mexico—an independent sovereign nation.” Pet. App. 289a. Conditions such as these are ongoing and “cannot easily be fixed.” *Id.* at 293a.

criminal organization. Xiomara and her daughter were held for almost a week before they escaped, crawling through deserted lots and hiding in a ditch to evade their captors. They live in constant fear and rarely leave the shelter.

Rosy fled her home country only to be terrorized again in Mexico. She is a survivor of gender-based violence and fled gang violence in her home country, along with her mother and younger brother. Returned to Mexico under MPP, the safety of the United States remains just out of reach. She suffers from frequent night sweats and nightmares, and in Ciudad Juarez, she has been approached by a gang member from her home country. He warned her that he would make her suffer if she informed anyone that he was a gang member. These threats further exacerbated her existing trauma.

Virginia, a Venezuelan woman in her fifties, detailed a story all too familiar to countless women subjected to sexual violence across the globe. She fled persecution in Venezuela, only to be returned to Mexico under MPP. Despite explaining to U.S. immigration authorities that she had experienced assaults and xenophobic treatment, she was returned to Ciudad Juarez. She reported being targeted after asking someone for directions to a market in downtown Ciudad Juarez. When officers heard her accent, they identified Virginia as a foreigner and asked to see her permit to be in Mexico. Although she believed she had all of the proper papers, the police threatened to detain her unless she paid them—which she lacked the ability to do. At that point, the police forced her into a truck, told her she could pay them in kind, and sexually assaulted her. Virginia fought, but the police ultimately overpowered her. Eventually, she began to

vomit and the officers pushed her out of the truck. She fears that U.S. immigration authorities will not believe her, and that she will be returned to Ciudad Juarez again if she has an opportunity to request another *non-refoulement* interview with immigration authorities.

In light of the desperation of refugees fleeing dangerous conditions in their home countries, MPP creates perfect conditions for criminal abuse and wrongdoing. MPP takes desperate people, who might face death if they return to their home countries, and tells them that they must remain at the Mexican border (a hazardous and lawless environment itself) if they wish to attempt to access the safety promised by asylum in the United States. Desperate people without options or support in lawless environments are easy prey for criminals.

Alma, her two children, and her brother-in-law, Juan, fled Guatemala after Alma's husband was murdered by gang members. The four of them reached the United States seeking asylum but were "caught" and "returned" to Mexico under MPP. Juan then attempted to enter the United States again, desperate to escape. Juan sought the help of human smugglers on the southern border, also referred to as coyotes, but did not have enough money to pay for all four family members. As a result, he struck a deal with the coyotes—he would agree to transport drugs into the United States. Once there, he would send money to have the coyotes bring Alma and her children to join him. This dream would never come to fruition—instead, the gang members who had killed Alma's husband paid the coyotes to kill Alma. Alma's oldest child was sold to sex traffickers and her youngest child was beaten so severely that she was sent to a hospital,

eventually winding up in federal custody. MPP encourages the environment in which such brutality flourishes.

In each of these examples, individuals or families fled to the United States seeking shelter, safety, and security from persecution in their home countries. Instead of finding the promise and tradition of “the generosity of our people in coming to the aid of those in need,” John F. Kennedy, *Statement by the President Upon Signing the Migration and Refugee Assistance Act*, UC Santa Barbara: Am. Presidency Project (June 28, 1962), <https://tinyurl.com/kwzx2k5f>, they were greeted by a cruel system of “catch and return”—relinquishing them to the brutality they were trying to escape.

II. MPP IS IMMORAL AND ILLEGAL.

Amici have a strong interest in ensuring that courts adhere to an important goal of federal immigration law: the protection of human life and dignity. MPP is contrary to the Church’s core teachings and the United States’ *non-refoulement* obligations. The Church teaches that all people, especially refugees and asylum seekers, should be welcomed and protected in recognition of and respect for their inalienable human dignity. *Non-refoulement* prohibits the return of migrants to any country in which they face a serious risk of persecution, torture, or other serious human rights violation. MPP is a direct affront to these core beliefs and obligations.

A. Asylum Seekers Should Be Welcomed and Protected.

All people, especially refugees and asylum seekers, should be welcomed and protected in recognition

of and respect for their inalienable human dignity. MPP does the opposite.

