No. 20-1554

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANDRÉS 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; JOSÉ M. URIAS MARTINEZ, individually and as next friend to Rosa Maria Martinez de Urias; ROSA M. MARTINEZ DE URIAS; SALOMÉ OLMOS LOPEZ, individually and as next friend to Evila Floridalma Colaj Olmos and J.C.; J.C.; EVILA F. COLAJ OLMOS

Plaintiffs-Appellees,
v.

ALEJANDRO N. MAYORKAS, Secretary of Homeland Security; TROY A. MILLER, Acting Commissioner of U.S. Customs and Border Protection; UR MENDOZA JADDOU, Director of U.S. Citizenship andImmigration Services; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement; MERRICK B. GARLAND, Attorney General; JOSEPH R. BIDEN, President

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
NO. 1:20-CV-10566

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO VACATE THE PRELIMINARY INJUNCTION

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INTRODUCTION

This case is the government's interlocutory appeal of a preliminary injunction that allowed five noncitizens to escape excruciating conditions near the U.S.-Mexico border and reach safety in the United States. That injunction has been their only legal protection against being forcibly returned to danger under the government's "Migrant Protection Protocols." The government has now, in effect, disclaimed any further interest in pressing this appeal. But the government nevertheless asks this Court to vacate the injunction without ruling on its merits, based on claims of mootness that rest on scant and contested evidence contained nowhere in the appellate record. Specifically, via a letter to this Court, the government argues that because it has filed papers telling the district court that these five plaintiffs "will not be returned to Mexico"—a claim resting on one line in a declaration by an official with no apparent authority over the MPP—the government believes the preliminary injunction should be vacated.

This is not how appellate procedure works. If a party feels aggrieved by a preliminary injunction, it can appeal. If the party changes its mind, it can seek to dismiss its interlocutory appeal and litigate or resolve the remainder of the case below. What the party cannot do is manufacture an appellate victory by filing a post-injunction declaration in the court below simply stating that it now, upon further reflection, will not do what the district court has already enjoined.

Of course, when an appeal becomes moot through no fault of the appellant, the equities may favor vacatur of the judgment below. *See McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 524 n.6 (1st Cir. 1993). The Supreme Court recently applied this principle in *Mayorkas v. Innovation Law Lab* to vacate a 2019 program-wide injunction against the MPP, in light of a memorandum in which the government purported to rescind the program. *See* No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021).

But that is not this case. First, precedent disfavors vacatur in interlocutory appeals, *McLane*, 3 F.3d at 524 n.6, and it separately disfavors allowing appellants to win appeals by purposefully mooting cases, *see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). Second, the injunction still provides Plaintiffs with their only meaningful protection against forcible return to Mexico. And third, the equities that led to vacatur in *Innovation Law Lab*—on which the government relies—do not exist here because the decision on appeal is not a precedential appellate decision upholding a program-wide injunction, but a district court decision protecting five individuals. This Court should dismiss this appeal, leave the preliminary injunction in place, and remand this case to allow proceedings to continue in the district court.

BACKGROUND

The MPP began in January 2019. On June 1, 2021, the government issued a memorandum purporting to terminate it. In recent months, the government has defended against challenges to the legality of both the MPP's termination and the MPP itself.

I. The government's appeal of the preliminary injunction in this case.

Plaintiffs are three Massachusetts residents and five of their relatives who were expelled into Mexico under the MPP in the summer and fall of 2019. A3–8. In May 2020, the district court granted preliminary injunctive relief requiring the five Plaintiffs who had been expelled into Mexico (the "MPP Plaintiffs") to be processed out of the MPP and permitted to pursue their asylum cases within the United States. A24–25.[1] The government filed this appeal.

