No. 20-1554

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDRES OSWALDO BOLLAT VASQUEZ, individually and as next friend to Luisa Marisol Vasquez Perez de Bollat, and as father and next friend to A.B.; A.B.; LUISA M. VASQUEZ PEREZ DE BOLLAT; JOSE M. URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA M. MARTINEZ DE URIAS; SALOME OLMOS LOPEZ, individually and as next friend to Evila Floridalma Colaj Olmos and J.C.; J.C.; EVILA F. COLAJ OLMOS

Plaintiffs-Appellees,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security; MARK A. MORGAN, Acting Commissioner of U.S. Customs & Border Protection; KENNETH T. CUCCINELLI, senior official in charge of U.S. Citizenship and Immigration Services; MATTHEW T. ALBENCE, senior official in charge of U.S. Immigration and Customs Enforcement; WILLIAM P. BARR, Attorney General; PRESIDENT DONALD J. TRUMP,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
No. 1:20-cv-10566
The Hon. Indira Talwani

APPELLANTS' NOTICE OF MOOTNESS AND MOTION TO VACATE THE PRELIMINARY INJUNCTION

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INTRODUCTION

Appellants-Defendants respectfully move this Court to vacate the May 14, 2020 decision and order and preliminary injunction that is the subject of this appeal.

This case concerns the Migrant Protection Protocols (MPP), a former Department of Homeland Security (DHS) policy that was previously 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 the Immigration and Nationality Act (INA) to return certain noncitizens temporarily to Mexico during the pendency of their removal proceedings. *See* 8 U.S.C. § 1225(b)(2)(C).

On May 14, 2020, the district court issued an order finding MPP unlawful and enjoining its application to Plaintiffs in this case. The government appealed. On November 2, 2020, following oral argument, this Court, on its own motion, placed this case in abeyance "[i]n view of the Supreme Court's recent grant of certiorari in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *cert. granted sub nom. Wolf, Sec. of Homeland, et al. v. Innovation Law Lab, et al.,* No. 19-1212 (Oct. 19, 2020), which appears to present arguments similar to some of the arguments raised in the present appeal." Order (11/2/20). Thereafter, on January 20, 2021, DHS announced that it would suspend "new enrollments" in

MPP pending further review of the program. *See* DHS Statement, *available at* https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program (last accessed June 1, 2021).

On June 1, 2021, the Secretary of Homeland Security announced that DHS had completed its review and terminated MPP effective immediately. The Secretary exercised his statutory discretion to determine whether to utilize the contiguous-territory-return authority in Section 1225(b)(2)(C), and concluded that MPP is not the best strategy for achieving the government's immigration-policy objectives and DHS's operational needs. *See* Mem. from Alejandro N. Mayorkas regarding Termination of the Migrant Protection Protocols Program (June 1, 2021), *available at* https://go.usa.gov/x6s7E. Later that day, in *Innovation Law Lab*, the government moved the Supreme Court to vacate the decision of the Ninth Circuit below and to remand with instructions for the court of appeals to vacate the district court's preliminary injunction, which formed the basis of the petition. *See* Government's Suggestion of Mootness and Motion to Vacate, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 1, 2021). On June 21, the Court granted that motion, issuing the following order: "The motion to vacate the judgment is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court

to vacate as moot the April 8, 2019 order granting a preliminary injunction. *See United States v. Munsingwear*, Inc., 340 U.S. 36 (1950)."

As a result of the Secretary's decision terminating MPP, Plaintiffs in this case no longer have any interest in defending the district court's preliminary injunction barring DHS from implementing MPP with respect to them, and the propriety of that injunction no longer presents a live case or controversy that the federal courts can resolve. Because that mootness will prevent review of the district court's erroneous preliminary injunction in this case, the government respectfully submits that this Court should, consistent with the Supreme Court's vacatur decision in *Innovation Law Lab*, vacate as moot the district court's order granting a preliminary injunction. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

BACKGROUND

1. The INA establishes procedures that DHS may use to process noncitizens who are "applicant[s] for admission" to the United States. 8 U.S.C. § 1225(a)(1).

