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11 UNITED STATES DISTRICT COURT  
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 IMMIGRANT DEFENDERS LAW  
 14 CENTER, a California corporation, et al.,

15 Plaintiff,

16 v.

17 ALEJANDRO MAYORKAS, Acting  
 Secretary, Department of Homeland  
 18 Security, et al.,

19 Defendants.

Case No. 2:20-cv-09893 JGB (SHKx)

**DEFENDANTS' SUPPLEMENTAL  
 BRIEF IN OPPOSITION TO  
 PLAINTIFFS' MOTIONS FOR  
 PROVISIONAL CLASS  
 CERTIFICATION (ECF NO. 35) AND  
 PRELIMINARY INJUNCTION (ECF  
 NO. 36)**

[[Proposed] Order filed concurrently  
 herewith]

Hon. Jesus G. Bernal

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1 Pursuant to the Court’s January 22, 2021 and February 3, 2021 Orders (ECF Nos.  
2 109, 113), Defendants submit this supplemental brief in opposition to Plaintiffs’ Motions  
3 for Provisional Class Certification (ECF No. 35) and Preliminary Injunction (ECF No.  
4 36). The Court ordered Defendants to submit a supplemental brief “on the status of the  
5 Migrant Protection Protocols as applied to Plaintiffs’ proposed class.” ECF No. 109 at  
6 2.

7 **I. UPDATE ON MIGRANT PROTECTION PROTOCOLS (“MPP”)**

8 On January 20, 2021, Defendant Department of Homeland Security (“DHS”)  
9 announced the suspension of new enrollments in the Migrant Protection Protocols  
10 (“MPP”), effective January 21, 2021.<sup>1</sup>

11 On February 2, 2021, Defendant Alejandro Mayorkas was confirmed by the U.S.  
12 Senate as DHS Secretary. On the same date, President Biden issued an Executive Order  
13 addressing, *inter alia*, MPP, directing the DHS Secretary to “promptly review” the MPP  
14 in order to determine whether to terminate or modify the MPP, including “whether to  
15 rescind . . . the ‘Policy Guidance for Implementation of the Migrant Protection  
16 Protocols’” of January 2019 “and any implementing guidance.”<sup>2</sup> The Executive Order  
17 referred explicitly to those presently enrolled in MPP, directing that:

18 [i]n coordination with the Secretary of State, the Attorney General, and the  
19 Director of CDC, the Secretary of Homeland Security shall *promptly*  
20 consider a phased strategy for the safe and orderly entry into the United  
21 States, consistent with public health and safety and capacity constraints, of

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23 <sup>1</sup> Press Release, U.S. Dep’t of Homeland Security, DHS Statement on the  
24 Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20,  
25 2021), available at [https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-  
new-enrollments-migrant-protection-protocols-program](https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program) (last accessed March 3, 2021).

26 <sup>2</sup> Exec. Order No. 14010, Creating a Comprehensive Regional Framework to  
27 Address the Causes of Migration, to Manage Migration Throughout North and Central  
28 America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United  
States Border, at Sec. 4(a)(ii)(B), 86 F.R. 8267, 8269 (Feb. 2, 2021) (the “Executive  
Order”).

1        *those individuals who have been subjected to MPP for further processing of*  
2        *their asylum claims.*<sup>3</sup>

3        On February 11, 2021, Defendant DHS announced that, “[b]eginning on February  
4 19, the Department of Homeland Security (DHS) will begin phase one of a program to  
5 restore safe and orderly processing at the southwest border. DHS will begin processing  
6 people who had been forced to ‘remain in Mexico’ under the Migrant Protection  
7 Protocols (MPP).”<sup>4</sup> The announcement explains that “[t]his new process applies to  
8 individuals who were returned to Mexico under the MPP program and have cases  
9 pending before the Executive Office for Immigration Review (EOIR),” but does not  
10 apply to (a) individuals outside the United States “who were not returned to Mexico  
11 under MPP,” (b) individuals outside the United States “who do not have active  
12 immigration court cases,” and (c) individuals “in the United States with active MPP  
13 cases.”<sup>5</sup>

14        On February 19, 2021, Defendant DHS began processing individuals in MPP into  
15 the United States pursuant to phase one.<sup>6</sup> After getting verified for eligibility and testing  
16 negative for COVID-19, approximately 25 individuals were transported by international  
17 organizations to the U.S.-Mexico border for processing through the San Ysidro Port of  
18 Entry in an “orderly, safe, and efficient” manner.<sup>7</sup>

19        On February 20, 2021, Defendant DHS issued further guidance on phase one,  
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21        <sup>3</sup> *Id.*

22        <sup>4</sup> Press Release, U.S. Dep’t of Homeland Security, DHS Announces Process to  
23 Address Individuals in Mexico with Active MPP Cases (Feb. 11, 2021), available at  
24 [https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases)  
[mexico-active-mpp-cases](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases) (last accessed March 3, 2021).

