



State of West Virginia  
Office of the Attorney General

Patrick Morrissey  
Attorney General

(304) 558-2021  
Fax (304) 558-0140

June 7, 2021

The Honorable Alejandro Mayorkas  
Secretary  
U.S. Department of Homeland Security  
301 7th Street SW  
Washington, DC 20528

Re: Termination of the Migrant Protection Protocols Program

Dear Secretary Mayorkas:

As the Attorney General of the State of West Virginia, I write to you regarding your decision dated June 1, 2021, permanently terminating the Department of Homeland Security's Migrant Protection Protocols Program, otherwise known as the "Remain in Mexico" policy. Your action and accompanying justification memorandum entirely overlooks a critical aspect of a major problem facing our country, the issue of illegal drug trafficking and fentanyl.

At this very moment, a flood of lethal fentanyl is pouring across the Southwest border. Unfortunately, your memorandum is silent on how termination of the Remain in Mexico policy will impact the fight against this deadly scourge.

West Virginians have fought strenuously to stem the tide of the opioid epidemic for years. Yet now much of our painstaking work is being washed away by the surging flow of fentanyl pills produced in Mexico and ultimately trafficked to West Virginia and other states. Indeed, last year alone 975 West Virginians died from overdoses involving fentanyl.

As a State, West Virginia must rely on the federal government to secure the border against this deadly scourge. We cannot single-handedly police the border of our State. The federal government, however, can and must protect our country from the smuggling of fentanyl pills by focusing resources on this critical responsibility.

While the COVID-19 pandemic undoubtedly played a role in the current fentanyl crisis, it is evident Mexican cartels are building an entire industry around the manufacturing and trafficking of fentanyl pills.

Even though you are familiar with this growing threat to our country, not one word of the justification memorandum indicates any awareness or consideration of how the termination of the Migrant Protection Protocols Program will impact the security of the Southwest border against the trafficking of illegal drugs. Yet one of the original purposes of the Remain in Mexico policy was so “[p]recious border security personnel and resources will be freed up to focus on protecting our territory.”<sup>1</sup> Failing to adequately acknowledge and address this extremely important issue almost assuredly renders the decision arbitrary and capricious and will make it more susceptible to legal challenge. There is no way to reasonably and lawfully make decisions of this kind if the Department considers only issues relating to migration and asylum, and pretends border security and drug smuggling are not factors.

As you know, a little less than one year ago, the Supreme Court vacated the rescission of the Deferred Action for Childhood Arrivals program because the justification memorandum issued at the time of the rescission failed to consider important aspects of the problem before the agency.<sup>2</sup> The Court further held that subsequent, post hoc explanations could not remedy that failure.<sup>3</sup> The Court made clear that a failure to issue an adequately reasoned decision in the first instance can only be remedied by issuing an entirely new decision. Accordingly, a straightforward application of the Court’s decision demonstrates that your June 1, 2021, termination of the Migrant Protection Protocols Program is legally defective because it failed entirely to address other critical border issues mentioned above.

The legal flaw in the termination is egregious for two reasons. First, it is hard to understand how the Secretary of the Department of Homeland Security could completely neglect a critical security issue in making a key decision. This precise issue was also brought directly to your attention by Congress. You recently appeared before the Senate Homeland Security Committee where Senator Rick Scott raised the urgent and pressing concern that local law enforcement has seen “an unbelievable increase in fentanyl” since January of this year while at the same time overall drug seizures at the border have decreased. You committed at the hearing that you would “review the data.”<sup>4</sup> Yet just a few weeks later you terminated the Migrant Protection Protocols Program without even mentioning your “review of the data” or that you considered how your decision threatens to aggravate the escalating drug trafficking surge by diverting border patrol, which plays an essential part in fighting the illicit drug trade, from securing the border to processing asylum seekers.

West Virginia has already lost far too many people, including young parents and children, over the past decade to fatal drug overdoses. The federal government must secure the border and renew its fight against illicit drug trafficking to prevent another decade of senseless death. There

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<sup>1</sup> Department of Homeland Security, *Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration* (Dec. 20, 2018), available at [www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration](http://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration).

<sup>2</sup> *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020).

<sup>3</sup> *Id.* at 1908 (“Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency’s original reasons . . .”).

<sup>4</sup> Available at [www.c-span.org/video/?511573-1/senate-hearing-unaccompanied-minors-us-mexico-border](http://www.c-span.org/video/?511573-1/senate-hearing-unaccompanied-minors-us-mexico-border).



should be no need for a lawsuit to make ending the fentanyl flood one of your priorities. We therefore respectfully request a prompt and full response to this letter, by June 20th.

This is a pressing and urgent matter impacting West Virginia and every State suffering from fentanyl abuse and illegal drug trafficking. Lives are being lost every day. There is no time for delay.

Sincerely,



Patrick Morrisey  
West Virginia Attorney General