

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

IMMIGRANT DEFENDERS LAW CENTER,
et al.,

Plaintiffs,

v.

CHAD WOLF, et al.,

Defendants.

Case No. 2:20-cv-09893-JGB-SHK

DECLARATION OF MICHAEL GARCIA BOCHENEK

1 **DECLARATION OF MICHAEL GARCIA BOCHENEK**

2
3 I, Michael Garcia Bochenek, declare pursuant to 28 U.S.C. § 1746 that the
4 following is true and correct:
5

6 1. I am senior counsel to the Children’s Rights Division of Human Rights
7 Watch, a position I have held since 2015. In this role, my work has focused on the
8 situation of migrant children, unaccompanied and with families, in the United States
9 and elsewhere. In the United States, my work has included monitoring and reporting
10 on conditions of detention in immigration holding cells,¹ documenting the extent
11 and impact of family separation,² assisting with the preparation of amicus briefs in
12 *Flores v. Barr* and other litigation,³ and preparing and submitting comments on
13 proposed regulations.⁴ I have taken part in regular *Flores* inspections of places of
14 immigration detention for children, including in large Office of Refugee
15 Resettlement congregant care facilities operating in Brownsville, Homestead, and
16 Tornillo; the U.S. Immigration and Customs Enforcement (ICE) family detention
17 center in Dilley; and U.S. Customs and Border Protection (CBP) immigration
18 holding cells in and around El Paso and McAllen. My work outside the United
19 States in the past five years has included research and reporting on the treatment of
20
21

22
23 ¹ Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US
24 Immigration Holding Cells* (2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

25 ² See, e.g., Human Rights Watch, *Separated Families Report Trauma, Lies, Coercion* (2018),
26 <https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion>; Human
27 Rights Watch, *Family Separation Harming Children, Families* (2019),
<https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families>.

28 ³ E.g., Brief of Amici Curiae Amnesty International and Human Rights Watch in Support of
Plaintiffs’ Motion to Enforce, *Flores v. Barr*, No. CV-85-4544 (C.D. Cal. filed Aug. 31, 2020).

⁴ E.g., Human Rights Watch, *Public Comment Opposing Asylum Bars* (Aug. 10, 2020),
<https://www.hrw.org/news/2020/08/10/public-comment-opposing-proposed-asylum-bars>.

1 migrant children in France,⁵ Mexico,⁶ and on the island nation of Nauru under
2 Australia’s offshore detention and processing arrangements with that country.⁷

3 2. I was director of law and policy at Amnesty International’s secretariat in
4 London from 2006 to 2015; counsel, senior researcher, and then deputy director of
5 Human Rights Watch’s Children’s Rights Division in New York between 1998 and
6 2006; the sole staff attorney from 1996 to 1998 at what became during my time
7 there the office of the Northwest Immigrant Rights Project in Granger, Washington;
8 and the Leonard H. Sandler Fellow in the Americas Division of Human Rights
9 Watch in Washington, D.C., from 1995 to 1996. I hold a bachelor’s degree from
10 Michigan State University and a law degree from Columbia University.

11 3. I make this declaration on the basis of my personal knowledge and
12 research on the Migrant Protection Protocols (MPP), also known as “Remain in
13 Mexico.” I have conducted field investigations and research on the MPP over the
14 past year, including in-person research in Tijuana and Ciudad Juárez from
15 November 2019 to March 2020 and remote interviews carried out between March
16 and October 2020. During this period, I led a research team that interviewed and
17 reviewed the case files of more than fifty people placed in the MPP. Our team also
18 conducted over forty interviews with lawyers, health professionals, shelter staff and
19 volunteers, and others working with migrant families on both sides of the US-
20 Mexico border.

21 4. I have documented the extreme harms that the Remain in Mexico
22 program imposes on asylum seekers. Although its formal title suggests that it
23 affords “protection” to asylum seekers and other migrants, the program is in reality

24 ⁵ Human Rights Watch, *“Like Living in Hell”: Police Abuses Against Child and Adult Migrants in*
25 *Calais* (2017); Human Rights Watch, *“Like a Lottery”: Arbitrary Treatment of Unaccompanied*
26 *Migrant Children in Paris* (2018); Human Rights Watch, *Subject to Whim: The Treatment of*
Unaccompanied Migrant Children in the Hautes-Alpes (2019).

27 ⁶ Human Rights Watch, *Closed Doors: Mexico’s Failure to Protect Central American Refugee*
and Migrant Children (2016).

28 ⁷ Human Rights Watch and Amnesty International, *Australia: Appalling Abuse, Neglect of*
Refugees on Nauru (2016).

