

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.

**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)

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

Pursuant to Ninth Circuit Rule 27-10, Petitioners-Appellees move this court to reconsider and vacate its July 19, 2021 order remanding the appeal with instructions to vacate the preliminary injunction as moot (“July 19 Order”). The premise of that order no longer exists because the government has since been ordered to reimplement the Migrant Protection Protocols (“MPP”), and therefore the preliminary injunction is no longer moot.¹ The district court also prematurely vacated the preliminary injunction before this Court’s mandate issued. The Court is therefore requested to vacate the July 19 Order and direct the district court to reinstate the preliminary injunction. Petitioners-Appellees further request this Court stay issuance of the mandate pertaining to the July 19 Order pending its consideration of the Motion for Reconsideration. Petitioners-Appellees timely file this motion within 45 days of the July 19 Order. 9th Cir. R. 27-10(a)(1); Fed. R. App. P. 40(a)(1).²

¹ This request is brought as a Motion for Reconsideration because it is based on facts that occurred after the July 19 Order. *Armster v. U.S. Dist. Ct.*, 806 F.2d 1347, 1356–57 (9th Cir. 1986) (“Consideration of subsequent factual occurrences is, thus, beyond the scope of a petition for rehearing.”) (internal citations omitted); *see also* Rutter Group Prac. Guide Fed. Ninth Cir. Civ. App. Prac., § 6:620 (“Appeals or motions disposed of by an ‘order’ are subject to reconsideration or reconsideration en banc via Circuit Rule 27-10.”). Petitioners-Appellees respectfully request that the Court construe this filing as a Petition for Rehearing if the Court so prefers.

² On August 31, 2021, Counsel for Respondents-Appellants informed undersigned counsel that they take no position on this motion.

I. This Court Should Reconsider and Vacate the July 19 Order Because Changed Circumstances Render the Preliminary Injunction No Longer Moot.

Motions for reconsideration must state “with particularity” “[c]hanges in legal or factual circumstances which may entitle the movant to relief.” 9th Cir. R. 27-10(a)(3). Here, the operative facts materially changed after the July 19 Order, because the Department of Homeland Security (“DHS”) is reimplementing MPP as directed by an injunction that has not been stayed. Those changes undermine the premise of this Court’s mootness finding and entitle Petitioners-Appellees to reconsideration.

On July 19, 2021 this Court remanded the appeal to the district court with instructions to vacate the preliminary injunction at issue as moot based on the Memorandum from Alejandro N. Mayorkas regarding Termination of the Migrant Protection Protocols Program (June 1, 2021), available at <https://go.usa.gov/x6s7E>. (“June 1 MPP Termination Memo”), and the Supreme Court’s subsequent order in *Mayorkas v. Innovation L. Lab*, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021) vacating the judgment and remanding with instructions to vacate as moot the preliminary injunction in that case. July 19 Order. This Court concluded that “[b]ecause the Supreme Court decided that a challenge to the MPP as a whole was moot after the government terminated the program ... the narrower question presented in this appeal is also moot.” *Id.* at 2.

The premise of the July 19 Order was that the government had terminated MPP. That premise no longer exists because DHS has been enjoined from implementing the June 1 MPP Termination Memo and has announced that it is reimplementing MPP in compliance with court orders. On August 13, the district court for the Northern District of Texas “permanently enjoined and restrained” the government “from implementing or enforcing the June 1 [MPP Termination] Memorandum” and it further ordered the government

to enforce and implement MPP *in good faith* until such time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens *because of* a lack of detention resources.

