No. 19-15716

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, et al.
Plaintiffs-Appellees,

v.

CHAD WOLF,
Acting Secretary of Homeland Security, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR AN IMMEDIATE STAY PENDING DISPOSITION OF PETITION FOR CERTIORARI OR AN IMMEDIATE ADMINISTRATIVE STAY

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ARGUMENT

This Court should stay, pending disposition of the government's forthcoming petition for a writ of certiorari in the Supreme Court of the United States, the district court's nationwide preliminary injunction of the Migrant Protection Protocols (MPP). In April and May 2019, a panel of this Court granted the government's motions for a stay pending appellate proceedings in this case. In reliance on that decision, the government has continued to use and expand MPP across the border, and after 13 months of operation, MPP is now firmly entrenched as the status quo. MPP has affected tens of thousands of aliens' immigration cases, including approximately 25,000 aliens presently waiting in Mexico for removal proceedings in the United States. Granting a stay through Supreme Court review will prevent massive disruption to the government's immigration operations and sudden confusion for thousands of migrants about their ability to enter the United States. It will also prevent the run on the border that occurred on Friday, February 28, mere hours after this Court briefly lifted the stay. At the very least, this Court should extend the stay by at least seven days, to March 10, to afford the Supreme Court an orderly opportunity for review. The motion for a stay that this Court granted in May 2019 asked the Court for, at minimum, at least "seven days to allow the government to seek relief from the Supreme Court." Dkt. 11 at 1 (Apr. 17, 2019).

1. Plaintiffs' arguments against a stay (Dkt. 94) do not withstand scrutiny. "Shortly after the issuance" of this Court's ruling, attorneys began contacting ports of entry and Customs and Border Protection (CBP) offices, with some even rushing to the ports in person, "demanding that their clients be permitted to present themselves at the port of entry and to enter the United States." Robert E. Perez Supp. Decl. ¶ 4 (March 3, 2020). One attorney demanded that CBP admit 1,000 people immediately. *Id.* Within a few hours, hundreds of migrants began amassing at multiple ports of entry across the border attempting to immediately enter the United States, creating a severe safety hazard that forced CBP to temporarily close some ports of entry in whole or in part. *Id.* ¶¶ 5-13, 15. Other migrants previously processed under MPP attempted to sneak across the border, where some were apprehended. *Id.* ¶ 8. The many mass gatherings on the Mexican side of the border were determined to be a safety risk to the traveling public and CBP personnel, and operational decisions were made to temporarily suspend port operations in certain locations. *Id.* ¶ 14. And while CBP officers were working to resolve the sudden influx of migrants at multiple ports, they were diverted away from their critical responsibilities of protecting national security, detecting and confiscating illicit materials, and guarding efficient trade and travel. *Id.* ¶ 15. In short, Plaintiffs' contention that lifting the stay would simply lead to an "orderly unwinding of MPP" (Opp. 2) is directly contradicted by the government's experience, and by the experts on the

ground. *See* Perez Supp. Decl. ¶ 14 (predicting that, without a stay, "the number of migrants gathered at the border, whether at or between the ports of entry, could have increased dramatically," including "not only the approximately 25,000 individuals currently waiting in Mexico for removal proceedings who may arrive in the United States from Mexico and request immediate admission, but also others in Mexico that have become aware of CBP's operational limitations and seek to exploit them").

Plaintiffs respond that the preliminary injunction "does not require the immediate re-entry of all individuals currently in Mexico pursuant to MPP," that the district court directed the government only to "'permit the named individual plaintiffs to enter the United States,'" and that the injunction "prohibits the government only from *returning* asylum seekers to Mexico." Opp. 1, 2 (quoting PI Op. 27; emphasis in original). But the injunction "enjoin[s] and restrain[s]" the government "from *continuing to implement or expand* the 'Migrant Protection Protocols.'" PI Op. 27 (emphasis added). And that is the directive that harms the government. As the experience of February 28 has shown, without a stay, hundreds and perhaps thousands of people will likely come to the border requesting immediate entry—whether they are entitled to enter the country or not—thereby creating a safety hazard and overwhelming critical national-security and public-safety functions at the ports of entry and in between them. Mot. 2-5; *see* Perez Decl. (Feb. 28) ¶ 4.

