

# TIME

## In a Win for Biden, Supreme Court Says He Can End the ‘Remain in Mexico’ Policy

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The Supreme Court ruled Thursday that the Biden Administration has the authority to end the controversial Trump-era immigration policy known as “Remain in Mexico,” in a win for Joe Biden and his Administration’s ability to determine its own immigration strategy.

In a 5-4 decision, the Supreme Court narrowly affirmed the Biden Administration’s authority to oversee U.S.-Mexico border procedure, and allows it to continue its efforts to end “Remain in Mexico”—officially called the Migrant Protection Protocols (MPP)—the Trump-era policy of returning migrants who have made a claim for asylum to Mexico while their case is adjudicated.

Chief Justice John Roberts wrote the majority opinion, joined by Justice Brett Kavanaugh and the court’s three liberals. Justice Amy Coney Barrett dissented, joined in part by the court’s other conservatives.

In the majority opinion, Roberts said the Administration’s actions to end the policy did not violate the law in the way red states who challenged the move had argued, potentially clearing the way for Biden to stop enrolling migrants in the program. But Roberts noted the Administration’s actions could be challenged on other grounds—specifically pointing to one section of the Administrative Procedure Act (APA)—and sent the decision back to the lower courts for further proceedings on separate legal questions.

The decision comes just four days after an alleged people smuggling incident in a tractor trailer caused the deaths of 53 migrants in San Antonio, Texas. Some immigration experts and advocates blame strict policies at the U.S.-Mexico border like MPP for incentivizing dangerous unauthorized border crossings orchestrated by people smugglers. “The Supreme Court’s decision paves the way for the Biden Administration to adopt a more orderly immigration process at the border,” says David Bier, the associate director of immigration policy at the libertarian Cato Institute. “‘Remain in Mexico’ was a failure. It dealt with asylum seekers so inhumanely that rather than ‘remaining in Mexico,’ they repeatedly crossed the border illegally.”

The Biden Administration has been attempting to end MPP since June 2021, but conservative states challenged the move and argued the executive branch did not have the authority to end the program the way that it did. The 5th Circuit Court of Appeals ruled in the states' favor in January, ruling that the Administration was bound to either detain asylum seekers in the U.S. or have them wait in Mexico—meaning the policy would have to stay in place until Congress allocated billions of dollars to expand the Department of Homeland Security's (DHS') detention capabilities. On Thursday, the Supreme Court ruled the 5th Circuit was wrong, and Roberts wrote in his opinion that the 5th Circuit's interpretation of immigration law “imposes a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico, one that Congress likely did not intend [immigration law] to impose.”

“The larger policy story behind this case is the multi-decade inability of the political branches to provide DHS with sufficient facilities to detain noncitizens who seek to enter the United States pending their immigration proceedings,” Kavanaugh wrote in his concurring opinion. “But this Court has authority to address only the legal issues before us. We do not have authority to end the legislative stalemate or to resolve the underlying policy problems.”

In her dissenting opinion, Barrett wrote that she agreed with the majority's analysis on the legal questions, “but not with its decision to reach them.” Barrett wrote that she would have remanded the case to the lower courts first.

Immigrant rights advocates celebrated the Supreme Court ruling and called on the Biden Administration to immediately begin allowing those currently in MPP waiting in Mexico to enter the U.S. to carry out the remainder of their asylum cases.

“We applaud the court's decision,” said Priscilla Orta, supervising attorney for Lawyers for Good Government's Project Corazon in Brownsville, Texas, an organization that provides pro bono legal advice for people enrolled in MPP. “At this moment, thousands of people have been enrolled in this program along the border. They live in dilapidated shelters and in dangerous conditions without access to counsel. In light of this decision, we now call on the Biden Administration to immediately pause all pending hearings and parole those enrolled so that they may seek asylum in safety.”

**Read More:** *The Battle Over 'Remain in Mexico' Shows How U.S. Immigration Policy Has Reached 'Peak Confusion'*

The conservative attorneys general who filed the lawsuit to halt the Biden Administration from terminating MPP expressed disappointment. “Today's decision by the U.S. Supreme Court is an unfortunate one, and I believe it was wrongly decided,” said Texas Attorney General Ken Paxton in a statement. “Today's decision makes the border crisis worse. But

it's not the end. I'll keep pressing forward and focus on securing the border and keeping our communities safe in the dozen other immigration suits I'm litigating in court.”

DHS did not immediately respond to TIME's request for comment.

Immigrants' rights advocates have long criticized MPP, which was created in December 2018 and implemented in January 2019 by the Trump Administration. Over 71,000 people were enrolled in MPP, according to the [Transactional Records Access Clearinghouse](#) (TRAC), a research organization at Syracuse University. Many people with few resources stayed in dangerous Mexican border cities like Matamoros, across the border from Brownsville, Texas, resulting in makeshift tent encampments forming along stretches of border, sheltering hundreds of migrants in precarious conditions. [Violence](#) against migrants is common.

The Biden Administration stopped enrolling new people in MPP in January 2021, and began allowing those already enrolled in the program to enter the U.S. while their asylum claim was reviewed by a U.S. immigration judge. By May 2021, only about 10,300 of the more than 71,000 migrants enrolled in MPP were admitted to the U.S., according to a TRAC analysis. In June, DHS Secretary Alejandro Mayorkas issued a memo officially terminating the program.

Then came the lawsuit brought by Texas and Missouri Attorneys General Paxton and Eric Schmitt, which argued that Mayorkas did not follow the letter of the APA when he terminated MPP. Because the lower court sided with the Attorneys General, MPP relaunched. In the six months since, more than 5,000 new people have been enrolled in the program, according to TRAC. Only 1,109 of those cases have been completed in court, and of them, only 27 people were granted asylum.

“The Supreme Court's decision to allow the Biden administration to terminate MPP doesn't fix all of the complex issues along the U.S.-Mexico border,” says Austin Kocher, assistant professor and researcher at TRAC. “But it does remove a major barrier to the lawful asylum process.”

Though immigrant advocates are cheering the Supreme Court ruling, another Trump-era policy known as Title 42 remains the primary barrier to the U.S. asylum system.

On April 1, the Biden Administration [announced](#) plans to lift Title 42, a public health authority that the federal government has invoked to immediately expel anyone who attempts to make an unauthorized crossing into the U.S. in the name of preventing the spread of COVID-19. Unlike under MPP, migrants can be expelled en masse under Title 42 without being given the right to file an asylum claim. Several states sued, arguing ending the program would create chaos, and in late May a federal judge ordered the Administration to continue enforcing Title 42 until litigation plays out—just as the courts

had done with the Administration's efforts to end MPP. That litigation is currently working its way through the court system, meaning a legal battle over the executive's authority to oversee immigration policy could end up before the Supreme Court again fairly soon.

"Continued litigation over federal policy has undermined the reasonable functioning of our immigration system and the ability of the executive branch to create and implement policies to manage migration at the border," says

Theresa Cardinal Brown, managing director of immigration and cross-border policy at the Bipartisan Policy Center. "Judges are not border or immigration experts and should not be making policy for the United States on these matters, and yet, they have increasingly done so."