

“REMAIN IN MEXICO” POLICY AND ITS PROGENY: IS THERE HOPE?

Elena V. Cordonean*

Mommy, I don't want to die!

– These were the words of a seven-year-old girl to her mother after they were returned to Nuevo Laredo, where they were later kidnapped.¹

I. INTRODUCTION

It is nearly impossible to fathom the idea that migrants seeking refuge from torture can be sent back to the environment they desperately fled from. However, this is the fate of thousands of refugees who see hope in our country, only to be outcasted to an even more dangerous environment.² As the American historian Bernard A. Weisberger exclaimed:

It's a politician's bromide—and it also happens to be a profound truth. No war, no national crisis, has left a greater impress on the American psyche than the successive waves of new arrivals that quite literally built the country. Now that arguments against immigration are rising again, it is well to remember that every single one of them has been heard before.³

* J.D. and Editor-in-Chief of the *Southwestern Law Review*, 2022–2023. I am grateful to our Staff and Executive Board Members for their efforts in refining this Note. Thank you to the Southwestern Moot Court Honors Program for teaching me the art of persuasive writing. A special thank you to Professor Catherine Carpenter who has been my support and inspiration throughout law school and beyond.

1. This narrative is based on the true story of a seven-year-old girl who was abducted from the Mexican migration office in Nuevo Laredo after a tent court hearing. See generally *Human Rights Fiasco: The Trump Administration's Dangerous Asylum Returns Continue*, HUM. RTS. FIRST (Dec. 2019), <https://humanrightsfirst.org/wp-content/uploads/2022/01/HumanRightsFiascoDec19-1.pdf> [<https://perma.cc/2RCE-UBZ5>].

2. See Julia Neusner, *Fatally Flawed: "Remain in Mexico" Policy Should Never Be Revived*, HUM. RTS. FIRST 1, 6 (Sept. 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/10/FatallyFlawed.pdf> [<https://perma.cc/P4U4-NUCJ>] (“[A]t least 1,544 publicly reported cases of kidnappings, murder, torture, rape and other violent attacks against people returned to Mexico.”).

3. Bernard A. Weisberger, *A Nation of Immigrants*, 45 AM. HERITAGE 1 (Feb./Mar. 1994).

The duty to protect the vulnerable is at the core of the “moral fabric of our Nation and our international and domestic legal obligations.”⁴ However, despite this recognition, with the passage of the Migrant Protection Protocols (MPP) program in 2019, the practice of isolating migrants who are seeking refuge from systematic violence has been geometrically magnified.⁵ As enacted, the MPP program, known as the “Remain in Mexico” (RMX) policy, forcefully returned asylum seekers to Mexico until their cases unfolded and became ripe for adjudication in the United States.⁶ RMX is the result of legislative inertia and, much like its predecessors, is yet another fundamentally flawed and draconian immigration policy. Exposing vulnerable asylum seekers to life-threatening conditions constitutes a de facto exile, and any attempt by future administrations to reinstate this policy under a different shell will achieve the same results.

This Note examines the impact of RMX, its predecessors and potential successors. Part II explains the practical framework of the policy, its intended purpose, the Biden Administration’s attempt to halt the policy, the U.S. Supreme Court’s decision to reinstate it, and the High Court’s decision allowing the Biden Administration to put an end to an era of bad immigration policy. Part III examines the problems, risks, and challenges associated with the RMX and other similarly designed legislation and emphasizes the need for a workable standard to curtail the immigration crisis in the United States. Finally, Part VI concludes with recommendations to address immigration concerns and protect the rights of those desperately seeking our country’s shelter.

4. “*We Can’t Help You Here*”: *US Returns of Asylum Seekers to Mexico*, HUM. RTS. WATCH (July 2, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico> [<https://perma.cc/GD8Y-L3NX>] [hereinafter HUM. RTS. WATCH, *We Can’t Help You Here*].

5. *See Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, U.S. COMM’N ON C.R. (Oct. 24, 2019), <https://www.usccr.gov/pubs/2019/10-24-Trauma-at-the-Border.pdf> [<https://perma.cc/5TEV-BMAQ>]; *see also* Leidy Perez-Davis & Kate Voigt, *Policy Brief: “Remain in Mexico” Plan Restricts Due Process, Puts Asylum-Seekers at Risk*, AM. IMMIGR. LAWYERS ASS’N (Feb. 1, 2019), <https://www.aila.org/aila-files/4F4951A8-615E-4D6F-8156-77A8B043DA83/18122112.pdf> [<https://perma.cc/62QP-ZAKY>].

6. *See* Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 757 (2020).

II. THE EVOLUTION OF RMX POLICY AND ITS CONSTITUTIONAL IMPLICATIONS

Immigration is an inherent trait of human existence and a highly politicized subject.⁷ The Department of Homeland Security (DHS) is “committed to building a safe, orderly, and humane immigration system that upholds our laws and values.”⁸ To address the immigration crisis, on January 24, 2019, DHS implemented what it labeled as an “*unprecedented action*” in the form of the MPP program, also known as the RMX policy.⁹ The “announced” driving force of this policy was to prevent smugglers and traffickers from exploiting migrants and using them for their profit to transport drugs, engage in violence, and threaten the welfare of the American people.¹⁰ RMX brought drastic changes to the former immigration policy by deeming asylum a “loophole” meant to escape the proper immigration procedures rather than a right based on this country’s domestic and international laws.¹¹ Instead of protecting refugees, the radical RMX policy placed an insurmountable burden on those who arrive at our country’s doorsteps seeking shelter by forcing them “wait for months, if not years, in the impoverished, cartel-ruled Mexican border cities” until their claims became ripe for adjudication in a U.S. Immigration Court.¹² Meanwhile, asylum seekers were forced to navigate the complexities of our immigration system without the assistance of counsel.¹³ The result? Refugees were subject to prison-like conditions in Mexican-border cities, making it virtually impossible to gather the necessary evidence to support their asylum claims.¹⁴ RMX did not provide an

7. See David A. Martin, *Taming Immigration: The 64th Henry J. Miller Distinguished Lecture Series Remarks*, 36 GA. ST. U. L. REV. 971, 971 (2020).

8. *DHS Statement on Supreme Court Decision on MPP*, U.S. DEP’T HOMELAND SEC. (Aug. 24, 2021), <https://www.dhs.gov/news/2021/08/24/dhs-statement-supreme-court-decision-mpp> [<https://perma.cc/LWT4-SGT4>].

9. *Migrant Protection Protocols*, U.S. DEP’T HOMELAND SEC. (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/T698-RKRQ>] [hereinafter DHS, *Migrant Protection Protocols*].

10. See *id.*

11. Stephen Meili, *Asylum Under Attack: Is it Time for a Constitutional Right?*, 26 BUFF. HUM. RTS. L. REV. 147, 147 (2020).

12. See Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers*, 51 COLUM. HUM. RTS. L. REV. 1, 38 (2019–2020).

13. See *Q&A: Trump Administration’s “Remain in Mexico” Program*, HUM. RTS. WATCH (Jan. 29, 2020), <https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program> [<https://perma.cc/MJ3J-FTT5>] [hereinafter HUM. RTS. WATCH, *Q&A*].

