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**BOARD OF IMMIGRATION APPEALS
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FALLS CHURCH, VA**

Amicus Invitation No. 19-11-5
_____)

**AMERICAN IMMIGRATION LAWYERS ASSOCIATION REQUEST TO APPEAR
AS AMICUS CURIAE AND BRIEF**

REQUEST TO APPEAR AS *AMICUS CURIAE*

The American Immigration Lawyers Association (“AILA”) is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA’s members practice regularly before the Department of Homeland Security (DHS), immigration courts and the Board of Immigration Appeals (BIA), as well as before federal courts.

AILA requests to appear as amicus curiae in response to the BIA invitation number 19-11-5, inviting public comment as to whether an Immigration Judge erred in terminating proceedings when a respondent subject to the administration’s Migrant Protection Protocols (MPP) or Remain in Mexico did not appear at a scheduled removal proceeding. AILA benefits from its members’ experience advising and – in a very limited capacity given the challenges of the program – representing respondents in MPP proceedings. AILA submits this brief to ensure that fairness and the agency’s obligation to do justice are considered in weighing the issue presented.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In January 2019, DHS implemented the MPP or Remain in Mexico program, which forced protection-seekers back to Mexico to await their removal proceedings in the United States. This unprecedented program now operates in seven areas along the U.S.-Mexico border

and has pushed over 55,000 migrants from the Northern Triangle and Cuba, among others¹ into some of the most dangerous states in Mexico.² Many migrants in the program have experienced kidnapping, extortion, assault, homelessness, health emergencies, and even death.³

Respondents in MPP may be instructed to return to ports of entry for their hearings at four or four-thirty in the morning, under the veil of darkness. Kidnapping and assault are frequent at the bridges, as migrants are highly visible and unprotected, especially at that hour. Less than two percent of respondents have been able to secure counsel to assist them in their immigration proceedings.⁴

DHS argues its authority to implement such a program under section 235(b)(2)(C) of the Immigration and Nationality Act (INA). Acknowledging that a federal court has declined to preliminarily enjoin the program and that the lawfulness may be beyond the Board's jurisdiction, AILA believes that MPP violates the immigration statute and U.S. international obligations to asylum-seekers. Any review of the outcome of a removal hearing must take into account the unprecedented nature, and potential boundary-pushing lawfulness, of the program, because it imposes considerable and in some cases insurmountable burdens on asylum claimants.

The first hearings under MPP were held before the San Diego Immigration Court, from where the case underlying this amicus request arises. MPP proceedings are now heard in both physical courts (San Diego and El Paso Immigration Courts) where respondents are considered

¹ See Latin America Working Group, Updated Remain in Mexico: Impacts, available at <https://www.lawg.org/updated-infographic-remain-in-mexico-impacts/> (last visited Dec. 3, 2019).

² See US Department of State, Mexico Travel Advisory, available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (last visited December 1, 2019).

³ See Human Rights First, Delivered to Danger, available at <https://www.humanrightsfirst.org/campaign/remain-mexico> (last visited December 3, 2019).

⁴ See TRAC Immigration, "Details on Remain in Mexico (MPP) Deportation Proceedings", available at <https://trac.syr.edu/phptools/immigration/mpp/> (last visited December 3, 2019) (showing that, through September 2019, 1,109 of 47,313 MPP cases had legal representation).

to be in DHS custody, and in tent facilities (so-called “port courts” in Laredo and Brownsville) where respondents appear via video teleconference (VTC) in courtrooms elsewhere in Texas. Access to counsel is restricted in all MPP proceedings.⁵

Through the experience it gained through its members’ representation of MPP respondents and in studying the implementation of this program, AILA finds that the systemic due process violations that plague MPP proceedings, as evidenced in the individual case records underlying the amicus invitation, make proper notice of proceedings unlikely. Even where notice may be conclusively shown, the inability of the court to provide fundamentally fair hearings render termination the only appropriate remedy.

**NEITHER IMPLEMENTATION OF MPP NOR THE RECORD SUPPORT
SUFFICIENT NOTICE OR EVIDENCE OF REMOVABILITY**

As a matter of policy and practice, the MPP program does not provide adequate notice of removal proceedings. As a result, *in absentia* orders should not be entered against respondents in MPP.

