UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANDRÉS OSWALDO BOLLAT VASQUEZ, et al., Plaintiffs, v. ALEJANDRO MAYORKAS, Secretary of Homeland Security, et al., Defendants.	No. 20-cv-10566-IT

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AS MOOT OR, IN THE ALTERNATIVE, TO STAY CASE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Introduction

This case involves twelve asylum seekers unlawfully expelled from the United States, and sent to one of the most dangerous places on earth, under the so-called "Migrant Protection Protocols" (MPP). Each is now in the United States because this Court granted preliminary injunctive relief. The government now claims that the case is moot, but has not demonstrated that any intervening event warrants mootness analysis, much less met the heightened burden of proof that applies when a party claims to have voluntarily ceased the challenged conduct.

In May 2020, this Court held that the MPP was not authorized by 8 U.S.C. § 1225(b)(2)(C)—the statute on which the Department of Homeland Security relied—and ordered that plaintiffs be permitted to re-enter the United States. After new plaintiffs joined the case in an amended complaint, the Court issued a second preliminary injunction. As a result of these rulings, twelve asylum-seekers who had been forced to fight for their survival in Mexico for seven to seventeen months are now pursuing their claims in Massachusetts. The government appealed the May 2020 injunction. In that appeal, it has contended that it is harmed by being required to permit the plaintiffs to remain in the United States pending their immigration proceedings, and affirmed its authority to return the plaintiffs to Mexico if it prevails.

Without abandoning its insistence that it has the legal authority to send the plaintiffs back to Mexico, the government now claims it does not intend to exercise that authority, and seeks to dismiss this case as moot. Its motion centers on the declaration of a non-party local Immigration and Customs Enforcement director. He states—without elaboration—that the plaintiffs "will not be returned to Mexico under the Migrant Protection Protocols." ECF No. 100-3 at ¶ 5.

That effort to moot this case and avoid a final judgment falls short for two reasons.

First, there has been no intervening event that could render this Court incapable of providing effective relief to the plaintiffs. Since the time the government evidently agreed the case

was not moot, it has done nothing but draft one sentence in a declaration for this case. But simply telling the Court that the plaintiffs are out of harm's way is not itself a change eliminating the controversy. Having previously affirmed its authority and desire to return the plaintiffs to Mexico, the government does not claim to have taken any agency action that alters that threat—much less one that would bind it moving forward.

Second, even if the declaration is evidence of any change at all—though it is not—the government cannot moot a case by voluntarily ceasing challenged conduct unless "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Rian Immigrant Center v. Cuccinelli*, No. 1:19-cv-11880-IT, 2020 WL 6395575, at *3 (D. Mass. Nov. 2, 2020) (quotation marks and citations omitted). The government has not met that burden. It has taken no binding action to ensure that the plaintiffs cannot be returned to Mexico and is diligently working to avoid the one result that would actually protect the plaintiffs—the orders of this court. Because the plaintiffs have a "concrete interest" in receiving a meaningful assurance that they will not be returned to Mexico, this Court can still provide "effectual relief," and the case is not moot. *Id.*

The government's argument that this case should be stayed pending DHS's review of the MPP similarly falls short. With no timeline in sight for the review's completion, the government has not met its burden to establish that an indefinite stay is warranted.

Statement of Facts

I. The plaintiffs are in the United States pursuant to this Court's preliminary injunctions.

DHS began implementing the MPP in January 2019. ECF No. 36-2. "Under the MPP, noncitizens 'arriving in or entering the U.S. from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.'" ECF No. 45 at 2 (quoting DHS Dec. 20, 2018 Press Release). In July 2019, DHS expanded the

MPP into Tamaulipas, a dangerous Mexican state in which cartels ruthlessly target migrants for kidnapping and other violent crimes. *See* ECF No. 96 at 7 & n.10.[1]

Plaintiffs Luisa Marisol Vasquez Perez de Bollat, A.B., Rosa Maria Martinez de Urias, Evila Floridalma Colaj Olmos, J.C., Nora Idalia Alvarado Reyes, Hermes Arnulfo López Merino, María de la Cruz Abarca de López, T.L., D.L., A.L, and Miriam Yanett Zuniga Posadas are asylum seekers who were all apprehended in the United States after they had crossed the southern border between ports of entry. ECF No. 96 at 6. Between July and October 2019, each was sent to Tamaulipas under the MPP. ECF No. 45 at 5-8, No. 79-6 at ¶¶ 4–8, No. 96 at 8–10. There, they fought for their survival, in some cases enduring violence or kidnapping attempts, staying inside to avoid cartels, or surviving in outdoor encampments or without enough to eat. ECF No. 45 at 5-9, No. 96 at 8-14.

