**No. 21-10806**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**State of Texas, State of Missouri,**
*Plaintiffs-Appellees*,

*v.*

**Joseph R. Biden, in his official capacity as President of the United States, *et al.***,
*Defendants-Appellants.*

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On Appeal from the United States District Court for the Northern District of Texas Amarillo Division No. 2:21-cv-00067-Z (Kacsmaryk, J.)

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# MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF NON-PROFIT ORGANIZATIONS AND FORMER IMMIGRATION JUDGES IN SUPPORT OF EMERGENGY MOTION TO STAY DISTRICT COURT ORDER

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Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7552

Blaine Bookey
Anne Dutton
Karen Musalo
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 703-8202

*Counsel for Amici Curiae*
(*Additional Counsel on Next Page*)

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
Anwen Hughes
Human Rights First
805 15th Street, NW, Suite 900
Washington, DC 20005
Telephone: (202) 547-5692

Melissa Crow
Southern Poverty Law Center
1101 17th Street, NW, Suite 705
Washington, DC 20036
Telephone: (202) 355-4471

Gracie Willis
Southern Poverty Law Center
150 E. Ponce de Leon Avenue,
Suite 340
Decatur, GA 30030
Telephone: (404) 521-6700

## SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record for Amici certifies that the following persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. American Immigration Council
2. American Immigration Lawyers Association
3. Catholic Legal Immigration Network, Inc.
4. Center for Gender & Refugee Studies
5. Human Rights First
6. Justice Action Center
7. National Immigration Law Center
8. Round Table of Former Immigration Judges
9. Southern Poverty Law Center

Pursuant to Fed. R. App. P. 26.1, Amici state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in either of the Amici.

Dated: August 17, 2021

*/s/ Blaine Bookey*
Blaine Bookey

Prospective Amici Curiae the American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Inc., Center for Gender & Refugee Studies, Human Rights First, Justice Action Center, National Immigration Law Center, Southern Poverty Law Center, and the Round Table of Former Immigration Judges respectfully request the Court's permission to file a brief as amici curiae in support of Defendants-Appellants' Emergency Motion for Administrative Stay and for Stay Pending Appeal.

Prospective Amici seek leave to file the attached brief to explain errors in the factual findings underpinning the permanent injunction issued by the district court, which orders Defendants to reinstate the Migrant Protection Protocols ("MPP"). In light of their extensive experience in the field of asylum research and practice in general, and MPP in particular, Prospective Amici respectfully submit that their brief will assist the Court in its evaluation of the claims presented in this appeal.

Counsel for Defendants have stated in writing they do not oppose this motion. Counsel for Prospective Amici contacted counsel for Plaintiffs-Appellees by email on August 17, 2021 at 5:01 p.m. Central

Time, asking for their position on this motion. As of the time of filing, counsel for Prospective Amici have not received a response and therefore do not know if Plaintiffs-Appellees intend to file an opposition to this motion.

The **American Immigration Council** is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has previously appeared as amicus before administrative and federal courts, including the Fifth Circuit Court of Appeals, on issues relating to the interpretation of federal immigration laws and policies.

The **American Immigration Lawyers Association** ("AILA") is a national, nonpartisan, and non-profit organization comprised of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent asylum seekers, U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace.

The **Catholic Legal Immigration Network, Inc. (CLINIC)** is the nation's largest network of non-profit immigration legal services providers, with over 400 affiliates in 49 states. CLINIC's programs serve asylum seekers on both sides of the U.S.-Mexico border. CLINIC's *Estamos Unidos* Asylum Project provides case preparation and referral services to asylum applicants subjected to the MPP in Ciudad Juarez, Mexico. Within the United States, CLINIC engages in a variety of activities to support asylum seekers and their representatives, including its Remote Motion to Reopen Project, which has successfully represented non-citizens, including asylum seekers subjected to MPP, on motions to reopen.