DHS initiates removal proceedings with the filing of a Notice to Appear (NTA) to the immigration court. 8 C.F.R. § 1003.14(a). Amongst other information, statute requires that the NTA contain the time and place that the initial hearing will take place. INA § 239(a)(1)(G); *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The NTA must include a certificate of service, where a DHS officer signs with their name and title attesting that the document containing the time and place of the hearing has in fact been served on the respondent. *See* 8 C.F.R. § 1003.14(a). Providing details on when and where a respondent needs to appear is an essential function of the NTA. *Pereira*, 138 S. Ct. at 2115. Without information on when and where to

⁵ *See* AILA, Letter to Congress on Tent Courts (November 12, 2019), available at <https://www.aila.org/advocacy/media/aila-correspondence/2019/aila-sends-letter-to-congress-demanding-public> (last visited December 3, 2019).

appear, the government “cannot reasonably expect the noncitizen to appear for his removal proceedings.” *Id.*

After removal proceedings are initiated, regulations allow for the issuance of an *in absentia* removal order if DHS establishes by clear, unequivocal, and convincing evidence (1) that the respondent is removable, and (2) that written notice of the time and place of proceedings and the consequences of the failure to appear were provided to the respondent or their counsel of record. 8 C.F.R. § 1003.26(c).

Unlike regular removal proceedings, MPP does not allow respondents to voluntarily arrive directly at the court at the time of their scheduled hearing. The program has been designed to make that impossible by taking this responsibility from respondents and placing it on the shoulders of DHS. Under MPP, respondents are required to appear at a separate remote location—a specified port of entry at the U.S.-Mexico border—at a specific time many hours before the scheduled hearing. DHS then detains the respondents to appear via VTC for their proceedings elsewhere or detains and transports them to the place of the court hearing. In MPP cases, the notice of the time and place of the court hearing provided in an NTA or subsequent notice of hearing—with nothing more—does not perform the NTA’s “essential function” of enabling respondents to appear at their hearings. The notice of when and where respondents must physically appear at the remote location on the U.S.-Mexico border to be transported to court in custody is every bit as essential as the time and place of the court hearing itself.

Recognizing this, DHS developed a separate document for those in MPP called “Migrant Protocols Initial Processing Information” forms, informally known as “tear sheets.” The tear sheets are supposed to give information on exactly when and where the respondent needs to present at the border to be transported to immigration court by DHS. But while DHS has

implicitly acknowledged that this information is essential to providing notice of a hearing in MPP cases, it fails to document service on respondent. Unlike the NTAs themselves, the tear sheets contain no attestation of service, meaning there is no certainty that respondents were actually provided with or instructed in a language they understand of the means to comply with the NTA or a subsequent notice of hearing.

Proof of service of the instructions is critical to find “clear, unequivocal and convincing evidence” of the notice of the hearing. Two recent, high profile situations in which DHS has given respondents unquestionably false information about when they have to appear in court or the outcome of the court hearing undermine any DHS trustworthiness and the presumption that it faithfully executes its duties. In the first situation, DHS officers returned MPP respondents to Mexico with tear sheets containing false information about when to appear, including in instances where the respondents were granted relief.⁶ In the second situation, DHS issued NTAs with false hearing dates in an effort to comply with *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), resulting in significant and unnecessary burdens on respondents, their attorneys, and the courts.⁷ Given this pattern of duplicity, the Board cannot trust DHS to properly serve MPP respondents with documents, notify them of the actual hearing dates, and ensure that a respondent who appears at a port of entry as directed will be taken to court in a timely manner.

The underlying record subject of this amicus offers a concrete example. Finding no evidence that the tear sheets were actually served on respondents⁸ and with no DHS officers

⁶ Gustavo Solis, “CBP agents wrote fake court dates to send migrants back to Mexico, records show,” San Diego Union Tribune (Nov. 7, 2019), available at <https://www.sandiegouniontribune.com/news/immigration/story/2019-11-07/cbp-fraud>.