Along with their Massachusetts family members, Ms. Vasquez, A.B., Ms. Martinez, Ms. Colaj, and J.C. brought suit in March 2020 and moved for preliminary injunctive relief. ECF Nos. 1, 27. In May 2020, the Court determined that plaintiffs were likely to succeed on the merits of their claim that the MPP was not authorized by the statute on which the government relied, 8 U.S.C. § 1225(b)(2)(C). ECF No. 45 at 14-22. The Court issued a preliminary injunction requiring the government to permit the plaintiffs' re-entry into the United States. *Id.* at 24. The plaintiffs presented themselves at the border, were given one-year grants of parole, and were reunited with their plaintiff family members in Massachusetts.[2]

[1] Lizbeth Diaz, *Two More Border Cities Added to U.S.-Mexico Asylum Program,* Reuters (June 23, 2019), reuters.com/article/us-usa-immigration-mexico/two-more-border-cities-added-to-us-mexico-asylum-program-sources-idUSKCN1TO0Y5.

[2] Ms. Colaj later successfully renewed her parole for an additional year.

In February 2021, over the government's continued objection, the Court issued a second preliminary injunction covering Ms. Reyes, Mr. López, Ms. Abarca, T.L., D.L., A.L, and Ms. Zuniga, who had joined the case as co-plaintiffs in December 2020 along with their Massachusetts family members. ECF No. 96 at 1-3; *see* ECF No. 94. By the time they entered the United States, each had spent between sixteen and seventeen months in Mexico under the MPP. *See* ECF No. 79-6 at ¶¶ 4–8, No. 96 at 8–10. After the preliminary injunction, they too were paroled for one year and reunited with family members in Massachusetts.

All twelve plaintiffs protected by the preliminary injunctions continue to be in removal proceedings. ECF No. 100-3 ¶ 5. Each has been permitted to remain in the United States pursuant to these preliminary injunctions.

II. The government seeks to preserve its authority to return the plaintiffs to Mexico and keep its options open with regard to the MPP.

The government appealed the May 2020 injunction. In a successful motion to expedite that appeal, the government claimed that the injunction could cause "serious and tangible harm" to its interests. June 19, 2020 Motion at 3, *Bollat Vasquez v. Wolf*, 1st Cir. No. 20-1554; June 23, 2020 Order. In its merits brief, the government argued that the MPP was "an indispensable tool in stemming the tide of unlawful migration at the southern border." June 26, 2020 Br. at 1. The government also opposed the plaintiffs' request for an 18-day briefing extension, citing a purported "harm that persists for as long as the government is required to permit Appellees to remain in the United States without any lawful basis for admission." July 21, 2020 Opposition at 7.

At oral argument, the government affirmed that it could return the plaintiffs to Mexico if the First Circuit vacated the injunction and remanded for consideration of claims the district court had not addressed.[3] Asked whether it would do so, the government supplied a post-argument letter:

> [I]n the event that this Court vacates the preliminary injunction . . . DHS will not return any of the individual plaintiffs to Mexico pursuant to the Migrant Protection Protocols (MPP) ***pending the district court's resolution of plaintiffs' preliminary injunction motion.*** In the event that the individual plaintiffs violate conditions of their parole, ***DHS reserves the right to return the individual plaintiffs to Mexico under MPP*** . . . . Additionally, in the event that the government prevails on the merits of plaintiffs' claims considered on remand, either in district court or before this Court, ***DHS reserves the right to return the individual plaintiffs to Mexico under MPP***.

Letter from the Government (Oct. 15, 2020) (emphasis added). On November 2, 2020, the First Circuit placed the appeal in abeyance after the Supreme Court granted certiorari in *Wolf v. Innovation Law Lab*, No. 19-1212, an MPP case. Nov. 2, 2020 Order.

