

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF TEXAS,)
STATE OF MISSOURI,)

Plaintiffs,)

v.)

JOSEPH R. BIDEN, JR.,)
in his official capacity as)
President of the United States, *et al.*,)

Defendants.)

Civil Action No. 2:21-cv-00067-Z

**DEFENDANTS' NOTICE OF
COMPLIANCE WITH INJUNCTION**

On August 13, 2021, the Court entered an injunction requiring Defendants to, *inter alia*, “enforce and implement [the Migrant Protection Protocols] *in good faith*.” ECF No. 94 at 52; *see also State v. Biden*, No. 21-10806, 2021 WL 3674780 at *13 (5th Cir. Aug. 19, 2021). Defendants submit this notice to update the Court on Defendants’ compliance with the injunction. As explained below, Defendants are actively engaged in attempting to re-implement MPP in good faith in accordance with the Court’s order, but MPP is not yet operational.

1. Defendants Are Taking Steps To Re-Implement MPP

Defendants are in the process of taking numerous steps to re-implement MPP in compliance with the Court’s order.

First, the U.S. Government is actively engaged in discussions with the Government of Mexico regarding re-implementation of MPP. Implementing MPP requires diplomatic engagement and concurrence from Mexico to accept individuals returned from the United States to Mexico. AR152-53. Mexico “reaffirmed its sovereign right to admit or reject the entry of foreigners into its territory,” when MPP was first announced, AR149 (Statement from Government of Mexico), and again following the injunction, *see* <https://www.gob.mx/sre/prensa/posicionamiento-sobre-resolucion-de-los-ee-uu-respecto-de-la-implementacion-de-la-seccion-235-b-2-c-de-su-ley-de-inmigracion-y-nacionalidad>. Mexico’s Ministry of Foreign Affairs issued a press release on August 25 stating it was not bound by the Court’s decision, but that it would enter a technical discussion with the United States regarding orderly, safe, and regular migration. *Id.*

Discussions with Mexico are ongoing and are proceeding in good faith, but, as of yet, Mexico has not yet agreed to accept returns under the Court-ordered restart of MPP. *See* Ex. A, Declaration of Blas Nuñez-Neto, ¶ 4. In order to restart MPP, the two governments must reach agreement on a number of foundational matters, including: the make-up of individuals who are

amenable to MPP, in what circumstances and locations returns to Mexico and reentry into the United States to attend court hearings can occur, how many individuals can be enrolled in given locations, and the types of support these individuals will receive in Mexico. *Id.* All of these topics, and others, remain under active negotiation. *Id.*

Importantly, MPP cannot function without Mexico's agreement to accept individuals returned from the United States under the program. *See State*, No. 21-10806, 2021 WL 3674780 at *14 (noting that "if the Government's good-faith efforts to implement MPP are thwarted by Mexico, it nonetheless will be in compliance with the district court's order..."). A prerequisite to being placed into MPP is placement into removal proceedings under 8 U.S.C. § 1229a. *See* 8 U.S.C. § 1225(b)(2)(C). And individuals need to be physically in the United States to be placed in § 1229a removal proceedings; those physically outside the United States cannot be processed for removal proceedings. Accordingly, MPP cannot function without individuals first coming to the United States and then being returned to Mexico. Return to territory is an essential element of the program.

As previously implemented, MPP was contingent upon Mexico's willingness to provide legal and procedural protections under applicable domestic and international law and certain commitments by Mexico to provide temporary status for the pendency of the stay in Mexico that, among other things, allowed individuals to apply for a work permit and ensured access to information and legal services, and allowed them to reenter and return from the United States for their court hearings. *See* AR151-54 (2019 Policy Guidance for Implementation of MPP). The U.S. Government is actively engaging with Mexico to seek this cooperation. Ex. A, ¶¶ 3-4.