1 anything but protective: it has sent people to some of Mexico’s most dangerous
2 cities and needlessly and foreseeably exposed them to considerable risk of serious
3 harm. These issues have only been exacerbated by the Covid-19 pandemic.
4

5 **The Remain in Mexico Program Traps Asylum-Seeking Individuals in**
6 **Dangerous Border Regions Where They Are Unable to Provide for Their Own**
7 **Basic Needs**

8 5. Over the past two years, US immigration authorities have sent more
9 than 67,000 people to Mexico while they wait for their asylum hearings in US
10 immigration courts,⁸ including families with children of any age. By one estimate,
11 children under the age of 18 were one-third of all those sent to Mexico; over 4,000
12 were under the age of five, and nearly 500 were less than one year old.⁹

13 6. Mexican towns along the border with the United States can be very
14 dangerous, especially for asylum seekers whose demeanor and speech mark them as
15 newcomers and who lack the resources to stay in hotels or in rented accommodation
16 in safer neighborhoods. In the course of my research, I have heard repeated accounts
17 of migrant families beaten, robbed, or subjected to other serious harm in
18 circumstances that suggest their assailants targeted them because of their national
19 origin or ethnicity. Women and girls described actual or attempted rape or other
20 sexual assault, also in circumstances suggesting they were targeted because they
21 were not Mexican or because they were indigenous or transgender. My research has
22 found that some of those responsible for extortion and other serious abuses appear
23

24 ⁸ Transactional Records Access Clearinghouse (TRAC) Immigration, Syracuse University, *Details*
25 *on MPP (Remain in Mexico) Deportation Proceedings* (data through Sept. 2020),
26 <https://trac.syr.edu/phptools/immigration/mpp/> (viewed Nov. 6, 2020). Select “initial filing”
measure, “month and year” graph time scale, “all” hearing locations.

27 ⁹ Kristina Cooke, Mica Rosenberg, and Reade Levinson, *Exclusive: U.S. Migrant Policy Sends*
28 *Thousands of Children, Including Babies, Back to Mexico*, Reuters, Oct. 11, 2019,
<https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-babies-and-toddlers-back-to-mexico-idUSKBN1WQ1H1> (viewed Oct. 16, 2020).

1 to have been Mexican government officials—police or immigration agents who
2 identified themselves as such, wore uniforms and drove vehicles bearing official
3 insignia, in some cases took people to police stations, and often threatened people
4 with arrest or deportation if they did not hand over money and other valuables. In
5 many cases, individuals reported that their attackers targeted them as they arrived in
6 Mexico after their initial placement in the MPP, on their way back from court
7 hearings, or as they left the migrant shelters where they stayed.

8 7. In addition to being targets of violence and abuse, individuals in the
9 MPP are subject to living conditions that make it extremely difficult to provide for
10 their own basic needs. People sent to Mexico under the MPP must navigate
11 unfamiliar surroundings in a country that is not their own, and many are dependent
12 on the generosity of humanitarian groups and volunteers for accommodation, food,
13 and health care. Many lack the resources necessary to rent a place for themselves
14 and their family to live and must depend on the network of migrant shelters, many
15 of which are at or near capacity. Health care in Mexico is, in practice, limited to
16 basic services; frequently, the only health services individuals in the MPP receive
17 are services provided by nongovernmental organizations and volunteers. Most
18 children in the MPP have also not had any formal education since they left their
19 home countries.

20 8. Migrant shelters in Mexican border towns quickly reached capacity as
21 the United States rolled out the MPP program. Some shelters began to use whatever
22 space they had available, making garages, auditoriums, and courtyards available for
23 families to set up individual tents. Services in Tijuana, the first city to which US
24 authorities sent individuals returned to Mexico, were quickly strained after the
25 commencement of the MPP. Between April and August 2019, the U.S. Department
26 of Homeland Security (DHS) assigned more than 6,200 MPP cases to the San
27
28

1 Ysidro port of entry, immediately across the border from Tijuana.¹⁰ As a result, by
2 July 2019, many migrant shelters were operating close to capacity.¹¹

3 9. In November 2019 I conducted field interviews at migrant shelters in
4 Tijuana. Every shelter provider I interviewed told me they were using all available
5 space in their facilities. In early 2020, before the onset of the Covid-19 pandemic,
6 the oldest and most well-established migrant shelter in the city, the Casa de
7 Migrante, housed about 200 people. Embajadores de Jesús, a shelter located on the
8 outskirts of the city on a poorly maintained gravel road at the end of a canyon,
9 offered refuge to about 300. Juventud 2000, near the border a short walk from the
10 Pedestrian West port of entry, had about 90 people.

11 10. My research also looked at the health impacts of inadequate shelter for
12 individuals returned to Mexico. Illnesses spread quickly in cramped quarters, and
13 the people we spoke with described daily struggles to maintain hygienic conditions
14 for themselves and their children. Skin diseases and respiratory infections were
15 particularly common, health officials and volunteer health providers told us.

16 11. The challenges of meeting basic needs are compounded for individuals
17 subject to the MPP because they are often unable to find work in order to support
18 themselves and their families. Mexican authorities on the border tell people they
19 have the right to work in Mexico during the time they are in the MPP, but the paper
20 record of admission – the only document most people receive – is not adequate
21 work authorization. Mexican lawyers confirmed to me that securing formal work
22 authorization requires a separate application process, and their description of the
23 process is consistent with the guidance on the website of Mexico’s immigration
24

25 ¹⁰ TRAC Immigration, *Details on MPP (Remain in Mexico) Deportation Proceedings* (data
26 through Sept. 2020), <https://trac.syr.edu/phptools/immigration/mpp/> (viewed Nov. 6, 2020). Select
27 “initial filing” measure, “month and year” graph time scale, “MPP Court San Ysidro Port” hearing
location, and sort by “month and year case began.”