14. See *After Observing Asylum Hearings, Amnesty International Calls to Stop Illegal Pushbacks of Asylum Seekers to Mexico*, AMNESTY INT’L (Apr. 11, 2019), <https://www.amnestyusa.org/press-releases/after-observing-asylum-hearings-amnesty->

alternative. If they are to pursue their asylum claims, migrants are left with one choice: they must remain in Mexican shelters for an indefinite time, in a perpetual state of limbo.¹⁵ The aftermath of RMX resulted in the depreciation of familial integrity and the displacement of thousands of refugees from their homes and families *after* they pled for sanctuary at our country's borders.¹⁶

A. An Unworkable Standard: Past and Current Efforts to Regulate Immigration

A non-citizen's interest in remaining in the U.S. is "weighty,"¹⁷ and immigration policies must address the problematic issues at the doorsteps of our nation's border. Four of the most notable immigration policies meant to contain the influx of undocumented migrants are (1) *Zero Tolerance* policy, which separated children from parents at the southern Mexican border; (2) *Turnback* policy, which forced asylum seekers to file their asylum applications only at specific border stations; (3) *Third Country* policy, which forced migrants to apply for asylum in countries they crossed on their way to the U.S.; and (4) *Migrant Protection Protocols* program, which sent migrants back to Mexico while their asylum applications were processed in a U.S. immigration court.¹⁸ These policies have been subject to extensive litigation under the Constitution, the Administrative Procedure Act, and the Immigration and Nationality Act.¹⁹ These policies were utilized as weapons to propel the current administration's efforts to abolish the prior asylum system, contradicting longstanding domestic and international migrant law and practice. As a result, refugees are bound to "lose the right to stay and live and work in this land of freedom."²⁰

DHS issued the MPP by directing the "return" of asylum applicants who arrive from Mexico, effectively substituting the traditional practice of detention and parole.²¹ Under the MPP, asylum applicants were placed

international-calls-to-stop-illegal-pushbacks-of-asylum-seekers-to-mexico [https://perma.cc/KK5C-L5Z7] (discussing the violation of American and Mexican asylum laws).

15. McDonnell & Merton, *supra* note 12, at 37–38.

16. See Cristina A. Quiñónez, *Exposing the American History of Applying Racial Anxieties to Regulate and Devalue Latinx Immigrant Reproductive Rights*, 54 U.S.F. L. REV. 557, 579–81 (2020).

17. *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982) (emphasizing that "the power to exclude or admit aliens is a sovereign prerogative"); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

18. Meili, *supra* note 11, at 147.

19. See *id.*

20. *Landon*, 459 U.S. at 32.

21. Meili, *supra* note 11, at 170.

under formal removal proceedings and forced to wait in Mexico until an immigration judge can process and resolve their asylum claims.²² During the first announcement of the RMX, former DHS Secretary Kristjen Neilson glorified the policy, claiming that it would “allow more resources to be dedicated to individuals who legitimately qualify for asylum.”²³

Within a few months following the announcement of the MPP, the White House issued a “Fact Sheet” calling asylum our “biggest loophole” that allows migrants to “flood[] to our border to use asylum to gain entry into our country and remain here indefinitely.”²⁴ In reality, the policy has served as the driving force behind the Trump Administration’s deterrence-focused initiatives to narrow eligibility grounds for asylum seekers and decrease the number of asylum applicants allowed in the U.S.²⁵

RMX was first intended to apply to refugees from Tijuana, Mexico,²⁶ but immediately expanded to other border states and countries such as Cuba, Guatemala, El Salvador, Venezuela, and Honduras and was later extended to asylum seekers throughout the country.²⁷ By December 2019, over 57,000 refugees automatically became subject to the policy.²⁸ In 2019 alone, the refugees impacted by the policy included 16,000 children, 500 of whom were under age one.²⁹ Thousands of Central American migrants who approached this country’s ports of entry to request asylum were denied entry, most of whom were women and children.³⁰ By February 2020, over 60,000 asylum applicants from Cuba, Guatemala, El Salvador, Guatemala,

22. *See id.*

23. DHS, *Migrant Protection Protocols*, *supra* note 9.

24. *Fact Sheet: President Donald J. Trump is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis*, THE WHITE HOUSE (Apr. 29, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/> [<https://perma.cc/3J5S-6RLN>].

25. *See* Miriam Valverde, *What You Need to Know About the Trump Administration’s Zero-Tolerance Immigration Policy*, POLITIFACT (June 6, 2018), <https://www.politifact.com/article/2018/jun/06/what-you-need-know-about-trump-administrations-zer/> [<https://perma.cc/UPP3-YJEU>].

26. *See* Max Rivlin-Nadler, *A Year of Trump’s ‘Remain-in-Mexico’ Policy Leaves Migrants Desperate, Vulnerable*, KPBS (Feb. 14, 2020, 4:50 AM), <https://www.kpbs.org/news/2020/feb/14/border-has-descended-darkness-year-remain-mexico/> [<https://perma.cc/YMR7-ZUQE>].

27. *See* Notice by Dep’t Homeland Sec. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019) (identifying new categories of aliens for expedited removal, including those found 100 air miles away from the border, and who have been continuously present in the U.S. for less than two years).

28. Rivlin-Nadler, *supra* note 26.

29. HUM. RTS. WATCH, *Q&A*, *supra* note 13.

30. *See* Fernanda Echavari, *Tijuana is Overwhelmed by a Rush of Asylum-Seekers—Many of Them Women with Children*, MOTHER JONES (Mar. 8, 2019), <https://www.motherjones.com/politics/2019/03/tijuana-asylum-seekers-women-children-trump/> [<https://perma.cc/DRB4-JUTP>].

Venezuela, and Honduras have been forced to wait in Mexico under the RMX.³¹

Asylum seekers are subject to an increased failure of immigration courts, including a lack of access to counsel, lack of transparency in immigration proceedings, and little to no legal protection.³² Most importantly, the central issue with the RMX is that individuals ordered to “return” are subject to even more dangerous conditions than those they tried escaping from.³³ According to a 2019 report, forty-five percent of asylum seekers and refugees treated by mental health officials reported being subject to crime and violence during their journey through Mexico.³⁴ The problem is exacerbated by the fact that asylum seekers are forced to remain in Mexican shelters in cities such as Nuevo Laredo and Tijuana, cities that are inherently dangerous and pose an increased risk of violence, kidnapping, torture, rape, and even death.³⁵ Data indicates that within the first year of the implementation of the RMX, there were “at least 816 publicly reported cases of kidnapping, rape, torture, assault, and other attacks on asylum seekers in the program.”³⁶

31. See Vanessa Romo, *Federal Court Suspends Injunction on Trump’s ‘Remain in Mexico’ Program*, NPR (Feb. 28, 2020, 4:41 PM), <https://www.npr.org/2020/02/28/810440516/federal-court-again-blocks-trumps-remain-in-mexico-program> [<https://perma.cc/T82T-PABT>].

32. See generally *The Attorney General’s Judges: How the U.S. Immigration Courts Became a Deportation Tool*, S. POVERTY L. CTR. (June 25, 2019), <https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool> [<https://perma.cc/RUG6-5V9T>] (examining the collapse of the immigration system and explaining why it cannot be salvaged in its current form).

