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' REPLY IN SUPPORT OF ITS NOTICE OF MOOTNESS AND MOTION TO VACATE THE PRELIMINARY INJUNCTION

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Appellees-Plaintiffs concede (Vacatur Opp. 13-15) that this appeal is moot and that dismissal is appropriate. And they concede (Vacatur Opp. 14), as they must, that the government has disclaimed any intent to return them to Mexico under MPP. They thus concede the factual predicates necessary for finding this appeal (and indeed the entire case) moot: Plaintiffs have received the ultimate relief requested in their complaint—to not be subject to MPP—and the challenged actions will not reoccur as to Plaintiffs. *See ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 54-55 (1st Cir. 2013). And as the Supreme Court recently explained in *Mayorkas v. Innovation Law Lab*, vacatur of the district court's order granting a preliminary injunction is therefore appropriate so that the order does not spawn future legal consequences. *Mayorkas v. Innovation Law Lab*, No. 19-1212, --- S. Ct. ---, 2021 WL 2520313 (June 21, 2021); *see also* Mot. 12-18; Letter 2.

Plaintiffs nevertheless contend that they have "continued interests in their claims" in district court, and that "the district court case is not moot." Opp. 14. Building on this premise, they contend vacatur is not warranted because "vacatur is rarely warranted in interlocutory appeals and in cases in which any alleged mootness results solely from the appellant's voluntary action," that "vacatur would be fundamentally inequitable here because the preliminary injunction remains important to the MPP Plaintiffs' safety," and "each of the factors that arguably

justified vacatur in *Innovation Law Lab* is absent here." Opp. 15. Plaintiffs are mistaken in all respects, and the Court should vacate the decision below. Alternatively, the Court may place the case in abeyance pending further developments concerning MPP's re-implementation and possible termination.

1. Plaintiffs' first contention that "vacatur is disfavored in appeals of preliminary injunctions," Opp. 16, is flatly inconsistent with the Supreme Court's decision in *Innovation Law Lab*, a case involving an appeal from another preliminary injunction of MPP. There, the Court issued the following order concerning the preliminary injunction: "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)." *Mayorkas v. Innovation Law Lab*, No. 19-1212, --- S. Ct. ---, 2021 WL 2520313 (June 21, 2021). And other courts of appeals in cases involving appeals both from preliminary injunctions directed at MPP and denials of such motions have likewise seen fit to vacate the order below, notwithstanding the fact that the appeal was interlocutory in nature. *See* 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."); Dkt. 139 at 1, *Adrianza Biden*, No. 20-4165 (2d Cir. October 13, 2021) ("it is hereby ORDERED that the appeal [challenging the denial of a preliminary injunction motion seeking to enjoin MPP] is DISMISSED because it is moot, the motion is GRANTED, and the district court's December 7, 2020 order denying a preliminary injunction is VACATED"); *see also* Dkt. 69 at 1, *Doe v. Mayorkas*, 20-55279 (9th Cir. September 24, 2021) (declining to reconsider Court's order in response to suggestion that *Texas* injunction rendered the case no longer moot).[1]

Plaintiffs also suggest that "vacatur is disfavored where the alleged mootness arises from the appellant's unilateral acts." Mot. 16. But that was the same

[1] Plaintiffs' reliance on *McLane v. Mercedes- Benz of N. Am., Inc.*, 3 F.3d 522, 524 n.6 (1st Cir. 1993) and *Newspaper Guild v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1285 n.15 (1st Cir. 1996) is double misplaced. First, the rationale for those cases, as stated by the case they rely on, *Gjertsen v. Bd. of Election Comm'rs of City of Chicago*, 751 F.2d 199, 202 (7th Cir. 1984) "is nowhere clearly expressed" in the cases. To the extent the reasoning is premised on the belief that "only a final judgment has res judicata or collateral estoppel effect," so "there is no harm in letting an interlocutory order stand," *id.*, that is plainly not the case here, where the government has articulated adverse consequences the decision may have on future litigation. Mot. 14-15; *infra* 5-6. Second, even were this rule persuasive on its own terms, it is flatly inconsistent with the Supreme Court's decision in *Innovation Law Lab* and *Doe*, both of which granted vacatur of interlocutory orders impacting MPP.

argument advanced by Plaintiffs in *Innovation Law Lab*, and one which the Court necessarily rejected in granting vacatur. As the government previously explained, 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. Mot. 12-13, 16-18 (collecting cases). And vacatur may also be appropriate even where government action is the cause of mootness, as the Supreme Court's *Innovation Law Lab* decision makes clear. Order, *Mayorkas v. Innovation Law Lab*, 19-1212 (June 21, 2021); *see also Board of Regents of the University of Texas System v. New Left Education Project*, 414 U.S. 807 (1973) (per curiam). Indeed, as one leading treatise has explained, vacatur may be 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," as well as other decisions relevant to a specific case. *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).