⁷ Kate Smith, “ICE told hundreds of migrants to show up to court on Thursday- for many, those hearings are fake,” CBS (Jan. 31, 2019), available at <https://www.cbsnews.com/news/immigration-court-ice-agents-hundreds-of-immigrants-fake-court-dates-2019-01-30-live-updates/>

⁸ Even if there were evidence that the tear sheets had been served upon respondent, an *in absentia* order would be inappropriate without evidence that the respondent did not appear at the remote location—the specified port of entry—at the time indicated on the tear sheet.

presented by the government to testify, the immigration judge rightly declined to enter *in absentia* orders of removal. DHS cannot establish by clear, convincing, and unequivocal evidence that notice of the hearing was provided where DHS itself has barred voluntary arrival at the hearing *and* has failed to establish service of the information which would allow the person to present for transport to the hearing in DHS custody.

In addition to the lack of a minimum notice which would enable the respondents to appear at their hearing, the record apparently contains no evidence of removability. The immigration judge was thus precluded from entering an *in absentia* order for two independent reasons: (1) lack of clear, unequivocal, and convincing evidence that the respondent was removable, and (2) lack of clear, unequivocal, and convincing evidence that the notice of the time and place of proceedings enabling respondent to attend the hearing was provided. 8 C.F.R. § 1003.26(c). Unable to enter an *in absentia* order of removal, the immigration judge properly terminated proceedings without prejudice.

TERMINATION IS APPROPRIATE

Where DHS is unable to establish that proper notice has been provided to the respondents, termination of proceedings is the appropriate remedy. This is clear both from case law, even following the Attorney General's recent opinion in *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), and from the structure of the statute itself.

In *Matter of S-O-G- & F-D-B-*, which did not present the issue of *in absentia* proceedings, the Attorney General acknowledged that

[i]mmigration judges also possess the authority to terminate removal proceedings where the charges of removability against a respondent have not been sustained. *See* 8 C.F.R. § 1240.12(c); [*Matter of*] *Sanchez-Herbert*, 26 I&N Dec. [43,] 44 [(BIA 2012)] (“If the DHS meets its burden, the [i]mmigration [j]udge should issue an order of removal; if it cannot, the [i]mmigration [j]udge should terminate proceedings.”).

Matter of S-O-G- & F-D-B-, 27 I&N Dec. at 468. The cited decision in *Matter of Sanchez Herbert* makes clear that this principle extends to DHS's burden of proof regarding notice, and not just DHS's burden of proof regarding the underlying substantive charges of removability.

Under the statute, a respondent who has been provided appropriate written notice "shall be ordered removed *in absentia* if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2))." INA § 240(b)(5)(A). The DHS burden of proof in *in absentia* proceedings is thus two-pronged, extending both to proof of notice and proof of removability. The Board's decision in *Matter of Sanchez-Herbert* makes clear that termination is the appropriate remedy in the event of a DHS failure to meet its burden of proof in either respect:

In fact, the purpose of *in absentia* proceedings is to determine whether the DHS can meet its burden to establish that the alien, who did not appear, received proper notice and is removable as charged. *See* section 240(b)(5) of the Act; 8 C.F.R. § 1003.26 (2012). If the DHS meets its burden, the Immigration Judge should issue an order of removal; if it cannot, the Immigration Judge should terminate proceedings. *See Matter of Lopez-Barrios*, 20I&N Dec. 203, 204 (BIA 1990).

Matter of Sanchez-Herbert, 26 I&N Dec. 43, 44 (BIA 2012).

The result prescribed by *Sanchez-Herbert* makes sense with respect to the statutory structure more broadly. INA § 240(c)(1)(A) provides that "[a]t the conclusion of the proceedings, the immigration judge shall decide whether an alien is removable from the United States." This provision presupposes that the proceedings will, in fact, have a conclusion. Similarly, the regulation at 8 C.F.R. § 1239.2(f) states that with an exception not relevant here, "in every other case, the removal hearing shall be completed as promptly as possible". 8 C.F.R. § 1239.2(f). An interpretation of INA § 240(b)(5)(A) that did not provide for termination as an appropriate remedy for failure to prove proper notice, in contrast, could lead to never-ending

proceedings that would not have a conclusion as presupposed by INA § 240(c)(1)(A), let alone a prompt one as prescribed by 8 C.F.R. § 1239.2(f).