Section 1225(b)(2)(A) provides that, if an "immigration officer determines" upon inspecting "an applicant for admission" that he "is not clearly and beyond a doubt entitled to be admitted," then the noncitizen "shall be detained for a proceeding under section 1229a" to determine whether he will be removed from

the United States or is entitled to some form of relief or protection from removal, such as asylum. 8 U.S.C. § 1225(b)(2)(A). As an alternative to a removal proceeding before an immigration judge under section 1229a, the INA authorizes an immigration officer to determine that a noncitizen is eligible for, and should be placed in, the "expedited removal" process described in Section 1225(b)(1). *See In re E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 521-524 (B.I.A. 2011); see *Department of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964-65 (2020) (explaining when expedited removal is available). When DHS chooses to place a noncitizen in expedited removal instead of a section 1229a removal proceeding, the person is typically removed from the United States "without further hearing or review," "unless [he] indicates either an intention to apply for asylum" or a fear of torture or persecution in the country to which he will be removed. 8 U.S.C. § 1225(b)(1)(A)(i); *see* 8 C.F.R. § 235.3(b)(4). If a person expresses such an intention or fear and an asylum officer or an immigration judge finds that he or she has a "credible fear" of persecution or torture, then the person "shall be detained" for further consideration" of his asylum request and placed in a removal proceeding under Section 1229a. 8 U.S.C. § 1225(b)(1)(B); *see* 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. §§ 208.30(f), 235.6(a)(1)(ii)-(iii), 1003.42(f).

In addition to the authorities described above authorizing DHS to detain applicants for admission who are not clearly entitled to admission during their

removal proceedings, the INA also authorizes DHS in certain circumstances to temporarily release applicants for admission into the interior. *See*, *e.g.*, 8 U.S.C. § 1182(d)(5)(A); 8 U.S.C. § 1226.

Another provision of Section 1225—the one most relevant here—provides DHS with a further option in certain instances: "In the case of an alien described in [Section 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C).[1]

2. In December 2018, then-Secretary Kirstjen Nielsen announced that DHS would "begin implementation of" the contiguous-territory-return authority in Section 1225(b)(2)(C) "on a wide-scale basis." 84 Fed. Reg. 6811 (Feb. 28, 2019). Secretary Nielsen issued policy guidance for implementing MPP on January 25, 2019. JA232-33.

Under MPP, it was DHS policy that certain "citizens and nationals of countries other than Mexico . . . arriving in the United States by land from Mexico—illegally or without proper documentation—may be returned to Mexico pursuant to" Section 1225(b)(2)(C) "for the duration of their Section [1229a]

[1] Section 1225 refers to the Attorney General, but those functions have been transferred to the Secretary of Homeland Security. *See Thuraissigiam*, 140 S. Ct. at 1965 n.3.

removal proceedings." *Id*. If a noncitizen was amenable for return to Mexico under MPP and an immigration officer determined that MPP should be applied, the person would be "issued a[] Notice to Appear (NTA) and placed into Section [1229a] removal proceedings," and then returned to Mexico to await those proceedings. *Id.* Secretary Nielsen also instructed, however, based on non-refoulement principles, that a noncitizen "should not be involuntarily returned to Mexico pursuant to Section [1225(b)(2)(C)] . . . if the alien would more likely than not be" tortured in Mexico or persecuted there on account of a protected ground (race, religion, nationality, membership in a particular social group, or political opinion). JA233; *see also* JA203-04. Secretary Nielsen explained that the government had adopted MPP after diplomatic engagement with the Government of Mexico. *Id.*

3. In March 2020, Plaintiffs brought this suit in the District of Massachusetts challenging MPP on various grounds and seeking a preliminary injunction. *See* JA50-85. Plaintiffs are five applicants for admission who were returned to Mexico under MPP after being apprehended very soon after illegally crossing the southern border without inspection. A61; JA31.

In May 2020, the district court concluded that MPP was unlawful on two grounds, and it granted Plaintiffs' motion for a preliminary injunction that barred DHS from continuing to apply MPP to Plaintiffs and ordered that Plaintiffs be

allowed to enter the United States to pursue their applications for admission. Op. 14-18. The government complied—all Plaintiffs have been in the United States for months. The government appealed, and this Court held oral argument in October 2020. Thereafter, the Supreme Court granted a writ of certiorari to the Ninth Circuit in *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), *cert. granted sub nom. Wolf, Sec. of Homeland, et al. v. Innovation Law Lab, et al.*, No. 19-1212 (Oct. 19, 2020), which also involved an appeal of a preliminary injunction against MPP. This Court on its own motion issued an order observing that *Innovation Law Lab* "appears to present arguments similar to some of the arguments raised in the present appeal," and stating that the Court would therefore "hold this appeal in abeyance pending the Supreme Court's adjudication of *Innovation Law Lab*. The parties are directed to inform the Clerk of this court when *Innovation Law Lab* has been decided (or when the proceedings now pending in the Supreme Court otherwise have been terminated) and indicate at that time whether they believe further briefing is necessary." Order (11/2/2020).

Plaintiffs amended their complaint in December 2020, after this Court's stay of appellate proceedings, to add several new Plaintiffs, Dkt. 73, and sought a second preliminary injunction raising the same arguments they had raised in their first motion. Dkt. 77. On February 13, 2021, the district court issued another injunction, relying on only one of the two statutory conclusions that it had reached

in its first order. Dkt. 96 at 22-27; *see also* Dkt. 96 at 20-22 (acknowledging that the Court's prior ruling was not clearly correct in light of intervening case law). The government did not appeal the second preliminary injunction because this Court's disposition of this appeal would be dispositive of the correctness of the second injunction.

4. Upon President Biden taking office on January 20, 2021, the then-Acting Secretary of Homeland Security directed that DHS would suspend "new enrollments" in MPP pending further review of the program. *See* DHS Statement, *available at* https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program (last accessed June 1, 2021). On February 2, 2021, President Biden signed Executive Order 14,010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 5, 2021). The President's Executive Order directed that "[t]he Secretary of Homeland Security shall promptly review and determine whether to terminate or modify" MPP, "including by considering whether to rescind" Secretary Nielsen's January 25, 2019 policy guidance and other "implementing guidance." *Id.* § 4(ii)(B), 86 Fed. Reg. at 8269. The President further directed the Secretary to "promptly consider a phased strategy for the safe and orderly entry

into the United States, consistent with public health and safety and capacity constraints, of those individuals who have been subjected to MPP for further processing of their asylum claims." *Id.*

On March 18, 2021, the government moved in the district court to dismiss the case below on the grounds that DHS had begun processing individuals out of MPP and had committed not to return any of the named Plaintiffs—those subject to the first and second injunctions, who had all been permitted to enter the United States pending their removal proceedings—to Mexico under MPP. As a result, their claims were moot. Dkt. 99. That motion remains pending.

5. In conducting its review of MPP, DHS gave thorough consideration to the significant legal and policy questions involved with MPP—including President Biden's policy objective to address the root causes of migration throughout North and Central America, the government's efforts to combat the spread of COVID-19, and the government's diplomatic engagements with the Government of Mexico. DHS recently completed that review. On June 1, 2021, Secretary Mayorkas announced his decision to terminate MPP and rescind the January 25, 2019 policy guidance and other MPP-implementation guidance. *See* Mem. from Alejandro N. Mayorkas regarding Termination of the Migrant Protection Protocols Program (June 1, 2021), *available at* https://go.usa.gov/x6s7E. Following the announcement, on the government's motion, the Supreme Court in *Innovation Law*

Lab vacated the Ninth Circuit's decision upholding the district court's nationwide preliminary injunction of MPP, as well as the district court order entering the preliminary injunction. The Supreme Court's order provides that: "The motion to vacate the judgment is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to direct the District Court to vacate as moot the April 8, 2019 order granting a preliminary injunction. *See United States v. Munsingwear*, Inc., 340 U.S. 36 (1950)." Order, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 21, 2021).

ARGUMENT

I. This Appeal Is Moot

Just as the Supreme Court determined in *Innovation Law Lab* with respect to the Plaintiffs in that case, the Secretary's decision to terminate MPP has mooted Plaintiffs' claim for the equitable relief that is the subject of this appeal. Plaintiffs sought the preliminary injunction at issue here based on claims that they were harmed by DHS's implementation of MPP. JA50-85. But those claimed harms are irrelevant now that the Secretary has decided, as an exercise of his discretion to implement the immigration laws and after a thorough review of MPP at the President's direction, 86 Fed. Reg. at 8269, that DHS will no longer exercise the contiguous-territory return authority in Section 1225(b)(2)(C) on a wide-scale, programmatic basis through MPP. The Secretary's decision to stop using MPP, and

his statement that he has no intent to resume the program that the district court enjoined as applied to Plaintiffs means that Plaintiffs have no basis to defend the preliminary injunction, the purpose of which was "merely to preserve the relative positions of the parties until a trial on the merits c[ould] be held." *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981); *see id.* at 394 (when enjoined conduct has ceased, "the correctness of the decision to grant [the] preliminary injunction . . . is moot").

In light of the Secretary's decision, no Plaintiff continues to have any personal stake in the preliminary injunction. *See* Order, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 21, 2021). Plaintiffs claim that they were harmed by virtue of being forced to return to Mexico under MPP while their removal proceedings were pending, JA1, but none can assert that interest now given that all have been allowed to return to the United States and MPP is no longer operative. Plaintiffs cannot be returned under a program that does not exist. Because Plaintiffs no longer have any live stake in preventing the government from implementing MPP, no federal court has authority under Article III to adjudicate Plaintiffs' entitlement to that injunction, and the injunction must be dissolved. *See Camenisch*, 451 U.S. at 396 ("[W]hen the injunctive aspects of a case become moot on appeal of a preliminary injunction," the issues in the case "can generally not be resolved on appeal, but must be resolved in a trial on the merits."); *cf. Genesis Healthcare*

Corp. v. Symczyk, 569 U.S. 66, 72 (2013) ("If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the litigation' at any point during litigation, the action can no longer proceed and must be dismissed as moot.") (citation omitted).

II. The Court Should Remand With Instructions To Vacate The District Court's Decision and Order

Because the mootness of Plaintiffs' claimed entitlement to a preliminary injunction will prevent this Court from reviewing the district court's erroneous decision issuing a preliminary injunction, this Court should follow the same course as the Supreme Court in *Innovation Law Lab*: this Court should remand the case with instructions to vacate the district court's order entering a preliminary injunction. *See* Order, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 21, 2021).

1. When a case becomes moot "while on its way [to the reviewing court] or pending [a] decision on the merits," the "established practice" in the courts of appeals is to "vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That practice ensures that no party is "prejudiced by a decision which in the statutory scheme was only preliminary," and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41; *see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994) ("If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such

disposition of the whole case as justice may require.") (quoting *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944)) (brackets in original).

Of particular relevance here, the Supreme Court has recognized that vacatur is appropriate where the government has sought review of a lower-court decision but intervening changes in federal law render further review of that decision moot. *See United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (per curiam). Following the Secretary's termination of MPP—which involved a similar appeal of a very similar preliminary injunction to the one entered by the district court here—the Supreme Court in *Innovation Law Lab* ordered vacatur of the district court's order entering a preliminary injunction. And *Munsingwear* itself involved a case that "became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order," *U.S. Bancorp Mortg.*, 513 U.S. at 25 n.3, and the Court indicated that vacatur could have been an appropriate disposition if the United States had sought that remedy. *Munsingwear*, 340 U.S. at 40 (observing that the United States "did not avail itself of the remedy it had to preserve its rights"); *see U.S. Bancorp Mortg.*, 513 U.S. at 25 n.3 (noting "*Munsingwear's* implicit conclusion that repeal of administration regulations" may provide a basis for vacating a lower court's decision even when that decision was adverse to the Executive Branch).

2. Vacatur is the appropriate disposition in the circumstances of this case, which mirror those of *Innovation Law Lab* almost exactly. Both cases involve individual noncitizens returned to Mexico under MPP who challenged that decision as unlawful under the INA and the Administrative Procedure Act (APA). In both cases, the district court issued an injunction enjoining prospective application of MPP to plaintiffs on the grounds that MPP exceeded the government's statutory authority under 8 U.S.C. § 1225(b)(2)(C). *Compare Innovation Law Lab*, 951 F.3d at 1084 *with* Op. 14-22. While *Innovation Law Lab* was pending before the Supreme Court and this case was pending before this Court, the Secretary terminated MPP, and the Supreme Court vacated both the Ninth Circuit decision on appeal, but also the district court decision and order granting the injunction. Order, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 21, 2021).

The same circumstance exists here: as in *Innovation Law Lab*, the district court's decision in this case entering the now-moot preliminary injunction interpreted the INA in ways that could potentially have "legal consequences" in the future if the decision were allowed to remain in place. *Munsingwear*, 340 U.S. at 41; *accord* Order, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 21, 2021). The district court concluded that section 1225(b)(2)(C) may not be applied to noncitizens apprehended immediately after crossing the border illegally because such individuals are not "arriving on land," but have in fact "arrived." Gov't Br.

15-17, 20-34; Gov't Reply 6-15. And the district court concluded, like the Ninth Circuit in *Innovation Law Lab*, that Plaintiffs were "explicitly excluded from the group of 'other aliens' described in § 1225(b)(2)(A) because they are applicants 'to whom paragraph (1) applies,'" Op. 18 (quoting 8 U.S.C. § 1225(b)(2)(B)(ii)); *see* Op. 18-22, meaning they could not be subject to contiguous territory return. Gov't Br. 17-19, 34-40; Gov't Reply 15-18. Each of those conclusions, just as in *Innovation Law Lab*, could have adverse legal consequences for the government in future cases if the district court's opinion were not vacated. The district court's interpretation of Section 1225(b) would severely constrict DHS's statutory contiguous-territory-return authority. *See also* Dkt. 64 at 2, *Doe v. Mayorkas*, 20-55279 (9th Cir. July 19, 2021) ("This appeal before us challenges a discrete procedural sub-issue of the now terminated MPP. Because the Supreme Court decided that a challenge to the MPP as a whole was moot after the government terminated the program, we conclude that the narrower question presented in this appeal is also moot. Accordingly, we remand this case to the district court with instructions to vacate the January 14, 2020 order granting the motion for classwide preliminary injunction as moot.").

3. The Supreme Court has observed that vacatur may be unwarranted where "the losing party has voluntarily forfeited his legal remedy by the ordinary process of appeal or certiorari." *U.S. Bancorp Mortg.*, 513 U.S. at 25; *see Karcher*

v. *May*, 484 U.S. 72, 83 (1987). But as the Court implicitly concluded in vacating the decision in *Innovation Law Lab*, that exception to general *Munsingwear* practice has no application here. Order, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 21, 2021).

The Supreme Court's decision in *Board of Regents of the University of Texas System v. New Left Education Project*, 414 U.S. 807 (1973) (per curiam), is likewise instructive. *See* 13C Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10.1 (3d ed. 2016 & Supp. 2021) (*Federal Practice & Procedure*) (discussing *New Left*). In that case, a state university's appeal of an injunction against the enforcement of two university rules became moot after the university repealed the challenged rules. *See New Left Educ. Project v. Bd. of Regents of the Univ. of Texas*, 472 F.2d 218, 219-220 (5th Cir.), *rev'd*, 414 U.S. 218 (1973). The court of appeals refused to vacate the district court's judgment because the case had "become moot . . . through action of the appellant," *id.* at 221, but the Supreme Court summarily reversed, directing vacatur of the judgment. *See* 414 U.S. at 218. As one leading treatise has explained, vacatur was necessary to ensure that governmental and other parties would not be "deterred" from taking "good faith" actions that would moot a case by "the prospect that," if they do so, "an erroneous district court decision may have untoward consequences in the unforeseen future." *Federal Practice & Procedure* § 3533.10.1. And that

consideration is particularly important when "[a] change in administration brought about by the people casting their votes" occurs, which provides "a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1043 (D.C. Cir. 2012). A new administration should not be precluded from promulgating new policies or revising old ones out of concern that doing so would require leaving in place an injunction against the government that was not reviewed on appeal.

The determination whether to vacate a lower-court decision in light of mootness "is an equitable one," *U.S. Bancorp Mortg.*, 513 U.S. at 29, that depends on what disposition would be "'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot," *id.* at 24 (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)). Here, as the Supreme Court already determined in *Innovation Law Lab*, that equitable inquiry calls for vacatur. In no sense does "justice . . . require" that DHS continue to utilize a discretionary immigration authority in a manner that the Secretary has determined is contrary to the interests of the United States, merely to allow this appeal to proceed in order to avoid the future legal consequences of a decision entered by the district court at the preliminary injunction stage. *Id.* at 21 (citation omitted); *see* 8 U.S.C. §

1225(b)(2)(C) (providing that the Secretary "*may* return [an] alien" to the contiguous foreign territory of arrival pending a Section 1229a removal proceeding) (emphasis added).

Moreover, as this Court has explained, additional equitable considerations apply where the movant is DHS or its component agencies. *See Arevalo v. Ashcroft*, 386 F.3d 19, 20–21 (1st Cir. 2004). "Not only did [DHS] vigorously pursue its appeal but, as a repeat player before the courts, it is primarily concerned with the precedential effect of the decision below and has an institutional interest in vacating adverse rulings of potential precedential value." *Id.* (cleaned up) (citing *Motta v. Dist. Dir. of INS*, 61 F.3d 117, 119 (1st Cir. 1995), and *Wal–Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747, 750 (1st Cir. 2003)). "'A case that becomes moot pending appeal, necessarily untested by appellate scrutiny, lacks the stamp of reliability that is required to warrant preclusive effect.'" *Id.* at 21 (quoting *Nat'l R.R. Passenger Corp. v. Int'l Ass'n of Machinists and Aerospace Workers*, 915 F.2d 43, 48 (1st Cir. 1990)). And as this Court further explained, these considerations are especially salient where, as here, plaintiffs are "no longer subject" to the challenged conduct. *See id.* "Consequently, vacating the judgment harms neither party and leaves the interpretation of [section 1225(b)(2)(C)] to be litigated fully in a more appropriate case." *Id.*

CONCLUSION

For the foregoing reasons, this Court should follow the lead of the Supreme Court's order in *Innovation Law Lab*, and vacate as moot the district court's order entering a preliminary injunction.

Dated: August 13, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because:

   The motion contains 4,238 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because: The motion has been prepared in a proportionally spaced typeface using Word 2016 in fourteen-point Times New Roman.

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Dated: August 13, 2021

CERTIFICATE OF SERVICE

I certify that on August 13, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. I also certify that counsel to Petitioners-Appellees are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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