No. 20-55279

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTIAN DOE et al.,

Petitioners-Appellees,

v.

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

Respondents-Appellants.

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND TO STAY ISSUANCE OF THE MANDATE PERTAINING TO JULY 19 ORDER

Appeal from the United States District Court
For the Southern District of California
D.C. No. 19-cv-02119-DMS-AGS
(Honorable Dana M. Sabraw)

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INTRODUCTION

On the undisputed facts, the premise of this Court's July 19 Order no longer exists, and this appeal is not moot. The government is "currently taking steps necessary to reimplement MPP" in compliance with the Texas injunction. Response at 3. This factual development, which Petitioners-Appellees stated "with particularity" in their motion, undermines the facts underlying this Court's July 19 Order and thus warrants reconsideration. 9th Cir. R. 27-10(a)(3). Given "the flexible character of the Art. III mootness doctrine," *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980), this Court retains "constitutional authority" to decide the appeal, Response at 4, because the government is resuming the program that underlies the injunction at issue. In these circumstances, the impending resumption of MPP is not at all "too speculative to overcome mootness" and ensure the issues in this appeal remain justiciable. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

Nothing argued by the government demonstrates otherwise. The district court's order vacating the preliminary injunction is null and void because it was entered before this Court's mandate issued. Although MPP as reinstated may not yet be fully operational, the government does not dispute MPP necessarily includes *nonrefoulement* interviews for which access to counsel is guaranteed by the injunction. Any changes in policy or practice regarding access to counsel during the

appeal represent nothing more than required compliance with the injunction, which cannot moot the appeal. As a result, this Court should grant the motion for reconsideration and proceed with deciding the appeal.

I. The District Court's Order Vacating the Preliminary Injunction Remains Null and Void Because It Was Entered Before this Court's Mandate Issued.

The government agrees "the district court vacated the injunction before this Court's mandate issued." Response at 4. It nonetheless urges this Court to ignore black letter law that the district court's order is null and void for lack of jurisdiction.

> When a proper notice of appeal has been timely filed, the general rule is that jurisdiction over any matters involved in the appeal is immediately transferred from the district court to the court of appeals. The district court is divested of authority to proceed further with respect to such matters, except in aid of the appeal, or to correct clerical mistakes, or in aid of execution of a judgment that has not been superseded, until the mandate has been issued by the court of appeals.

Matter of Thorp, 655 F.2d 997, 998 (9th Cir. 1981) (cleaned up). In particular, "[a] district court lacks jurisdiction to modify an injunction once it has been appealed except to maintain the status quo among the parties." *Prudential Real Est. Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000).

Only "issuance of the mandate" returns jurisdiction to the district court to vacate an injunction that has been appealed. *Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990). Otherwise, the court is "without authority to

proceed … with respect to the matters" at issue on appeal, and any actions taken on such matters before the mandate issues are "a nullity." *Thorp*, 655 F.2d at 999.

The mandate rule is no meaningless formality. The time provided for issuance of the mandate is intrinsic to the quality and legitimacy of appellate decisions:

> No opinion of this circuit becomes final until the mandate issues…. Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel at the request of the parties pursuant to a petition for panel rehearing, in response to an internal memorandum from another member of the court who believes that some part of the published opinion is in error, or *sua sponte* by the panel itself…. [This] collaborative process strengthens, not weakens, the final quality of those opinions, thereby better enabling them to stand the test of time, and engender the respect of thoughtful citizens for both the opinion, and the court that produced it.

Carver v. Lehman, 558 F.3d 869, 878–79 (9th Cir. 2009); *see also Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004) ("Until the mandate issues, we retain jurisdiction, and we are capable of modifying or rescinding today's opinion.") (internal citations omitted).

Before the mandate issues, any order of this Court remains subject to modification or rescission based on "[c]hanges in legal or factual circumstances" identified by timely motion. 9th Cir. R. 27-10(a)(3). Within the time for seeking to reconsider the July 19 Order, the Texas injunction undermined its premise. That kind of eventuality is precisely why this Court reserves power to reconsider its orders based on new "[f]actual developments." Response at 4. It would unjustifiably elevate form over substance to say this Court may not reconsider the July 19 Order when

the factual premise for that order no longer exists. *Cf. Perry v. Brown*, 667 F.3d 1078, 1086 (9th Cir. 2012) ("As a case progresses and circumstances change, a court may sometimes properly revise a prior exercise of its discretion.").

This motion does not present any question of "reviving the appeal." Response at 4. Because the mandate did not issue, the appeal never concluded. "[U]ntil a mandate is issued, a case is not closed. The jurisdiction of the court of appeals does not terminate until issuance of the mandate." *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990) (cleaned up). "The legitimacy of an expectation of finality of an appellate order depends on the issuance or not of the mandate required to enforce the order," because a "court of appeals may modify or revoke its judgment at any time prior to issuance of the mandate, sua sponte or by motion of the parties. Thus, finality of an appellate order hinges on the mandate, as does a defendant's expectation of finality." *Id.*

When the district court vacated the injunction, the July 19 Order was not final because the mandate had not issued. As a result, the government had no legitimate expectation of finality in that order, and the district court lacked jurisdiction to vacate the injunction.

