

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANDRES OSWALDO BOLLAT
VASQUEZ, et al.

Plaintiffs,

v.

ALEJANDRO MAYORKAS,¹
Secretary of Homeland Security, et al.

Defendants.

C.A. No. 20-10566-IT

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AS MOOT
OR, IN THE ALTERNATIVE, TO STAY PENDING REVIEW OF MPP**

Now come Defendants, by and through their attorney, Nathaniel R. Mendell, Acting United States Attorney for the District of Massachusetts, and hereby respectfully move this Honorable Court to dismiss Plaintiffs' claims as moot. Plaintiffs have already received the ultimate relief sought in their complaint: all of the Plaintiffs previously subject to the Migrant Protection Protocols (MPP) have been paroled into the United States pending removal proceedings under 8 U.S.C. § 1229a, and they will not be returned to Mexico pursuant to MPP. In the alternative, should this Court find that the case is not moot, Defendants respectfully request that the case be stayed, pending the completion of the Department of Homeland Security's (DHS) review of MPP.

BACKGROUND

This case concerns the Migrant Protection Protocols, a DHS policy that, until January 21, 2021, was applied to certain applicants for admission who were arriving on land at the Southwest

¹ Alejandro Mayorkas is substituted as a party for his predecessor in office. *See* Fed. R. Civ. P. 25(d).

Border and were returned to Mexico pursuant to 8 U.S.C. § 1225(b)(2)(C) to await their 8 U.S.C. § 1229a removal proceedings.

On March 20, 2020, Plaintiffs brought a complaint on behalf of five individuals (Plaintiffs Luisa Marisol Vasquez de Bollat, A.B., Evila Floridalma Colaj Olmos, J.C., and Rosa Maria Martinez de Urias) who had been returned to Mexico pursuant to MPP to await removal proceedings. Dkt. 1. As relief, they sought: 1) a declaration that MPP and its non-refoulement procedures are unlawful and that Plaintiffs' inclusion in MPP was and is unlawful; 2) an injunction preventing Defendants from applying MPP to the Plaintiffs; and 3) an order that Plaintiffs be paroled into the United States to remain during the pendency of their 8 U.S.C. § 1229a removal proceedings and any appeals. *Id.* at Prayer for Relief. In the alternative, Plaintiffs sought an order that they be provided with non-refoulement interviews consistent with the practice used for reasonable fear interviews under 8 C.F.R. § 208.31. *Id.* Plaintiffs filed a motion for a preliminary injunction on April 13, 2020. Dkt. 27. This Court granted Plaintiffs' motion, in part, on May 14, 2020, ordering DHS to rescind the orders returning the Plaintiffs to Mexico and leaving to DHS, in the first instance, the determination of whether parole or detention in the United States was appropriate. Dkt. 45. On May 15, 2020, pursuant to the Court's Order, Plaintiffs Colaj and Vasquez, their minor children, and Plaintiff Martinez were paroled into the United States. *Id.*; Decl. of Stephen Maloney, attached as Ex. A, ¶ 6. On December 22, 2020, Plaintiffs amended their complaint to add seven new Plaintiffs who were subject to MPP (Plaintiffs Nora Idalia Alvarado Reyes, Hermes Arnulfo López Merino, Maria de la Cruz Abarca de López, T.L., D.L., A.L., and Miriam Yanett Zuniga Posadas), seeking identical relief. Dkt. 73. On December 25, 2020, Plaintiffs filed a second motion for a preliminary injunction. Dkt. 77.

On January 20, 2021, there was new leadership at DHS, and Acting Secretary Pekoske issued a memorandum directing that, effective January 21, 2021, DHS would “suspend new enrollments in [MPP], pending further review of the program.” Pekoske Memo dated Jan. 20, 2021, attached as Ex. B. On February 2, 2021, the President signed an executive order instructing DHS to “promptly review and determine whether to terminate or modify” MPP and, in coordination with the Secretary of State, the Attorney General, and the Director of the CDC, to “promptly consider a phased strategy for the safe and orderly entry into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum claims.” Exec. Order No. 14010, 86 FR 8267 (Feb. 2, 2021). On February 11, 2019, DHS announced that, beginning on February 19, 2021, it would begin processing individuals out of MPP who had been returned to Mexico and had pending cases before the Executive Office for Immigration Review (EOIR). *See* “DHS Announces Process to Address Individuals in Mexico with Active MPP Cases,” Feb. 11, 2021, *available at*: <https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases>.