In the Old Testament, God calls upon his people to care for the foreigner: “You shall not oppress a resident alien; you well know how it feels to be an alien, since you were once aliens yourselves in the land of Egypt.” *Exodus* 23:9. *Leviticus* 19:34 similarly instructs, “You shall treat the alien who resides with you no differently than the natives born among you; you shall love the alien as yourself; for you too were once aliens in the land of Egypt. I, the LORD, am your God.” In the New Testament, Jesus identifies himself with migrants and other marginalized persons and in fact fled his homeland as an infant with his family to escape political violence. *Matthew* 2:13–23. He reiterates the Old Testament command to welcome and care for the stranger: “For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me.” *Matthew* 25:35.

Pope Francis has spoken of the “moral imperative” of welcoming and protecting migrants and refugees. Pope Francis, *Address of His Holiness Pope Francis to Participants in the International Forum on “Migration and Peace,”* Vatican (Feb. 21, 2017), <https://tinyurl.com/y95d7gu8>. “Every stranger who knocks at our door is an opportunity for an encounter with Jesus Christ, who identifies with the welcomed and rejected strangers of every age (Matthew 25:35–43).” Pope Francis, *Message of His Holiness Pope Francis for the 104th World Day of Migrants and Refugees 2018,* Vatican (Jan. 14, 2018), <https://tinyurl.com/yysawo95>. And he has called upon Catholics and all people of good will to “embrace all those fleeing from war and hunger, or forced by discrimination, persecution, poverty and environmental degradation to leave their

homelands.” Pope Francis, *Message of His Holiness Pope Francis for the Celebration of the 51st World Day of Peace*, Vatican (Jan. 1, 2018), <https://tinyurl.com/ycv25ux8>.

This commitment to protecting migrants flows from the Catholic Church’s longstanding tradition of defending the fundamental and inalienable rights of every human being. *See generally Modern Catholic Social Teaching on Immigration: Notable Quotes*, CLINIC (June 18, 2015), <https://tinyurl.com/yc2bax3u> (highlighting teachings from as early as 1891). Every person is created in God’s image and deserves dignity and respect. Pontifical Council for Just. & Peace, *Compendium of the Social Doctrine of the Church* ¶ 108 (2005). *See generally Genesis* 1:27. Thus, migrants and asylum seekers, like all persons, are imbued with inherent dignity and natural rights that must be respected, without regard to their citizenship status or national origin. *See Modern Catholic Social Teaching on Immigration: Notable Quotes* 14, CLINIC (Oct. 2015), <https://tinyurl.com/7ku5546m> (quoting Pope Saint John Paul II, *Speech of Saint Pope John Paul II to the General Assembly of the International Catholic Migration Commission* (July 5, 1990) (“It is necessary to restate that, for migrants or refugees as for all other human beings, rights are not based primarily on juridical membership in a determined community, but, prior to that, on the dignity of the person”). This core principle drives the Church to lead the faithful and all people of good will to see every person, and especially the vulnerable migrant or asylum seeker, as made in God’s image, and thus to welcome and care for them out of compassion and respect for their human dignity. *See* Pontifical Council “Cor Unum” & Pontifical Council for the Pastoral Care of

Migrants & Itinerant People, *Refugees: A Challenge to Solidarity*, Vatican, <https://tinyurl.com/alygikm>.

Also central to the Church's teachings is that every human life is sacrosanct, and therefore anyone whose life is threatened has the right to protection. Those who "flee wars and persecution" have the right "to claim refugee status" and to seek asylum, rather than to migrate through ordinary channels. U.S. & Mexican Catholic Bishops, *Strangers No Longer: Together on the Journey of Hope*, USCCB ¶ 37 (Jan. 22, 2003), <https://tinyurl.com/3ca3v3ta>. The human rights and dignity of asylum seekers must be respected, regardless of their citizenship, visa status, or mode of arrival. See *Responding to Refugees and Migrants: Twenty Action Points for the Global Compacts* 3, Vatican, <https://tinyurl.com/yxofpvcp> ("Migrants, asylum seekers and refugees should be received as human beings, in dignity and full respect for their human rights, regardless of their migratory status.").