The **Center for Gender & Refugee Studies**, based at the University of California Hastings College of the Law, advances the human rights of refugees through litigation, scholarship and policy recommendations. In addition, the Center provides technical assistance for attorneys representing asylum seekers nationwide, including in cases of individuals returned to Mexico under the Migrant Protection Protocols, reaching over 8,000 unique asylum cases at all levels of the immigration and federal court system in the past year alone. The

Center has appeared as counsel or amicus before nearly every court of appeals, including the Fifth Circuit Court of Appeals, on issues relating the proper interpretation of U.S. asylum law and represented plaintiffs challenging the MPP program.

**Human Rights First** is a non-governmental organization established in 1978 that works to ensure U.S. leadership on human rights globally and compliance domestically with this country's human rights commitments. Human Rights First operates one of the largest U.S. programs for pro bono legal representation of refugees, working in partnership with volunteer lawyers at leading law firms to provide legal representation without charge to indigent asylum applicants, including some subject to MPP. Human Rights First has conducted research, issued reports, and provided recommendations to the U.S. government on MPP and that program's impact on asylum seekers.

The **Justice Action Center** ("JAC") is a non-profit organization whose mission is to use a combination of storytelling and litigation to advocate for unseen and overlooked immigration issues. In doing so, JAC ensures that the richness and diversity of the immigrant experience is heard both inside and outside the courtroom. As an

organization working on behalf of immigrant communities, JAC has a strong interest in protecting constitutional and statutory rights for asylum seekers. In addition, JAC has litigated issues relating to the constitutional and statutory violations immigrants in the MPP program experienced.

The **National Immigration Law Center** ("NILC") is a national non-profit legal organization dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Employing litigation, policy advocacy, and technical assistance and legal support to advance its mission, NILC focuses on issues affecting the security and well-being of immigrant communities, such as those related to discriminatory enforcement practices and immigrants' access to justice and due process. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, including the right of access to the U.S. asylum system, and has advanced laws and policies that reinforce the nation's values of equality, due process, opportunity, and justice.

The **Round Table of Former Immigration Judges** includes retired immigration judges and former members of the Board of

Immigration Appeals ("Board"), which have combined centuries of experience in these roles. The Roundtable includes a former Board Chair and former Assistant Chief Immigration Judge. All members were appointed to serve in immigration courts around the United States and on the Board by the Executive Office for Immigration Review ("EOIR"). Due to their service, they have extensive expertise in immigration law, including asylum and withholding of removal proceedings and can offer this Court a unique perspective on the issues before it in this case.

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

Prospective Amici have a substantial interest in the issues presented in this case, which implicate the opportunities for asylum seekers to access their statutory and constitutional rights. Indeed, the ability of asylum seekers to pursue protections in the United States as guaranteed under domestic and international law is core to the missions of each organization. The outcome of this litigation is thus of great importance to Prospective Amici who respectfully submit their perspective could aid the Court in its consideration. Accordingly, Prospective Amici respectfully request the Court's leave to file the attached brief.

Dated: August 17, 2021

Respectfully submitted,

*/s/ Blaine Bookey*

Blaine Bookey
Anne Dutton
Karen Musalo
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 703-8202

Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
Gianna Borroto
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7552

*Counsel for Amici*
*(Additional Counsel on Next Page)*

Allison Perlin
Rebecca Gendelman
Kennji Kizuka
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Human Rights First
805 15th Street, NW, Suite 900
Washington, DC 20005
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## CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing motion and attached brief via the Court's ECF filing system.