Second, the U.S. Government is actively working on rebuilding infrastructure and reorganizing resources and personnel along the southwest border that are necessary to operate

MPP. Ex. A, ¶¶ 5-8. To assist with these efforts, DHS has created an interagency Task Force comprised of the various DHS components involved in MPP as well as the Executive Office for Immigration Review at the Department of Justice and the Department of State. *Id.* at ¶ 5. The Task Force is meeting regularly to rebuild the infrastructure and reapportion the staffing required to reimplement MPP. *Id.* This includes identifying funding and obtaining contracts to rebuild court hearing facilities used for immigration court hearings for individuals in MPP. *Id.* at ¶¶ 7-8. The previously existing facilities have been repurposed and demobilized as court facilities and would need to be rebuilt with COVID-19 transmission mitigation concerns taken into account. *Id.* at ¶ 7. Already, DHS has identified funds to contract for the IHFs, which will cost approximately \$14.1 million to construct and \$10.5 million per month to operate. *Id.* at ¶ 8. In line with the actions taken by the previous Administration, DHS plans to execute the contract for the IHFs as soon as an agreement is reached with Mexico. *Id.*

Third, the Executive Office for Immigration Review (EOIR) is working to make space available on immigration court dockets to schedule hearings for individuals in MPP. Ex. A., ¶ 6. Before individuals can be placed into MPP, they must be placed into removal proceedings under 8 U.S.C. § 1229a, *see id.* § 1225(b)(2)(C), which is done by issuing the charging document (the notice to appear) that ideally sets a hearing date. *id.* § 1229(a). This requires coordination between DHS and EOIR—coordination that is now well underway. Ex. A., ¶ 6.

Fourth, DHS is engaged in extensive planning regarding how to operationalize MPP at the southwest border, given changed conditions, including the ongoing risks posed by COVID-19 and the Defendants' obligation to implement the Center for Disease Control and Prevention's (CDC) Title 42 Order, which temporarily prohibits the introduction into the United States of certain noncitizens traveling from Canada or Mexico into the United States. *See Order Suspending the*

Right to Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42,828 (Aug. 5, 2021); *see also* 85 Fed. Reg. 65806 (Oct. 16, 2020) (CDC Order). These changed circumstances require the updating of internal guidance and documents, development of necessary health protocols, and provision of this updated information to third parties, including the noncitizens who will be placed into MPP. Ex. A., ¶ 9. Not only must the U.S. Government ensure that MPP is implemented consistent with the Title 42 order, it must ensure that the policies and procedures underlying MPP operations protect the safety and health of U.S. law enforcement, noncitizens, and U.S. communities. *Id.* at ¶¶ 10-11.

2. MPP Has Not Yet Been Re-Implemented

Despite Defendants' extensive and continuing efforts, MPP has not yet been operationally re-implemented. Because MPP is not yet operational, the U.S. Government is continuing to use other means of processing individuals arriving at the border as DHS had previously done, including by expelling individuals pursuant to the CDC's Title 42 order. Ex. A., ¶ 11. Single adults, and families to the extent possible, continue to be expelled pursuant to CDC's Title 42 authorities. *Id.*; *see* <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>. Individuals expelled pursuant to the Title 42 Order are not processed under Title 8 and as a result would not be subject to MPP even if MPP were currently operational.

There are, however, limits to the application of the CDC order, and there are various circumstances in which DHS is unable to apply the CDC Order for "a range of factors, including, most notably, restrictions imposed by foreign governments." 86 Fed. Reg. at 42,841, 42,836 & nn.82-83. In particular, Mexico "has placed certain nationality- and demographic-specific restrictions on the individuals it will accept for return via the Title 42 expulsion process." *Id.* at 42,836. "With limited exceptions, the Mexican government will only accept the return of Mexican and Northern Triangle nationals." *Id.* And "along sections of the border, Mexican officials refuse to accept the return of any

non-Mexican family with children under the age of seven.” *Id.*

In addition, the CDC Order allows for the exception of persons whom the U.S. Government determines “should be excepted from this Order based on the totality of the circumstances, including consideration of significant law enforcement, officer and public safety, humanitarian, and public health interests.” 86 Fed. Reg. at 42,841. Pursuant to that exception, DHS has been working with select non-governmental organizations (NGOs) to identify individuals who meet specified vulnerability criteria that merit such exceptions from Title 42. Ex. A., ¶ 11.