25        <sup>5</sup> *Id.*

26        <sup>6</sup> Press Release, U.S. Dep’t of Homeland Security, DHS Statement on First Step in  
27 Process to Address Individuals in Mexico with Active MPP Cases (Feb. 19, 2021),  
28 available at [https://www.dhs.gov/news/2021/02/19/dhs-statement-first-step-process-](https://www.dhs.gov/news/2021/02/19/dhs-statement-first-step-process-address-individuals-mexico-active-mpp-cases)  
[address-individuals-mexico-active-mpp-cases](https://www.dhs.gov/news/2021/02/19/dhs-statement-first-step-process-address-individuals-mexico-active-mpp-cases) (last accessed March 3, 2021).

<sup>7</sup> *Id.*

1 describing the process as follows:

2 First, individuals may register for intake via an online support hub, where  
3 they will be asked to provide basic information to confirm eligibility.  
4 Through the support hub, they can ask questions about the process of their  
5 case. There will also be a telephone hotline to answer questions and offer  
6 support. The support hub is available via: <https://conecta.acnur.org/>, and  
7 registration went live on February 19, 2021. This hub is operated by  
8 facilitating organizations with the support of the U.S. government.

9 Next, facilitating organizations will transmit registration information to DHS  
10 to verify that the individual an on-going removal proceeding pursuant to MPP  
11 and is eligible for this facilitated process. DHS will respond with a positive  
12 or negative indicator based on several data points to inform the facilitating  
13 organizations whether an individual is eligible to enter the United States as  
14 part of this process. DHS has provided criteria to facilitating organizations to  
15 prioritize individuals based on duration of their enrollment in MPP and other  
16 vulnerability factors.

17 Once confirmed as having a pending immigration court case, individuals will  
18 be contacted by facilitating organizations and provided instructions for  
19 accessing a designated staging location, where they will complete a health  
20 questionnaire and undergo testing for COVID-19. Individuals who test  
21 negative will be sheltered and receive further assistance in preparation for  
22 U.S. processing. Those who test positive will be supported by facilitating  
23 organizations to isolate and/or seek treatment in line with the policy of the  
24 relevant local health authority in Mexico. Following isolation and screening,  
25 such an individual will again be eligible for facilitated arrival at a designated  
26 port of entry. At the staging site, facilitating organizations will provide EOIR-  
27 33 Change of Address forms and offer additional legal services and support.

28 Individuals who complete the testing and screening requirements above will  
be transported from the staging site to the designated port of entry for  
processing into the United States. If they completed the Change of Address  
form, DHS will use this form to administratively move their case to the  
immigration court closest to the migrant's identified address. Unless an  
individual presents a national security or public safety concern, the individual  
will generally be assessed for enrollment in an alternative-to-detention

1 program, released by DHS, and provided instructions for contacting U.S.  
2 Immigration and Customs Enforcement (ICE) at their destination.<sup>8</sup>

3 **II. EFFECT OF MPP CHANGES ON PLAINTIFFS’ PROPOSED CLASS**

4 Plaintiffs define their proposed class as follows: “[A]ll noncitizens who:

5 (1) expressed or will express a fear of persecution in their home countries or a desire to  
6 seek asylum; (2) were or will be subjected to the Migrant Protection Protocols; and  
7 (3) presented, will present, or have been directed to present themselves at the San Ysidro  
8 or Calexico ports of entry.” Complaint, ¶ 243. As explained further below, the new  
9 administration’s recent changes to MPP affect Plaintiffs’ entire proposed class. There  
10 are no longer any future MPP participants in Plaintiffs’ proposed class, and the  
11 remaining class members who are current MPP participants with active immigration  
12 court cases now have a process available to them to come to the United States pending  
13 resolution of those immigration court proceedings.