Finally, the Church teaches that all people "have the right to migrate to support themselves and their families" and instructs that nations—particularly economically prosperous nations—should "provide ways to accommodate this right." *Strangers No Longer, supra* ¶ 35; *Catechism of the Catholic Church* ¶ 2241, available at <https://tinyurl.com/mr288mys>. All people have the "right to receive from the earth what is necessary for life—food, clothing, shelter." Fr. Thomas Betz, *Catholic Social Teaching on Immigration and the Movement of Peoples*, USCCB, <https://tinyurl.com/yxlerkxz>; see also *A Catholic Framework for Economic Life, a Statement of the U.S. Catholic Bishops*, USCCB (2015), <https://tinyurl.com/y55hpeoa> ("All people have a right to life and to secure the basic

necessities of life, such as food, clothing, shelter, education, health care, safe environment, and economic security.”). When individuals cannot find “the economic, political, and social opportunities to live in dignity” in their country of origin, individuals have the right to migrate to another country to support themselves and their families. *Strangers No Longer, supra* ¶ 34; see also Pope Francis, *Fratelli Tutti*, Vatican ¶ 129 (Oct. 3, 2020), <https://tinyurl.com/36zdptzj> (“[W]e are obliged to respect the right of all individuals to find a place that meets their basic needs and those of their families, and where they can find personal fulfillment.”).

These fundamental concepts underlie the Church’s commitment to care for refugees and to call upon public authorities to do the same.

In 1952, Pope Pius XII promulgated the apostolic constitution *Exsul Familia Nazarethana*, reaffirming the Church’s commitment to care for refugees during the post-World War II refugee crisis. Pope Pius XII, *Exsul Familia Nazarethana*, Papal Encyclicals Online (1952), <https://tinyurl.com/3k7r7h2p>. He called upon the Church to “offer refugees and migrants a comfort in their trials” and to “look after them with special care and unremitting aid.” *Ibid.* Decades later, Pope Saint John Paul II explained that undocumented migrants “come[] before us like that ‘stranger’ in whom Jesus asks to be recognized. To welcome him and to show him solidarity is a duty of hospitality and fidelity to Christian identity itself.” Pope Saint John Paul II, *Undocumented Migrants, Message of Pope John Paul II for World Migration Day*, Vatican (July 25, 1995), <https://tinyurl.com/ybyoseuo>. He further affirmed the obligation to welcome and assist migrants

“whatever their legal status with regard to State law.”
Ibid.

The Church thus calls upon “public authorities” to “respect the fundamental and inalienable rights of the human person,” including in immigration and asylum policies. *Catechism of the Catholic Church, supra* ¶ 1907. As Pope Saint John Paul II explained, governments must “regulate the migratory flows with full respect for the dignity of the persons and for their families’ needs.” Pope Saint John Paul II, *Message of the Holy Father John Paul II for the 90th World Day of Migrants and Refugees*, Vatican (Dec. 15, 2003), <https://tinyurl.com/yy3nzphd>.

To be sure, the Church recognizes the right of sovereign nations to regulate their borders and to control immigration in furtherance of the common good. However, “[a] country’s regulation of borders and control of immigration must be governed by concern for all people and by mercy and justice.” *Catholic Social Teaching on Immigration and the Movement of Peoples, supra*. Accordingly, in regulating immigration, nations must respect the human dignity and rights of migrants and protect those fleeing violence and persecution. As Pope Benedict XVI explained, although “every state has the right to regulate migration and to enact policies dictated by the general requirements of the common good,” states must always “safeguard[] respect for the dignity of each human person.” Pope Benedict XVI, *Message of His Holiness Pope Benedict XVI for the World Day of Migrants and Refugees*, Vatican (Oct. 12, 2012), <https://tinyurl.com/y6jgu8un>.

B. *Non-Refoulement* is a Legal Requirement and a Moral Imperative—U.S. Immigration Law Does Not Exist Isolated from History or Moral Teachings.

Just as the Church's social teachings are motivated by a concern for human life and dignity, so too is some of federal immigration law. This is particularly true for the principle of *non-refoulement* as it applies to asylum seekers and refugees.

In the wake of the horrors of World War II, leading nations of the world cemented their duty to never again allow such tragedy to unfold. Not only did they bind one another to never engage in or abet acts of persecution, but in light of the harm caused by nations' decisions to turn a blind eye to the death and suffering that had occurred during the Holocaust, they also vowed to aid individuals suffering such harm at the hands of others.

Never again should persons fleeing persecution feel, in their own words, "abandoned by the world" and turned back to their tormentors. See Timothy E. Lynch, *Refugees, Refoulement, and Freedom of Movement: Asylum Seekers' Right to Admission and Territorial Asylum*, 36 *Geo. Immigr. L.J.* 73, 75 (2021) (quoting Dan Froomkin, *Talking to Survivors of the SS St. Louis*, *Medium* (Jan. 27, 2017), <https://tinyurl.com/2p96hzz3>) (discussing the United States' rejection at its shore of Jewish passengers of the SS *St. Louis* fleeing the Nazi regime, 30% of whom were later murdered in the Holocaust).