On February 13, 2021, this Court granted Plaintiffs’ second motion for a preliminary injunction, in part, ordering DHS to rescind the orders returning the Plaintiffs to Mexico and leaving to DHS, in the first instance, the determination of whether parole or detention in the United States was appropriate. Dkt. 96. Pursuant to this Court’s Order, on February 13 and February 14, 2021, Plaintiffs Reyes, López Merino, Abarca de López, T.L., D.L., A.L., and Posadas were paroled into the United States. *Id.*; Ex. A ¶¶ 7, 8. Although they may be detained for the purpose of removal, none of the Plaintiffs will be returned to Mexico pursuant to MPP. Decl. of Todd M. Lyons, attached as Ex. C, ¶ 5.

ARGUMENT

A. Plaintiffs’ Claims Are Moot Because They Are No Longer in MPP and Will Not Be Subject to MPP Again.

Article III of the Constitution limits federal courts’ jurisdiction to certain “Cases” and “Controversies.” U.S. Const. art. III, § 2, cl. 1. “No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

“When a case is moot—that is, when the issues presented are no longer live or when the parties lack a legally cognizable interest in the outcome—a case or controversy ceases to exist, and dismissal of the action is compulsory.” *Cruz v. Farquharson*, 252 F.3d 530, 533 (1st Cir. 2001); *see also* *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980)). A claim will be considered no longer “live” when a court cannot provide effectual relief because no justiciable case remains. *Oakville Dev. Corp. v. FDIC*, 986 F.2d 611, 613 (1st Cir. 1993). A court is prohibited from issuing an advisory opinion, so a moot case must be dismissed. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) (“If events have transpired to render a court opinion merely advisory, Article III considerations require dismissal of the case.”); *see also* *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

The court may decline to dismiss for mootness within a narrow exception: voluntary cessation of challenged conduct. *ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 54-55 (1st Cir. 2013). The voluntary cessation exception arises where “the defendant voluntarily ceases the challenged practice,” thereby mooting the case. *Id.* at 54. The exception is designed to prevent a litigant from “altering its behavior long enough to secure dismissal and then reinstating it immediately after.” *Id.* However, even if the exception applies, the “case may still be found moot

if the defendant meets the ‘formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to reoccur.’” *Id.* at 55 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 190(2000); *see also Rian Immigrant Center v. Cuccinelli*, No. 1:19-cv-11880-IT, 2020 WL 6395575, at * 5 (D. Mass. Nov. 2, 2020).

Plaintiffs have received the ultimate relief requested in their complaint and it is absolutely clear that the challenged actions cannot be reasonably expected to reoccur. *See ACLU of Mass.*, 705 F.3d at 55. All of the Plaintiffs have been paroled into the United States and are in removal proceedings under 8 U.S.C. § 1229a. *See* Ex. A ¶¶ 6-8; Ex. C ¶ 5. DHS is in the process of reviewing MPP. Exec. Order No. 14010. On February 11, 2021, DHS announced a plan to begin processing individuals out of MPP who (like the Plaintiffs prior to issuance of the preliminary injunction orders) had been returned to Mexico under MPP and had pending cases before EOIR and began processing those cases on February 19, 2021. *See* “Migrant Protection Protocols,” *available at* <https://www.dhs.gov/migrant-protection-protocols> (accessed March 17, 2021). Although they may be detained for the purpose of removal, Plaintiffs will not be returned to Mexico under MPP. Ex. C ¶ 5; *see ACLU of Mass.*, 705 F.3d at 56 (in declining to apply the voluntary cessation exception, giving weight to the fact that the defendants are high-ranking federal officials and the fact that “[t]he change has come about in part because of the different policy perspectives of a different President (and a different HHS) than the administration which originally granted the contract in 2006”); *cf.*, *Rian Immigrant Center*, 2020 WL 6395575, at * 5 (finding offer of “what Defendant Cuccinelli ‘expects’ may occur” did not meet government’s burden to show the challenged action could not reasonably be expected to reoccur). Thus, addressing the legality of MPP, which is no longer applied to Plaintiffs and will not be applied to them again, would amount to an impermissible advisory opinion. *Mangual*, 317 F.3d at 60.