14 **A. Effect of the Suspension of New Enrollments**

15 The suspension of new enrollments in MPP beginning on January 20, 2021, has  
16 the effect of reducing the size of Plaintiffs’ proposed class and preventing any additions  
17 to the class. Plaintiffs’ proposed class is defined to include future MPP participants  
18 (namely, persons who “will express a fear of persecution in their home countries or a  
19 desire to seek asylum” and “will be subjected to the Migrant Protection Protocols”), but  
20 the number of future MPP participants is now zero. Defendant DHS has suspended  
21 “new enrollments” in MPP, and there is no indication that the current administration  
22 intends to reverse the suspension. Similarly, there are no persons who are currently not  
23 in MPP who will be placed into MPP in the future, and thus become members of the  
24 proposed class.

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27 <sup>8</sup> U.S. Dep’t of Homeland Security, Migrant Protection Protocols, DHS Begins to  
28 Process Individuals in MPP Into the United States to Complete their Immigration  
Proceedings (Feb. 20, 2021; last published March 3, 2021), available at  
<https://www.dhs.gov/migrant-protection-protocols> (last accessed March 3, 2021).

1           **B.     Effect of Implementation of Phase One**

2           Phase one of Defendant DHS’s “program to restore safe and orderly processing at  
3 the southwest border,” announced on February 11, 2021, and commenced on February  
4 19, 2021, applies to all remaining (i.e., non-future) members of the proposed class who  
5 have a live case or controversy against Defendants. As explained above, the phase one  
6 procedure applies to all individuals (a) returned to Mexico pursuant to MPP,  
7 (b) currently outside the United States, and (c) who have active immigration court cases.  
8 While Plaintiffs’ proposed class definition does not specifically limit class membership  
9 to persons outside the United States, it is clear from Plaintiffs’ allegations, the nature of  
10 their claims, and their requested relief that the class is indeed limited to persons outside  
11 the United States. The individual plaintiffs’ claims are premised on difficulties in  
12 applying for asylum, accessing counsel, and in living conditions *while in Mexico*, and the  
13 named plaintiffs are all currently in Mexico. *See* Complaint, ¶¶ 15-20 (named plaintiffs  
14 all currently “trapped” in Mexico), 269 (claim two) (“Defendants have failed to consider  
15 Individual Plaintiffs’ inability to meaningfully access legal representatives for the  
16 purpose of applying for asylum, as well as the consequences of requiring asylum seekers  
17 to languish indefinitely in life-threatening conditions in Mexico.”), 297 (claim six)  
18 (“Forced to return to Mexico, Individual Plaintiffs cannot communicate effectively with  
19 attorneys in the United States.”), 322 (claim eight) (“Defendants knew or should have  
20 known that the Return Policy and Presentation Requirement leaves asylum seekers  
21 unable to meet their basic human needs, including adequate housing, food, clean water,  
22 and medical care, while in Mexico.”), 332 (claim nine) (“During Individual Plaintiffs’  
23 actual and constructive confinement, Defendants have failed to protect Individual  
24 Plaintiffs from harm while in Mexico and failed to provide for their basic needs.”). The  
25 individual plaintiffs all seek “return to the United States,” and “[p]ending the release of  
26 individuals into the United States,” various interim measures to protect the individual  
27 plaintiffs “while in Mexico.” *Id.*, Prayer for Relief, (e)-(h).

28           Moreover, while Plaintiffs’ proposed class definition is not limited to persons who

1 have active immigration court cases, Defendants believe that all remaining (i.e., non-  
2 future) members of the proposed class with a live case or controversy against Defendants  
3 have active “cases pending before the Executive Office for Immigration Review  
4 (EOIR),” and are thus subject to phase one. When members of the proposed class were  
5 placed into MPP, they were returned to Mexico “for the duration of their INA section  
6 240 removal proceedings.”<sup>9</sup> Thus, at the time members of the proposed class were  
7 returned to Mexico, they were also placed into removal proceedings and had “cases  
8 pending before the Executive Office for Immigration Review (EOIR).” There are likely  
9 some individuals who were placed in MPP, are currently outside the United States, and  
10 no longer have active immigration court cases—for example, individuals who were  
11 removed *in absentia* due to failing to appear at the designated port of entry on the date  
12 listed on their Notices to Appear. But, to the extent these individuals are still considered  
13 members of Plaintiffs’ proposed class, they do not have a live case or controversy  
14 against Defendants. They are no longer in MPP, and, given the January 20 suspension  
15 on new enrollments in MPP, there is no risk that they will be placed in MPP again.