Dated: August 17, 2021 */s/ Blaine Bookey*
Blaine Bookey

## CERTIFICATE OF COMPLIANCE

The foregoing motion complies with Fed. R. App. P. 27(d)(2)(A) because it contains 1,129 words, as measured by Microsoft Word software. The motion also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

Dated: August 17, 2021 */s/ Blaine Bookey*
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# BRIEF OF NON-PROFIT ORGANIZATIONS AND FORMER IMMIGRATION JUDGES IN SUPPORT OF EMERGENCY MOTION TO STAY DISTRICT COURT ORDER

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Katherine E. Melloy Goettel
Aaron Reichlin-Melnick
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American Immigration Council
1331 G Street NW, Suite 200
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Karen Musalo
Center for Gender & Refugee Studies
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 703-8202

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*(Additional Counsel on Next Page)*

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805 15th Street, NW, Suite 900
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Dated: August 17, 2021

*/s/ Blaine Bookey*
Blaine Bookey

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# TABLE OF AUTHORITIES

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## Regulations



## Other Authorities

## STATEMENT OF INTEREST OF AMICI CURIAE

Amici are non-profit organizations[1] and former immigration judges with extensive experience in U.S. asylum and immigration law, including familiarity with the Migrant Protection Protocols ("MPP"). Together these organizations have engaged in asylum work and research for decades and worked to ensure that asylum seekers are afforded access to their statutory and constitutional rights in alignment with international standards. Amici thus have a strong interest in the issues in this case that impact their core missions and expertise.[2]

## INTRODUCTION

On June 1, 2021, Secretary of the Department of Homeland Security ("DHS") Alejandro Mayorkas issued a memorandum terminating the Migrant Protection Protocols ("MPP"). MPP forcibly returned people seeking asylum in the United States to dangerous conditions in Mexico while their cases progressed through U.S. courts.

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

[2] No person or entity other than Amici authored or contributed funds intended for the preparation or submission of this brief.

As documented in the administrative record ("AR"), MPP was a humanitarian catastrophe: asylum seekers were murdered, raped, kidnapped, extorted, and compelled to live in squalid conditions where they faced significant procedural barriers to meaningfully presenting their protection claims. In proceedings below, the district court ignored the serious and intractable problems DHS has now acknowledged with MPP, ordering DHS to abandon its chosen method of border management and reinstate MPP.

DHS's decision to terminate MPP was neither arbitrary nor capricious. The district court's holding to the contrary rests on two incorrect factual findings: that MPP effectively (1) deterred migration, indicated by increased arrivals following MPP's suspension in January 2021; and (2) reduced meritless asylum claims, indicated by the high rates of *in absentia* removal orders issued to MPP enrollees. *Texas v. Biden*, 2021 WL 3603341, at *5-6, 18-19 (N.D. Tex. Aug. 13, 2021) ("Order"). Working off these facts, the district court concluded that the termination of MPP was arbitrary and capricious because DHS did not consider the asserted benefits of MPP or adequately explain its concern over high rates of *in absentia* removal orders. *Id*. at *18-21.

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

## ARGUMENT

### I. The Record Does Not Support the District Court's Conclusion that Terminating MPP Contributed to a Border Surge

The district court's findings that suspending MPP "contributed to [a] border surge," Order at *9, and that Secretary Mayorkas ignored "prescient" warnings, Order at *19, are unsupported by record evidence.

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

*First*, border encounters had been rising before the government suspended MPP. From April through December 2020, border encounters increased from 17,106 to 74,018, a 333% increase. AR669. Rather than a sudden surge once MPP was suspended in January 2021, "[s]ince April 2020, the number of encounters at the southwest border has been steadily increasing." AR622; *see* AR631 ("migration started to increase in April 2020"). By December 2020, border encounters were already at their highest since summer 2019 during a "surge" that MPP was allegedly designed to restrain. AR669. Thus, the district court's finding that Secretary Mayorkas disregarded the possibility that "the suspension of the MPP . . . would lead to a resurgence" of border crossings, Order at *19, was clearly erroneous. The "resurgence" had already occurred months earlier. *See* AR621-27, 628-32; 660-669.

*Second*, although MPP was officially suspended in January 2021, for all intents and purposes, MPP had already been suspended much earlier—in March 2020—when the Trump administration created the Title 42 expulsion policy. *See* AR622 (explaining Title 42). Under Title 42, the vast majority of individuals encountered at the border, including

those who would otherwise have been subjected to MPP, are expelled without processing under Title 8. *Id*.

