
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

**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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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency

As set forth more fully in the motion, on February 28, 2020, the Court issued an opinion upholding—and lifting a stay of—a nationwide injunction barring enforcement of an important Executive Branch initiative, the Migrant Protection Protocols (MPP), that is designed to address the dramatically escalating burdens of unauthorized migration, which is causing irreparable harm to the defendants and the public. That initiative has been operative for 13 months and as a consequence of that, some 60,000 people are presently subject to MPP, and 25,000 are presently in Mexico. The Court’s reinstatement of the injunction causes the United States public and the government significant and irreparable harms—to border security, public safety, public health, and diplomatic relations.

(3) When and how counsel notified

The undersigned counsel notified counsel for Plaintiffs by email on February 28, 20120 of Defendants’ intent to file this motion and its substance. Service will be

effected by electronic service through the CM/ECF system and via email.

(4) Decision requested by

The government requests an immediate administrative stay and a decision on this stay request by Saturday, February 29, 2020.

Counsel to Defendants

By: /s/ Erez Reuveni

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ARGUMENT

This Court should immediately 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), which a panel of this Court previously stayed and which this Court today affirmed. A stay is necessary on an emergency basis because MPP is a critical Executive Branch and foreign-policy initiative that is indispensable to addressing the crisis that the governments of the United States and Mexico jointly face on our shared border. *See* Dkt. 89-1 (Op.). Without a stay, the injunction creates a substantial risk of immediate chaos on the border, threatening irreparable harm to the government, migrants, and the United States public. In the alternative, this Court should issue a one-week administrative stay through Friday, March 6, 2020, in order to maintain the status quo to allow the Supreme Court an orderly opportunity to consider whether to stay or administratively stay the district court's injunction pending further proceedings in that Court.

1. MPP has been in effect for over 13 months, since January 25, 2019. When the district court in this case preliminarily enjoined the government from implementing MPP on April 8, 2019, it stayed the effective date of that injunction until April 12, 2019, in order to allow the government to seek emergency relief from this Court. On April 12, 2019, this Court issued an administrative stay of the injunction, and on May 7, 2019, this Court stayed the injunction in full. 924 F.3d 503 (9th Cir. 2019). That stay remained in place until today. In the 13 months that MPP has been

operative, the government has returned 60,000 aliens to Mexico to await the pendency of their removal proceedings, at least 25,000 of whom are now in Mexico. *See* Decl. of Robert E. Perez ¶ 4. The government has also resolved 36,000 applications for immigration relief filed by persons subject to MPP.

Today, a divided panel of this Court lifted the stay that has been in place since April 12, 2019, reinstating the nationwide injunction issued by the district court, without any delay before the injunction would take effect. The panel concluded that “the return-to-Mexico requirement of the MPP is inconsistent with 8 U.S.C. § 1225(b),” Op. 20; *see also* Op. 21-34, and that MPP likely “does not comply with our treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b),” Op. 20; *see also* Op. 34-48. The panel concluded that the equities favored Plaintiffs, and that a nationwide injunction was appropriate. Op. 48-53. Accordingly, the panel “lift[ed] the emergency stay imposed by the motions panel,” and “affirm[ed] the decision of the district court.” Op. 53.

2. This Court should immediately reinstate the stay of the district court’s preliminary injunction pending disposition of a petition for a writ of certiorari, or alternatively, issue a brief administrative stay—through Friday, March 6, 2020—to maintain the status quo to allow the Supreme Court time to consider in an orderly fashion the government’s forthcoming emergency stay application to that Court, including time for the plaintiffs to file a brief on the government’s stay application. Without a stay from this Court, the injunction will continue to inflict immediate and grave harm on the United States.

