

November 19, 2021

The Honorable Merrick B. Garland  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

The Honorable Alejandro Mayorkas  
Secretary  
U.S. Department of Homeland Security  
3801 Nebraska Avenue, NW  
Washington, DC 20016

Re: Biden Administration Poised to Violate the *Orantes* Injunction with the Restart of the Migrant Protection Protocols

Dear Attorney General Garland and Secretary Mayorkas,

I write to enclose a letter to your counsel in *Orantes-Hernandez*, along with the [modified and consolidated version of the Injunction](#) that remains in place to protect access to asylum for citizens and nationals of El Salvador who come into the custody of U.S. immigration officials and wish to apply for asylum. The National Immigration Law Center (NILC) represents the class in this matter, along with the ACLU Immigrants' Rights Project and the ACLU of Southern California.

As you are aware, the prior administration mounted an unrelenting attack on our nation's asylum system and on vulnerable individuals and families fleeing persecution, particularly those who sought protection at our southern border. A centerpiece of this attack was the "Remain in Mexico" policy, also known as the "Migrant Protection Protocols" or "MPP." MPP was designed to deter asylum seekers from requesting protection at our border by forcing them to live in squalid conditions and face unrelenting danger in Mexico while waiting for their U.S. immigration court hearings. Human rights organizations [documented](#) over 1,500 publicly reported cases of violent attacks against people returned to Mexico under MPP, including *Orantes* class members who suffered harms as severe as gang rapes and even [murder](#). The available data unquestionably understates the extent of the violence visited upon vulnerable asylum seekers forced to remain in Mexico given barriers to reporting and the shift to "Title 42" expulsions, which have been [subjected several thousands](#) more to grave harm.

In 2020, then-candidate Biden [promised](#) that if elected President, he would end MPP in the first 100 days and "restore our asylum laws so that they do what they should be designed to do – protect people fleeing persecution." A diverse, multigenerational coalition of voters responded, delivering a clear mandate to the now-Biden administration to reject the previous administration's hateful and divisive agenda. President Biden announced historic executive actions on Day One, pledging to undo the harms of the previous administration. Included in these announcements was the [immediate suspension](#) all new MPP enrollments, a critical first step toward addressing the ongoing harm caused by MPP. The administration then [commenced](#) a "wind down," which gave access to the asylum application process for some in MPP who had been denied that access, and on June 1, Secretary Mayorkas [formally terminated](#) MPP. Although the wind down was limited and did not nearly address the full scope of MPP's harms, we had been hopeful that phases to come would eventually reopen proceedings for all impacted *Orantes* class members and others whom MPP denied a full and fair opportunity to present claims for humanitarian protection.

That hope faded quickly and graver concerns began to emerge when it was [reported](#) that the administration intended to reinstitute MPP, even before the district court in *Texas v. Biden* [ruled](#) the June 1, 2021 memorandum terminating MPP to have been legally insufficient. The administration's response to the order in that case took these concerns to a level we never would have imagined possible with the Biden administration.

Earlier this week, DHS [stated](#) that the MPP "reimplementation will begin within the coming weeks." The October 29, 2021 [Memorandum](#) re-terminating MPP and the accompanying [Explanation of the Decision to Terminate the Migrant Protection Protocols](#) make clear what was already well established – MPP forced its victims into dangerous, life-threatening, unstable, unhealthy, dehumanizing, and ultimately unlawful circumstances. These dangers, as well as other flaws of MPP that are endemic to its design stand in direct contravention to the *Orantes* Injunction's bar on coercing Salvadoran nationals to abandon their asylum claims and requirements to ensure Salvadoran nationals have access to counsel. No measure of changes to the policy can cure those flaws. If reinstated, MPP thus will inevitably violate multiple provisions of the longstanding *Orantes* Injunction.

Despite your own considered analysis and conclusion that MPP imposed unacceptable conditions that denied access to counsel and to proceedings themselves, and further that it is not possible to fix MPP, the administration is poised to re-start the very policy and practices that it so fervently denounced when administered by the Trump administration. Put simply, there is no excuse for this renunciation and abdication on the part of the Biden administration.

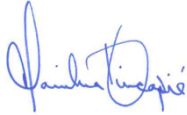
While appreciating the need to comply with the Texas district court order, nothing in that court's order purports to excuse the Government from the pre-existing *Orantes* Injunction. Moreover, nothing in the order requires halting the MPP wind down or confining the wind down's scope to the first two phases. And nothing in the court's order requires that this administration embrace the cruel, inhumane, illegal, and, in too many instances, deadly facets of the prior administration's implementation of MPP. While not bound to do any of this, the administration now appears to be committing itself to a path of violating the *Orantes* Injunction in addition to a host of other laws. These violations will be perpetrated on your watch, against the administration's own stated principles.

To be clear, while violating law specific to *Orantes* class members, MPP is unlawful, inhumane, and immoral as applied to any individual seeking asylum in the United States, and we implore you to halt the rush to stand back up a policy that will inevitably lead to more deaths, sexual assaults, and kidnapping and that will further turn this country's back on law and morality. Moreover, continued, unsupportable reliance on the [widely discredited](#) Title 42 expulsion policy is no different – the danger, instability, and denial of counsel, due process, and humanitarian protection does not hinge on which of these two unlawful anti-asylum policies is applied in a given case. It is past time for the administration to abandon failed and deadly deterrence policies. All who seek humanitarian protection deserve the access to the asylum system, free of the threats, coercion, and impeded access to counsel that the *Orantes* Injunction forbids.

I look forward to receiving your response prior to any restart of MPP and any application of such to any class member. I am available in the interim to speak with you regarding the grave policy concerns and implications your decisions pose, and the signatories to the enclosed letter to Ms. Fabian are available to address any aspects of the litigation and related matters raised in that letter.

Thank you for your attention to this serious matter.

Respectfully,



Marielena Hincapié, Esq.  
Executive Director  
National Immigration Law Center

cc: Ambassador Susan Rice, Domestic Policy Council  
Esther Olavarria, Domestic Policy Council  
Advisor Jake Sullivan, National Security Council  
Tyler Moran, National Security Council  
Liz Sherwood-Randall, Homeland Security Advisor  
Dana Remus, White House Counsel  
Jennifer Sokoler, White House Counsel  
Sarah B. Fabian, Department of Justice Office of Immigration Litigation