16 The relief Plaintiffs seek in this case is limited to addressing access to counsel,  
17 access to the asylum system, and living conditions of those individuals who are currently  
18 in MPP—not those of individuals who may have been subject to MPP in the past. *See*  
19 Complaint, Prayer for Relief, (c)-(d) (seeking declaration that MPP is unlawful and  
20 enjoining its implementation), (e) (seeking return of the proposed class to return to the  
21 United States “to pursue their asylum claims from inside the country”), (f)-(g) (seeking  
22 interim measures for “individuals subjected to MPP”). Accordingly, to the extent  
23 Plaintiffs’ proposed class includes past MPP participants, those past MPP participants  
24 have moot claims and lack Article III standing to seek prospective injunctive relief. *See,*  
25 *e.g., Am. Diabetes Ass’n v. United States Dep’t of the Army*, 938 F.3d 1147, 1152 (9th

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27 <sup>9</sup> U.S. Immigration and Customs Enforcement, Implementation of the Migrant  
28 Protection Protocols (Feb. 12, 2019), available at  
<https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf> (last accessed March 3, 2021).

1 Cir. 2019) (“A case becomes moot . . . when the issues presented are no longer live or  
2 the parties lack a legally cognizable interest in the outcome.”); *City of Los Angeles v.*  
3 *Lyons*, 461 U.S. 95, 102, 111 (1983) (in order to establish standing to pursue injunctive  
4 relief, a plaintiff must show a “threat of injury that must be both ‘real and immediate,’  
5 not ‘conjectural’ or ‘hypothetical,’” and past injury does not suffice to show a threat of  
6 future injury, “[a]bsent a sufficient likelihood that [the plaintiff] will be again wronged  
7 in a similar way”).

8 The proposed class members that do have live claims—those currently in MPP in  
9 Mexico with pending immigration court cases—are subject to phase one. They therefore  
10 now have a process available to them that would enable them to enter the United States  
11 pending the outcome of their immigration proceedings—the ultimate relief they seek in  
12 the Complaint. *See* Compl., Prayer for Relief, (e). And now that the new administration  
13 is working to bring MPP to an end, and to provide the proposed class with the ultimate  
14 relief they seek by way of the Complaint and Motions, the extraordinary relief Plaintiffs  
15 seek by way of the Complaint and Motions—the immediate return of thousands of  
16 proposed class members—is even less warranted. *See Winter v. Natural Res. Def.*  
17 *Council, Inc.*, 555 U.S. 7, 22 (2008) (preliminary injunctive relief “is an extraordinary  
18 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to  
19 such relief”); *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 2014) (a  
20 mandatory injunction that goes beyond maintaining the status quo is particularly  
21 disfavored); *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (a  
22 plaintiff seeking a mandatory injunction “must establish that the law and facts clearly  
23 favor [its] position, not simply that it is likely to succeed”); *H’Sh aka v. O’Gorman*, 758  
24 F. App’x 196, 202 (2d Cir. 2019) (affirming denial of preliminary injunction because,  
25 *inter alia*, the Government had adopted “a new approach [that] may soon moot this  
26 litigation”); *SolarCity Corporation v. Salt River Project Agricultural Improvement and*  
27 *Power District*, 2016 WL 5109887, at \*3 (D. Ariz. Sept. 20, 2016) (concluding that  
28 “judicial economy counsels against granting preliminary [injunctive] relief in this case,”



1 given the imminence of a Ninth Circuit decision that would decide the issues raised in  
2 the preliminary injunction motion, and denying the motion without prejudice to its  
3 refiling after resolution of the appeal).

4 It also bears emphasizing that the claims of a number individuals subject to phase  
5 ones have already been resolved: These individuals have already been returned to the  
6 United States pursuant to phase one, and their claims are therefore moot. As noted  
7 above, approximately 25 individuals were processed at the port of entry on February 19,  
8 2021, the first day of phase one. Defendant DHS continues to process additional  
9 individuals on a daily basis. Indeed, five of the eight named Plaintiffs are now in the  
10 United States, and four of them were processed at the port of entry and returned to the  
11 United States pursuant to phase one: (1) Nicholas Doe (on or around February 19, 2021);  
12 (2) Feliza Doe (on or around February 25, 2021); (3) Jessica Doe (on or around February  
13 28, 2021); and (4) Benjamin Doe (on or around February 28, 2021).<sup>10</sup>

14 Defendant DHS should be afforded a reasonable opportunity to continue  
15 implementing phase one in an orderly manner that ensures the safety and wellbeing of  
16 current MPP participants, their families, ICE, CBP, and USCIS employees, immigration  
17 court personnel, and citizens of the United States. Plaintiffs, on the other hand, do not  
18 appear to have any need to continue pressing for their desired relief through litigation.