To start, the sudden reinstatement of the preliminary injunction could prompt a rush on the southern border by some of the 25,000 or more individuals who are in

Mexico under MPP and may now seek immediate entry into this country. Perez Decl. ¶¶ 4-5. Processing such individuals would be massively burdensome on its own. *Id.* ¶ 5. These individuals would have to be screened—including for urgent medical issues. *Id.* ¶¶ 5, 9. The time necessary to accomplish such processing would undercut CBP’s ability to carry out its other critical missions, such as protecting against national-security threats, apprehending illicit materials, and ensuring efficient trade and travel. *Id.* ¶ 5. The injunction thus threatens massive and irreparable national-security and public-safety concerns. *See id.* Those concerns are not speculative: Mere hours after this Court ruled today, counsel for aliens subject to MPP started contacting CBP demanding that their clients be admitted to the United States; one counsel demanded that CBP admit 1,000 individuals over a bridge at a port of entry on the southern border. *Id.* ¶ 9.

Federal law requires mandatory detention of these aliens, who have no right to be admitted to the United States. *Accord* Op. 28 (reasoning that aliens covered by MPP are section “[1225](b)(1) applicant[s]”); 8 U.S.C. 1225(b)(1)(B)(ii) (imposing mandatory detention); *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). A rush on the border by aliens who were returned to Mexico under MPP would require potentially tens of thousands of detentions. But the government does not have infinite detention space. Perez Decl. ¶ 6. The government could be irreparably injured if it is forced suddenly to place thousands of migrants arriving unexpectedly into detention. And that does not include the approximately 1,300 other aliens encountered on any given day. *Id.* Moreover, given limitations in government detention capacity, many such aliens could not immediately be taken into custody by other government agencies that do not operate at the border, leading to overcrowding in government

facilities, which leads to a corresponding risk of individuals getting sick in government custody and facing other harms to their health and safety. *Id.* ¶ 7. Any such overcrowding would also pose a serious safety risk to the government's employees at the border. *Id.*

The costs to the government of detaining even a fraction of the class of individuals subject to MPP is significant. *See* Perez Decl. ¶ 8. To detain 500 individuals for one month costs approximately 2.8 million dollars. *Id.* A larger facility for 2,000 individuals costs approximately \$ 10 million per month. *Id.* The government does not currently have facilities for all additional individuals waiting in Mexico with pending immigration proceedings, either at the border or in the interior. *Id.* As a result, housing up to 25,000 individuals subject to mandatory detention (approximately) would be extremely and irreparably costly in terms of resources and other mission-critical government activities that would have to cede way to implementing those detentions. *Id.*

Unless the injunction is immediately stayed, it will also immediately and irreparably damage the bilateral relationship between the United States and Mexico. Decl. of Ambassador Christopher Landau ¶ 3. Both countries face a severe challenge from uncontrolled flows of third-country migrants through Mexico to the United States. *Id.* MPP is a critical component of the effort to deter those flows, 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. *Id.* Unless the stay that has been in place for ten months is reinstated to maintain the status quo, the injunction 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. *Id.* Such uncontrolled flows also threaten to undermine legitimate commerce between our two countries (which, in 2019, were each other’s largest trading partners), as both countries are required to divert resources to address third-country migration. *Id.* ¶ 4. The migration issue 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. Accordingly, as the United States Ambassador to Mexico explains, “it is my firm belief ... 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.” *Id.*

Finally, a stay would not significantly harm plaintiffs, who are eleven aliens subject to MPP and six organizations that provide services to immigrants. And any such harm is vastly outweighed by the harms to the government from the disruption of the status quo. The district court itself stayed its injunction briefly in order to allow this Court to consider a stay request. On April 12, 2019, this Court issued a stay of the injunction and a stay has remained in effect until today. Accordingly, the status quo for many months now is one in which MPP is operative, and reinstatement of the stay of the injunction would not significantly harm Plaintiffs, given that they have been subject to MPP for over 13 months as of today. Certainly an administrative stay through March 6 will cause no meaningful harm to Plaintiffs.

Accordingly, the government respectfully requests that this Court issue an immediate stay of the district court’s injunction pending disposition of the government’s petition for certiorari. In the alternative, the government asks the Court to issue an administrative stay through March 6, 2020, to allow the Supreme Court time

to consider the government's stay application.