33. See Zolan Kanno-Youngs & Maya Averbuch, *Waiting for Asylum in the United States, Migrants Live in Fear in Mexico*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/us/politics/asylum-united-states-migrants-mexico.html> (outlining that twenty shelters and churches in Tijuana housed around 3,000 migrants forced to remain in Mexico, unable to find U.S. lawyers, repeatedly robbed, and kidnapped).

34. *US ‘Remain in Mexico’ Policy Endangers Lives of Asylum Seekers in Tamaulipas State*, DRS. WITHOUT BORDERS (Sept. 5, 2019), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/us-remain-mexico-policy-endangers-lives-asylum-seekers-tamaulipas> [<https://perma.cc/58NF-39LD>].

35. See Scott Martelle, Opinion, *The Evidence Is In: Trump’s ‘Remain in Mexico’ Policy Puts Asylum-Seekers’ Lives at Risk*, L.A. TIMES (Aug. 30, 2019, 8:22 AM), <https://www.latimes.com/opinion/story/2019-08-30/remain-in-mexico-dangerous-conditions-asylum-trump-immigration-border> [<https://perma.cc/X4DT-MGAW>].

36. HUM. RTS. WATCH, *Q&A*, *supra* note 13.

B. Biden Administration's Attempt to Halt the RMX

The same day that President Biden took office, the DHS paused the RMX in a January 2021 Memorandum³⁷ and officially ended the program on June 1, 2021.³⁸ The Attorney General for Texas and Missouri sued the Biden Administration and the DHS on April 13, 2021, claiming that the decision to end the policy was arbitrary and capricious.³⁹ Following a motion for a preliminary injunction to enjoin the government from enforcing the decision to halt the policy, the district court ordered the Biden Administration to reinstate the RMX.⁴⁰ The district court ordered the Biden Administration and DHS to “enforce and implement MPP in good faith” until “lawfully rescinded,” and until “such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under [Title 8] Section 1255 without releasing any aliens because of a lack of detention resources.”⁴¹ The Biden Administration appealed, arguing that the executive branch “has clear authority to determine immigration policy,” and that the DHS Secretary “had discretion on whether or not to return asylum seekers back to Mexico.”⁴² On August 19, 2021, the Fifth Circuit held that “[e]ven if the Government were correct that long-term compliance with the district court’s injunction would cause irreparable harm, it presents no reason to think that it cannot comply with the district court’s requirement of good faith while the appeal proceeds.”⁴³

Despite the unprecedented nature of this decision, the U.S. Supreme Court denied the administration’s request to stay the district court’s order to reinstate the MPP.⁴⁴ In a one-paragraph order denying the application for stay, the U.S. Supreme Court declined to address the legality and merits of the policy. It reasoned that “applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant

37. *Statement on the Suspension of new Enrollments in the Migrant Protection Protocols Program*, U.S. DEP’T. OF HOMELAND SEC., (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> [<https://perma.cc/WGZ7-7TBE>].

38. *Memorandum on the Termination of the Migrant Protection Protocols Program*, U.S. DEP’T. OF HOMELAND SEC. (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf [<https://perma.cc/DQ27-EJ2Z>].

39. *State v. Biden*, 554 F. Supp. 3d 818, 828 (N.D. Tex. 2021)

40. *Id.* at 857.

41. *Id.*

42. Associated Press, *Appeals Court Won’t Delay ‘Remain in Mexico’ Return*, U.S. NEWS (Aug. 2, 2021, 12:59 AM), <https://www.usnews.com/news/politics/articles/2021-08-19/appeals-court-wont-delay-remain-in-mexico-return> [<https://perma.cc/NZJ6-CUB5>].

43. *State v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021).

44. *Biden v. Texas*, 142 S. Ct. 926, 926 (2021) (mem.).

Protection Protocols was not arbitrary and capricious.”⁴⁵ Accordingly, the Biden Administration was offered a “do-over” and a path to ultimately end the MPP by comprehensively explaining its procedural defects. And the Biden Administration did not hesitate to walk this path.

C. *MPP 2.0 and Counting*

When the Fifth Circuit again ruled against the government, this time on the merits of the appeal, the federal government filed a petition for writ of certiorari with the U.S. Supreme Court, which was granted on February 18, 2022.⁴⁶ On June 30, 2022, the Supreme Court reversed the Fifth Circuit in a 5–4 vote and held that the federal government has authority to revoke the MPP.⁴⁷ The Court held that the decision to end the MPP did not violate the Immigration and Nationality Act (INA), and that the October 29, 2021, Memorandum issued by the DHS Secretary was “final agency action.”⁴⁸ Turning to the merits of the appeal, the Court recognized that under the INA, the DHS Secretary has discretionary authority to return a noncitizen to a foreign contiguous territory but that the implementation of MPP is not mandatory under the statute.⁴⁹ Reaching the issue of statutory interpretation, the Court emphasized that “[t]he statute says ‘may,’” ruling that both the district court and the Fifth Circuit erred in finding that the INA required the implementation of MPP.⁵⁰ The Court reasoned that Congress’s authority over the Remain in Mexico policy under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁵¹ which amended the Immigration and Nationality Act of 1952, does not deny the President the authority to end the MPP.⁵²

Paradoxically, following the Supreme Court’s decision, the Biden Administration took steps to restart the program, while simultaneously issuing new justifications for ending it. In response to increased public criticism, administration officials released a memorandum explaining their

45. *Id.*

46. *Biden v. Texas*, 142 S. Ct. 1098, 1098 (2022).

47. *Biden v. Texas*, 142 S. Ct. 2528, 2534, 2548 (2022).

48. *Id.* at 2541–44.

49. *Id.* at 2548.

50. *Id.* at 2541–44.

51. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

52. *Biden*, 142 S. Ct. at 2542.

reasoning.⁵³ The main rationale was that the “program’s costs outweighed its benefits.”⁵⁴ The memorandum referred to costs, such as the “dangerous conditions in Mexico, the difficulty immigrants faced in conferring with lawyers across the border and the ways in which the program undermined the administration’s foreign policy objectives and domestic policy initiatives.”⁵⁵

The Supreme Court’s ruling in *Biden v. Texas* has mostly short-term positive impacts, allowing the administration to formally end the MPP.⁵⁶ Following the Supreme Court’s decision, the district court lifted the injunction requiring DHS to reimplement the MPP.⁵⁷ Following the Supreme Court’s decision, DHS released a statement stating that the “DHS is committed to ending the court-ordered implementation of MPP in a quick, and orderly, manner. Individuals are no longer being newly enrolled into MPP, and individuals currently in MPP in Mexico will be disenrolled when they return for their next scheduled court date. Individuals disenrolled from MPP will continue their removal proceedings in the United States.”⁵⁸

However, the situation for those seeking refuge at our borders is dire, regardless of whether the MPP is in place. In response to the COVID-19 pandemic, the U.S. has implemented a travel ban under section 265 of Title 42 of the U.A. Code.⁵⁹ Under this premise, hundreds of thousands of people were refused entry since section 265 was first enacted,⁶⁰ stripping asylum-seekers of their right to seek asylum at our country’s borders without being criminalized. Luckily, this was, too, a short-lived endeavor.⁶¹

53. Adam Liptak et al., *Supreme Court Sides with Biden’s Efforts to End ‘Remain in Mexico’ Program*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/us/politics/biden-remain-in-mexico-scotus.html>.