II. This Appeal is Not Moot Merely Because the Reinstated MPP Is Ramping Up or the Government Has Complied In Part or Whole with the Injunction.

Despite admitting that it is reinstating MPP, the government makes two attempts to suggest the appeal is moot, both of which founder on settled precedent.

First, the government contends the issues are not "live" because "MPP is not yet operational." Response at 3–4. Given the flexible nature of mootness doctrine, that contention is meritless. An appeal does not become moot merely because the practices at issue have been suspended as long as those practices may be resumed. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287–88 (2000) (holding closure of business "is not sufficient to render this case moot" because plaintiff "is still incorporated" and "could again decide to operate a nude dancing establishment"); *Clark v. City of Lakewood*, 259 F.3d 996, 1012 (9th Cir. 2001) (holding closure of plaintiff's business due to lapsed license did not moot appeal where plaintiff's "stated intention is to return to business" and new license application "is not an insurmountable barrier"). *cf. S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128 1133–34 (9th Cir. 2004) (holding dispute was not moot although plaintiff had "not applied for a mass gathering permit, or engaged in any other preparations for a mass gathering" for eight years, where plaintiff had not "ceased to exist" and it sought "to hold another gathering").

Those decisions destroy the government's position. Indeed, this case presents an even stronger argument against mootness because the government has been expressly ordered to reinstate MPP and is "making good faith efforts to restart the program." Response at 6. The government recently outlined the extensive efforts currently underway, including diplomacy with the government of Mexico to enlist its cooperation in implementing MPP, "rebuilding infrastructure and reorganizing resources" that are "necessary to operate MPP" along the southwest border, coordinating to make space for MPP cases in the immigration courts, and otherwise planning to operationalize MPP. *Texas v. Biden,* Notice of Compliance with Injunction, No. 2:21-CV-067-Z (N.D. Tex. Sept. 15, 2021).

In these circumstances, no "speculation" is needed to see the dispute over access to counsel remains an "ongoing controversy," especially where the government does not dispute that MPP remains subject to *nonrefoulement* obligations and *nonrefoulement* interviews remain intrinsic to MPP. Response at 4, 6. Accordingly, this appeal is not moot because it is not "absolutely clear" that class members "no longer [have] any need of the judicial protection" guaranteed by the preliminary injunction. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000).

The government reverses the burden of proof by suggesting Petitioners-Appellees must now "satisfy the requirements for a preliminary injunction based on

current circumstances." Response at 6. "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result…. Bearing the initial burden of establishing jurisdiction is different from establishing that it has disappeared." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 & n.20 (1993). If the government believes future developments might "further affect the issues in this case," Response at 6, it may bring those matters before the Court by appropriate future motion, but at present it cannot sustain its "heavy burden to establish mootness." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 894 F.3d 1005, 1011 (9th Cir. 2018).

Second, the government mistakenly suggests the appeal is moot because during the appeal it "amended its policy guidance implementing MPP to provide greater access to counsel." Response at 5. The amended policy says only that counsel may "participate telephonically" in *nonrefoulement* interviews as long as such participation "does not delay the interview." *Id.* Assuming the amendment is an attempt to comply with the command to provide "telephonic access to counsel during the *nonrefoulement* interviews," which is questionable, it does not address the requirement that "class members are entitled to in-person access to retained counsel prior to their *nonrefoulement* interviews." ER 20. At best, the amended policy

represents partial and conditional compliance with the injunction that cannot moot the appeal.

Even full compliance cannot moot the appeal. "Compliance is just what the law expects." *S.E.C. v. Worthen*, 98 F.3d 480, 482 (9th Cir. 1996). The government may have "complied with the preliminary injunction, but mere compliance with the law does not moot injunctive relief." *Disney Enterprises, Inc. v. VidAngel Inc.*, No. CV 16-04109-AB (PLAx), 2019 WL 4565168, at *1 (C.D. Cal. Sept. 5, 2019), *appeal dismissed,* No. 19-56174, 2020 WL 5959676 (9th Cir. Sept. 30, 2020); *cf. Friends of the Earth*, 528 U.S. at 189 ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."). The government opposed the preliminary injunction in the district court, contests it on appeal, and would presumably resume the challenged conduct absent the injunction. As a result, any compliance with the injunction cannot moot this appeal. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1117 n.5 (10th Cir. 2012) ("[A] party's attempt to comply with a court order does not moot an appeal from that order," and "a party's vigorous defense of an enjoined law counsels against concluding that a case is moot.").

Now that the government is reinstating MPP, it would waste this Court's substantial investment of resources and impose unnecessary burdens on the district court to dismiss the appeal and force the parties to relitigate the preliminary

injunction, which would likely result in another appeal imposing additional burdens on this Court. In these circumstances, where the appeal has been briefed and argued and the action has been pending almost two years, to "abandon the case" at this "advanced stage" would "prove more wasteful than frugal." *Friends of the Earth*, 528 U.S. at 192. Accordingly, the Court should grant the motion for reconsideration and proceed with the appeal.

CONCLUSION

For the foregoing reasons, Petitioners-Appellees respectfully request that the Court grant the relief requested in their Motion for Reconsideration.

Respectfully submitted,

/s/ Monika Y. Langarica
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Counsel for Petitioners-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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