28 ¹¹ See, e.g., Wendy Fry, *Tijuana Shelters Overwhelmed by U.S. Crackdown*, Balt. Sun, July 12,
2019, [https://www.baltimoresun.com/tijuana-shelters-overwhelmed-by-u-s-immigration-
crackdown-story.html](https://www.baltimoresun.com/tijuana-shelters-overwhelmed-by-u-s-immigration-crackdown-story.html) (viewed July 26, 2020).

1 agency, the National Migration Institute (Instituto Nacional de Migración, INM).¹²
2 According to my research, many employers will not accept the paper record of
3 admission as evidence of work authorization. Employment opportunities are also
4 generally scarce for individuals placed in the MPP. In addition, many people are
5 fearful of leaving their children unsupervised or – in the case of parents of all but
6 the oldest children – are unable to do so because there is no one else to care for their
7 children.

8 12. While living conditions for people waiting in Mexico have been dire
9 throughout the time the MPP has been in effect, my field interviews and
10 observations repeatedly confirmed that conditions have only become worse since
11 the start of the Covid-19 pandemic.

12 13. In response to the pandemic, many shelters in Tijuana, including the
13 Casa del Migrante, reduced their capacity. Some shelters have imposed extended
14 lockdowns, while others seemed to disregard basic protocols. In Tijuana, some
15 shelters have strict time limits and have still required people to leave during the
16 Covid-19 pandemic, even when this has meant expelling individuals who have
17 nowhere else to seek shelter.

18 14. Staff in many shelters were particularly critical of the lack of
19 government guidance and support to help them respond appropriately to the
20 pandemic and expressed concerns about their inability to isolate those who develop
21 symptoms. In many cases, shelter workers said, they depended on nongovernmental
22 organizations for the personal protective equipment and other supplies they needed
23 to prevent the spread of Covid-19.

24 15. Given the precarious nature of living conditions in Mexico, nearly every
25 individual in the MPP whom our research team interviewed described the sense that

26

27 ¹² See Gobierno de México, Instituto Nacional de Migración, “Obtención de permiso de trabajo
28 para extranjeros residentes temporales en México” (undated),
<https://www.gob.mx/tramites/ficha/permiso-a-extranjeros-residentes-temporales-y-temporales-estudiantes-para-trabajar-en-mexico/INM795> (viewed Nov. 7, 2020).

1 their lives were in limbo. My research has found that even before immigration
2 courts suspended MPP hearings in response to the pandemic, lengthy waits for court
3 dates caused severe despair and depression among individuals trapped in Mexico.
4 The Covid-19 pandemic has only worsened this situation, as fear of the pandemic
5 and indefinite delays of court hearings have increased people's sense of desperation.

6
7 **The Government's Presentation Requirement Is a Serious Impediment to**
8 **Individuals' Ability to Access the U.S. Asylum System**

9 16. My research has found that the requirement that individuals in the MPP
10 present themselves at particular ports of entry along the U.S. border for their
11 hearings severely impedes their access to the U.S. asylum system. In practice, the
12 government's implementation of the presentation requirement imposes arduous and
13 dangerous conditions on individuals returned to Mexico, particularly individuals
14 returned to border regions far from the port of entry where they are required to
15 present themselves for their hearings. Lack of notice and unreliable government
16 communication about court dates and times also mean that some individuals may
17 not present at the correct time, posing the serious risk that they may receive an *in*
18 *absentia* removal order.

19 17. Presenting at a port of entry can be an arduous process, requiring
20 individuals to make their way to the border port in the middle of the night. Failure to
21 arrive hours before a hearing can result in individuals being turned away: our
22 research team recorded accounts of people not allowed to cross the border to attend
23 court even though they arrived well before the actual time of their hearing.

24 18. Presenting for court is especially difficult and dangerous for individuals
25 placed in the MPP who are returned to Mexican border towns far from the port of
26 entry where they are required to present for their hearings, forcing them to travel
27 long distances over dangerous terrain in order to attend court. When the MPP
28 expanded to cover people who entered the United States near Calexico, California,

1 DHS sent some individuals to Tijuana, about 180 kilometers (110 miles) west. But
2 our research team heard that most individuals who were processed at the port of
3 entry at Calexico were returned directly across the border to Mexicali with orders to
4 report to a border station in Tijuana. In one such case, CBP transferred a 41-year-
5 old Honduran woman and her family from Yuma, Arizona, to Calexico, California,
6 about 100 kilometers (60 miles) west, and sent them across the border into Mexicali
7 with a court hearing in San Diego. She told our research team that “From Mexicali,
8 we had to make our way here [to Tijuana]. The immigration agents didn’t give us
9 any directions. They didn’t tell us where there were shelters.”