54. *Id.*

55. *Id.*

56. *Supreme Court Holds that Biden Administration’s Termination of the Migrant Protection Protocols Did Not Violate the Immigration and Nationality Act* Authors, CLINIC LEGAL (Aug. 24, 2022), <https://www.cliniclegal.org/resources/litigation/supreme-court-holds-biden-administrations-termination-migrant-protection> [<https://perma.cc/H CJ5-J3VF>].

57. *Id.*

58. *Statement on U.S. District Court’s Decision Regarding MPP*, U.S. DEP’T HOMELAND SEC. (Aug. 8, 2022), <https://www.dhs.gov/news/2022/08/08/dhs-statement-us-district-courts-decision-regarding-mpp> [<https://perma.cc/TP87-YYSL>].

59. 42 U.S.C. § 265 (mandating the suspension of entries and imports from designated places in an effort prevent spread of communicable diseases).

60. See Eileen Sullivan, *Title 42 Has Allowed Many Migrants to Be Quickly Expelled, and Others to Stay*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/us/politics/immigration-public-health-rule-mexico.html>.

61. Adam Isacson & Maureen Meyer, *Commentary, Title 42 is (Probably) Over. The U.S. Still Needs a Responsible Approach to Migration*, WOLA (Nov. 18, 2022),

But this begs the question: Is this *actually* the end of bad immigration policy?

The answer to this question does not involve too much digging into U.S. immigration history. Following the Supreme Court's denial of stay, the Biden Administration disclosed in September 2021 that it had begun deliberations about reinstating the MPP, that it engaged in diplomatic negotiations with Mexico's government, and that no person is to be sent back to Mexico without that country's cooperation.⁶² On December 2, 2021, the administration announced that it would be reinstating MPP along the border.⁶³ In doing so, the administration "did not revive the program in the same form as it existed under the Trump administration."⁶⁴ Instead, it expanded the group of people who are subject to the MPP.⁶⁵ This "reinvented" immigration policy was coined "MPP 2.0," and it applied to all Western Hemisphere nationals, a much larger group of refugees than those targeted by "MPP 1.0."⁶⁶

A significant change, however, was the fact that MPP 2.0 no longer actively prevented people from seeking counsel advice during the interview process, giving each person twenty-four hours prior to the interview to contact an attorney.⁶⁷ Nevertheless, it is hard to fathom how this change is even possible in practice since very few lawyers are available to migrants seeking refuge at U.S. borders. It remains unclear how some of our immigration goals will be achieved, considering that immigration courts are severely backlogged.⁶⁸

The MPP is formally "over," at least for now. But is it really, and for how long? Officials continue to demand that RMX be reinstated.⁶⁹ With the 2024 presidential election around the corner, we can only anticipate that

<https://www.wola.org/analysis/title-42-over-responsible-approach-migration/> [https://perma.cc/C6GB-DZDY] (observing that the end of Title 42 provides temporary relief).

62. *The "Migrant Protection Protocols"* AM. IMMIGR. COUNCIL (2022), <https://www.americanimmigrationcouncil.org/research/migrant-protection-protocols>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (noting that the "expanded population meant that MPP was applied to Haitians and other Caribbean nationals who were previously exempt under MPP 1.0").

67. *Id.*

68. *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, TRAC IMMIGR. (Dec. 18, 2023), <https://trac.syr.edu/reports/734/> [https://perma.cc/V7BU-ZWV8].

69. Rafael Bernal, *Speaker Johnson to Biden: Mexico 'Will Do What We Say'*, THE HILL (Feb. 29, 2024, 5:29 PM), <https://thehill.com/latino/4498745-speaker-johnson-biden-mexico-immigration-border/> [https://perma.cc/7ZNQ-H67E] (noting that Speaker Johnson "doubled down on his calls to reinstate the 'Remain in Mexico' policy for migrants trying to enter the U.S. and recounted telling President Biden that Mexico 'will do what we say' if the administration decides to implement the policy")

some variation of a former radical immigration policy will be brought back to life.

III. MYTHS AND REALITY: CHALLENGES ASSOCIATED WITH THE RMX AND OTHER SIMILARLY DESIGNED IMMIGRATION LEGISLATION

A. *The Immigration Cliché: Practical Realities at United States Borders*

Current and past immigration programs create an unworkable standard, evidenced by empirical data and the countless challenges raised by various organizations across the U.S. There are countless problems associated with current and former immigration policies. But the main problem is that they do nothing to address, let alone resolve, the immigration crisis.⁷⁰

Although past immigration trends have fluctuated along with our country's political avenues, the narrative surrounding the large numbers of arrivals describes the current situation at the border as a "humanitarian crisis."⁷¹ The growing number of migrants seeking refuge along the southern border has also been increasingly described as an "invasion."⁷² While clearly contradicting the government's own data, the "invasion" paradigm has been used to validate restrictive and punitive immigration policies.⁷³ Regardless of its justification, under the MPP, a notable increase has been registered in the arrival of family units and unaccompanied

70. See Alex Nowrasteh, *Immigration*, in CATO AT LIBERTY, CATO HANDBOOK FOR POLICYMAKERS 121 (8th ed. 2018).

71. See *Southern Border Humanitarian Crisis*, CTR. FOR DISASTER PHILANTHROPY (Oct. 22, 2021), <https://disasterphilanthropy.org/disaster/southern-border-humanitarian-crisis/> [<https://perma.cc/QB5M-AYKC>]; see also Audie Cornish et al., *How The Southern U.S. Border Has Become A Nearly Constant Humanitarian Crisis*, NPR (Sept. 24, 2021), <https://www.npr.org/2021/09/24/1040550699/how-the-southern-u-s-border-has-become-a-nearly-constant-humanitarian-crisis> [<https://perma.cc/W59L-D5ZU>]; Meg Wagner et al., *The Crisis at the US-Mexico Border*, CNN (June 26, 2019), <https://www.cnn.com/us/live-news/immigration-us-mexico-border-june-2019/index.html> [<https://perma.cc/UM7P-MQAH>].

72. See John Fritze, *Trump Used Words Like 'Invasion' and 'Killer' at Rallies More Than 500 Times: USA TODAY Analysis*, USA TODAY (Aug. 8, 2019), <https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/> [<https://perma.cc/JXU2-8EAJ>]; see also Julia Carrie Wong, *Trump Referred to Immigrant "Invasion" in 2,000 Facebook Ads, Analysis Reveals*, THE GUARDIAN (Aug. 5, 2019), <https://www.theguardian.com/us-news/2019/aug/05/trump-internet-facebook-ads-racism-immigrant-invasion> [<https://perma.cc/R2VA-3TPJ>].