More than 70,000 migrants, about one third of them children, were sent to Mexico under the MPP.[4] Although the district court in *Innovation Law Lab* enjoined the MPP and the Ninth Circuit ultimately affirmed, the injunction was stayed. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1077, 1080 (9th Cir. 2020); *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020).

President Biden was inaugurated on January 20, 2021. That same day, his administration suspended new MPP enrollments pending a review of the program. ECF No. 100-2. That review

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[3] *See* Oral argument at 41:40-43:40, CourtListener, *Bollat v. Wolf*, 1st Cir. No. 20-1554 (Oct. 6, 2020), courtlistener.com/audio/72072/bollat-vasquez-v-wolf/.

[4] TRACImmigration, *Details on MPP (Remain in Mexico) Deportation Proceedings*, trac.syr.edu/phptools/immigration/mpp/ (set to "Initial Filing"); *see also* Reuters and Joseph Zeballos-Roig, *Trump's Immigration Crackdown Forced 16,000 Children, Including 500 Babies, to Wait for Weeks or Months in Mexico for their Asylum Hearings*, Business Insider (Oct. 11, 2019), businessinsider.com/exclusive-us-migrant-policy-sends-thousands-of-babies-and-toddlers-back-to-mexico-2019-10.

remains pending. The government also moved in the Supreme Court to hold *Innovation Law Lab* in abeyance.[5] And in February 2020, the government began processing certain noncitizens with open cases out of the MPP and paroling them into the United States.

By the time the Biden administration suspended new enrollments into the MPP, the program was not being used to expel Central American asylum seekers. Beginning in March 2020, in light of the Covid-19 pandemic and under the claimed authority of a public health provision, 42 U.S.C. § 265, the Trump administration conducted hundreds of thousands of rapid expulsions of asylum seekers into Mexico *without* first putting them into removal proceedings,[6] and the expulsion of Central Americans under the MPP all but ceased.[7] The Biden administration has continued expelling thousands of Central American asylum seekers into Tamaulipas and other parts of Mexico under "Title 42," including families with children.[8] As Covid-19 transmission in the United States declines, the government has not indicated when it will stop Title 42 expulsions, nor has it committed *not* to resume MPP expulsions when it does so.

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[5] Motion of Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar, *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 617 (2020) (No. 19-1212).

[6] *See* FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions, cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020; Jason Dearen & Garance Burke, *Pence Ordered Borders Closed After CDC Experts Refused*, AP NEWS (Oct. 3, 2020), apnews.com/article/virus-outbreak-pandemics-public-healthnew-york-health-4ef0c6c5263815a26f8aa17f6ea490ae; American Immigration Council, *Fact Sheet: A Guide to Title 42 Expulsions at the Border* (Mar. 29, 2021), americanimmigration council.org/research/guide-title-42-expulsions-border.

[7] *Details on MPP (Remain in Mexico) Deportation Proceedings*, *supra* note 4 (set "Initial Filing" and sorted by "Nationality").

[8] Molly O'Toole, *'Sitting ducks for organized crime': How Biden border policy fuels migrant kidnapping, extortion*, L.A. Times (Apr. 28, 2021), latimes.com/politics/story/2021-04-28/biden-title-42-policy-fueling-kidnappings-of-migrant-families-at-border-and-extortion-of-u-s-relatives.

On March 18, 2021, the government moved to dismiss this case. ECF No. 99. Meanwhile, the states of Texas and Missouri have sued to challenge the January 20, 2021 suspension of new MPP enrollments.[9] Joined by the state of Arizona, they have also moved to intervene at the Supreme Court in *Innovation Law Lab*.[10]

Legal Standard

As this Court has explained:

> A case is moot where it is impossible for a court to grant any effectual relief whatever to the prevailing party. The mootness review is grounded in the case or controversy requirement and ensures that courts do not render advisory opinions. But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. Moreover, the burden of establishing mootness rests squarely on the party raising it, and the burden is a heavy one.
>
> A defendant's voluntary cessation of a challenged practice usually does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. Rather, for a case to be rendered moot, a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

Rian, 2020 WL 6395575, at *3 (citations and quotations omitted).