10 19. DHS has also flown people across the country before sending them to
11 Mexico. Some people told us they were sent from the Rio Grande Valley to San
12 Diego, and from there to Tijuana. One Honduran man told our team that he and his
13 two children entered the United States near Reynosa in August 2019 and were
14 detained in McAllen, Texas. He indicated that an “agent announced, ‘We’re going
15 to process you. We’re going to send you to wait for your court in Tijuana.’ When
16 we heard that, everybody started to cry.” In another such case, a Honduran woman
17 told us that after she, her husband, and their 15-year-old son entered the United
18 States near Reynosa in June 2019, immigration officials held them for three or four
19 days in Texas before flying them to San Diego. They spent another three days in
20 immigration holding cells in San Diego before US immigration authorities sent
21 them to Tijuana with an initial hearing date in January 2020. Similarly, a
22 Guatemalan woman said that she, her husband, and their 5-year-old son also entered
23 the United States near Reynosa in June 2019, spent four days in a holding cell in
24 Texas, and then another five days in detention in San Diego before US immigration
25 authorities sent her to Tijuana.

26 20. In some cases, people have received notices listing the wrong date for
27 their immigration court hearing. Because the likely consequence of not appearing at
28

1 the exact date and time of an immigration court hearing is a deportation order issued
2 *in absentia*, this defect is particularly serious.

3 21. Nearly all of the notices I viewed in the course of our research also
4 listed incorrect addresses for the person facing deportation, meaning that the
5 immigration court had no reliable way to alert people of changes to the date and
6 time of their hearing. Many simply stated “*domicilio conocido*,” literally meaning
7 “known address”—even though the person’s address in Mexico was, in fact,
8 unknown at the time DHS agents issued the notice. In one case we reviewed, an
9 immigration judge critiqued this policy, commenting that “in cities the size of
10 Tijuana and Mexicali there is no reasonable possibility that correspondence sent to
11 respondents at *domicilio conocido* will actually be received by respondents,
12 particularly since respondents are not Mexican and have no prior residence in
13 Mexico.”

14 22. Presenting at the border has been made more difficult by the U.S.
15 government’s postponements during the Covid-19 pandemic. The precipitous
16 timing of some of these announcements has meant that many families only learned
17 that their hearings had been postponed after long, arduous journeys to the port of
18 entry. For instance, a pregnant 22-year-old Cuban woman and her husband travelled
19 for 10 hours on crowded buses through dangerous territory from Nogales to Ciudad
20 Juárez in mid-May, learning only after they arrived that hearings had again been
21 postponed.

22 23. Our research also found that for the first several months of the Covid-19
23 pandemic, the procedures that U.S. agencies adopted for people to receive
24 rescheduled hearing dates have imposed unnecessarily burdensome presentation
25 requirements. Until May 10, DHS and the Executive Office for Immigration Review
26 (EOIR) instructed people to go to the border on the original date of their hearing to
27
28

1 receive a new notice, or “tear sheet,”¹³ an approach that did not take into account the
2 dangers and difficulties migrant families face to get to border stations before dawn.
3 One man whose attorney had already given him a copy of his rescheduled hearing
4 notice told Human Rights Watch that when he went alone to the border crossing
5 early in the morning, without his wife and young children, to confirm the
6 rescheduled date, CBP agents said he should have come with his entire family and
7 that not bringing them risked an *in absentia* order of deportation. The agencies then
8 instructed people to appear one month after the date of their hearings without
9 clarifying what they should do if the day the following month fell on a weekend.¹⁴
10 As one attorney explained to us, “logistically speaking, the lack of clear information
11 has been a nightmare” for their clients in the MPP.

12

13 **Individuals Subject to the MPP Are Kept in DHS Custody When Reentering**
14 **the United States for Their Hearings**

15 24. According to our research, asylum seekers in the MPP who present at
16 the United States border for an immigration hearing are strictly held in DHS custody
17 for the period they are in the U.S. Some families told us they were thinking of
18 abandoning their asylum claims because the process of attending hearings was so
19 traumatic for their children.

20 25. One woman we interviewed attended her first immigration court hearing
21 in August 2019 with her husband and their three daughters, all under age 5. “We
22 had nothing to eat from 9 a.m. to 3 p.m.,” she told us. “The officials wanted us to
23 keep the kids quiet. Really I was at the point of giving up.” They had the same
24 experience at later court hearings. Reflecting on the long waits to see the judge, she

25

26 ¹³ U.S. Department of Homeland Security, Joint DHS/EOIR Statement on MPP Rescheduling
(Mar. 23, 2020), <https://www.dhs.gov/news/2020/03/23/joint-statement-mpp-rescheduling>
27 (viewed Nov. 7, 2020).

28 ¹⁴ U.S. Department of Homeland Security, Joint DHS/EOIR Statement on the Rescheduling of
MPP Hearings (May 10, 2020), <https://www.dhs.gov/news/2020/05/10/joint-dhseoir-statement-rescheduling-mpp-hearings> (viewed Nov. 7, 2020).