Accordingly, the nations ratified the 1951 Convention, of which *non-refoulement* is “[t]he core principle.” 1951 Refugee Convention, UNHCR, <https://tinyurl.com/yxwf5vf3>. This principle, enshrined in Convention Article 33, requires that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” The protection guaranteed by *non-refoulement* is broad. It protects refugees and asylum seekers alike, regardless of formal status, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, UNHCR ¶ 6 (Jan. 26, 2007), <https://tinyurl.com/yy25y4sr>, and assures persecution victims that no state will return them to their country of origin, nor to “any territory in which the person concerned will be at risk—regardless of whether those territories are the country of origin of the person concerned,” Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, UNHCR ¶ 113 (2003), <https://tinyurl.com/y6cunlqe> (emphasis in original). Where a nation is “not prepared to grant asylum,” the nation may remove asylum seekers only “to a safe third country,” where they can “ensure that the individual in question is not exposed” to persecution. *Id.* ¶¶ 76, 117 (emphasis added).

Although it did not initially ratify the Refugee Convention, the United States came to recognize its duty as a global leader to affirm and enforce these

moral norms when it acceded to these treaty obligations. See Protocol Relating to the Status of Refugees, <https://tinyurl.com/y33m2q84> (noting accession to the 1967 Protocol, binding the United States to the provisions in the convention). As President Lyndon B. Johnson, urging the Senate to accede to the Protocol, explained, “[g]iven the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol’s objectives everywhere.” Lyndon B. Johnson, *Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees*, UC Santa Barbara: Am. Presidency Project (Aug. 1, 1968), <https://tinyurl.com/yxmauj33>. He continued: “[f]oremost among the humanitarian rights which the Protocol provides is the prohibition against expulsion or return of refugees to *any* country in which they would face persecution.” *Ibid.* (emphasis added).

In 1980, the passage of the Refugee Act fully realized this promise to shelter migrants and refugees. Congress, too, recognized the United States’ moral leadership and saw the need to amend asylum law to be consistent with this “tradition of welcoming the oppressed of other nations and with our obligations under international law”—i.e., the 1967 Protocol. See H.R. Rep. No. 96-608, at 17–18 (1979). The Refugee Act speaks in unqualified terms, guaranteeing that the United States “shall not deport or return any alien . . . to a country if . . . such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular

social group, or political opinion.” Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980). And its parallel to the requirements of the Refugee Convention was intended and unmistakable. See *INS v. Stevic*, 467 U.S. 407, 421 (1984) (noting the Act’s language “conform[s] to the language of Article 33”).⁴ Thus, “[i]f one thing is clear from the legislative history of [the Refugee Act of 1980], it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the [1967 Protocol],” and, by extension, Article 33. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Finally, the U.S. Code itself would enshrine the United States’ “long tradition as a haven for people uprooted by persecution and political turmoil.” President Jimmy Carter, *Refugee Act of 1980 Statement on Signing S. 643 Into Law*, UC Santa Barbara: Am. Presidency Project (Mar. 18, 1980), <https://tinyurl.com/3utvs2wy>.

The *non-refoulement* principle enshrined in federal immigration law closely mirrors the teachings of the Church. It requires nations not to return refugees and asylum seekers to any areas where they would face persecution, thus protecting the human dignity and right to life of those fleeing violence and persecution. The Gospel values and the Church’s teachings

⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) amended this provision to substitute the term “remove” in place of “deport or return.” IIRIRA, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-589; 8 U.S.C. § 1231(b)(3)(A). This revision simply reflects that all types of deportation and exclusion proceedings had been consolidated under the nomenclature of removal. Cf. *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1062 n.2 (9th Cir. 2010).

on protecting the inalienable human dignity of migrants require the consistent application of *non-refoulement*.