Argument

I. This case is not moot.

This case is not moot because the Court can still provide the plaintiffs meaningful relief—an order forbidding the government from returning them to Mexico under the MPP because it is illegal. Ultimately, the government's mootness argument is an attempt to free itself of the

[9] Complaint, *Texas v. Biden*, No. 2:21-CV-00067-Z (N.D. Tex. Apr. 13, 2021).
[10] Motion to Intervene as Petitioners by the States of Texas, Missouri, and Arizona, *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 617 (2020) (No. 19-1212), 2021 WL 2029764.

preliminary injunctions and avoid a final judgment on the merits, which is insufficient to establish mootness. The government's motion should be rejected.

The government's argument fails for two reasons. First, the government has not pointed to an "intervening event" that could moot this case because the only action it has taken is the submission of a self-serving litigation declaration. Second, even if the government's declaration were an "intervening event," it falls squarely within the "voluntary cessation" doctrine and fails to provide the plaintiffs the protection that would leave them without a "legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

A. No intervening event has changed the plaintiffs' status.

This case is not moot because no intervening event has *ceased* the conduct at issue in this case or otherwise altered the plaintiffs' need for this Court's protection. The plaintiffs are in the United States only by virtue of this Court's two preliminary injunctions. And nothing in their status has changed since they were paroled into the United States that even raises the specter of mootness. To the contrary, the government seeks to *create* mootness through the nonbinding statement of an ICE officer.

By definition, a case cannot be rendered moot unless there is an "intervening event" that makes it impossible for a court to grant any effectual relief whatever to the prevailing party, such as when the parties dispute a contract and that contract expires and no damages are sought. *Town of Barnstable v. O'Connor*, 786 F.3d 130, 142 (1st Cir. 2015); *ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013). The intervening event renders the case moot when it "completely and irrevocably eradicate[s] the effects of the [defendants'] conduct." *Town of Barnstable*, 786 F.3d at 142 (internal quotation marks and citations omitted). In this case, the government points to no intervening event that changes plaintiffs' status.

The government instead relies on an assertion of a local ICE Field Officer Director Todd M. Lyons that the plaintiffs "will not be returned to Mexico under the Migrant Protection Protocols." ECF No. 100-3 at ¶ 5. But this is certainly not an "intervening event." Mr. Lyons claims neither to possess any *discretion* over the MPP, nor to have made any *directive* not to return the plaintiffs to Mexico, nor even to have the *authority* to issue such a directive. What is more, he does not claim that *any* government official has made any such decision about the plaintiffs' fate or issued any directive, that any such decision was communicated to anyone at DHS or documented in any government systems, or that it is binding on future officials.

Mr. Lyons's statement is at best an *assertion* that this case is moot, rather than as an *action* (or even a report about such an action) amounting to the sort of lasting or binding commitment that could be capable of actually causing a case to become moot. It is no more meaningful than would be his statement, under oath, that "this case is moot."[11]

The government's remaining arguments similarly fail. *See* ECF No. 100 at 5. The government asserts that the plaintiffs are in removal proceedings and were paroled into the United States. But the plaintiffs were in removal proceedings from the moment they were placed in the MPP and were granted parole—valid for just a year—as a result of the preliminary injunctions. The government never contended that this rendered its First Circuit appeal moot. The government also references its "process of reviewing MPP" but that review—even if it somehow addresses the plaintiffs' situation directly—is still pending, and may be impacted by ongoing legal challenges

[11] If the government wanted to bind itself to a decision not to return the plaintiffs to Mexico, it could do so, such as by conceding the merits of the case. *See Am. Hist. Ass'n v. Peterson*, 876 F. Supp. 1300, 1308-10 (D.D.C. 1995) (where defendant "refused to enter into a consent decree," letters evidencing "intent" did not moot case). Instead, the government has continued to defend the MPP and has reserved the right to remove the plaintiffs. *See Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1143 (D.C. Cir. 1989) (continued defense of the challenged conduct undermines mootness).

such as the lawsuits and intervention attempts by the states of Texas, Missouri, and Arizona. Finally, the government mentions that it has voluntarily processed *other* people out of the MPP, but this has nothing to do with the legal situation of the plaintiffs. Thus, the government's motion to dismiss should be denied as it has failed even to point to an "intervening event" that could render the case moot.