Accordingly, this Court cannot provide relief to the Plaintiffs and the action is moot.

B. In the Alternative, this Court Should Stay Proceedings Pending the Outcome of DHS's Review of MPP.

Should the Court find that the case is not moot, Defendants respectfully request that the Court stay further proceedings in this matter until DHS completes its review of MPP.

“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Microfinancial, Inc. v. Premier Holidays Intern., Inc.*, 385 F.3d 72, 77 (1st Cir. 2004) (“It is apodictic that federal courts possess the inherent power to stay proceedings for prudential reasons.”). The party seeking a stay must show good cause for its issuance, the stay must be reasonable in duration, and “the court must ensure that competing equities are weighted and balanced.” *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1155 (1st Cir. 1992). “A stay is appropriate where it is likely to conserve judicial and party time, resources, and energy.” *D’Agostino v. Fed. Ins. Co.*, No. CIV.A. 12-11628, 2013 WL 3106203, at *1 (D. Mass. Oct. 30, 2013) (internal citation omitted). However, “to be entitled to a stay, a party must demonstrate a clear case of hardship if there is a danger that the stay will damage the other party.” *Austin v. Unarco Industries*, 705 F.2d 1, 5 (1st Cir. 1983).

Given DHS’s suspension of new enrollments in MPP, its current review of the program, and the on-going processing of certain individuals returned to Mexico pursuant to MPP, good cause exists for this Court to stay proceedings to allow for the completion of that review. Doing so would conserve the resources of the Court and the parties, and, as the President has ordered that the review be conducted promptly, the stay would be of reasonable duration. *See D’Agostino*, 2013 WL 3106203, at *1; *Marquis*, 965 F.2d at 1155. Finally, because Plaintiffs are all in the United States, not Mexico, they will suffer no prejudice if proceedings in this Court are stayed. A stay is

particularly appropriate because the Supreme Court has decided to suspend briefing in *Mayorkas v. Innovation Law Lab*, No. 19-1212 and hold that case in abeyance pending the government's review of MPP.

CONCLUSION

In light of the foregoing, Defendants respectfully move this Honorable Court to dismiss Plaintiffs' claims as moot, or, in the alternative, to stay this case pending the completion of DHS's review of MPP.

Respectfully submitted,

NATHANIEL R. MENDELL
Acting United States Attorney

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Dated: March 18, 2021

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ANDRÉS OSWALDO BOLLAT
VASQUEZ, *et al.*,

Plaintiff,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.¹

CASE NO. 1:20-CV-10566-IT

DECLARATION OF STEPHEN MALONEY

I, Stephen Maloney, 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 declare as follows relating to the above-captioned matter:

1. I am the Acting Deputy Executive Director of Admissibility and Passenger Programs, U.S. Customs and Border Protection (CBP). I have been with CBP since 2002. In my current position, I oversee the programs and policies relating to traveler inspection and admissibility. I have served in this position since January

¹ Secretary Mayorkas is automatically substituted for his predecessor. *See* Fed. R. Civ. P. 25(d).

19, 2021. Prior to serving in this role, I was the Director of Field Transformation.

2. I have been apprised of this litigation matter, including the A-numbers of the Plaintiffs: Evila Floridalma Colaj Olmos, J.C., Luisa Marisol Vasquez Perez de Bollat, A.B., Rosa M. Martinez de Urias, Nora Idalia Alvarado Reyes, Hermes Arnulfo López Merino, María de la Cruz Abarca de López, T.L., D.L., A.L., and Miriam Yanett Zuniga Posadas.

3. Personnel within CBP have queried the relevant CBP systems for the name and A-number for each of the above Plaintiffs in the above-captioned litigation provided by Plaintiffs' counsel in connection with paroling these individuals into the United States.