DATED: February 28, 2020

Respectfully submitted,

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Civil Division

SCOTT G. STEWART
Deputy Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation –
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Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 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: February 28, 2020

Respectfully submitted,

/s/Erez Reuveni

EREZ REUVENI

Assistant Director

U.S. Department of Justice

Counsel for Defendants-Appellants

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 1,481 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: February 28, 2020

Respectfully submitted,

/s/Erez Reuveni

EREZ REUVENI

Assistant Director

U.S. Department of Justice

Counsel for Defendants-Appellants

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Chad F. Wolf, *et al.*,)
Applicants,)
)
)
v.)
)
Innovation Law Lab, *et al.*,)
Respondents.)
_____)

No. 19-15716

DECLARATION OF ROBERT E. PEREZ

I, Robert E. Perez, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and information made known to me in the course of my employment, hereby make the following declaration with respect to the above-captioned matter:

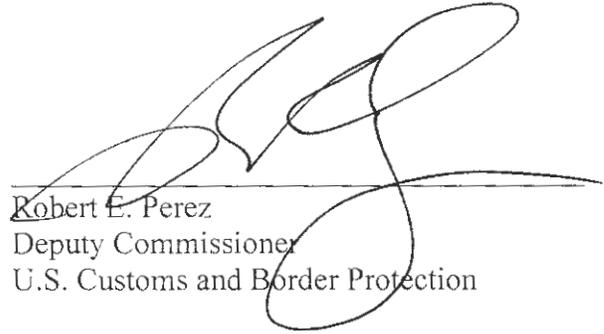
1. I am currently the Deputy Commissioner for U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have been employed in this role since November 2018. I began my career in 1992 with the legacy U.S. Customs Service. During my 27 years of federal service, I have held various leadership positions, including Director of Field Operations (DFO) for CBP’s New York Field Office; DFO and Port Director in Detroit, Michigan; and Director of the Customs–Trade Partnership Against Terrorism. Immediately prior to assuming my current role, I served as Executive Assistant Commissioner for Operations Support.
2. In my current position, I serve as the agency’s senior career official, with a primary focus of working closely with the Commissioner to ensure that CBP’s mission of protecting our Nation’s borders from terrorists and terrorist weapons is carried out effectively in partnership with other Federal, state, local, and foreign entities. Other top CBP priorities for which I am responsible include securing and facilitating legitimate global trade and travel, keeping illegal drugs and illegal aliens from crossing our borders, and protecting our Nation’s food supply and agriculture industry from pests and disease.

3. I am familiar with the Ninth Circuit's February 28, 2020 order in *Innovation Law Lab v. Wolf*, No. 19-15716, lifting the emergency stay imposed by a motions panel of the Ninth Circuit and affirming the decision of the district court to issue a preliminary injunction setting aside the Migrant Protection Protocols (MPP). This injunction has significant implementation concerns for CBP.
4. Approximately 60,000 aliens have been returned to Mexico pursuant to MPP since January 2019. Presently, based on the information available to CBP, considering the number of people who may not arrive for their hearing, it is a reasonable estimate that approximately 25,000 individuals remain in Mexico who may arrive in the United States for the completion of their removal proceedings. This number, however, could fluctuate based on the number of individuals who, for instance, have decided not to arrive in the United States for their hearing but instead remain in Mexico.
5. If this injunction is left in place and CBP is required to process this approximately 25,000 people, this would place an enormous strain on CBP. It would take a significant number of hours to process individuals into the United States. Moreover, individuals would have to be screened, for instance, to determine whether there are urgent medical issues, whether all of the members of the family have arrived together or if any of the children are unaccompanied alien children. The time necessary to accomplish this processing would necessarily reduce CBP's ability to effectively carry out its other critical missions, such as protecting against national security threats, apprehending illicit materials and ensuring efficient trade and travel.
6. Moreover, all of the individuals who are returning are subject to detention. Detention of those processed in MPP, who are currently in Mexico, would place enormous strain on CBP. CBP, together with its partners at DHS, would have to ensure that there is sufficient bed space to detain all of these individuals. This is in addition to the average number of individuals CBP is already apprehending or encountering in any given day, which could be approximately 1,300 aliens.