1 said, “They make people wait a long time. We think it’s meant as a punishment.”
2 Her husband told us that when they went to court in November 2019, “One guard
3 kept saying, ‘Those of you with children, control them. If your children are fucking
4 around, I can take away your court hearing.’ It’s almost impossible to get a 1-year-
5 old to stay seated in a chair.”

6 26. Other interviewees have given similar accounts. A 27-year-old
7 Guatemalan woman told us that on the day of her immigration court hearing in
8 November, she arrived at 3:00 a.m., an hour ahead of the time CBP agents had
9 instructed her to arrive. A bus took her and others to court in San Diego, and she
10 saw the judge at 8:00 a.m. Asked what she did in the four hours between 4:00 a.m.
11 and seeing the judge other than taking the bus, she replied, “We just waited. They
12 didn’t say why.”

13 27. While in the United States for hearings, interviewees in the MPP
14 described how their movements were carefully confined by guards. One individual
15 explained to me, “We wait in a hallway, seated in chairs. The kids are right there
16 with us. There’s nowhere else for them. They can’t play. The guards don’t permit
17 them to move around. They reprimand you if the kids get out of the chairs. You sit
18 all day. It’s a long time.” Another woman said: “If you have a baby and you need to
19 change your baby’s diapers, they’ll give you a diaper. But there’s no place to go.
20 You have to change your baby on the floor, right there in the hallway.”
21

22 **The MPP Drastically Reduces Asylum Seekers’ Access to Legal Counsel for**
23 **Their Hearings, Impeding Their Ability to Meaningfully Present Their Claims**
24 **for Asylum**

25 28. Most people processed under the MPP are unrepresented.¹⁵ Our research
26 has shown that individuals who are sent to Mexico face particularly formidable

27 _____
28 ¹⁵ TRAC Immigration, Syracuse University, *Details on MPP (Remain in Mexico) Deportation Proceedings* (data through Sept. 2020), <https://trac.syr.edu/phptools/immigration/mpp/> (viewed

1 barriers to legal representation. Few attorneys are able to take on pro bono clients
2 who are physically located across an international border, and those attorneys that
3 do consistently describe serious impediments to interviewing clients safely,
4 obtaining necessary documents, and preparing clients adequately for court hearings.
5 Adding to these difficulties, DHS has only undertaken to allow attorneys one hour
6 to meet with clients prior to MPP hearings¹⁶; even then, U.S. immigration agents
7 have often given attorneys even less preparation time and sometimes barred them
8 from meeting with clients at all before their hearings.

9 29. Based on our research, few pro bono or low-cost legal service providers
10 represent people in the MPP. For those organizations that do, the time and expense
11 involved in crossing the border, difficulties in finding private spaces in which to
12 interview clients, and safety concerns can significantly limit their time with clients,
13 impeding the attorneys' ability to prepare their cases. Even mundane tasks such as
14 copying documents or getting signatures on forms become onerous when lawyers
15 and clients are separated by an international border.

16 30. In the course of our research, attorneys for the very few clients subject
17 to MPP who had legal representation described difficulties with getting permission
18 to visit certain shelters to meet with clients and, for those living outside the shelters,
19 the risks of meeting where they lived. One attorney explained to me that individuals
20 from the United States are readily identified, meaning that if attorneys go to some
21 neighborhoods "we put everyone in the house at risk" because any perceived U.S.
22 connection carries a risk of extortion and kidnapping.

25 Nov. 6, 2020). Select "current status" measure, "month and year" graph time scale, "all" hearing
26 locations, and filter by "represented" status.

27 ¹⁶ See Memorandum from Nathalie R. Asher, Acting Executive Associate Director, US
28 Immigration and Customs Enforcement, to Field Office Directors, Enforcement and Removal
Operations, *Migrant Protection Protocols Guidance* (Feb. 12, 2019) at 3,
[https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-
Implementation-Memo.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf) (viewed Nov. 7, 2020).

1 31. DHS policy documents state that people who attend MPP hearings will
2 be available to speak with their lawyers for one hour before their case is called.¹⁷ In
3 practice, however, our research found that lawyers who represent clients in MPP
4 hearings often have even less time to meet with them on the day of the hearing. In
5 some cases, we have heard that lawyers cannot meet their clients at all.

6 32. Our research showed that unrepresented individuals in the MPP are
7 severely disadvantaged in their ability to present their asylum claims in immigration
8 court. Without the benefit of legal representation or orientation sessions,
9 immigration court hearings are bewildering. For many people, the experience of
10 attending the first hearing is disconcerting because they expect to be able to tell the
11 judge why they left their home countries. Instead, they receive a 12-page asylum
12 application in English, a directive to complete the application in English and
13 provide English translations of all supporting documents, and another court date, the
14 sole purpose of which is to receive their completed application and set an individual
15 hearing to consider it. Without counsel to help navigate this system, many
16 individuals are unable to effectively advocate for themselves. Many individuals we
17 interviewed had also attended four or five such initial, or “master calendar,”
18 hearings—repeated preliminary appearances that could have been avoided by legal
19 representation or orientation sessions.