If DHS has not met its dual burden under INA § 240(b)(5)(A) to justify entry of a removal order *in absentia*, and if termination of proceedings were not the appropriate remedy under such circumstances, then presumably the only option would be a continuance of the proceedings to a later hearing date. The Attorney General has taken the position that administrative closure is not possible absent exceptional circumstances not at issue here, *see Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), so that would not be an option.

At the later hearing date, however, the situation could potentially repeat itself: DHS might still be found not to have provided proper notice, even if it could otherwise demonstrate removability. If termination had not been the appropriate remedy the first time, then presumably it would not be the appropriate remedy the second time either.

To reject termination of proceedings as the appropriate remedy where DHS does not meet both portions of its dual burden under INA § 240(b)(5)(A) to justify entry of a removal *order in absentia*, therefore, would create the possibility of perpetual proceedings. If the immigration judge is not supposed to terminate proceedings where insufficient evidence of notice has been provided, but cannot enter an order of removal or even administratively close the case, the case could be continued over and over again. It would be what one might call a zombie proceeding, forever shambling onward and yet incapable of being brought to an end. Such a result would be inconsistent with INA § 240(c)(1)(A).

If one follows the rule of *Sanchez-Herbert*, on the other hand, such zombie proceedings are prevented. Either DHS can show both notice and removability by the requisite standard of clear, convincing, and unequivocal evidence, in which case an order of removal can be entered

under INA § 240(b)(5)(A) and bring the proceedings to a close; or DHS cannot meet this two-pronged burden of proof, and proceedings can be brought to a close through termination. Either way, “the removal hearing shall be completed as promptly as possible”, 8 C.F.R. § 1239.2(f). Besides being consistent with existing case law, this result is much more consistent with INA § 240(c)(1)(A) than the prospect of perpetually undead zombie proceedings.

MPP PROCEEDINGS GENERALLY VIOLATE DUE PROCESS AND ARE OTHERWISE INVALID

In addition to the arguments above, *in absentia* orders should not issue as a matter of law due to the lack of due process guarantees in MPP proceedings and the illegality of such proceedings as applied to asylum seekers.

The Fifth Amendment of the U.S. Constitution protects immigrants’ due process rights in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). Courts must offer respondents a full and fair hearing. *Matter of M-A-M*, 25 I&N Dec. 474, 479 (BIA 2011); *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002). Hearings “must be conducted in a manner that satisfies principles of fundamental fairness.” *Matter of Beckford*, 22 I&N Dec. 1216, 1225 (BIA 2000).

Removal proceedings conducted under the MPP rubric fail to provide basic due process protections. An absence of fairness begins with the issuance of Notices to Appear and run through the proceedings themselves. Basic notions of justice cannot permit the entry of a removal order where DHS has done everything to ensure that respondents fail.

At the outset, DHS has been issuing faulty, incorrect and incomplete NTAs to migrants in MPP. Errors include mistakes as to the time and date of the hearing, knowingly using the addresses of migrant shelters instead of the actual address of the named respondent or simply

noting “known address” (*domicilio conocido* in Spanish), as was used in the case underlying this amicus invitation. In one case, DHS used a Facebook page as an address.⁹

NTAs are also often incomplete, lacking a designation as to whether DHS is categorizing the migrant as an arriving alien, present in the United States who has not been admitted or paroled, or removable following admission. Such error-ridden documents corrode the ability of respondents to fully exercise their rights in proceedings under INA § 240(b)(4)(B).

The MPP program also fails to provide meaningful access to counsel. Both the statute and regulations provide for the right to representation at no expense to the government. INA § 240(b)(4)(A); 8 CFR § 240.3. In February 2019, AILA predicted that the program’s nature would effectively block access to counsel.¹⁰ Sadly, the prediction has borne true. Only two percent of respondents in MPP were represented.¹¹

The numbers of individuals in MPP, the complexity of their legal claims and the unavailability of attorneys in Mexico authorized to practice before the immigration courts all conspire to limit access to counsel. The number of migrants in MPP is almost four times the membership of AILA. To render legal services to MPP asylum seekers, U.S.-licensed attorneys either must travel into Mexican border cities or try to fulfill their professional obligations by preparing complicated asylum cases without a meaningful opportunity to consult in person with their clients.

