

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ANDRÉS OSWALDO BOLLAT VASQUEZ, et al.,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, et al.,

Defendants.

No. 20-cv-10566-IT

**PLAINTIFFS' RESPONSE TO GOVERNMENT'S NOTICE OF INJUNCTION IN
TEXAS V. BIDEN**

Plaintiffs were removed from the Migrant Protection Protocols and reached safety in the United States only as a result of this Court's preliminary injunction orders, which remain the only documents with any legal force that prevent the government from returning the plaintiffs to Mexico. That protection is especially vital now in light of a new nationwide injunction which vacated the government's June 1 memorandum terminating new MPP enrollments and ordered the Department of Homeland Security to re-implement the program. *Texas v. Biden*, No. 2:21-cv-067-Z, 2021 WL 3603341, *27 (N.D. Tex. Aug. 13, 2021). Notwithstanding that development, the government now contends the *Texas v. Biden* order "does not change the fact that this case is moot," because in March 2021 DHS purportedly "committed not to return [the plaintiffs] to Mexico pursuant to MPP." ECF No. 110. But the government's March 2021 submission failed to raise a meaningful question regarding mootness. And the government's mootness claims are now undercut both by its ongoing efforts to vacate this Court's May 2020 preliminary injunction on appeal and by the injunction in *Texas v. Biden*.

First, it is important to be clear about the limited force of what the government has represented. Far from making any "commitment," in March 2021 the government submitted a

declaration expressing an intention or prediction that Plaintiffs “will not be returned to Mexico under the Migrant Protection Protocols,” ECF No. 100-3 at ¶ 5. For the reasons provided in Plaintiffs’ opposition, ECF No. 107 at 7–12, these 11 words recited in the passive voice—signed by a local official with no claimed authority over the MPP—fall short of the “formidable burden” to show mootness. *See Rian Immigrant Center v. Cuccinelli*, No. 1:19-cv-11880-IT, 2020 WL 6395575, at *5 (D. Mass. Nov. 2, 2020). Even if the words had legal force, which they do not, they would be at most a voluntary cessation of the challenged conduct. ECF No. 107 at 10–12.

Second, the government’s claims of mootness are undermined by its ongoing efforts to vacate this Court’s May 2020 injunction and oppose any claim that the MPP was unlawful. In a document filed on August 13 at the First Circuit, the government contends the June 1 memorandum terminating new MPP enrollments mooted its appeal of the May 2020 injunction. *See* Appellants’ Notice of Mootness and Motion to Vacate the Preliminary Injunction at 2–3, *Bollat Vasquez, et al., v. Wolf, et al.*, 1st Cir. No. 20-1554 (filed Aug. 13, 2021) (“Aug. 13 Motion”). But rather than seek to withdraw its appeal, the government asks the First Circuit to vacate this Court’s injunction. *Id.* The government argues the preliminary injunction “could have adverse legal consequences for the government in future cases” apparently because this Court’s “interpretation of Section 1225(b) would severely constrict DHS’s statutory contiguous-territory-return authority.” *Id.* at 15.¹ Thus, even as it asserts a vague commitment not to return Plaintiffs to Mexico, the government is pursuing the legal authority to do that exact thing—both to Plaintiffs and to others.² That is the opposite of a showing of mootness. *See Rian*, 2020 WL

¹ The government has not withdrawn its August 13 filing.

² The government’s submission to the First Circuit describes the circumstances of this case as being “almost exactly” like those of *Innovation Law Lab*, in which the Supreme Court recently

6395575 at *5 (continued defence of the legality of challenged conduct undercut mootness claim).

Third, even if the government were not pursuing a strategy of defending the MPP’s legality, the proceedings in *Biden v. Texas* negate any possible claim of mootness. The order in *Biden v. Texas* vacates the June 1 memorandum and requires DHS to “enforce and implement MPP *in good faith*.” *Texas*, 2021 WL 3603341, at *27. The district court concluded that the “termination of MPP was arbitrary and capricious and in violation of the APA,” *id.* at *22, and that “terminating MPP necessarily leads to the systemic violation of Section 1225,” which the court construed as a command to detain anyone not returned to Mexico, *id.* at *23. The proceedings in *Texas v. Biden* demonstrate that, without the protection of this Court, Plaintiffs remain exposed not only to whatever the government might wish to do in the future, but also to whatever another federal court might *order* the government to do. To make matters worse, the government may be less eager to defend the legality of the MPP’s *termination* than it is to stop courts from considering the legality of the MPP’s *origins*.³

vacated a 2019 program-wide preliminary injunction after the parties agreed—before the order in *Texas v. Biden*—that the June 1 memorandum mooted the appeal before the Court. Aug. 13 Motion at 13–14, citing *Mayorkas v. Innovation Law Lab*, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021). The government now characterizes *Innovation Law Lab* as a case about “individual noncitizens,” without mentioning that those individuals were no longer impacted by the status of the preliminary injunction for reasons including death, the conclusion of their immigration cases, or having been processed out of the MPP for reasons separate from the injunction, which had not taken effect. *See id.* at 14; *see also* Petitioner’s Suggestion of Mootness and Motion to Vacate the Judgment of the Court of Appeals at 11, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (U.S. filed June 1, 2021); Respondents’ Opposition to Petitioners’ Motion to Vacate at 3, *Mayorkas v. Innovation Law Lab*, No. 19-1212 (U.S. filed June 11, 2021).

³ *See* Natalie Kitroeff, *As Migrants Surge Toward Border, Court Hands Biden a Lifeline*, N.Y. Times (Sept. 6, 2021), [nytimes.com/2021/09/06/world/americas/mexico-migrants-asylum-border.html](https://www.nytimes.com/2021/09/06/world/americas/mexico-migrants-asylum-border.html); *see also* Emily Green, *The Biden Admin Is Considering Reviving Trump’s ‘Remain in Mexico’ Policy for Migrants*, VICE News (Aug. 18, 2021), [vice.com/en/article/qj8a3d/the-biden-admin-is-considering-reviving-trumps-remain-in-mexico-policy-for-migrants](https://www.vice.com/en/article/qj8a3d/the-biden-admin-is-considering-reviving-trumps-remain-in-mexico-policy-for-migrants) (reporting

For Plaintiffs these developments are not a recipe for mootness; they are a recipe for danger. They eliminate the possibility that the prediction of a local DHS official in March 2021 could offer any meaningful safeguard.

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Respectfully submitted,

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senior administration officials were considering reviving the MPP prior to the *Texas v. Biden* order).