To the extent noncitizens are not covered by, are exempted from, or otherwise cannot be expelled pursuant to the CDC Order, they are processed instead under Title 8 and put into removal proceedings, in accordance with prior practices predating the Court’s order. Ex. A., ¶ 12. Pursuant to these pre-existing policies, DHS may use its “discretion” under 8 U.S.C. § 1182(d)(5)(A) to “parole an alien into the United States” in certain circumstances, or under 8 U.S.C. § 1226 to “release” a noncitizen pending a decision on whether the noncitizen is to be removed “on ‘bond’ or ‘conditional parole,’” *State*, 2021 WL 3674780, at *13. DHS also has discretion to place certain inadmissible noncitizens in expedited removal proceedings under 8 U.S.C. § 1225. DHS intends to continue the exercise of its pre-existing policies and practices as it continues to work in good faith to re-implement MPP. Ex. A., ¶ 12.

Dated: September 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the Northern District of Texas by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Brian C. Ward _____

BRIAN C. WARD

U.S. Department of Justice

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
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STATE OF TEXAS,)	
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v.)	Civil Action No. 2:21-cv-00067-Z
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JOSEPH R. BIDEN, JR.,)	
in his official capacity as)	
President of the United States, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

DECLARATION OF BLAS NUÑEZ-NETO

I, Blas Nuñez-Neto, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge, and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

1. I am the Chief Operating Officer at U.S. Customs and Border Protection (CBP), within the Department of Homeland Security (DHS), and have been in this role since March 5, 2021. Since August 24, 2021, I have been serving as the Vice Chair for the Secretary of Homeland Security’s Southwest Border Taskforce. I also previously served at DHS as an Advisor to CBP Commissioner Gil Kerlikowske from January 12, 2015 to January 16, 2017.
2. Pursuant to this Court’s August 13, 2021, order, DHS has taken a number of steps to reimplement the Migrant Protection Protocols (MPP). These steps include (1) engaging with the Government of Mexico (GOM); (2) creating an interagency task force; (3) initiating the

processes required to rebuild needed infrastructure and reorganize resources; and (4) reviewing and updating MPP related policies in light of Title 42 and COVID-19.

3. Most importantly, DHS and the Department of State (DOS) are holding diplomatic engagements with the Government of Mexico (GOM) and have already held several high-level meetings to advance negotiations related to restarting MPP. Because the U.S. Government cannot implement MPP without GOM's concurrence, these negotiations—which are ongoing—are critical.

4. Though the specific details of ongoing diplomatic engagements are sensitive, at this point GOM has not yet agreed to accept individuals returned to Mexico under the court-ordered restart of MPP. Prior to implementation, our two governments must reach agreement on a number of foundational matters, to include: the demographic make-up of individuals who can be returned to Mexico pursuant to MPP; in what circumstances and locations returns and reentry for court-related matters can occur; how many individuals can be enrolled in given locations; and what kind of support these individuals will receive while in Mexico. All of these topics, and others, are being actively discussed with the GOM.

5. DHS is not waiting for these negotiations to conclude, however, before taking steps to reimplement MPP. DHS has created an interagency task force comprised of the various DHS components involved in MPP as well as the Executive Office for Immigration Review (EOIR) at the Department of Justice (DOJ) and DOS. The task force is meeting regularly to quickly and efficiently rebuild the infrastructure and reapportion the staffing required to reimplement MPP.

6. The task force is, among other things, coordinating with EOIR regarding dockets and management of removal proceedings. Before individuals can be placed into MPP, they must be placed into removal proceedings, which is done by issuing the charging document (the notice to

appear) that ideally sets a hearing date. EOIR is, as a result, working to make space available on immigration court dockets to schedule hearings for individuals in MPP. These ongoing efforts will allow the government to be able to rapidly implement MPP once an agreement is reached with GOM.