73. The total number of apprehensions of unlawful entrants into the United States has been relatively steady over the last ten years and through 2018. While the number of apprehensions of unlawful entrants began to rise notably in 2019, they are at a historical low compared to the numbers registered in the 2000s when the numbers were two to three times higher. See *Total Alien Apprehensions by Fiscal Year, Southern Border Sectors*, U.S. BORDER PATROL (2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-southwest-border-sector-apps-fy1960-fy2018.pdf> [<https://perma.cc/28TB-X9Q2>].

children.⁷⁴ Like previous deterrence-based immigration strategies, the current crackdown measures have not and are unlikely to stem the flow of migrants.⁷⁵ One of the many consequences of ineffective immigration policy has been the concentration of large populations of unaccompanied minors and family units in Mexican cities at ports of entry along the southern border,⁷⁶ which began with “metering”⁷⁷ and has been exacerbated by RMX.⁷⁸ This reality has resulted in a significant and mostly unmet need for legal services among migrants wanting to enter the U.S., who frequently struggle to comply with complex and ever-changing legal requirements enforced by a muddy and bureaucratic immigration system.⁷⁹

The practical result of the MPP and its predecessors is that vulnerable asylum seekers, including children and teenagers separated from their families,⁸⁰ have been instantly abandoned after lawfully requesting asylum. Migrants are not affirmatively protected against persecution and many have faced violence and kidnapping as they await their day in court.⁸¹ Moreover, once asylum seekers are ordered to stay in Mexico,

74. See generally Randy Capps et al., *From Control to Crisis: Changing Trends and Policies Reshaping U.S.-Mexico Border Enforcement*, MIGRATION POL’Y INST. 1, 10 (Aug. 2019), <https://www.migrationpolicy.org/research/changing-trends-policies-reshaping-us-mexico-border-enforcement>.

75. See Doris Meissner & Sarah Pierce, *Policy Solutions to Address Crisis at the Border Exist, but Require Will and Staying Power to Execute*, MIGRATION POL’Y INST. (Apr. 2019), <https://www.migrationpolicy.org/news/policy-solutions-address-crisis-border-exist-require-will-staying-power>.

76. See Jason Kao & Denise Lu, *How Trump’s Policies Are Leaving Thousands of Asylum Seekers Waiting in Mexico*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/interactive/2019/08/18/us/mexico-immigration-asylum.html>; see also Julián Aguilar, “The Dam is Going to Overflow”: In Mexico Pressure Builds as U.S. Immigration Policies Take Hold, TEXAS TRIB. (May 16, 2019), <https://www.texastribune.org/2019/05/16/mexico-pressure-builds-us-immigration-policies-take-hold/> [<https://perma.cc/2D4G-DBGH>]; Dennis Romero, *Migrants Met with Fear, Disdain in Tijuana, Mexico*, NBC NEWS (Nov. 17, 2018), <https://www.nbcnews.com/news/world/migrants-met-fear-disdain-tijuana-mexico-n937506> [<https://perma.cc/7RN3-R3N2>].

77. AM. IMMIGR. COUNCIL, *POLICIES AFFECTING ASYLUM SEEKERS AT THE BORDER* (2020), <https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border>.

78. See Madeleine Wattenbarger, *Asylum Seekers Struggle to Navigate Trump’s Broken Border Policy*, NEW REPUBLIC (June 13, 2019), <https://newrepublic.com/article/154181/asylum-broken-remain-mexico-policy> [<https://perma.cc/E9Q9-XVWS>].

79. See Kayleen Hartman, *Lawyering Over the Line: Teaching Crisis Lawyering with Law Students Serving Asylum Seekers in Mexico*, 35 GEO. IMMIGR. L.J. 47, 51 (2020).

80. See Reade Levinson et al., *Exclusive: Asylum Seekers Returned to Mexico Rarely Win Bids to Wait in U.S.*, REUTERS (June 12, 2019), <https://www.reuters.com/article/idUSKCN1TD13J/>.

81. See Molly O’Toole, *A Times Special Report: Asylum Policy on Shaky Ground*, A TIMES SPECIAL REPORT (Aug. 29, 2019), https://enewspaper.latimes.com/infinity/article_share.aspx?guid=4451c711-f803-4861-ada0-9558eff71923 [<https://perma.cc/G92F-EYW7>].

their prospects of having the judgment reversed on safety grounds, allowing them to wait in the U.S., are incredibly slim.⁸² Thus far, most migrants returned to Mexico are sent back to cities with the highest murder, kidnapping or robbery rates, led by gangs and drug cartels.⁸³ Human rights organizations have expressed concerns that Mexico does not authorize refugees to study, work, or receive social or medical services within its borders.⁸⁴ Refugees “have both immediate and long-term needs to access food, water, shelter, communication with family and lawyers, and other necessities, but have been left with no legal means to earn the income required to do so.”⁸⁵ More critically, their access to legal counsel is around four percent,⁸⁶ which is a de facto deprivation of thousands of refugees of the right to access counsel.⁸⁷ The harsh reality is that RMX and its predecessors effectively exposed refugees and asylum seekers in Mexico to inhumane conditions that violate their most fundamental human rights.⁸⁸

B. *Remain in Mexico Conflicts with the INA*

On its face, the MPP directly contradicts Congress’s specific instruction that asylum seekers remain in the United States while they await an immigration hearing under section 235(b)(1) of the INA.⁸⁹ Section 235(b)(1) “authorizes the Department of Homeland Security to return certain applicants for admission to the contiguous country from which they are arriving on land (whether or not at a designated port of entry) pending removal proceedings under INA §240.”⁹⁰ In discerning whether Congress

82. Levinson et al., *supra* note 80.

83. *See id.*

84. *See* Levi Vonk, *Mexico Isn’t Helping Refugees. It’s Depriving Them of Their Rights*, FOREIGN POL’Y (Feb. 8, 2019), <https://foreignpolicy.com/2019/02/08/mexico-isnt-helping-central-american-refugees-its-depriving-them-of-their-rights-caravan-1951-refugee-convention-non-refoulement-honduras-central-america-turkey-syria/> [<https://perma.cc/WF5Z-TUVE>].

85. HUM. RTS. WATCH, *We Can’t Help You Here*, *supra* note 4.

86. TRAC IMMIGRATION, CONTRASTING EXPERIENCES: MPP VS. NON-MPP IMMIGRATION COURT CASES (2019), <https://trac.syr.edu/immigration/reports/587/> [<https://perma.cc/X7J4-PYFN>].

87. *See* Joel Rose, *Trump Administration’s ‘Remain in Mexico’ Policy Leaves Migrants Confused, Scared*, NPR (Jun. 28, 2019), <https://www.npr.org/2019/06/27/736716101/trump-administrations-remain-in-mexico-policy-leaves-migrants-confused-scared> [<https://perma.cc/N5NX-2KLU>].

88. *See* EXEC. COMM. OF THE HIGH COMM’R’S PROGRAMME, PROBLEM OF REFUGEES AND ASYLUM SEEKERS WHO MOVE IN AN IRREGULAR MANNER FROM A COUNTRY IN WHICH THEY HAD ALREADY FOUND PROTECTION, No. 58 (XL) (Oct. 13, 1989) (noting that asylum seekers may be returned only if they are “treated in accordance with recognized basic human standards until a durable solution is found for them”).

89. DHS, *Migrant Protection Protocols*, *supra* note 9.

90. HUM. RTS. WATCH, *Q&A*, *supra* note 13.

has authorized refugee prosecution, the natural starting point for analysis is the statutory text.⁹¹ DHS asserts power under section 235 of the INA,⁹² which concerns the inspection of people seeking entrance to the U.S., including those not clearly entitled to admission, such as asylum applicants. Section 235(b)(2)(C) states explicitly that the government may return an individual arriving at a contiguous nation for the duration of their pending removal procedure under section 240 of the INA.⁹³ While the DHS memorandum asserts authority under section 235(b)(2)(C) of the INA,⁹⁴ sending refugees to Mexico under this policy would directly contravene Congress's command that asylum applicants remain in the U.S. while their cases are pending.⁹⁵ Although INA section 235(b)(1) generally confers broad authority on immigration officials to apply expedited removal to certain classes of aliens,⁹⁶ in some circumstances, an alien subject to expedited removal may be entitled to certain procedural protections before she can be removed from the U.S.,⁹⁷ especially those who pass the credible fear evaluation.