B. The governments' conduct is, at best, a voluntary cessation.

Even if the government identifies an "intervening event," the case is still not moot because the government's conduct falls squarely within the voluntary cessation doctrine. Mr. Lyons' statement that the plaintiffs "will not be returned to Mexico" is at best an unsupported assertion that at some unknown time and by some unknown means—for purposes of seeking to moot this litigation—the government decided to make the plaintiffs' temporary removal from the MPP permanent. But this sort of conduct is exactly what the voluntary cessation doctrine precludes.

This case is analogous to *Rian Immigration Center v. Cuccinelli*, cited in the government's brief. ECF No. 100 at 5. In that case, the plaintiffs challenged DHS's decision to stop considering certain deferred action requests, and the Court held that the acting DHS Secretary's subsequent memorandum directing USCIS to resume considering deferred action requests was a voluntary cessation. 2020 WL 6395575, at *5. The Court explained that government did not meet its "formidable burden" to show that it was "absolutely clear" that the challenged action "could not reasonably be expected to recur" where it continued to defend the legality of the challenged conduct and offered only the acting USCIS director's expectation that the termination of deferred action would not recur. *Id.*

Here, as in *Rian,* the government continues to defend its (incorrect) interpretation of 8 U.S.C. § 1225(b)(2)(C). And it does not even offer *any* prediction about whether future officials will honor Mr. Lyons' decision, assuming he has even made one. What is more, the "voluntary

cessation" in *Rian* was a nationwide directive by an acting DHS Secretary to his subordinates, and the question of recurrence therefore involved the possibility that the agency would change course through another memorandum. Mr. Lyons' declaration here, by contrast, was prepared for litigation by a local ICE Field Office Director and is not directed to or binding on anyone in DHS.[12] The Court should thus deny the government's motion to find the case moot as the voluntary cessation doctrine applies.[13]

II. An indefinite stay is not warranted.

The government alternatively moves the Court to stay the case pending DHS's review of the MPP. But "[t]he proponent of a stay bears the burden of establishing its need," *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citation omitted), and the government has not met that burden.

First, the government has not indicated that DHS's general review of the MPP will resolve the situation of the plaintiffs in this case, who are in the unique position of having entered the United States as a consequence of the Court's preliminary injunctions. Second, DHS's MPP review has already lasted four months without update, and the government has provided no indication of how long it will take. *See Sierra Club, Inc. v. Granite Shore Power LLC*, No. 19-CV-216-JL, 2019 WL 8407255, at *14 (D.N.H. Sept. 13, 2019) (declining a stay pending agency review where "no

[12] The Court in *Rian* also explained that the government had failed to show that the "voluntary cessation is unrelated to the litigation." 2020 WL 6395575, at *4. Similarly, the Lyons statement here appears to have been written solely for the purpose of mooting this case.

[13] The government also cites *ACLU of Massachusetts v. U.S. Conference of Catholic Bishops*, *see* ECF No. 100 at 4–5, which is inapplicable as that case holds that the voluntary cessation exception does not apply, where "the challenged conduct ends because of an event"—in that case, the expiration of a contract—"that was scheduled before the initiation of the litigation and is not brought about or hastened by any action of the defendant." 705 F.3d at 55. Here, the government claims this case is moot because of a statement it made for the very purpose of attempting to moot it—precisely the sort of "maneuver[] designed to insulate a decision from review" that the voluntary cessation exception is designed to prevent. *See id.* (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)).

definite end date [to the agency's decision was] in sight"). Third, pending agency consideration of a general subject is not a reason to stay litigation where the agency process may take months or years, the agency determination may itself be subject to litigation, and the agency may simply decide to continue the protocol as before.[14]

Conclusion

For these reasons, the Court should deny the government's motion to dismiss as moot or, in the alternative, to stay pending review of the MPP.

[14] *See Rosenberg v. LoanDepot.com LLC*, 435 F. Supp. 3d 308, 316–17 (D. Mass. 2020) ("Although enlightened FCC guidance might prove useful, the Court is unwilling to stay the instant case for an underminate period."); *see also Singer v. Las Vegas Athletic Clubs*, 376 F. Supp. 3d 1062, 1070–71 (D. Nev. 2019); *Conservation Council for Hawaii v. Nat'l Marine Fisheries Serv.*, 97 F. Supp. 3d 1210, 1231–32 (D. Haw. 2015).

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