4. I am making this Declaration for the purpose of confirming that I reviewed and am supplying the information from CBP's systems for each of the identified Plaintiffs in the above-captioned litigation regarding the date that each of these individuals were paroled into the United States.

5. This Declaration is based on my personal knowledge and other information conveyed to me by my staff and other knowledgeable CBP personnel in the course of my official duties and responsibilities.

6. On May 15, 2020, the following individuals were paroled into the United States:

a. Evila Floridalma Colaj Olmos,

- b. J.C.,
- c. Luisa Marisol Vasquez Perez de Bollat,
- d. A.B., and
- e. Rosa M. Martinez de Urias.

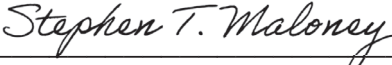
7. On February 13, 2021, the following individuals were paroled into the United States:

- a. Nora Idalia Alvarado Reyes,
- b. Hermes Arnulfo López Merino,
- c. María de la Cruz Abarca de López,
- d. T.L.,
- e. D.L., and
- f. A.L.

8. On February 14, 2021, Miriam Yanett Zuniga Posadas was paroled into the United States.

I declare, under penalty of perjury, that the forgoing is true and correct to the best of my knowledge, information and belief.

Executed on the 16th day of March, 2021.

 **STEPHEN T MALONEY** Digitally signed by STEPHEN T MALONEY
Date: 2021.03.16 07:36:37 -04'00'

Stephen Maloney, Acting Deputy Executive Director
U.S. Customs and Border Protection

Secretary

U.S. Department of Homeland Security
Washington, DC 20528

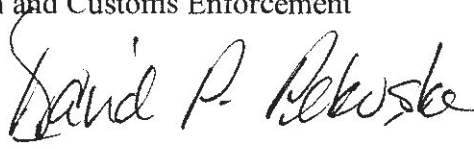


**Homeland
Security**

January 20, 2021

MEMORANDUM FOR: Troy Miller
Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement

FROM: David Pekoske
Acting Secretary 

SUBJECT: **Suspension of Enrollment in the Migrant Protection
Protocols Program**

Effective January 21, 2021, the Department will suspend new enrollments in the Migrant Protection Protocols (MPP), pending further review of the program. Aliens who are not already enrolled in MPP should be processed under other existing legal authorities.

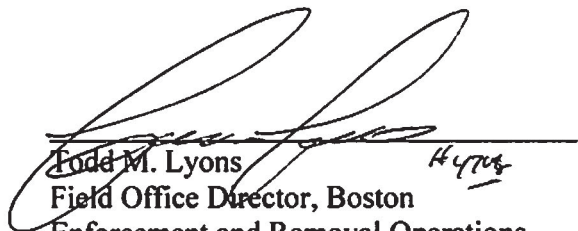
EXHIBIT

B

3. I make this declaration in support of the government's motion to dismiss or, in the alternative, to stay this matter. This declaration is based upon my personal knowledge and/or information conveyed to me in the course of my official duties and responsibilities and/or review of the administrative files and/or electronic records maintained by DHS.
4. I have been apprised of this litigation matter, including the A-numbers of the Plaintiffs: Luisa Marisol Vasquez de Bollat, A.B., Evila Floridalma Colaj Olmos, and J.C., Rosa Maria Martinez de Urias, Nora Idalia Alvarado Reyes, Hermes Arnulfo López Merino, Maria de la Cruz Abarca de López, T.L., D.L., A.L., and Miriam Yanett Zuniga Posadas.
5. Plaintiffs Luisa Marisol Vasquez de Bollat, A.B., Evila Floridalma Colaj Olmos, and J.C., Rosa Maria Martinez de Urias, Nora Idalia Alvarado Reyes, Hermes Arnulfo López Merino, Maria de la Cruz Abarca de López, T.L., D.L., A.L., and Miriam Yanett Zuniga Posadas are in removal proceedings pursuant to 8 U.S.C. § 1229a and, although ERO Boston might re-detain these Plaintiffs for the purpose of removal, they will not be returned to Mexico under the Migrant Protection Protocols.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 10, 2021.


Todd M. Lyons
Field Office Director, Boston
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement