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.

APPELLEES' BRIEF PURSUANT TO ORDER OF JUNE 22, 2021

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)

MONIKA Y. LANGARICA
JONATHAN MARKOVITZ
BARDIS VAKILI
DAVID LOY
ACLU FOUNDATION OF SAN DIEGO
& IMPERIAL COUNTIES
P.O. Box 87131
San Diego, California 92138-7131
Telephone: 619.398.4485
Counsel for Petitioners-Appellees

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Unlike *Innovation Law Lab*, the injunction at issue here is not clearly moot. It continues to protect people previously forced into Mexico who fear persecution or torture and are entitled to non-*refoulement* interviews in which the injunction guarantees their right to counsel. If necessary, this Court may remand for limited factfinding on the issue of mootness, but the current record does not permit the Court to dismiss the appeal as moot or vacate the injunction.

A. The Party Asserting Mootness Must Prove It Is Impossible for the Court to Provide Effective Relief.

A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," which occurs "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). "[A] case is not moot if *any* effective relief may be granted." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc). The "doctrine of mootness is more flexible than other strands of justiciability doctrine." *Id*. Even if a court is not "able to return the parties to the status quo ante ... an appeal is not moot if the court can fashion some form of meaningful relief." *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1000 (9th Cir. 2004).

"The party asserting mootness bears the burden of establishing that there is no effective relief remaining that the court could provide." *S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1134 (9th Cir. 2004). That is "a heavy burden of

persuasion." *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1159 (9th Cir. 2002). Accordingly, should they assert it, Defendants would "bear the burden to establish that relief is not simply unlikely or conjectural but impossible." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 894 F.3d 1005, 1011 (9th Cir. 2018). On the current record, it is not "impossible" that the preliminary injunction in this case can protect future class members. *Id.*

B. The Preliminary Injunction in This Case Is Not Moot.

In *Innovation Law Lab* ("*ILL*"), the Supreme Court vacated the judgment and remanded with instructions to direct the district court to vacate as moot the order granting a preliminary injunction. *Mayorkas v. Innovation L. Lab*, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021). Unlike in that case, the preliminary injunction here is not moot because it may continue to provide "effective relief" to future class members. *S. Oregon Barter Fair*, 372 F.3d at 1134. In *ILL*, the government moved to vacate the judgment because of the Department of Homeland Security ("DHS") "Secretary's decision to terminate [the Migrant Protection Protocols] program and rescind the policy memoranda, along with his unequivocal statement that the agency has no intention of resuming [the Migrant Protection Protocols]." Petitioners' Suggestion of Mootness and Mot. to Vacate, *Innovation L. Lab*, No. 19-1212, 2021 WL 2520313 (U.S. June 1, 2021) ("*ILL* Gov't Mot.") at *10. The government argued those developments mooted the preliminary injunction,

id., which was based in part on claims that DHS's implementation of the so-called Migrant Protection Protocols ("MPP") was unlawful and caused irreparable harm, *Innovation L. Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1114 (N.D. Cal. 2019).

The Supreme Court's decision to vacate the injunction in *ILL* has no bearing on this case because the two injunctions implicate distinct issues; in *ILL*, the plaintiffs argued that MPP itself is unlawful, whereas Petitioners-Appellees here argue that people already forced into MPP are entitled to the right of access to retained counsel in non-*refoulement* interviews.[1] *Id.*; ER 1. As the plaintiffs in *ILL* stated, "[t]he preliminary injunction enjoined and restrained [the government] from continuing to implement or expand [MPP]" but it "did not require the government to return or provide any other relief to those already placed in MPP and returned to Mexico." Respondents' Opposition to Petitioners' Mot. To Vacate, *Innovation L. Lab*, No. 19-1212, 2021 WL 2520313 (U.S. June 11, 2021) ("Opp. to *ILL* Gov't Mot.") at *3. Here, the injunction protects people who have already been forced into MPP and returned to Mexico.

Moreover, the President has directed DHS to undertake a "phased strategy for the safe and orderly entry into the United States of persons previously subjected to MPP for further processing[.]" *ILL* Gov't Mot. at 11. That process is incomplete;

[1] Non-*refoulement* interviews adjudicate whether the harm that persons in MPP fear in Mexico renders them subject to persecution or torture such that they should be removed from MPP and allowed into the United States. SER 8.

thousands of people remain in Mexico pursuant to MPP awaiting processing into the United States.[2] Therefore, DHS's decision to terminate MPP going forward does not moot the preliminary injunction in this case because even if DHS has terminated prospective implementation of MPP, there are people who remain in Mexico pursuant to the program who may seek non-*refoulement* interviews and stand to benefit from the injunction. Unlike in *ILL* where the plaintiffs agreed they had "no interest in the preliminary injunction" now that MPP has been terminated, Opp. to *ILL* Gov't Mot. at 3, here, the government cannot meet its heavy burden of establishing "that there is no effective relief remaining that the court could provide." *S. Oregon Barter Fair v. Jackson County*, 372 F.3d at 1134.

C. Vacatur Is Not Appropriate, but if Necessary, the Court May Remand for Limited Factfinding.

Vacatur is not appropriate in this case because the government cannot carry its heavy burden to prove mootness where it is more than "simply unlikely or

[2] DHS has begun processing into the United States some people previously enrolled in MPP, allowing about 11,000 people with open cases into the country so far. DHS expanded processing to include people who were ordered deported under MPP without being present in court on June 23, 2021. The expanded criteria reportedly impacts at least "nearly 28,000" people. Media Release, U.S. Dep't Of Homeland Sec., *DHS Announces Expanded Criteria for MPP-Enrolled Individuals Who Are Eligible for Processing into the United States* (June 23, 2021), https://www.dhs.gov/news/2021/06/23/dhs-announces-expanded-criteria-mpp-enrolled-individuals-who-are-eligible-processing; Hamed Aleaziz, *Biden Is Expanding A Plan To Bring Back Asylum-Seekers Who Were Forced To Wait In Dangerous Mexican Border Towns,* Buzzfeed News (June 22, 2021), https://www.buzzfeednews.com/article/hamedaleaziz/biden-asylum-seekers-mpp-mexico.

conjectural" that future class members could benefit from relief under the preliminary injunction, which will be the case as long as there are people who remain in Mexico pursuant to MPP. *Ctr. for Biological Diversity*, 894 F.3d at 1011. Indeed, even after January 21, 2021, when DHS first suspended the program and stopped enrolling new individuals, at least one non-*refoulement* interview has taken place along the California-Mexico border, in which two class members benefitted from the preliminary injunction.[3] Ex. A, Mot. Supp. Rec. If there are material fact issues going to mootness, this Court may remand for limited factfinding on that point. *See United States v. Dharni*, 757 F.3d 1002, 1003 (9th Cir. 2014) (retaining jurisdiction and remanding for limited purpose of "allowing the parties to supplement the record" and "permitting the district court to make findings of fact"). But the current record does not allow the Court to hold as a matter of law that the injunction is moot.

CONCLUSION

For the foregoing reasons, the Court should retain jurisdiction over the appeal and if necessary, remand for limited factfinding on the issue of mootness.

Respectfully submitted,
/s/ Monika Y. Langarica
Monika Y. Langarica
Counsel for Petitioners-Appellees

[3] David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, U.S. Dep't Of Homeland Sec. (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 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,

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