By the time MPP was suspended in January 2021, it had been almost entirely replaced by Title 42. From October through December 2020, just 1.2% of border encounters resulted in an MPP enrollment—2,574 of 216,681. AR660. By comparison, 92% of border encounters over that period resulted in an expulsion under Title 42 or a non-MPP repatriation. *Id.* A significant portion of people expelled under Title 42 then immediately crossed the border again, contributing to the increase in border encounters that the district court erroneously blamed on the suspension of MPP. AR631-632. Furthermore, as the record makes clear, the primary reason that migrants come to the United States is conditions in their home country, not U.S. policy. AR431, 458, 630.

The district court's conclusions about the effect of terminating MPP rest on the faulty premise that correlation equals causation. *See* Order at *9 ("Since MPP's termination, the number of enforcement encounters on the southwest border has skyrocketed."). DHS's decision to terminate MPP in favor of different strategies to manage border arrivals is supported by substantial evidence in the record, which shows

that the suspension of MPP did not contribute to an increase in border encounters.

## II. The Record Does Not Support the District Court's Findings Regarding MPP *In Absentia* Rates and Their Root Causes

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

One primary reason for terminating MPP was the "high percentage of [MPP] cases completed through the entry of an *in absentia* removal orders." AR4. In reaching its conclusion that there were supposedly "similarly high rates of *in absentia* removals *prior to* implementation of MPP," the district court inappropriately cited to extra-record statistics from the Executive Office for Immigration Review ("EOIR") on the non-detained "*in absentia* rate," and misrepresented the relevant government statistics provided in the record. Order at *20 (emphasis in original).

EOIR *in absentia* rates "overstate the rate at which immigrants fail to appear in court." AR565. "*In absentia* rate" is an EOIR statistic produced by dividing annual *in absentia* removal orders by annual "initial case completions." AR563. It does not represent the rate at which people fail to appear in court. AR565. For example, if 10 people are scheduled to appear for a hearing, one person is ordered removed

for failure to appear, and no other cases are completed, the *in absentia* rate for that day would be 100%. A 100% "*in absentia* rate," therefore, does not indicate that 100% of the cases *heard* on a given day resulted in *in absentia* orders.

The termination memorandum did not cite the EOIR *in absentia* rate for MPP. It used an entirely different statistic, calculating that 44% of all MPP cases ever filed ended with an *in absentia* removal order. AR4. This is nearly three times higher than the 17% of non-detained removal cases filed inside the United States that end with an *in absentia* order. AR564.

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

Using either the district court or the termination memorandum's calculation method, the rate at which people were unable to attend court hearings was unacceptably higher under MPP than for people

inside the United States. Therefore, the Secretary's reliance on those facts was neither arbitrary nor capricious, and was supported by the record.

### B. The Record Documents Systemic Deficiencies in MPP That Contribute to Higher *In Absentia* Removals

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

The district court's reliance on DHS's baseless 2019 assertion that high *in absentia* rates resulted from asylum seekers in MPP abandoning meritless asylum claims finds no support in the record. This finding ignores dangers faced by asylum seekers in Mexico, as well as systemic barriers to obtaining protection in MPP proceedings, resulting in many *in absentia* orders. DHS initially ignored these due process violations when initiating MPP, but later correctly acknowledged them. *See* AR3.

The June 1 memo, in a portion the district court does not quote, referred not only to concerns about "whether the process provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief," but also about "whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to

housing, income, and safety" were driving the high *in absentia* rate. AR4.

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

The danger to and harm experienced by those in MPP was a direct result of the policy itself. *See* AR358 (statement by Asylum Officer whistleblower to Congress that MPP "actively places asylum seekers in

exceptionally dangerous situations"). To reach U.S. immigration courts, asylum seekers and other migrants in MPP were repeatedly forced to run a gauntlet of kidnapping and assault—unconscionable violence no one attending a non-MPP immigration court hearing in the United States would face. AR469, 485. Asylum seekers were routinely targeted and kidnapped traveling to or from their MPP hearings, at times near the ports of entry. AR485, 374-421 (collected reports of violence towards individuals in MPP). In implementing MPP, the U.S. government essentially delivered people in MPP into the hands of highly organized criminal cartels exercising significant control in many regions of Mexico and corrupt Mexican officials. AR374-421.