Initially, the government suggested that it might seek to return the MPP Plaintiffs to Mexico as soon as it could. It sought and was granted an expedited schedule. June 23, 2020 Order. And when Plaintiffs moved for an 18-day extension of their briefing deadline, the government opposed, citing the purported "harm that persists for as long as the government is required to permit Appellees to remain in

[1] The MPP Plaintiffs were paroled into the United States and are living with family in Massachusetts. ECF No. 73 ¶¶ 121, 137, 150. The district court later granted a second preliminary injunction protecting three additional families who had joined the case as co-plaintiffs. ECF No. 96. The government did not appeal that second injunction.

the United States without any lawful basis for admission." July 21, 2020 Opposition at 7.

Following questions from the panel at argument, the government softened its tone. In a post-argument letter, the government stated that if the preliminary injunction were vacated and remanded for consideration of Plaintiffs' Administrative Procedure Act arguments, the Department of Homeland Security would agree not to expel the MPP Plaintiffs to Mexico "pending the district court's resolution of plaintiffs' preliminary injunction motion." Oct. 15, 2020 Letter. But if the "plaintiffs violate[d] conditions of their parole" or the government prevailed on remand, "DHS reserve[d] the right to return the individual plaintiffs to Mexico under MPP." *Id.*

This appeal was placed in abeyance after the Supreme Court granted certiorari in *Innovation Law Lab*. Nov. 2, 2020 Order. Like this case, *Innovation Law Lab* involved the scope of the contiguous-country return authority of 8 U.S.C. § 1225(b)(2)(C).

II. The *Innovation Law Lab* litigation.

Innovation Law Lab v. Nielsen was filed by six nonprofit organizations and 11 expelled individuals in February 2019, just after the MPP began. 366 F. Supp. 3d 1110, 1116 (N.D. Cal. 2019). In April 2019, the district court preliminarily enjoined the government from "continuing to implement or expand" the MPP and ordered it

to permit the individuals to enter the United States within two days. *Id.* at 1130. But the injunction was stayed pending appeal. *See Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019); *Wolf v. Innovation Law Lab*, 140 S. Ct. 1564 (2020). Those stays prevented the individual plaintiffs from receiving the benefit of the district court's order and paved the way for 68,000 people—including the MPP Plaintiffs in this case—to be expelled to Mexico under the same program.[2]

On President Biden's first day in office, in January 2021, DHS suspended new enrollments into the MPP. *See id.* at 1. President Biden also ordered a review of the program, and DHS began a process by which it accepted back into the country approximately 11,200 people who had been expelled under the MPP and still had pending immigration cases. *Id.* at 1–2. Although the Supreme Court was set to hear oral argument in *Innovation Law Lab* in March 2021, the government successfully moved to hold the case in abeyance. Order, *Innovation Law Lab*, No. 19-1212 (U.S. Feb. 3, 2021).

III. The government's motion to dismiss in the district court.

In this case, as in *Innovation Law Lab*, the government took steps to stop courts from considering challenges to the legality of the MPP. In response to Plaintiffs' amended complaint, the government moved to dismiss, contending the

[2] *See* Alejandro N. Mayorkas, Termination of the Migrant Protection Protocols Program at 1 (June 1, 2021), dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf ("June 1 Memo").

case was moot. ECF No. 100. The motion papers included a declaration from Todd Lyons, a local Immigration and Customs Enforcement director. ECF No. 100-3. Mr. Lyons attested that he had been "apprised of this litigation matter, including the A-numbers" of the MPP Plaintiffs. *Id.* ¶ 4. He stated that removal proceedings for the five MPP Plaintiffs remained pending, and that, while they might be detained for removal purposes "they will not be returned to Mexico under the Migrant Protection Protocols." *Id.* ¶ 5.

The government contended that these 12 words in Mr. Lyons' declaration rendered the case moot. ECF No. 100 at 5. But its submissions nowhere explained whether Mr. Lyons had any authority over the MPP, or whether his statement was expressing an official decision of some kind or merely a prediction about the MPP Plaintiffs' future. Mr. Lyons and the government also did not say whether *any* DHS official had made a decision not to return the MPP Plaintiffs to Mexico, or whether such decision was recorded in any government systems or communicated to anyone at DHS, whether it was subject to change and who, if anyone, was bound by it. Plaintiffs filed an opposition, ECF No. 107, and the motion remains pending.