7. Moreover, CBP facilities are not generally designed for long-term detention, and CBP generally endeavors to move individuals out of its custody as expeditiously as possible, particularly children, so that they can be transferred to locations more appropriate for such detention. Any backlog in ICE's ability to accept transfers of custody from CBP is likely to lead to individuals remaining in CBP custody for extended periods. Similarly, any limitation on ICE's ability to accept transfers of custody is likely to lead to overcrowding in CBP facilities, which leads to a corresponding risk of individuals getting sick in our custody and facing other harms to their health and safety. Any such overcrowding would also pose a serious safety risk to CBP's own employees.
8. Currently CBP operates a limited number of temporary facilities in addition to its ports of entry and Border Patrol stations. Those temporary facilities are extremely costly. One month for a facility designed to house 500 individuals costs approximately \$ 2.8 million. A larger facility for just 2,000 individuals costs approximately \$ 10 million per month. CBP does not currently have facilities for all 20,000 additional individuals and, in my experience, ICE does not have sufficient space for all such individuals. As a result, housing the approximately 25,000 in CBP facilities would be extremely costly.
9. The concern that individuals will arrive at ports of entry is not speculative. In the hours shortly after the Ninth Circuit's decision issued, counsel for aliens immediately started to contact CBP demanding entry for their clients. Indeed, one counsel demanded that they be permitted immediately to bring over 1,000 individuals to a bridge at a southern border port of entry. Immediate and significant numbers of individuals entering may also exceed CBP's capacity to screen people for serious medical concerns. This is particularly concerning given the current outbreak of the coronavirus.

I declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 28 day of February, 2020.



Robert E. Perez
Deputy Commissioner
U.S. Customs and Border Protection

**THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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v.)
)
Chad F. Wolf, et al.,)
Defendants-Appellants.)

No. 19-15716

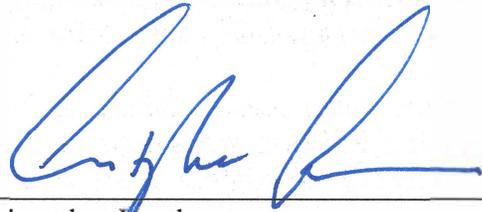
DECLARATION OF AMBASSADOR CHRISTOPHER LANDAU

I, Christopher Landau, declare as follows:

1. I am the United States Ambassador to Mexico. I was nominated by the President on March 26, 2019, confirmed by the Senate on August 1, 2019, and sworn into office on August 12, 2019. I presented my credentials to President Andrés Manuel López Obrador on August 26, 2019.
2. I am aware that, earlier today, a panel of this Court issued an opinion affirming the district court's grant of a preliminary injunction setting aside the Migrant Protection Protocols (MPP).
3. The panel's decision, unless stayed, will have an immediate and severely prejudicial impact on the bilateral relationship between the United States and Mexico. Both countries face a severe challenge from uncontrolled flows of third-country migrants through Mexico to the United States. The MPP is a critical component of the effort to deter such flows, 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. 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.
4. Such uncontrolled flows also threaten to undermine legitimate commerce between our two countries (which, in 2019, were each other's largest trading partners), as both countries are required to divert resources to address such third-country migration.
5. The migration issue 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. It is my firm belief, as the United States Ambassador to Mexico, 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.

6. I further believe that these injuries would be not only immediate but also irreparable, and could not be remedied by a subsequent decision at the merits phase of this litigation. If the current incentive structure for migrants (and smugglers) is altered, I believe there would be a spike in migration that would overcome both countries' resources and have unquantifiable effects on legitimate bilateral commerce. These severely deleterious effects would not be remedied if this Court subsequently lifted the injunction.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 2020.



Christopher Landau
United States Ambassador to Mexico