Texas v. Biden, No. 2:21-CV-067-Z, 2021 WL 3603341, at *27 (N.D. Tex. Aug. 13, 2021). On August 19, the Fifth Circuit declined to stay that order pending the government’s appeal. *Texas v. Biden*, No. 21-10806, 2021 WL 3674780 (5th Cir. Aug. 19, 2021). On August 24, the Supreme Court, after granting a brief administrative stay, also declined to stay the district court order pending the government’s appeal. *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021); *Biden v. Texas*, No. 21A21, 2021 WL 3702101 (U.S. Aug. 20, 2021). On August 24, DHS issued a statement confirming that while its appeal is pending, “DHS will comply with the order in good faith.” U.S. Dep’t of Homeland Sec., *DHS Statement on Supreme Court Decision on MPP* (Aug. 24, 2021),

<https://www.dhs.gov/news/2021/08/24/dhs-statement-supreme-court-decision-mpp>.

In light of the court orders and DHS’s statement confirming its intent to re-implement MPP, the government can no longer carry its heavy burden to prove the injunction in this case is moot. Since the government is now reimplementing MPP, it is not “unlikely or conjectural” that future class members could benefit from relief under the preliminary injunction granting access to counsel for individuals subject to MPP *nonrefoulement* procedures. *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 894 F.3d 1005, 1011 (9th Cir. 2018). It is also no longer the case that “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome,” because class members stand to benefit from access to counsel in MPP *nonrefoulement* interviews as ordered by the preliminary injunction. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Moreover, the government can no longer prove “that there is no effective relief remaining that the court could provide” where MPP *nonrefoulement* interviews could take place at any moment. *S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1134 (9th Cir. 2004). In these circumstances, it is not “absolutely clear” that class members “no longer [have] any need of the judicial protection that [they] sought” and obtained from the district court. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). Thus, as a matter of law, the preliminary injunction is no longer moot. Because of these

“changes in legal or factual circumstances,” the Court should grant this Motion for Reconsideration and vacate the July 19 Order.³ 9th Cir. R. 27-10(a)(1).

II. This Court Should Instruct the District Court to Vacate its July 30 Order Vacating the Preliminary Injunction Because the Injunction Is No Longer Moot and this Court’s Mandate Has Not Yet Issued.

Jointly with their Motion for Reconsideration, Petitioners-Appellees request that this Court direct the district court to vacate its July 30 order vacating the preliminary injunction. In addition to the injunction no longer being moot, the district court vacated the injunction prematurely and without jurisdiction to do so, because it acted before this Court’s mandate issued. Fed. R. App. P. 41(b); *Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990) (holding jurisdiction returns to the district court after issuance of the mandate). Since the Court did not direct otherwise, the mandate pertaining to the July 19 Order does not issue until 52 days after that order. Fed. R. App. P. 41(b) (mandate issues no earlier than 7 days after time to seek rehearing expires); Fed. R. App. P. 41(a)(1) (party has 45 days to seek rehearing in case against federal government); 9th Cir. R. 27-10(a)(1) (“A party seeking further consideration of an order that disposes of the entire case on the merits, terminates a case, or otherwise concludes the proceedings

³ Should the government wish to assert mootness based on hypothetical future changes to MPP or any underlying policy that impacts MPP *nonrefoulement* procedures, it would be free to do so in a later motion, but that issue is not currently before the Court.

in this Court must comply with the time limits of FRAP 40(a)(1).”). Because the mandate had not yet issued, this Court’s July 19 Order was subject to reconsideration, and the district court acted prematurely in vacating the injunction. *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 ... finality of an appellate order hinges on the mandate[.]”) (internal citations and quotations omitted). If necessary, Petitioners-Appellees additionally request that this Court stay the mandate pertaining to the July 19 Order while it decides this motion.

CONCLUSION

For the foregoing reasons, Petitioners-Appellees respectfully request the Court grant their Motion for Reconsideration, vacate the July 19 Order, direct the district court to vacate its July 30 order vacating the preliminary injunction, and retain jurisdiction of the appeal. Petitioners-Appellees further request this Court stay the mandate pertaining to its July 19 Order pending consideration of the Motion for Reconsideration.

Respectfully submitted,

/s/ *Monika Y. Langarica*

Monika Y. Langarica

Counsel for Petitioners-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 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