IV. The June 1 Mayorkas memorandum.

On June 1, 2021, Secretary of Homeland Security Alejandro Mayorkas issued a memorandum terminating new MPP enrollments. The memo stated that it "d[id] not impact the status of individuals who were enrolled in MPP at any stage of their

proceedings before" the immigration courts. June 1 Memo at 7. Thus, by its own terms, the memo did not apply to anyone *previously* placed in the MPP, such as the MPP Plaintiffs here.

Secretary Mayorkas' memo did not concede that the MPP had been illegal; it said that the benefits of terminating the program outweighed the benefits of maintaining it. *See id.* at 4. The memorandum also revealed that even after the suspension of new MPP enrollments in January 2021, DHS continued to use 8 U.S.C. § 1225(b)(2)(C) to expel back into Mexico noncitizens who were already in the MPP but had crossed the border again. *See id.* at 5.

In *Innovation Law Lab* and in this case, the government quickly argued that the June 1 memo resolved Plaintiffs' claims and removed any need for further judicial consideration of the MPP's legality.

V. The Supreme Court's vacatur of the *Innovation Law Lab* injunction.

On June 1, the government told the Supreme Court that Secretary Mayorkas' memo had rendered its appeal in *Innovation Law Lab* moot. *See* Petitioner's Suggestion of Mootness and Motion to Vacate the Judgment of the Court of Appeals at 3, *Innovation Law Lab*, No. 19-1212 (U.S. filed June 1, 2021) ("ILL Mot."). The government asked the Court to dismiss the appeal, vacate the Ninth Circuit's decision, and instruct the Ninth Circuit to vacate the district court's injunction. *Id.*

In support of its arguments regarding mootness, the government argued that the individual plaintiffs in *Innovation Law Lab* no longer had an interest in preserving 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 been stayed. *Id.* at 11. The plaintiffs opposed vacatur but conceded that the individual circumstances referenced by the government and the June 1 memo had rendered the appeal moot as to the individual and organizational plaintiffs, respectively. Respondents' Opposition to Petitioners' Motion to Vacate at 3, *Innovation Law Lab*, No. 19-1212 (U.S. filed June 11, 2021).

The government in *Innovation Law Lab* made several equitable arguments in support of vacatur. For one thing, the Ninth Circuit's decision "contribute[d] to the rise of nationwide injunctions." ILL Mot. at 15 (quotation marks omitted).[3] In addition to issues of geographic scope, the Ninth Circuit had decided questions about DHS's nonrefoulement obligations and contiguous return authority under 8 U.S.C. § 1225(b)(2)(C). *Id.* at 14–15. Vacatur was important, on this view, because the Ninth Circuit merits panel "should not be allowed to control future litigation" about these questions "simply because this appeal became moot." Petitioners' Reply in Support of Motion to Vacate the Judgment of the Court of Appeals at 2, *Innovation*

[3] The government noted four times that the injunction at issue was "without any geographical limits," "geographically unlimited," or "geographically limitless." *Id.* at 2, 6, 7, 15.

Law Lab, No. 19-1212 (U.S. filed June 15, 2021) ("ILL Reply"). The government noted that vacatur would still leave litigants "free to invoke any of the lower-court opinions in this case as persuasive authority." *Id.* at 9.

The government also represented that Secretary Mayorkas' decision to terminate the MPP followed months of consideration and was taken in the best interests of the United States, "not because he sought to avoid further litigation over the MPP's legality." *Id.* at 2. Declining to vacate the injunction would cloud agency decision-making, the government argued, by forcing DHS to choose between policy changes that are in the country's interest, and the ability to challenge legal decisions that might have future consequences for the government. ILL Mot. at 16–17.

Following these arguments, on June 21, 2021, the Supreme Court vacated the judgment of the Ninth Circuit and instructed that court to direct the vacatur of the April 2019 preliminary injunction. *Innovation Law Lab*, 2021 WL 2520313.