20 33. Lack of access to counsel also makes it more challenging for individuals
21 in the MPP to challenge the impediments caused by video hearings. Video hearings
22 are frequently used in MPP proceedings and create further barriers to people’s
23 ability to understand the hearings and effectively convey the elements of their
24 claims. Our research found that video hearings are dehumanizing and frequently
25 affected by technical difficulties, such as muffled sound and frequent loss of video
26 feed, which make it even more challenging for unrepresented individuals to
27 advocate for themselves in their asylum proceedings.

28 ¹⁷ *Id.*

1 34. Our research has found that lack of access to counsel has also harmed
2 individuals' ability to navigate their asylum cases through the confusing, poorly
3 communicated developments during the Covid-19 pandemic. The response of EOIR
4 and CBP to the pandemic has been piecemeal and erratically communicated. While
5 EOIR took some steps at the end of March to improve communication about court
6 closures and hearing postponements, including daily updates to attorneys registered
7 as practicing in immigration courts,¹⁸ these updates are inaccessible to
8 unrepresented individuals in Mexico.

9 35. An additional concern is that asylum applications must be filed within
10 one year of an individual's date of arrival in the United States. Unrepresented
11 individuals typically submit their asylum applications at one of their initial hearings.
12 Some of the people I interviewed who were placed in the MPP in late 2019 or
13 January 2020 had not yet submitted asylum applications when the immigration
14 courts stopped hearing MPP cases in March 2020, meaning that they are reaching
15 the one-year deadline. Many in this situation are unlikely to be aware that EOIR set
16 up an electronic filing process in response to the pandemic.

17 36. The impact of lack of access to counsel is visible in the low asylum
18 grant rates for individuals placed in the MPP. DHS reported that as of July 17, 2020,
19 just 523 people had received grants of asylum or withholding of removal out of
20 nearly 44,000 MPP cases DHS considered completed, a grant rate of only slightly
21 more than 1 percent for the MPP cases concluded in the first 18 months of the
22 program.¹⁹ As of September 2020, data collected by Syracuse University's
23
24

25 ¹⁸ U.S. Department of Justice, "EOIR Stakeholder Update," email sent Mar. 27, 2020 (on file with
26 Human Rights Watch) (announcing creation of listserv "to enhance communication with our
stakeholders during the national pandemic").

27 ¹⁹ U.S. Department of Homeland Security, "Migrant Protection Protocols Metrics and Measures,"
n.d., pp. 1-2,
28 [https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_metrics_and_m
easures_0.pdf](https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_metrics_and_measures_0.pdf) (viewed September 25, 2020).

1 Transactional Records Access Clearinghouse (TRAC) recorded a total of 585 grants
2 of asylum or withholding in MPP cases.²⁰

3 **Exceptions to the MPP Are Rarely Granted, Even When Harm or**
4 **Vulnerability Is Clearly Documented**

5 37. The MPP program theoretically incorporates a nonrefoulement
6 safeguard against sending people to harm while they wait for their U.S. asylum
7 hearings. In purported compliance with the principle of nonrefoulement, U.S.
8 asylum officers should interview people who express fear of being sent to Mexico,
9 and CBP should not process them under the MPP if an asylum officer finds that it is
10 more likely than not that their lives or freedom would be threatened because of their
11 race, religion, national origin, political opinion, or membership in a particular social
12 group or that they would be tortured by a state agent if returned to Mexico.

13 38. In practice, people rarely receive the benefits of this safeguard. My
14 research has found repeated accounts of people denied a nonrefoulement interview
15 even though they requested one or expressed fear of being sent to Mexico. One man
16 told us he only spoke briefly with officials before he was sent to Mexico: “They did
17 not ask me any real questions except whether I wanted to be returned to Honduras
18 or Mexico. How is that even a choice?”

19 39. Even when interviews are granted, exceptions to processing under the
20 MPP are rarely made. As one attorney explained to me, “The general idea U.S.
21 officials seem to have is that being kidnapped, raped, or extorted is to be expected.
22 These things aren’t seen as harm.” We repeatedly heard of cases in which people
23 told asylum officers that they had suffered kidnapping attempts by members of
24 cartels, rape or other violent attacks by other private actors, or acts of extortion by
25 Mexican officials, in nearly every case receiving denials of their requests to remain
26

27 ²⁰ TRAC Immigration, Syracuse University, *Details on MPP (Remain in Mexico) Deportation*
28 *Proceedings* (data through Sept. 2020), <https://trac.syr.edu/phptools/immigration/mpp/> (viewed
Nov. 6, 2020). Select “initial filing” measure, “month and year” graph time scale, “all” hearing
locations, sort by “outcome,” and view “grant relief” result.

1 in the United States. In some cases, people said immigration agents simply ignored
2 their requests to explain why they were afraid to go to Mexico.

3 40. Government data also show that nonrefoulement interviews rarely result
4 in protection. A DHS assessment found that of the approximately 7,400 “fear
5 screenings” completed by October 15, 2019, only 13 percent received positive
6 determinations.²¹ An analysis of immigration court data by the news agency Reuters
7 found that less than 1% of MPP cases had been removed from the MPP docket.²²

8 41. According to our research, U.S. authorities have denied requests for
9 release from the MPP even when people offer detailed, substantiated accounts of
10 being targeted by Mexican police because of their national origin. In one such case,
11 Mexican federal police stopped a Salvadoran family as they approached the bridge
12 to seek asylum from U.S. immigration authorities. The officers took the family to a
13 police station, took their phones and money, and held them for two days without
14 food and water until a relative arranged to send a total of \$4,500 in separate wire
15 transfers to five names the police sent her. The family unsuccessfully tried to
16 explain these events as the basis for their fear of return to Mexico in an initial
17 nonrefoulement interview; the U.S. government then proceeded to return the family
18 to Mexico.

19 42. In the few cases where individuals have lawyers, CBP has often not
20 permitted the lawyer to attend the nonrefoulement interview, whether in person or
21

22 ²¹ U.S. Department of Homeland Security, “Assessment of the Migrant Protection Protocols
23 (MPP),” Oct. 28, 2019, p. 5,
24 https://www.dhs.gov/sites/default/files/publications/assessment_of_the_migrant_protection_protocols_mpp.pdf (viewed Sept. 25, 2020). In a more recent analysis, DHS reported that its agents had referred just over 18,000 people for nonrefoulement assessment interviews as of June 18, 2020, but it did not say what percentage of that total was successful. Department of Homeland Security, “Migrant Protection Protocols Metrics and Measures” (undated) at 1,
25 https://www.dhs.gov/sites/default/files/publications/migrant_protection_protocols_metrics_and_measures_0.pdf (viewed Sept. 25, 2020).

26
27 ²² Reade Levinson, Mica Rosenberg, and Kristina Cooke, *Exclusive: Asylum Seekers Returned to Mexico Rarely Win Bids to Wait in U.S.*, Reuters, June 12, 2019,
28 <https://www.reuters.com/article/us-usa-immigration-returns-exclusive/exclusive-asylum-seekers-returned-to-mexico-rarely-win-bids-to-wait-in-us-idUSKCN1TD13Z> (viewed Sept. 25, 2020).

1 by telephone. Under the terms of a January 2019 policy memorandum, “provided
2 the MPP assessments are part of either primary or secondary inspection, DHS is
3 currently unable to provide access to counsel during the assessments.”²³ This lack of
4 counsel was also confirmed in a statement by a former asylum officer, who
5 explained that in nonrefoulement interviews, “The asylum seeker is denied access to
6 legal representation during the interview and the interview will not be postponed to
7 give the applicant an opportunity to find and confer with counsel.”²⁴

8 43. By the beginning of 2020, DHS was allowing attorneys to attend some
9 nonrefoulement interviews by telephone, but this practice was highly inconsistent.
10 Nearly every attorney interviewed by Human Rights Watch described cases in
11 which DHS did not call them even though the attorneys had submitted written
12 requests in advance and even after their clients asked CBP and the interviewing
13 officer to contact the attorney. One lawyer told our research team that CBP usually
14 failed to call her for these hearings; when they have called, it has been without
15 notice.

16 44. In the course of our research, we heard that asylum officers appeared to
17 base denials in part on the incorrect assumption that people could be safe in Mexico
18 if they travelled to another part of the country. This assumption fails to account for
19 the reality that many people placed in the MPP do not have the resources or
20 knowledge of Mexico to be able to relocate elsewhere, and that they must be able to
21 return to border cities regularly for their immigration hearings.²⁵

22 ²³ U.S. Citizenship and Immigration Services, Policy Memorandum: Guidance for Implementing
23 Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols
24 (Jan. 28, 2019) at 3, [https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-
Guidance-for-Implementing-Section-35-b-2-C-INA.pdf](https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf) (viewed Nov. 7, 2020).

25 ²⁴ Written Statement of Douglas Stephens, Esq., to the U.S. House Committee on Homeland
26 Security, Subcommittee on Border Security, Facilitation, and Operations (Nov. 19, 2019) at 5,
27 [https://www.whistleblower.org/wp-content/uploads/2019/11/111819-cover-letter-Testimony-of-
Douglas-Stephens-for-the-House-Homeland-Security-Committee-FINAL.pdf](https://www.whistleblower.org/wp-content/uploads/2019/11/111819-cover-letter-Testimony-of-Douglas-Stephens-for-the-House-Homeland-Security-Committee-FINAL.pdf) (viewed July 6,
2020).

28 ²⁵ A USCIS policy memorandum instructs asylum officers to take into account “whether residing
in another region of Mexico to which the alien would have reasonable access could mitigate

1 45. Additionally, although DHS has said that it will not place “vulnerable”
2 people in the MPP, including unaccompanied children and people with “[k]nown
3 physical/mental health issues,” according to our research, this humanitarian
4 exemption has been erratically implemented throughout the time that the MPP has
5 been in effect.

6 46. My research identified numerous cases in which CBP placed people
7 with disabilities, high-risk pregnancies, or other needs that require specialized,
8 ongoing treatment and care in the MPP or declined to remove them from the MPP
9 once it became aware of these needs. Our interviews also revealed that many
10 individuals had tried to tell CBP agents they or their children had serious health
11 conditions that required specialized care or were living with disabilities that meant
12 they could not live safely and in conditions of dignity in shelters in Mexico, to no
13 avail.

14 47. DHS policy guidance states that unaccompanied children should not be
15 placed in the MPP. However, in the course of my research, I have heard of several
16 instances in which CBP placed unaccompanied children into the MPP. In one case,
17 CBP returned a 16-year-old Honduran girl and her 1-year-old daughter to Mexico.

18 48. People whose first language is not Spanish—for example, Guatemalans
19 who speak K’iche’ or other indigenous languages—frequently face discrimination
20 and experience additional hardship in Mexico, meaning that they should also be
21 considered for exemption from the MPP. In fact, DHS policy guidance suggests that
22 people whose first language is not Spanish should not be placed in the MPP at all.
23 Nevertheless, I interviewed indigenous families placed in the MPP who spoke only
24 limited Spanish, and lawyers I spoke with described similar cases.

25 49. My research has also documented the return of many individuals with
26 special health needs to Mexico, where they face extreme hardship. In one case, a

27 _____
28 against the alleged harm.” U.S. Citizenship and Immigration Services, Policy Memorandum:
Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the
Migrant Protection Protocols (Jan. 28, 2019) at 4.

1 Brazilian family apprehended by CBP near Calexico in February 2020 showed
2 immigration agents medical records for their 1-year-old daughter, who was born
3 with congenital hydrocephalus, a rare condition that causes excessive cerebrospinal
4 fluid to accumulate in brain cavities and requires specialized treatment. CBP
5 disregarded the medical reports and the parents' request to remain in the United
6 States because of their daughter's health. Instead, immigration officials placed the
7 family in the MPP and returned them to Mexico. In another case, a mother and her
8 6-year-old son, who lives with a psychosocial disability, were returned to Mexico
9 even after her son was sexually assaulted at the shelter where they were staying.

10 50. In September 2019, Human Rights Watch documented six cases in
11 which persons with disabilities, four of them children, were placed in the MPP.²⁶
12 Lawyers and aid workers I have spoken with told us that these accounts were not
13 unusual. Indeed, reports from other groups and news accounts have described
14 people placed in MPP even though they had epilepsy, heart conditions, other serious
15 medical conditions, or significant psychosocial disabilities.

16 51. My research has also included accounts of people denied a humanitarian
17 exemption even though they faced high-risk or late-term pregnancies. In other cases,
18 CBP denied humanitarian exemptions to people with health conditions that could
19 not be accommodated with dignity in the circumstances in which they were living
20 after U.S. officials sent them to Mexico. In one case, an attorney reported that CBP
21 refused to exempt a pregnant woman unable to walk due to a broken foot, who was
22 relying on her 14-year-old son to take her to the bathroom in the shelter where they
23 lived.

24 52. According to attorneys interviewed in our research, some families
25 whose requests to be removed from the MPP on humanitarian grounds or whose
26 requests for nonrefoulement interviews were rejected were subsequently abducted

27
28 ²⁶ Human Rights Watch, "US Move Puts More Asylum Seekers at Risk," Sept. 25, 2019,
<https://www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk>.

1 on their way to immigration court. Most of these families then received *in absentia*
2 deportation orders when they did not appear at their hearings. Based on our
3 research, immigration judges frequently deny motions to reopen *in absentia*
4 deportation orders even when abduction was the reason for a person’s failure to
5 appear.

6 53. In response to the Covid-19 pandemic, my research has found that the
7 U.S. government’s general practice now is not to hold nonrefoulement interviews or
8 to consider humanitarian requests for families in the MPP to return to the United
9 States. CBP has suspended most nonrefoulement interviews because of the
10 pandemic. My research has also found that requests for humanitarian exemptions
11 have typically not even been processed, including in one case a request from a
12 family with two very sick children.

13 54. However, MPP processing has continued in spite of the pandemic.
14 Although U.S. immigration authorities summarily expelled most people who
15 crossed the U.S.-Mexico border after March 20, 2020, CBP has continued to place
16 some people in the MPP—more than 2,800 in the first five months after the
17 summary expulsion order took effect, including 767 in August and 1,167 in
18 September 2020.²⁷

19
20
21
22
23
24
25
26

27 ²⁷ U.S. Customs and Border Protection, “Migrant Protection Protocols,” “Southwest Border
28 Enrollments in MPP,” <https://www.cbp.gov/newsroom/stats/migrant-protection-protocols> (viewed
Nov. 7, 2020).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 9, 2020
Calais, France



Michael Garcia Bochenek
Human Rights Watch
350 Fifth Avenue, 34th Floor
New York, New York 10118
(212) 216-1213