Plaintiffs relatedly contend that "the government is wrong when it asserts that the preliminary injunction will overwhelm the immigration detention system," because the injunction does not require the government to permit the "mass entry of people who have been returned to Mexico." Opp. 2; *see* Opp. 5 (arguing that the injunction does not "create[ ] a substantial risk of immediate chaos at the border"). Again, that ignores the immediate on-the-ground reality, documented by the government, that prevailed immediately after this Court lifted the stay of the injunction, in which attorneys demanded that the government immediately admit their putative clients, including in one instance a group of 1,000 migrants. Perez Decl. (Feb. 28) ¶ 9; Perez Decl. (March 3) ¶¶ 4-15; *see also* Decl. of Enrique Lucero ¶¶ 6-7 (explaining that "if CBP is required to process approximately 25,000 inadmissible aliens in an extremely short timeframe and then transfer those aliens to ICE custody, it would overload [ICE's] already burdened resources and create significant adverse implications for public safety and the integrity of the United States immigration system"); *see also id.* ¶¶ 7-8 (explaining resource constraints that would result in costs to the agency in the tens of millions of dollars). And Plaintiffs have no response to the fact that the absence of MPP—requiring the deployment of resources to combat the migration flows at the southern border—will require the diversion of resources from other more productive uses, like trade and drug interdiction. Christopher Landau Decl. ¶ 3; Lucero Decl. ¶ 10.

As the government has also explained (Mot. 2-5), processing an influx of tens of thousands of migrants—each of whom would need to be screened, including for urgent medical issues—would impose a crippling burden on border authorities and undercut their ability to carry out other critical missions, such as protecting against national-security threats, detecting and confiscating illicit materials, and ensuring efficient trade and travel. Perez Decl. (Feb. 28) ¶¶ 5, 9; Perez Supp. Decl. (Mar. 3) ¶ 15. A spike in volume of that size could also overwhelm the government's detention capacity. Perez Decl. (Feb. 28) ¶¶ 6-8. Plaintiffs contend that the government could "manage" the influx by simply "releasing individuals" into the country. Opp. 2-3. But Congress has made the opposite determination, concluding that all such aliens must be detained during the pendency of their removal proceedings (save in exceptional cases), *see* 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(2)(A), in part because releasing such aliens into the interior results in an unacceptable number of them absconding and failing to appear for their removal proceedings. *See* H.R. Rep. No. 104-469, 117-18 (1995) (finding that "thousands" of aliens arrive in the United States each year, seek "asylum immediately upon arrival," and when "released into the general population" "do not return for their hearings," and further determining that such incentives were mitigated "in districts ... where detention capacity has increased and most [ ] aliens" are not released). And Plaintiffs' suggestion that the government simply release into the interior all MPP-processed aliens who would

seek entry without a stay would cause the very harm that Congress sought to end through the legislation that provided the government authority to return aliens to the contiguous territory of their arrival. *See* Lucero Dec. ¶ 9 (explaining that paroling aliens will result in potentially tens of thousands of aliens absconding and failing to appear for the removal proceedings, which will require further expenditure of scarce resources and manpower to investigate, locate, and apprehend fugitive aliens).

2. Plaintiffs also contend that halting MPP poses little problem because MPP does not deter "'uncontrolled flows' of migrants who will be "incentivize[d]' to travel through Mexico to the border" in the absence of a stay, Opp. 3 (quoting Mot. 4), and is not "responsible for the recent reduction in migration to the U.S." through Mexico, Opp. 3; *see also* Opp. 3-4. That assertion is not credible. As the current United States Ambassador to Mexico explained: "The MPP is a critical component of the [bilateral] effort to deter" "uncontrolled flows of third-country migrants through Mexico to the United States," "which place a severe strain on both countries' resources and lead to exceptionally dangerous conditions for the migrants themselves, who are often exploited by human smugglers." Landau Decl. ¶ 3. Indeed, MPP is part of a larger, multilateral framework between the United States, Mexico, and other Latin American countries for addressing migration issues affecting countries in the Western Hemisphere. Decl. of Valerie Boyd ¶¶ 4-8. And as to Mexico

specifically, MPP is a "carefully negotiated solution with the Government of Mexico," encouraging Mexico to assist in controlling migration flows, so that "Mexico and the United States now share an equal respective burden, while more effectively using our limited resources." *Id.* ¶ 7. Thus, as the U.S. Ambassador to Mexico explained: "Unless stayed, I believe that the panel decision will incentivize such dangerous migration and obliterate the substantial progress that both countries have made over the past year in curbing uncontrolled flows of third-country migrants through Mexico to the United States." Landau Decl. ¶ 3. That assessment is entitled to great weight, and it surely overcomes the speculative views offered by Plaintiffs and their two declarants—neither of whom can speak with any such authority as to MPP's effect on diplomatic relations. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185 (9th Cir. 2011) (courts generally must "defer to" executive "officers' specific, predictive judgments" about matters where "the government has unique expertise").