VI. The government's efforts to dismiss Plaintiffs' claims and vacate the injunction in this case.

On August 13, the government filed a Notice of Mootness and Motion to Vacate the Preliminary Injunction in this Court. It argued that due to the June 1 memo, "Plaintiffs in this case no longer have any interest in defending the district court's preliminary injunction," and that the preliminary injunction should be vacated. Aug. 13, 2021 Mot. at 3. The government did not mention that the June 1

memo disclaimed any application to individuals, including the MPP Plaintiffs, previously placed in MPP.

The government compared this case to *Innovation Law Lab*, which it now described as a case about individual asylum seekers. According to the government, *Innovation Law Lab* is "a similar appeal of a very similar preliminary injunction to the one entered by the district court here" and the "circumstances of this case … mirror those of *Innovation Law Lab* almost exactly." *Id.* at 13–14. As the government explained, "both cases involve individual noncitizens" challenging their return to Mexico under the MPP, and both involve injunctions "enjoining prospective application of MPP to plaintiffs." *Id.* at 14. Both injunctions, moreover, "could have adverse legal consequences for the government." *Id.* at 15. Given these claimed similarities, the government argued that the Supreme Court has "already determined" that the "equitable inquiry calls for vacatur." *Id.* at 17.

The government also filed a status report in the district court—where it had previously moved to dismiss based on the Lyons declaration—arguing that, due to the June 1 memo, "the case is moot in its entirety." ECF No. 109 at 2. Responding to the memo's disclaimer regarding noncitizens who had already been enrolled in MPP at any time, the government claimed—without support—that "this language refers to the fact that individuals who were enrolled in MPP cannot invoke the memorandum to gain entry into the United States." *Id.*

On the same day as the government filed its submission regarding vacatur and mootness in this Court, a district court in Texas vacated the June 1 memo and required DHS to "enforce and implement MPP in good faith." *Texas v. Biden*, 2021 WL 3603341, at *27 (N.D. Tex. Aug. 13, 2021). The ruling came in a lawsuit that initially challenged the January 20 suspension of MPP enrollments. *Id.* at *1. The *Texas* plaintiffs amended their complaint in light of the June 1 memo, and the district court held a trial on the merits. *Id.* at *1–2. The district court in *Texas* concluded that the "termination of MPP was arbitrary and capricious and in violation of the APA," and that "terminating MPP necessarily leads to the systemic violation of" 8 U.S.C. § 1225, which the court construed as a command to detain anyone not returned to Mexico. *Id.* at *22–23. The Fifth Circuit denied a stay pending appeal, *Texas v. Biden*, No. 21-10806, 2021 WL 3674780 (5th Cir. Aug. 19, 2021), as did the Supreme Court, *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021). The Court held the government had failed to show it was likely to succeed on its claim that the June 1 memo "was not arbitrary and capricious." *Id.*[4]

Although the *Texas* injunction eliminated the factual basis for the arguments that the government had made regarding the mootness of this appeal, the government

[4] On September 29, 2021, DHS announced that it intends to issue a new memo terminating the MPP "in the coming weeks." DHS Press Releases, DHS Announces Intention to Issue New Memo Terminating MPP (Sept. 29, 2021), dhs.gov/news/2021/09/29/dhs-announces-intention-issue-new-memo-terminating-mpp.

did not withdraw its August 13 submission to this Court. Instead, in a letter, the government stated that, in light of the *Texas* injunction, "this appeal is no longer moot solely by virtue of the Secretary's June 1 decision terminating MPP." Sept. 21, 2021 Letter at 2.[5]

In one paragraph of the September 21 letter, the government advanced a new argument: that Plaintiffs' claims are moot for reasons currently under consideration by the district court—*i.e.*, "because no Plaintiff is presently subject to MPP and no Plaintiff will be subject to MPP in the future." *Id.* at 2. In support, the government quotes and italicizes its own legal memorandum in the district court, which stated that the MPP Plaintiffs are in removal proceedings, were paroled into the United States, and "*will not be returned to Mexico under MPP*." *Id.* (quoting ECF No. 100 at 5). The September 21 letter does not explain the government's conclusion that the MPP Plaintiffs "will not be returned." It does not attach, cite, or mention the underlying declaration on which the government relied below. The letter argues, once again, that vacatur of the preliminary injunction is warranted, "as the Supreme Court recognized" in *Innovation Law Lab. Id.*

[5] Although the letter supplied the Court with a new authority—the *Texas* injunction—the government did not conform to the requirements of Federal Rule of Appellate Procedure 28(j).

