

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-1212

DAVID PEKOSKE, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.,
PETITIONERS

v.

INNOVATION LAW LAB, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE PETITIONERS
TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE AND
TO REMOVE THE CASE FROM THE FEBRUARY 2021 ARGUMENT CALENDAR

Pursuant to Rule 21.1 of the Rules of this Court, the Acting Solicitor General, on behalf of petitioners, David Pekoske, Acting Secretary of Homeland Security, et al., provides this notice of recent agency action affecting this case, and respectfully moves to hold the briefing schedule in abeyance and to remove the case from the February 2021 argument calendar.¹ Petitioners' reply

¹ Acting Secretary Pekoske is substituted as a party for his predecessor in office. See Sup. Ct. R. 35.3. Other official-capacity parties have also been substituted for their predecessors, and several further substitutions are likely to

brief is currently due on February 16, 2021, and the case is currently scheduled for argument on March 1, 2021. We are authorized to represent that, in light of the current circumstances, respondents consent to petitioners' request to hold the briefing schedule in abeyance and to remove the case from the February 2021 argument calendar, without prejudice to either side requesting to have the case recalendared should the matter not be resolved.

1. This case concerns the Migrant Protection Protocols (MPP), a Department of Homeland Security (DHS) policy that, until January 21, 2021, was applied to certain nationals of foreign countries who had transited through Mexico from a third country to reach the United States land border. In promulgating MPP, DHS invoked the authority under 8 U.S.C. 1225(b)(2)(C) to return certain aliens temporarily to Mexico during the pendency of their removal proceedings.² DHS began processing aliens under MPP on January 28, 2019. Since then, the agency reports having returned approximately 68,700 individuals to Mexico under MPP. Some of them have had their removal proceedings resolved; some have

occur in the near future as current acting officials are succeeded by appointees.

² Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. See Department of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1965 n.3 (2020).

withdrawn their applications for relief or protection from removal; and others' removal proceedings are ongoing.

2. In February 2019, respondents -- 11 aliens who were returned to Mexico under MPP and six organizations that provide legal services to migrants -- brought this suit in the Northern District of California challenging MPP on various grounds and seeking a preliminary injunction. In April 2019, the district court issued a preliminary injunction, without any geographical limits, that barred DHS from "continuing to implement or expand" MPP, and ordered that the individual plaintiffs be allowed to enter the United States. Pet. App. 83a; see id. at 48a-83a. On appeal, the court of appeals affirmed the district court's injunction. Id. at 1a-47a. The court of appeals stayed the injunction "insofar as it operate[d] outside" the boundaries of the Ninth Circuit, but otherwise denied a stay pending further proceedings. Id. at 93a; see id. at 84a-94a.

This Court then stayed the district court's injunction in full pending the timely filing and disposition of a petition for a writ of certiorari. 140 S. Ct. 1564. The government filed the petition for a writ of certiorari on April 10, 2020, and the Court granted the petition on October 19, 2020.

3. On January 20, 2021, Acting Secretary Pecoske issued a memorandum directing that, effective on January 21, 2021, DHS would "suspend new enrollments in [MPP], pending further review of the

program.” App., infra, 1a. He further directed that “[a]liens who are not already enrolled in MPP should be processed under other existing legal authorities.” Ibid. When DHS announced the Acting Secretary’s decision, it also explained that “current COVID-19 non-essential travel restrictions, both at the border and in the region, remain in place,” and “[a]ll current [MPP] participants should remain where they are, pending further official information.” Department of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), <https://go.usa.gov/xAFRE>.

4. In light of these recent developments, petitioners respectfully request that the Court hold further briefing in abeyance and remove this case from the February 2021 argument calendar. The government’s reply brief is currently due on February 16, 2021, and the case is currently scheduled for argument on March 1, 2021. Given DHS’s suspension of new enrollments in MPP and its current review of the program, it would be appropriate for the Court to hold further proceedings in this case in abeyance to allow for the completion of that review.

5. We have consulted with counsel for respondents, who have informed us that in light of the current circumstances, respondents consent to petitioners’ request to hold the briefing schedule in abeyance and to remove the case from the February 2021 argument calendar, without prejudice to either side requesting to have the

case recalendared should the matter not be resolved. If this motion is granted, we will advise the Court of material developments that would support further action by the Court.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

FEBRUARY 2021

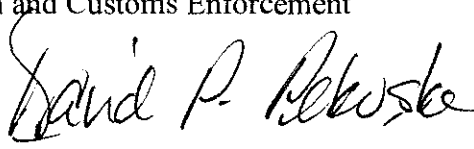


Homeland Security

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.