### 19 **III. REQUEST FOR STAY**

20 In light of (a) Defendant DHS’s recent announcements suspending “new  
21 enrollments” in MPP, (b) President Biden’s Executive Order directing the DHS  
22 Secretary and CDC Secretary to “promptly” consider “a phased strategy for the safe and  
23 orderly entry into the United States, consistent with public health and safety and capacity  
24 constraints”; (c) Defendant DHS’s presently ongoing implementation of phase one in  
25 returning current MPP participants to the United States in an efficient, orderly, and safe  
26 manner, Defendants believe it would be most efficient for the Court and the parties to

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28 <sup>10</sup> Defendant DHS’s records reflect that Hannah Doe was granted humanitarian  
parole on January 22, 2021.

1 stay this litigation pending DHS's continued implementation of phase one. The new  
2 administration should be afforded time to implement phase one, allowing for the  
3 efficient, orderly, and safe entry into the United States of those individuals eligible for  
4 entry.

5 Notably, on February 3, 2021, in *Mayorkas, et al. v. Innovation Law Lab*, the  
6 United States Supreme Court issued an order holding the remaining briefing in abeyance  
7 and removing the case from its oral argument calendar, in light of the Government's  
8 request for additional time to allow for the completion of review of the MPP program.  
9 2021 WL 357256 (Feb. 3, 2021).<sup>11</sup> Just as the Supreme Court did in *Innovation Law*  
10 *Lab*, the Court should stay this action to enable the Government to complete its review  
11 of MPP pursuant to the Executive Order and provide for the orderly, efficient, and safe  
12 return of current MPP participants with active immigration court cases to the United  
13 States.

#### 14 **IV. CONCLUSION**

15 Defendants request that the Court stay this action for four months and order the  
16 parties to submit a joint status report within (thirty) 30 days of the stay being entered,  
17 and every thirty (30) days thereafter until the stay is lifted.

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26 <sup>11</sup> Similarly, on March 1, 2021, in *Doe, et al. v. Wolf, et al.*, 19-cv-2119 (S.D.  
27 Cal.), another MPP proposed class action, the court issued an order extending all  
28 pending deadlines (including the defendants' answer deadline) by sixty days. Dkt. No.  
64. On February 25, 2021, in *K.P.P.R., et al. v. Wolf, et al.*, 21-cv-007 (S.D. Tex.),  
another MPP proposed class action, the court granted 21-day extensions for the  
defendants' oppositions to preliminary injunction and class certification motions and  
response to the complaint. Dkt. Nos. 12, 13.

1 Dated: March 3, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IMMIGRANT DEFENDERS LAW  
CENTER, a California corporation, et al.,

Plaintiff,

v.

ALEJANDRO MAYORKAS, Acting  
Secretary, Department of Homeland  
Security, et al.,

Defendants.

Case No. 2:20-cv-09893 JGB (SHKx)

**[PROPOSED] ORDER STAYING CASE**

1 The Court, having considered the parties’ supplemental briefs filed in response to  
2 the Court’s January 22, 2021 Order (Dkt. 109), and good cause appearing therefor,  
3 hereby ORDERS that:

- 4 1. This case is hereby stayed (including Defendants’ deadline to respond to the  
5 Complaint) for four months from the date of this Order; and
- 6 2. The parties shall file a Joint Status Report within thirty (30) days of the date of  
7 this Order, and every thirty (30) days thereafter until the stay is lifted. The  
8 Joint Status Reports shall report on the status of processing Migrant Protection  
9 Protocols (“MPP”) participants in phase one and other MPP-related  
10 developments and how this civil case shall proceed.

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12 Dated: \_\_\_\_\_

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14 \_\_\_\_\_  
15 HONORABLE JESUS G. BERNAL  
16 UNITED STATES DISTRICT JUDGE

17 PRESENTED BY:

18 TRACY L. WILKISON  
19 Acting United States Attorney  
20 DAVID M. HARRIS  
21 Assistant United States Attorney  
22 Chief, Civil Division

23           /s/ Matthew J. Smock            
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