ARGUMENT

I. Dismissal of this appeal is appropriate because the government has disclaimed an interest in the relief it sought.

The government—on behalf of all appellants in this case—has explicitly abandoned its prior asserted interest in vacating the preliminary injunction so that it can potentially return the MPP Plaintiffs to Mexico, and thus has waived the appellants' interest in this appeal. Given that development, although Plaintiffs continue to have an interest in pressing their case in district court, they do not oppose the dismissal of this appeal.

But, to be clear, the government is wrong to contend that *Plaintiffs* lack an interest in preserving the order that protects the MPP Plaintiffs' ability to remain in the United States during the pendency of the district court litigation. The government bears the burden to prove the mootness of Plaintiffs' claims, *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013), and, for reasons Plaintiffs have explained in the district court, it has not come close to doing so. The government's submission of a declaration expressing an intention or prediction about what will happen to the MPP Plaintiffs is not the kind of intervening event that can render a case moot. *See* ECF No. 107 at 8–10.[6] But even if it were, it would be a voluntary cessation of the

[6] The Supreme Court recently resolved the related question whether an unaccepted offer of judgment moots a case. It does not. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 165 (2016), as revised (Feb. 9, 2016). The supposed intervening event

challenged conduct. *See id.* at 10–11. Plaintiffs have therefore explained to the district court, where the government's motion remains pending, that the government has not met its resulting "formidable burden" to show the mootness of Plaintiffs' claims. *Id.* (quoting *Rian Immigrant Center v. Cuccinelli*, No. 1:19-cv-11880-IT, 2020 WL 6395575, at *5 (D. Mass. Nov. 2, 2020)).

The government has fallen especially short of meeting that burden here in this Court. In claiming that this appeal is moot, the government's September 21 letter implicitly relies on the Lyons declaration, a document filed in the district court ***after*** it entered its preliminary injunction. The Plaintiffs have disputed the government's factual and legal claims about the significance of that document, the district court has yet to resolve that dispute, and the declaration has not been presented to this Court. The government has not explained why this Court should deem this case moot based on the contested implications of a document that this Court does not have before it and the district court has not addressed.[7]

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that the government claims has mooted Plaintiffs' claims before the district court is not even an offer of judgment. It is the government's own effort to *avoid* a judgment against it.

[7] *See Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015) ("This court and our sister circuits generally have held that declarations that were not part of the record before the district court at the time of a judgment or order are not part of the record on appeal of that judgment or order."); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir.1988) ("Papers submitted to the district court after the ruling that is challenged on appeal should be stricken from the record on appeal.").

But that does not mean that this appeal must continue. While Plaintiffs' continued interests in their claims are the reason that the *district court* case is not moot, the only party seeking relief from *this* Court is the government. Through this appeal, the government sought the authority to return the plaintiffs to Mexico during the pendency of the district court litigation. It now claims that it has no intent to exercise such authority, and makes clear it no longer seeks a ruling on the merits of the preliminary injunction. Dismissal is appropriate. *Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("[A]n appeal should … be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant any effectual relief whatever in favor of the appellant …." (quotation marks omitted)).

II. This Court should not vacate the preliminary injunction that continues to protect the MPP Plaintiffs.

While Plaintiffs do not object to the dismissal of this appeal, vacating the preliminary injunction that has protected the MPP Plaintiffs is a different matter. Vacatur is an equitable remedy, and the equities do not support it here for three reasons. First, vacatur is rarely warranted in interlocutory appeals and in cases in which any alleged mootness results solely from the appellant's voluntary action. Second, vacatur would be fundamentally inequitable here because the preliminary injunction remains important to the MPP Plaintiffs' safety. Third, each of the factors that arguably justified vacatur in *Innovation Law Lab* is absent here.