The extreme violence, despair, and insecurity people endured under MPP forced many asylum seekers to choose between risking their lives to travel to hearings at unsafe ports of entry or abandoning their claims for humanitarian relief. *See, e.g.*, AR204, 374-421. For many asylum seekers in MPP, the constant reality of violence in Mexico came on top of unbearable living conditions that left them without adequate shelter, access to medicine, or food. *See, e.g.*, AR229 (congressional testimony); AR478 (Human Rights Watch complaint to DHS Office of

Inspector General). The record includes accounts of individuals who received *in absentia* orders while in the hands of kidnappers, AR290, as well as individuals who received *in absentia* orders after narrowly escaping kidnapping on their way to ports of entry for a hearing. AR291; *see also* AR228, 311 (detailing traveling in the middle of the night or through dangerously inclement weather to attend hearings).

### 2. Inherent procedural problems with MPP, including lack of notice, led to higher-than-average *in absentia* rates

The district court failed to consider evidence in the record showing that, by design, MPP obstructs respondents' ability to appear for their hearings, leading to the high rate of *in absentia* removal orders. The government is required to inform a respondent of the time and place of their removal proceedings via a notice to appear ("NTA"). 8 C.F.R. § 1239.1. But under MPP, the respondent's NTA is virtually useless because they are unable to independently appear for their hearing. *See generally* AR168. Instead, they must go to a designated port of entry ("POE") so that DHS officials can transport them to their hearing. AR168, 491. But the record documents that border officials did not always comply. AR439. Moreover, the information regarding when and

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

Compounding these problems, MPP respondents often lacked stable addresses for follow-up communications from DHS and the immigration court. *See* AR198 (DHS report noting that "some migrants must give up shelter space in Mexico when they come to the US for a hearing . . . leaving them without an address" and recommending CBP "create a reliable method of communication"); AR438-39 (noting the widespread problem of incorrect addresses on NTAs); AR228 (congressional testimony noting that NTAs often listed the wrong address, the address of a temporary shelter, or no address at all). When hearings were changed or rescheduled, respondents alone carried the burden to figure that out, despite the challenges of living in tents or shelters (if they were lucky). *See, e.g.*, AR466 (requiring MPP respondents to show up at a POE to receive a *new* tear sheet following COVID-19-related hearing suspensions); AR311 (congressional

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

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

Legal representation increases the likelihood individuals will appear at hearings. AR569-70, 574. The extensive barriers to legal representation inherent in MPP meant that only 6% of people subjected to MPP were able to obtain legal representation. AR595.[4] Due in part to this abysmally low legal representation rate for individuals in MPP, 44% of people placed into MPP were ordered removed *in absentia*. *See* AR4.

Lack of representation for asylum seekers in MPP impeded their ability to successfully plead their case. AR441-42, *cf.* AR570. Asylum seekers without representation struggled to prepare applications in English and present critical evidence. Few asylum seekers in MPP have regular access to computers or phones, which are essential to compiling asylum applications and submitting evidence with required translation

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

into English. *See, e.g.*, AR441-42, 447, 382, 387, 393-94. Many MPP asylum seekers with bona fide claims have been denied protection or given up claims due to lack of legal representation. AR606 (linking to Human Rights Watch report).

Each of these systemic failings were not even mentioned by the district court, despite Secretary Mayorkas acknowledging them in his termination memo. *See* AR4. Ignoring the root causes of MPP *in absentia* rates—as detailed in the record—is reversible error.

## CONCLUSION

For the foregoing reasons, the Defendants' request for a stay should be granted.

Dated: August 17, 2021

Respectfully submitted,

*/s/ Blaine Bookey*

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