Accordingly, the Holy See has emphasized that the *non-refoulement* principle “should always be respected.” *Responding to Refugees and Migrants: Twenty Action Points for the Global Compacts, supra* at 2. The Holy See has further asserted that the *non-refoulement* principle “is based on the individual situation of” each refugee and “not on how ‘safe’ a country is generally claimed to be,” and it has urged nations to “avoid using safe country lists, as such lists often fail to meet the refugee’s needs for protection.” *Ibid.* It has also called upon nations to “expand the number and range of alternative legal pathways for safe and voluntary migration and resettlement, in full respect for the principle of non-refoulement.” *Ibid.*

In furtherance of this belief, Bishop Mario E. Dorsonville, auxiliary bishop of Washington and chairman of the USCCB’s Committee on Migration, affirmed that

we must work as a nation to welcome the newcomer and respond to those in need with Christ-like compassion. This includes . . . addressing the root causes of migration[] and reforming our bogged down immigration system. It is possible to do these things while respecting the rule of law; we need only commit ourselves to the task.

U.S. Bishops’ Migration Chairman Responds to Outcome of Supreme Court Case on Migrant Protection Protocols, USCCB (June 24, 2021), <https://tinyurl.com/4naps8d5>.

If MPP is to continue, then it *must* be consistent with the *non-refoulement* obligations of Article 33. If it is inconsistent with *non-refoulement* obligations, it must be ended as illegal and immoral.

It is unnecessary here to relitigate whether the prior version of MPP violated the United States’ *non-refoulement* obligations—it did. The highest court to consider the question on the merits, the Ninth Circuit, held that “Congress intended [the Refugee Act and successors] to ‘parallel’ the anti-refoulement provision of Article 33,” and MPP likely failed to “comply with the United States’ anti-refoulement obligations under [the Refugee Act].” *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1087–93 (9th Cir. 2020) (affirming an injunction of MPP under the Administrative Procedure Act), *vac’d as moot*, 5 F.4th 1099 (9th Cir. 2021) (mem.). And the Government’s actions since—highlighting the numerous issues with the program and seeking to end it—strongly suggest agreement.

With *Innovation Law Lab* pending before the Supreme Court, the Secretary determined that rather than fight for a program that is inhumane and illegal, he would end MPP. After thorough consideration of the issues, the Secretary identified that “[i]n practice . . . there were pervasive and widespread reports of MPP enrollees being exposed to extreme violence and insecurity at the hands of transnational criminal organizations *that prey on vulnerable migrants as they waited in Mexico* for their immigration court hearings in the United States.” Pet. App. 288a–289a (emphasis added). As noted above, for example, the Secretary relied on evidence showing “that 81% of individuals and families returned to Mexico under MPP did not

feel safe in Mexico, and that 48% had been a victim or witness of violence in Mexico.” *Id.* at 290a (emphasis added). The Secretary, in light of these and other similar findings, correctly understood that the United States could no longer abandon individuals at risk of such violence by reimplementing MPP without a serious overhaul.

As the Secretary recognized, though, no such overhaul is possible. The Secretary identified four key areas in which MPP was particularly deficient: asylum seekers had to affirmatively state a fear of return to Mexico in order to be screened for exemption from the policy, *id.* at 293a–294a; they had to prove they were “more likely than not”⁵ to face persecution if returned to Mexico, which is higher than the showing required to claim asylum from their home countries, *id.* at 294a–295a; they were not initially permitted to have counsel for *non-refoulement* interviews, *id.* at 295a–296a; and the program was plagued with operating inconsistencies and pressure on immigration officials to find against asylum seekers, *id.* at 296a. The Secretary recognized the possibility that these deficiencies could be shored up, but as the benefit of hindsight has made clear, he predicted that doing so would not solve the underlying *non-refoulement* problems. *Id.* at 297a; see also *UNHCR Comment on Reinstatement of U.S. Policy That Endangers Asylum Seekers*, UNHCR (Dec. 2, 2021), <https://tinyurl.com/34tbusrr>

⁵ While this standard is consistent with the showing required for withholding of removal, which implements the Refugee Convention’s *non-refoulement* provisions, this requirement is accompanied by the procedural safeguards attendant to a full merits hearing.

(“The announced adjustments to the policy are not sufficient to address these fundamental concerns.”).

Specifically, the Secretary noted that, for any changes to correct these flaws, DHS would need to “lengthen the screenings and . . . devote additional asylum officers and detention space to these screenings, both of which are in short supply.” Pet. App. 297a. That is, Congress had determined through the Refugee Act that certain procedural safeguards associated with full merits proceedings are necessary to fulfill the United States’ legal and moral duties under the Refugee Convention. But lengthening the proceedings to comply—in essence, creating full merits determinations—would take immigration officials away from other duties, such as the obligation to handle affirmative asylum claims on the merits on a reasonable and timely basis, leaving asylum seekers in limbo longer in order to resolve these preliminary claims, with nowhere to house them. A solution to comply with one set of *non-refoulement* obligations by neglecting another set of *non-refoulement* obligations is not a solution at all.