The MPP rests on the false premise that the DHS has only two options regarding individuals who arrive at the border seeking asylum: detention or forced return to Mexico before a hearing is scheduled.⁹⁸ However, Congress has never forced the executive branch to make this binary choice, and the DHS blatantly disregards the fact that it can release refugees on parole under the INA while their asylum case is pending.⁹⁹ The Ninth Circuit found that RMX conflicts with section 1225(b), which establishes guidelines and procedures for immigration officers' inspection and expedited removal of inadmissible aliens,¹⁰⁰ and "violates treaty-based non-

91. See *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 283 (2011) ("We begin, as in any case of statutory interpretation, with the language of the statute.").

92. 8 U.S.C. § 1225 (2011) (titled as § 235).

93. 8 U.S.C. § 1225 (titled as § 234(b)(2)(C)) (citing 8 U.S.C. § 1229(a)).

94. DHS, *Migrant Protection Protocols*, *supra* note 9.

95. See 8 U.S.C. § 1158(a)(1) (2018) (providing that refugees may qualify for asylum "irrespective of [immigration] status" and regardless of whether they are "at a designated port of arrival"); see also *Galvan v. Press*, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.")

96. See *Samirah v. O'Connell*, 335 F.3d 545, 547 (7th Cir. 2003) ("Parole allows an alien temporarily to remain in the United States pending a decision on his application for admission.").

97. See 8 C.F.R. § 235.3(b)(1) (2022); see also CONG. RSCH. SERV., R 45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 1 (2019), <https://sgp.fas.org/crs/homesecc/R45314.pdf> [<https://perma.cc/LB77-KM35>].

98. DHS, *Migrant Protection Protocols*, *supra* note 9.

99. 8 C.F.R. § 235.3(b)(1) (2022).

100. *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1081 (9th Cir. 2020).

refoulement obligations codified at 8 U.S.C. Section 1231(b).”¹⁰¹ The court determined that the MPP was applied wrongly to all asylum seekers, rather than enforcing the specific differences between the categories of immigrants defined in section 1225(b)(1).¹⁰²

The INA provides that a safe third nation must be capable of providing asylum seekers with protection, security, and due process.¹⁰³ However, the practical realities of the MPP demonstrate that the policy failed to carry out the goal of the INA because asylum-seekers are not afforded even the most basic due process rights at the nation’s borders.¹⁰⁴ Besides being wholly inconsistent with the INA, the MPP program runs afoul of the Constitution by forcing asylum seekers to remain in Mexican shelters that are inherently dangerous and pose an increased risk of refugee kidnapping, sex trafficking, and death.

C. *The Ultimate Fate of RMX*

The RMX policy was intended to curtail drug trafficking and human smuggling across U.S. borders.¹⁰⁵ However, the RMX did nothing but. Most refugees have no legal means to enter official ports of entry, and as a result, many rely on smugglers to facilitate their journey to freedom.¹⁰⁶ Recent immigration policies have weaponized a long-broken immigration system that resulted in a chauvinistic attack on the unity of family and our nation’s economy. Much like its predecessors, the RMX policy placed the U.S. in a bad light in the international circuit by contradicting the longstanding position that our nation is a safe harbor for those in need of our protection. Such policies show that we are unable to control our borders, weaken the power of the executive branch, pose serious national security concerns, and are draining our country’s resources by forcing it to defend litigation, rather than focusing on addressing the immigration crisis.

101. *Id.* at 1081–82.

102. *Id.* at 1084.

103. *See* 8 U.S.C. 1158(a)(2)(A) (2018).

104. *See* Perez-Davis & Voigt, *supra* note 5, at 3.

105. DHS, *Migrant Protection Protocols*, *supra* note 9.

106. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 6 (2008) (noting that “refugees must routinely rely upon smugglers and even traffickers in order to escape their own country because no state grants refugees legal authorization to travel for the purpose of seeking asylum”).

IV. THERE IS HOPE IF THERE IS CHANGE: RECOMMENDATIONS TO ADDRESS THE IMMIGRATION CRISIS AND PROTECT THE REFUGEES' RIGHTS

The asylum stigma must be reversed, and refugees facing persecution must be afforded the opportunity to seek and obtain shelter. The ability to seek protection is a right enshrined in domestic and international law.¹⁰⁷ While not everyone who claims fear of return is eligible for relief from removal,¹⁰⁸ the right to seek asylum is at the heart of our judicial system and must be afforded to those in need. Congress must initiate the much-needed change and act affirmatively to defund any variation of a future MPP.¹⁰⁹ Based on a long history of bad immigration policies, there is an increased concern that future administrations will implement new radical policies that will likely have the same effect, unless the roots of the problem are exterminated. Congress must scrutinize shelters and tent courts across the border,¹¹⁰ and any immigration policy to replace the RMX must be carefully drafted to guarantee asylum-seekers at least minimal due process rights,¹¹¹ and ensure its strict compliance with the statutory provisions of the INA.¹¹²

A. *Congress Must Defund Outrageous, Inhumane, and Unconstitutional Immigration Policies*

Congress has unrestricted authority to enact laws and regulations governing the exclusion of aliens.¹¹³ However, in the exercise of its broad

107. See Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980); see also Protocol Relating to the Status of Refugees, arts. III, VI (a)–(c), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

108. See 8 U.S.C. §§ 1158(b)(1)(A), 1101(a)(42) (2018); see also 8 C.F.R. § 208.18 (2022) (individuals may be granted asylum under existing statutes and regulations if they fit the criteria of “refugee” or qualify for protection under the Convention Against Torture).

109. HUM. RTS. WATCH, *Q&A*, *supra* note 13.

110. See *Congress Should Conduct Significant Oversight of Remain in Mexico and Use of Tent Courts by DHS and DOJ*, AM. IMMIGR. LAWS. ASS'N (Oct. 7, 2019), <http://www.womensrefugeecommission.org/wp-content/uploads/2020/04/Port-Court-NGO-Letter-10-7-2019-FINAL.pdf> [<https://perma.cc/5JA5-S5CF>] [hereinafter *Congress Should Conduct Significant Oversight*].

111. See Joel Rose, *Few Asylum-Seekers Winning Cases Under “Remain in Mexico” Program*, NPR (Dec. 19, 2019, 3:46 PM), <https://www.npr.org/2019/12/19/789780155/few-asylum-seekers-winning-cases-under-remain-in-mexico-program> [<https://perma.cc/C5C7-JPFQ>].

112. See *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1081 (9th Cir. 2020) (finding the RMX inconsistent with section 1225(b) of the INA, which establishes procedures for immigration authorities to inspect inadmissible individuals and expedite their removal).