A. Vacatur is rarely warranted in interlocutory appeals and where mootness results from the actions of the appellant.

Although the Supreme Court once described an "established practice" of vacating a judgment when a case becomes moot on appeal, *see United States v. Munsingwear, Inc*., 340 U.S. 36, 39 (1950), a presumption *against* vacatur applies under the particular circumstances of this appeal.

First, vacatur is disfavored in appeals of preliminary injunctions. *See McLane*, 3 F.3d at 524 n.6. Instead, "[i]n the case of interlocutory appeals, … the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from." *Id.* (quotation marks and citations omitted); *Newspaper Guild of Salem, Loc. 105 of Newspaper Guild v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1285 n.15 (1st Cir. 1996); *see also* Judgment, *Devitri v. Cronen*, No. 18-1281 (1st Cir. Feb. 6, 2019) (declining to vacate ruling below where terms of preliminary injunction had been fulfilled and appeal had become moot).

Second, vacatur is disfavored where the alleged mootness arises from the appellant's unilateral acts. "When the losing party's voluntary action causes the case to become moot, a presumption against vacatur applies, and vacatur is appropriate only when it would serve the public interest." *Diffenderfer v. Gomez-Colon*, 587

F.3d 445, 451 (1st Cir. 2009); *see Bancorp*, 513 U.S. at 24.[8] That is because in such cases, granting the "extraordinary remedy" of vacatur would "disturb the orderly operation of the federal judicial system," *Bancorp*, 513 U.S. at 26–27, and encourage mischief.

In *Innovation Law Lab*, the government argued that an exception to this second presumption applied: Where the "desire to avoid review" and "the presence of the federal case played no significant role" in the voluntary action that mooted the dispute, the Supreme Court held that the concerns animating *Bancorp* were not present and vacatur was appropriate. *See Alvarez v. Smith*, 558 U.S. 87, 96–97 (2009); *see also* ILL Reply at 2 (describing *Alvarez* to apply to "good-faith reasons external to the litigation"). But this is plainly not such a case.[9]

Instead, the government seeks vacatur of a preliminary injunction in an interlocutory appeal, based on nothing but a sentence that it submitted to the district court in order to seek the dismissal of the case below. Unusually strong equities in

[8] The Court in *Bancorp* also observed that "even in the absence of, or before considering the existence of, extraordinary circumstances" that could justify vacatur, "a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)." *Id.* at 29.

[9] The government in *Innovation Law Lab* also argued that the caselaw suggests vacatur is appropriate where mootness is caused by "intervening changes in federal law." ILL Mot. at 13. That is also not the case here.

the government's favor would have to be present to justify vacatur. But they are absent.

B. The preliminary injunction is essential to protecting the MPP Plaintiffs from return to Mexico.

Vacatur is inequitable because it would place the MPP Plaintiffs at risk. The MPP Plaintiffs are in the United States only because of the preliminary injunction now on appeal. Less than a year ago, the government claimed that it had an urgent need to send them back to Mexico. Although the government now disclaims an intent to return them to Mexico, which may well waive its interest in pursuing this appeal, the government has not shown that this disclaimer has any binding effect on the current administration or any future administration.

The protection afforded by the preliminary injunction is especially vital in light of the uncertainty arising from the *Texas v. Biden* injunction. Given that the government has now been ordered to restart MPP, and could well be subject to other similar orders going forward, it is in no position to make any guarantees about the approach it will take—or be required to take—now or under a future administration with regard to noncitizens who were formerly in the MPP.[10] It is also unknown what

[10] Not including appeals, cases in the Boston immigration court last an average of three years—or over four years in cases where relief is granted. *See* TRACImmigration, Immigration Court Processing Time by Outcome, trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (tabulating "Average Days" for proceedings in Massachusetts, using "All" and "Relief Granted" outcomes).

remedies will be sought by other litigants—including litigants who may wish to punish asylum seekers in order to deter asylum requests—and what remedies courts may grant. And the divisive national attention being focused on the MPP and the southern border only increases the risk that decisions that impact the lives of the MPP Plaintiffs will be colored by a range of unpredictable considerations. This case has already supplied an example of that uncertainty: the government's motion to dismiss this appeal based on the June 1 Memo was overtaken by events within hours of being filed.