Non-refoulement concerns were not the only reason the Secretary relied upon in deciding to terminate MPP, but they were by themselves sufficient. As this Court recognized, “if it is illegal for DHS to [continue doing a specific act], that conclusion supported . . . disallow[ing that specific act].” *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020). And here, there is no question that numerous courts had recognized that it is illegal for DHS to continue violating *non-refoulement* obligations by returning individuals

to Mexico where they face persecution without implementing adequate procedural safeguards. *See* Pet. App. 282a n.33 (collecting cases).

In 1968, and again in 1980, the United States made a promise to be the “shining city upon a hill” and help “refugees ma[k]e their way through the choppy seas” to safety. President Ronald Reagan, *Farewell Address*, Ronald Reagan Presidential Libr. & Museum (Jan. 11, 1989), <https://tinyurl.com/2p9czrc6>. The Secretary’s decision to listen to these courts and stop breaking that promise must stand.

C. *Amici* Stand Against MPP.

The Church’s commitment to protecting human life and dignity demands that it take a strong position against MPP. Catholic Bishops in the United States have consequently been outspoken critics of MPP.

Catholic Bishops of the dioceses along the border issued a statement expressing their “total disagreement” with MPP. *Statement of the Bishops of the Border Between Texas and Northern Mexico*, Just. for Immigrants (Mar. 4, 2019), <https://tinyurl.com/y3uma5m8>. They explained that immigrants at our border are “brothers and sisters who are suffering, Christ in need,” and emphasized that they should be given “the support they require, without assuming they are criminals, as they are sometimes perceived.” *Ibid.*

After visiting the U.S.–Mexico border, Bishop Mark J. Seitz of El Paso condemned MPP, stating that “[r]espect for the truth demands that I speak up to say that this fundamental right to asylum here at the border really is effectively over.” *Asylum at the Border Is “Effectively Over,” El Paso Bishop Says*, Catholic Sentinel (June 28, 2020), <https://tinyurl.com/mr2aparx>.

More recently, after DHS announced it would reinstate MPP in December 2021, Bishop Seitz again condemned MPP, explaining that

the name itself is a lie. It has nothing to do with the protection of migrants, and it places families in dangerous situations among communities that are already suffering from a lack of resources. Second, MPP operates on the assumption that those coming to our border have no right to enter. To prevent those who seek asylum from entering is not only heartless, it is illegal.

CLINIC Condemns the Biden Administration's Decision to Restart MPP and Doubles Down on Its Call for Termination, in Support of Asylum Seekers, CLINIC (Dec. 2, 2021), <https://tinyurl.com/2p8azht6>.

Bishop Joe S. Vásquez of Austin, Texas, then chairman of the USCCB's Committee on Migration, and Sean Callahan, president and CEO of Catholic Relief Services, issued a statement joining the Texas and Mexico border Bishops in their opposition to MPP. Bishop Joe S. Vásquez & Sean Callahan, *USCCB Migration Chairman and CRS President Issue Statement Supporting Texas–Mexico Border Bishops' Statement on Recent U.S. Government Asylum Policy*, USCCB (Mar. 13, 2019), <https://tinyurl.com/y39j7coq>. They “urge[d] the Administration to reverse this policy, which needlessly increases the suffering of the most vulnerable and violates international protocols” and “affirm[ed] a person’s right to seek asylum.” *Ibid.* Bishop Vásquez and Mr. Callahan emphasized that “recent efforts to curtail and deter” the critical right to asylum, including MPP, were “deeply troubling.” *Ibid.*

This condemnation extends beyond dioceses located along the U.S.–Mexico border. In December 2021, Bishop Dorsonville “strongly urge[d] the Administration to take all necessary action to end MPP and replace it with an approach that respects human dignity, exemplifies our national values, upholds the rule of law, and embraces Christ’s call to welcome the newcomer.” *U.S. Bishops’ Migration Chairman Expresses Concern Over Reimplementation of Migrant Protection Protocols*, USCCB (Dec. 3, 2021), <https://tinyurl.com/y6kezfsr>.

CONCLUSION

MPP is illegal and immoral. For the reasons stated above and in Petitioners’ brief, the judgment below should be reversed.

Respectfully submitted.

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