113. See *Kleindienst v. Mandel*, 408 U.S. 753, 765–67 (1972) (noting that Congress has plenary control over admission and exclusion of aliens).

power over immigration and naturalization, “Congress regularly makes rules that would be unacceptable if applied to citizens.”¹¹⁴

For many years, immigration detention funding has been a source of conflict between Congress and the executive branch.¹¹⁵ Despite the conflict, when an administration implements a policy that does not comport with due process, Congress should resist it and deny funding needed to implement it.¹¹⁶ Human rights advocates urge Congress to stop funding hateful policies and instead invest that money in projects that will generate meaningful results.¹¹⁷ To start, if the administration implements a bad immigration policy and fails to mitigate the problems associated with it, Congress must defund it until the program is fundamentally corrected to comport with due process.¹¹⁸ Congress should enact appropriate legislation so that refugees are treated with dignity and humanity, and account for their safety and security.¹¹⁹

B. Congress Must Conduct Investigatory Hearings and Delegate Officials to Control and Scrutinize Border Shelters and Tent Courts

Congress must act decisively to place immigration policies under vigorous investigatory hearings, congressional briefings, and delegate officials to scrutinize border shelters and tent courts.¹²⁰ Under the MPP, the Trump Administration allocated \$155 million to operate five temporary courts along the length of the border.¹²¹ However, the tent courts in Laredo and Brownsville forced asylum applicants to wait in two of the world’s most dangerous cities: Nuevo Laredo and Matamoros.¹²² Due to high levels

114. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

115. See Muzaffar Chishti et al., *Executive Power Showdown: Congress and White House Quarrel over Immigration Spending*, MIGRATION INFO. SOURCE (Feb. 28, 2019), <https://www.migrationpolicy.org/article/executive-power-showdown-congress-white-house-immigration>.

116. See *President Trump’s Executive Orders on Immigration and Refugees*, CTR. FOR MIGRATION STUDIES (Jan. 29, 2017), <https://cmsny.org/trumps-executive-orders-immigration-refugees/> [<https://perma.cc/P7HP-XQKB>].

117. See *Defund Hate*, NAT’L IMMIGRANT J. CTR., <https://immigrantjustice.org/issues/defundhate> [<https://perma.cc/CE42-NUPM>].

118. HUM. RTS. WATCH, *Q&A*, *supra* note 13.

119. *See id.*

120. *Id.*

121. See Nick Miroff, *Along Texas Border, Trump Administration Sets Up Tent Courts for Virtual Asylum Hearings*, WASH. POST (Sept. 18, 2019, 6:29 AM), https://www.washingtonpost.com/immigration/along-texas-border-trump-administration-sets-up-tent-courts-for-virtual-asylum-hearings/2019/09/18/f29d1326-d9bc-11e9-adff-79254db7f766_story.html [<https://perma.cc/WY8U-U4P4>].

122. See *Congress Should Conduct Significant Oversight*, *supra* note 110.

of violence and abduction, the U.S. State Department has issued a level four “Do Not Travel” warning to both cities.¹²³

Tent courts served as pop-up immigration courts designed to hear thousands of asylum hearings for migrants waiting in Mexico¹²⁴ but provided even greater obstacles to due process for asylum claimants. Asylum seekers, including those with children, were required to travel through perilous pre-dawn circumstances to get to ports of entry in Laredo and Brownsville by 4:30 a.m., as mandated by DHS.¹²⁵ Several refugees were abducted or almost kidnapped while traveling by bus to the ports of entry. Individuals who did not appear in court were often removed in their absence, despite Tamaulipas having a high risk of kidnapping and violent crimes against migrants.¹²⁶

Immigration judges do not staff these tent courts. Instead, they communicate with the migrants through teleconference from another site.¹²⁷ A typical immigration court hearing would have the migrant in the same room as the attorney, immigration judge, and interpreter.¹²⁸ Migrants were forced to attend a series of hearings before a decision was rendered on their case.¹²⁹ The DHS neglected to tell the public about the tent courts’ fundamental operations and processes,¹³⁰ such as the fact that unlike in regular immigration courts, attorney observers were not authorized to access hearing sessions in the tent court facilities.¹³¹

The conditions in and around these tent courts were outrageous, to say the least. For example, various members of Congress have visited the tent courts after the House Judiciary Committee announced an investigation into

123. *See id.*

124. *See* Reynaldo Leños Jr., *Problems at Tent Courts and a Growing Tent Encampment; One Year into Remain in Mexico*, TEXAS PUB. RADIO (Jan. 30, 2020), <https://www.tpr.org/border-immigration/2020-01-30/problems-at-tent-courts-and-a-growing-tent-encampment-one-year-into-remain-in-mexico> [<https://perma.cc/RS4M-R7SY>].

125. *See Congress Should Conduct Significant Oversight*, *supra* note 110.

126. *See id.*

127. *See id.*

128. *See* Priscilla Alvarez, ‘I don’t want to be deported’: Inside the Tent Courts on the US-Mexico Border, CNN (Jan. 28, 2020, 6:02 AM), <https://www.cnn.com/2020/01/28/politics/tent-courts-remain-in-mexico/index.html> [<https://perma.cc/VY2G-YRG5>].

129. *See id.*

130. *See Congress Should Conduct Significant Oversight*, *supra* note 110.

131. *See id.* (noting that an NIJC attorney formally appearing before the Laredo Court on behalf of asylum seekers was allowed to enter to represent her clients, but she was not allowed to attend the sessions of *pro se* responses); *see also* Bianca Steward et al., *Tent Court Hearings for Migrants Ramp Up in Texas as Lawyers Decry Lack of Access*, NBC NEWS (Sept. 16, 2019), <https://www.nbcnews.com/news/latino/tent-court-hearings-migrants-ramp-texas-lawyers-decry-lack-access-n1054991> [<https://perma.cc/Z5ZL-9MBU>].

the RMX.¹³² The lawmakers has to navigate through tents, makeshift food stalls, and clotheslines.¹³³ One Congress member, Rep. Rosa DeLauro of Connecticut, expressed extreme outrage over the program as she walked on the dirt path between tents and clothes hanging on trees.¹³⁴ DeLauro noticed migrants sleeping under tents and exclaimed that the U.S. has “created here an unbelievable outrage against humanity.”¹³⁵ Congress should keep a close eye on the DHS and the Department of Justice’s use of tent courts.¹³⁶ Congress must act to expose immigration abuse through vigorous investigative hearings, briefings, and delegations to border shelters and tent courts.

C. *Asylum Seekers Must Be Afforded at the Very Least Minimal Due Process Rights*

The legality of the MPP and its predecessors is, at best, questionable. However, it is critical to address the fundamental right that gives all other rights meaning: due process.¹³⁷ The right to due process is enshrined in international human rights law.¹³⁸ Due process for asylum seekers is required by the Fifth Amendment of the U.S. Constitution, which states in relevant part that “No person shall be . . . deprived of life, liberty, or property, without due process of law.”¹³⁹ There is a statutory right to seek asylum, which applies at all ports of entry, regardless of immigration status.¹⁴⁰ This, in turn, creates a significant liberty interest, triggering the

132. Priscilla Alvarez, *Democratic Lawmakers Visit Camp in Mexico Where Migrants Wait to Claim Asylum*, CNN (Jan. 17, 2020), <https://www.cnn.com/2020/01/17/politics/democratic-lawmakers-matamoros-trip-migrants/index.html> [https://perma.cc/5J7F-6Y8B].

133. *See id.*

134. *See id.*

135. *See id.*

136. *See Congress Should Conduct Significant Oversight*, *supra* note 110.