The government may believe the risks to the MPP Plaintiffs are small, and Plaintiffs hope they are. But no one can promise the MPP Plaintiffs that they will be safe if the preliminary injunction is lifted—least of all a government working tooth and nail to avoid any legal rulings that would curtail its legal authority to return them to Mexico.

One additional equitable consideration is relevant. Even if the MPP Plaintiffs faced no more risk, vacatur of the injunction that has protected them would not be without impact. The five MPP Plaintiffs suffered traumatic events. When they thought they had reached safety, they were cast out onto to the streets of Mexico and left for months to fight for their survival as part of a U.S. government program. One is now battling cancer. ECF No. 73 at 138. Unnecessarily extinguishing the

injunction's protection from return to Mexico will inevitably impact the MPP Plaintiffs' sense of safety and stability in a manner that counsels against vacatur.

C. The government interests that supported vacatur in *Innovation Law Lab* are absent here.

The government argues that this Court need not even weigh the equities because the Supreme Court has already done so under circumstances "almost exactly" like these. Aug. 13, 2021 Mot. at 14. In fact, the government interests that supported vacatur in *Innovation Law Lab* are entirely absent here.

This case does not involve a "geographically limitless" injunction or a ruling by a Court of Appeals that could bind future litigants. *See* ILL Mot. at 15; ILL Reply at 9. Unlike in *Innovation Law Lab*—where the injunction had never gone into effect and the individual plaintiffs had either been processed out of the MPP through other means, concluded their immigration cases, or died, ILL Mot. at 11—the individual plaintiffs in this case directly benefited from the preliminary injunction and would be impacted by its vacatur. And the voluntary government action that supposedly mooted this case is not "external" to the case and has not been shown to have been taken for reasons other than "to avoid further litigation." *See* ILL Reply at 2. Moreover, whereas denying vacatur here merely allows the preliminary injunction to remain in place, denying vacatur in *Innovation Law Lab* could have allowed the

injunction in that case—which had been stayed pending appeal—to go into effect just at the moment that the parties agreed it was no longer needed.

While the government in *Innovation Law Lab* identified legal consequences that would arise from leaving intact the decision of the Ninth Circuit panel, *see* ILL Mot. at 14–15, here it supports its motion only with vague references to "adverse legal consequences," Aug. 13 Mot. at 15. Apparently, it is referring to the fact that future litigants in hypothetical future challenges to MPP-like programs[11] might cite the district court's ruling as persuasive authority without having the case "red-flagged" in Westlaw. These harms bear no resemblance to the equities identified by the government in *Innovation Law Lab*.

Finally, the government here already has a pending motion to dismiss in the district court, in which it has actually submitted a declaration and briefed the arguments that it only points this Court to in a letter. If the government is correct that Plaintiffs' claims are moot, the entire case will be dismissed below. And if the government is incorrect and its motion to dismiss is denied, it will not face "adverse legal consequences"—it will merely live to fight another day, including, if necessary, the right to appeal a final judgment to this Court at the appropriate time.

[11] The Biden administration was reportedly considering reviving a version of the MPP even before the *Texas* injunction. *See* 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/thebiden-admin-is-considering-reviving-trumps-remain-in-mexico-policy-for-migrants.

These equities cannot justify the vacatur of a preliminary injunction that continues to protect the MPP Plaintiffs from being returned to poverty and danger in Mexico.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal and deny the government's motion to vacate the preliminary injunction.

Dated: October 1, 2021

Respectfully submitted,

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/s/ Adam J. Kessel
Adam J. Kessel

CERTIFICATE OF SERVICE

I certify that on October 1, 2021, I electronically filed the foregoing using the appellate CM/ECF system. I also certify that counsel to Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF System.

/s/ Adam J. Kessel
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