7. Restarting MPP requires operational adjustments. DHS is taking steps to rebuild the infrastructure needed for MPP and redeploy resources as needed. Importantly, MPP requires space near the border to hold immigration court proceedings. Although there are some immigration courts near the border, under the previous iteration of MPP these were not sufficient to meet the program's needs. To supplement the existing courts, DHS utilized soft-sided Immigration Hearing Facilities (IHF) in Laredo and Brownsville, Texas. These IHFs, however, were largely dismantled and repurposed to facilitate processing at the ports of entry (POEs) when MPP was terminated. These IHFs now need to be restructured and rebuilt built to accommodate court proceedings, and these new facilities must be designed and constructed with robust mitigation measures for COVID-19. In addition, the POEs will need to find another space to process the migrants currently being processed in the repurposed facilities in order to not adversely impact POE operations.

8. DHS has identified funds to contract for the IHFs, which will cost approximately \$14.1 million to construct and \$10.5 million per month to operate. In line with the actions taken by the previous Administration, DHS plans to execute the contract for the IHFs as soon as an agreement is reached with GOM.¹ DHS estimates that once the contracting process has been completed the

¹ During the previous administration, the IHFs were not built until after the June 7, 2019 joint declaration between the U.S. Government and the Government Of Mexico. The June 7th agreement permitted further expansion of MPP.

building of the IHFs and the installation of necessary information technology will take approximately 30 days.

9. Among other efforts, the Task Force is reviewing MPP-related policies and procedures in light of two developments that were not at issue when MPP was initiated: first, the ongoing risk posed by COVID-19, and second, the continued role that DHS plays in enforcing the Center of Disease Control's (CDC's) Title 42 Order, which temporarily prohibits the entry of certain noncitizens traveling from Canada or Mexico into the United States. Both of these developments require updates to past protocols and practices, as well as updated guidance to the workforce.

10. The current COVID-19 pandemic greatly affects how MPP is reimplemented. In March 2020, immigration court proceedings were paused indefinitely because of COVID-19. DHS is currently reviewing the necessary and critical measures to be taken at each step of MPP processing to protect our officers, communities, and the migrants from the spread of COVID-19 (e.g., face coverings, social distancing, disinfecting, testing, vaccines, etc.). Given these protocols, DHS is evaluating how many people can safely be processed for court hearings on a daily basis, which will in turn affect the setting of court dates and issuance of the requisite Notices to Appear. These changed circumstances require updating of internal guidance and procedures, developing necessary health protocols, and putting plans in place to provide this updated information to third parties, including the noncitizens who will be placed into MPP. Lastly, as noted above, the IHF facilities must include COVID mitigation measures in their redesign.

11. In addition, when MPP was first implemented, DHS was not implementing the CDC's Title 42 public health order, which restricts the entry of non-citizens into the United States for public health reasons and takes precedence over the use of Title 8 authorities (such as expedited

removal or MPP returns) at the land border. DHS is actively assessing the interplay of this authority with the reimplementation of MPP and developing appropriate guidance to the field to clarify this interplay. Importantly, individuals who are subject to Title 42 will continue to be expelled when MPP is reimplemented. However, the Title 42 order has always included exceptions for humanitarian reasons, and DHS has been working with non-governmental partners to identify individuals who meet specified vulnerability criteria that merit such exceptions from Title 42. In other cases, individuals who are covered by Title 42 cannot be expelled because the GOM does not accept the return of certain nationalities or demographics at certain parts of the border. There is no guarantee that the GOM will accept via MPP those whom it has refused to allow to be expelled pursuant to Title 42.

12. Those individuals who are not covered by, are exempted from, or cannot be expelled pursuant to Title 42 are put into Title 8 removal proceedings.. DHS also has the discretion to place certain inadmissible noncitizens into expedited removal. DHS intends to continue the exercise of its pre-existing policies and practices as it continues to work in good faith to re-implement MPP.

13. These actions demonstrate that DHS has been working, and will continue to work, in good faith to reimplement the MPP, as required by the court's injunction.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief. Executed on this 15th day of September, 2021



Blas Nuñez-Neto
Vice Chair, Southwest Border Taskforce
Department of Homeland Security
Chief Operating Officer
U.S. Customs and Border Protection