Of AILA’s membership, only a handful of attorneys are representing clients in MPP due to the logistical hurdles and safety concerns. The few US-based legal service providers that have

⁹ Adolfo Flores, “Border Patrol Agents are Writing ‘Facebook’ as a Street Address for Asylum-Seekers Forced to Wait in Mexico,” BuzzFeed News (Sept. 27, 2019), available at <https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico>.

¹⁰ AILA, Policy Brief: “Remain in Mexico” Plan Restricts Due Process, Puts Asylum Seekers Lives at Risk (Feb. 1, 2019), available at <https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-remain-in-mexico-plan-chaos>.

¹¹ See TRAC Immigration, *supra* note 4.

started to assist respondents in MPP in Matamoros, Nuevo Laredo, Ciudad Juarez and Tijuana are drops in a desert. No service providers are available to migrants in Reynosa and Piedras Negras, where DHS has implemented MPP; and locations in the interior of Mexico where some migrants have relocated (sometimes involuntarily) are even further from qualified counsel.

DHS and EOIR additionally limited access to counsel by prohibiting legal orientation sessions in the courts and tents where respondents appear for their hearings. The administration has also curtailed the use of friends of court for respondents in MPP.¹²

Whether someone is represented by counsel is the most important factor in determining success in obtaining a grant of asylum. Studies have found that unrepresented asylum seekers in the United States face profound challenges in navigating complex immigration laws, obtaining documents critical to substantiating their claims, and obtaining relief. In fact, non-detained individuals who are represented are “nearly five times more likely” to win relief than their unrepresented counterparts.¹³ The prejudice of denying counsel to a respondent is obvious.

Lack of language access has also rendered MPP proceedings unfair. Federal law provides that all agencies must provide access to non-English speakers. In 2012, EOIR adopted a Language Access Plan.¹⁴ The plan provides for translation of “vital” documents and for “full and complete” interpretation of all proceedings. In MPP proceedings, EOIR is violating its own Language Access Plan.

Despite these obligations, MPP proceedings, especially those conducted via VTC, are not interpreted in full. Court observers have noted that the court interpreters only interpret questions

¹² <https://www.justice.gov/eoir/file/1219301/download> (last visited December 1, 2019).

¹³ Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court (Sept. 28, 2016), available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹⁴ <https://www.justice.gov/sites/default/files/eoir/legacy/2012/05/31/EOIRLanguageAccessPlan.pdf>

spoken by and directed to the respondent by the immigration judge.¹⁵ Legal argument between DHS counsel and the immigration judge are not interpreted, running afoul of legal ethics as well as the Court's own commitments.¹⁶

In addition, EOIR has so far failed to furnish Spanish translations of applications for relief, such as the application for asylum, form I-589. Such translations are vital to the ability of respondents in MPP to pursue relief options. Respondents are being returned to Mexico, a Spanish-speaking country, with relief applications in English. Immigration Judges are requiring respondents to return with the applications completed in English. Given the minimal to no access to free translation services in Mexico, court translation of the documents is essential to a fair hearing.

CONCLUSION

Given the pervasive and systemic due process violations present in MPP, it would be unjust to issue an *in absentia* order against a respondent in MPP who failed to appear for proceedings. MPP is contrary to law because individuals are subject to proceedings that meaningfully deprive them of their right to apply for asylum and related protection.

MPP is an extraordinary departure from the meaningful access to asylum the immigration law contemplates. The insurmountable limitations on respondents in MPP proceedings has made fundamentally fair proceedings impossible. Under such circumstances, immigration judges cannot make credible findings of notice. Absent the ability to enter an *in absentia* order, termination is the only just result.

¹⁵ See e.g. Testimony of Laura Pena, ABA before the U.S. House of Representatives, Committee on Homeland Security, Subcommittee on Border Security, Facilitation and Operations (Nov. 19, 2019), available at <https://homeland.house.gov/imo/media/doc/Testimony-Pena.pdf>.

¹⁶ See EOIR Policy Memorandum 19-14, Allegations of Misconduct by EOIR Adjudicators and *Ex Parte* Communications (Aug. 16, 2019), available at <https://www.justice.gov/eoir/page/file/1196341/download>.

Respectfully submitted,



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