137. *See generally* Wong Wing v. United States, 163 U.S. 228 (1896) (finding that a sentence of imprisonment and hard labor could not be imposed for the crime of illegal entry into the United States without a jury trial).

138. *See generally* Inter-Am. Comm’n on H. R. [IACHR] Res. 04/19, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking* (Dec. 7, 2019), <https://www.oas.org/en/iachr/decisions/pdf/ReResoluci-4-19-en.pdf> [https://perma.cc/46SC-WYFN] (recognizing “the obligation of States to protect the rights of all persons, regardless of their migration status”); *see also* G.A. Res. 217 (III) A, Universal Declaration Hum. Rts. (Dec. 10, 1948); G.A. Res. 2200A (XXI), Int’l Covenant on Civ. and Pol. Rts. (Dec. 16, 1966); G.A. Res. 2106 (XX), Int’l Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965); G.A. Res. 40/144, art. 5(1)(c), Declaration on the Hum. Rts. of Individuals who are not Nationals of the Country in Which they Live (Dec. 13, 1985).

139. U.S. CONST. amend. V.

140. *See* 8 U.S.C. § 1158(a)(1) (2018).

attachment of due process rights.¹⁴¹ Under current U.S. law, courts must balance the private interest at risk, the possibility of mistake, and the government's interest to decide the amount of process required, as established in *Mathews v. Eldridge*.¹⁴²

Due process rights and the right of access to legal representation for asylum seekers under past and current immigration policies have been threatened, undermining the rule of law.¹⁴³ The impact of RMX on asylum seekers has been disastrous. DHS claims that asylum seekers are aware of what is needed to prove to asylum officers at preliminary screening interviews through adjustments to training materials.¹⁴⁴ However, these interviews are only available to those asylum seekers whom U.S. Customs and Border Protection officers appropriately refer for further screening upon their expression of fear at the border.¹⁴⁵ If an asylum officer then finds that an individual has proven a "significant possibility" of establishing eligibility for asylum,¹⁴⁶ that person will get a hearing before an immigration judge.¹⁴⁷ Limits on meaningful access to counsel, appeals, and monitoring at various phases of the process have been a source of significant worry for advocates.¹⁴⁸ As data reveals, less than one percent of migrants subject to the RMX had access to legal representation at tent courts, despite repeated requests from non-governmental organizations to

141. See, e.g., *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (holding that INA did not preclude district court's jurisdiction over procedural due process challenge to asylum procedures); see also *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504 (C.D. Cal. 1988) (same). But see *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (distinguishing the types of statutory provisions concerning immigrants to which due process rights attach).

142. 424 U.S. 319 (1976) (holding that procedural due process must be assessed using a balancing test that considers the interests of the affected individual, the government's interest in minimizing procedural burdens, the possibility of mistakenly restricting individual interests under current procedures, and the extent to which additional procedures would help lower the possibility of error).

143. See *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (reasoning that aliens must be afforded some Due Process and cannot be stripped of basic human rights).

144. See generally *Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> [<https://perma.cc/PSK4-SR5H>] [hereinafter *Questions and Answers*]; see also DEP'T HOMELAND SEC., 82 FR 4769-01, ELIMINATING EXCEPTION TO EXPEDITED REMOVAL AUTHORITY FOR CUBAN NATIONALS ARRIVING BY AIR (2017).

145. See 8 C.F.R. § 253.3(b)(4) (2017).

146. See 87 Fed. Reg. 18,078, 18,220 (Mar. 29, 2022) (codified at 8 C.F.R. § 235.3(b)(4)(ii)). A credible fear requires a "significant possibility" that the individual could establish eligibility for asylum or protection under the Convention Against Torture. See *Questions and Answers*, *supra* note 144.

147. See 8 U.S.C. § 1225(b)(1)(B)(ii) (2018); 8 C.F.R. § 208.30(f) (2018).

148. B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 104 (2017).

provide such representation.¹⁴⁹ According to the U.S. Citizenship and Immigration Services' policy guidance, "DHS is currently unable to provide access to counsel during the assessments given the limited capacity and resources at ports-of-entry and Border Patrol stations as well as the need for the orderly and efficient processing of individuals."¹⁵⁰ Moreover, the fear screening shall take place in private, without the presence of lawyers.¹⁵¹ When asylum seekers are denied legal representation, their ability to prepare for interviews and provide evidence that demonstrates a "credible fear" is categorically undermined. In the long run, the legislative and executive branches must pass legislation that protects the rights of asylum seekers at U.S. borders by ensuring they are afforded basic due process rights, have access to legal counsel, are placed in temporary shelters focused on victim rehabilitation, are provided the necessary medical and psychological care, and their claims are processed in a reasonable and timely manner. Due process is a human right, not a burden. One's immigration status does not diminish a government's obligation to treat all individuals with respect, regardless of their status.

D. Federal Courts Must Enforce Article 31 of the 1951 Refugee Convention

Article 31 of the 1951 Convention Relating to the Status of Refugees is focused on the non-penalization, detention, and protection of refugees.¹⁵² Article 31 states that "[t]he Contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened" do "enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their

149. See *Congress Should Conduct Significant Oversight*, *supra* note 110.

150. U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0169-POLICY MEMORANDUM: GUIDANCE FOR IMPLEMENTING SECTION 235(B)(2)(C) OF THE IMMIGRATION AND NATIONALITY ACT AND THE MIGRANT PROTECTION PROTOCOLS (2019), <https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf> [HTTPS://PERMA.CC/X7XS-E8YT].

151. See Dara Lind, *Civil Servants Say They're Being Used as Pawns in a Dangerous Asylum Program*, VOX (May 2, 2019), <https://www.vox.com/2019/5/2/18522386/asylum-trump-mpp-remain-mexico-lawsuit> [https://perma.cc/GCW5-FR6Z] (noting that "[Asylum Officers'] union members said they were instructed to tell asylum seekers that there would be 'no room' for a lawyer during their interview (though lawyers have been able to observe MPP screenings in rare cases)").

152. See generally Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection*, CAMBRIDGE UNIV. PRESS 185 (2003).

illegal entry or presence.”¹⁵³ The non-penalization clause exists to protect asylum seekers from being trapped in limbo. A broader interpretation of this clause would encompass claimants who are attempting to enter or are in the process of entering the territory of a state. Federal courts should enforce Article 31 by allowing asylum-seekers to cross the border until they complete their application process and are denied asylum *or* placed in U.S. shelters pending a court hearing. Compliance with Article 31 will ensure expedited parole for asylum-seekers. In turn, the government will efficiently spend the taxpayers’ money on reforming current immigration systems rather than creating new ones that are bound to fail.

V. CONCLUSION

The troubling concerns of past immigration practices, as well as the immigration crisis confronting our nation, require extensive congressional oversight. Meaningful change cannot occur unless Congress defunds disastrous immigration policies. There is a clear pattern in the conduct of past administrations to reinvent “old” immigration policies under a different name. Existing immigration regulations must be reevaluated and changed. The RMX policy, and similar policies that require asylum seekers to remain outside the U.S. while their applications are processed, cannot be implemented in a lawful, safe, or humane manner and do not comply with domestic and international laws, or due process.

153. *Id.* at 186; *see also* 189 U.N.T.S. 150; 606 U.N.T.S. 267 (outlining the 1967 Protocol to the 1951 Convention).