Plaintiffs never address Ambassador Landau's unambiguous assessment that unless the months-long stay of the injunction is reinstated, the injunction will "obliterate the substantial progress" that the United States and Mexico have made in this context over the past year and will undermine future efforts at such partnerships. Landau Decl. ¶ 3; *see also* Boyd Decl. ¶ 4 ("The suspension of MPP undermines almost two years' worth of diplomatic engagement with the Government of Mexico

through which a coordinated and cohesive immigration control program has been developed," therefore "call[ing] into question the United States' ability to build and uphold international migration management partnerships. [These] rely on reciprocal agreements for each side to uphold, which could unravel if one side no longer upholds its agreements.").

Plaintiffs rely on two declarants—an Assistant Professor of Human Geography and the former Mexican ambassador to the United States—to argue that "border enforcement by Mexico—not MPP or other initiatives by the U.S. government—is responsible for the recent reduction in migration to the U.S." Opp. 3. But increased enforcement by Mexico is a *consequence* of its agreement with the United States to share in shouldering the burdens of the shared mass-migration crisis affecting both Nations, and MPP was a critical component of that diplomatic agreement. Boyd Decl. ¶¶ 4-8; Landau Decl. ¶¶ 3-6. It is not credible to suggest that increased Mexican enforcement that began after MPP was implemented is not attributable to MPP, especially in the face of a declaration from the government's current ambassador that continued progress between the U.S. and Mexican governments relies critically on MPP. *See* Landau Decl. ¶¶ 3-6.

Plaintiffs contend further that enjoining MPP "offers the possibility of improving diplomatic relations." Opp. 5. But that uninformed speculation cannot be

squared with the informed judgment of the current Ambassador to Mexico, who explains that the opposite is true. Landau Decl. ¶¶ 5-6. The migration challenge has been the subject of substantial discussion between the Governments of the United States and Mexico, and is a key issue in the bilateral relationship, *id.* ¶ 5; *see also* Boyd Decl. ¶¶ 5-7, such that "a stay of the panel decision pending further review is imperative to prevent a crisis on our country's southern border and in its critically important relationship with Mexico," Landau Decl. ¶ 5. Plaintiffs rely on former U.S. officials to suggest otherwise, Opp. 4-5, but the current Ambassador is obviously better situated to address this issue, and Plaintiffs' contrary assertions, premised on the opinion of an individual who has not served as an ambassador since 2013, cannot be credited over the evidence that the government has presented. *See* Landau Decl. ¶ 3; Boyd Decl. ¶¶ 5, 7-8.

3. Plaintiffs also briefly assert that a stay is not warranted because they are likely to succeed on the merits in any further review and because the equities favor them. Opp. 6-7. The government recognizes that two members of the merits panel disagree with the government on those points. But a stay remains necessary and appropriate given the points above and the particular circumstances of this case.

First, three of the five Judges of this Court to have considered MPP agree that it should not be enjoined nationwide. Stay Op. 10 (per curiam opinion joined by Judges O'Scannlain and Watford); Stay Op. 1-5 (Watford, J., concurring); Op. 53-

57 (Fernandez, J., dissenting). Three Judges, including the author of the merits panel decision, unanimously voted to issue a stay of the injunction in May 2019, which led to MPP becoming the status quo except for a few hours on February 28, 2020. Stay Op. 1-11. And three of five Judges to address the merits have concluded that MPP is statutorily authorized under 8 U.S.C. § 1225(b)(2)(C), *see* Stay Op. 5-10 (per curiam opinion); Op. 53-57 (Fernandez, J., dissenting), and that even if there is merit to Plaintiffs' non-refoulement claim, that alone cannot support a nationwide injunction of MPP. Stay Op. 10 (per curiam opinion); Stay Op. 1-5 (Watford, J., concurring); Op. 53-57 (Fernandez, J., dissenting).

Second, MPP has now been in effect for 13 months, 10 of which followed this Court's stay of the injunction on April 12, 2019. As demonstrated above, in the government's current stay motion, and in the declarations submitted in support of this stay request, disrupting that status quo would be immediately and profoundly damaging to the interests of the United States and the public. Mot. 1-5. A stay pending the disposition of the government's petition for a writ of certiorari is warranted. At the least, a brief stay for one week, to allow the Supreme Court an orderly opportunity to consider the case, is plainly warranted.

CONCLUSION

Accordingly, the government respectfully requests that this Court enter a stay of the injunction pending further review before the Supreme Court. At a minimum,

the Court should extend the administrative stay through March 10, 2020, to allow the Supreme Court time to consider the government's stay application.

DATED: March 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020, I served a copy of this document on the Court and all parties by filing it with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and a link to this document to all counsel of record.

DATED: March 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27 because it contains 2,479 words, including footnotes. This motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally-spaced typeface using Microsoft Word 14-point Times New Roman font.

DATED: March 3, 2020

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