2. Plaintiffs' contention that "[v]acatur is inequitable because it would place the MPP Plaintiffs at risk," Mot. 18, is equally meritless. As the government has explained, Letter 1-2, and as Plaintiffs concede (Vacatur Opp. 14), the government has disclaimed any intent to return them to Mexico under MPP. All named Plaintiffs "have been paroled into the United States and are in removal proceedings under 8 U.S.C. § 1229a," ECF #100 at 4-5, and the government has submitted a declaration, under penalty of perjury, that Plaintiffs "*will not be returned to Mexico under MPP*" regardless of whether MPP remains in effect or not. *Id.* at 5 (emphasis added).

Plaintiffs nevertheless contend that the injunction must remain in place—notwithstanding that Plaintiffs have received the ultimate relief requested in their complaint, to not be subject to MPP now or in the future, and the challenged actions will not reoccur as to Plaintiffs—"in light of the uncertainty arising from the *Texas v. Biden* injunction." Mot. 18. But the *Texas* injunction requires the government "to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the [Administrative Procedure Act] and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 12[2]5 without releasing any aliens because of a lack of detention resources." *Texas v. Biden*, No.

2:21-CV-067-Z, 2021 WL 3603341, *27 (N.D. Tex. Aug. 13, 2021).[2] The *Texas* injunction has no bearing on Plaintiffs in this case, who are not parties to the *Texas* case, and who have been physically present in this country for months.[3]

3. Plaintiffs' final argument that *Innovation Law Lab* does not support vacatur here is also without merit. Opp. 20-21. In *Innovation Law Lab*, the government argued that vacatur was appropriate given the multiple significant pronouncements the decision appealed from made on MPP that could spawn legal consequences in the future. As the government explained, Mot. 14-15, that is also the case here. Both cases involve individual noncitizens returned to Mexico under MPP who challenged that decision as unlawful under the INA and the 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

[2] The government is appealing that injunction, and sought a stay of its effect pending appeal. *See Texas v. Biden*, 10 F.4th 538 (5th Cir. 2021); *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021). The Fifth Circuit appeal remains pending, and the government filed an opening brief on September 20, 2021. The States' response brief is due October 12, 2021 and the government reply is due October 19, 2021. Oral argument is scheduled for November 2, 2021.

[3] On October 12, 2021, the district court denied the government's motion to dismiss on mootness grounds, reasoning that "[w]hile Defendants' commitment not to return the Plaintiffs to Mexico pending removal proceedings . . . may be sufficient to remove the immediacy of the threat of irreparable harm underlying the preliminary injunctions entered in this case, . . . , these assurances are not sufficient to render the case moot in light of the Memorandum and Order and nationwide injunction issued by the Northern District of Texas." Dkt. 112. While the government disagrees with that ultimate conclusion, as relevant here, the district court has concluded that Plaintiffs no longer have any cognizable interest in the

authority under 8 U.S.C. § 1225(b)(2)(C). *Compare Innovation Law Lab*, 951 F.3d at 1084 *with* Op. 14-22. And 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).

Plaintiffs dismiss these harms because the decision in *Innovation Law Lab* was a precedential Ninth Circuit decision, whereas the decision here is a district court decision. Mot. 21. To be sure, a district court decision is not binding precedent, and other district courts in this Circuit to which the same issues may be presented are free to decide the issues differently. But the record in this case belies Plaintiffs' contention that the decision cannot spawn legal consequences. Plaintiffs themselves relied on the decision in asking for a second preliminary injunction in this case, and the district court rested its decision almost entirely on its prior decision. *See Bollat Vasquez v. Mayorkas*, 520 F. Supp. 3d 94, 96-112 (D. Mass. 2021). And Plaintiffs have vigorously sought to "relate" subsequent claims concerning MPP under the district court's local rules to their initial case, to ensure the case is heard by the same district judge who has already indicated how they would rule on the issues presented. *See* Dkts. 13, 15, 72. Should Plaintiffs file any

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preliminary injunction decision or arguing that it should not be vacated.

further claims against MPP, either on behalf of themselves or others, their past actions strongly suggest they would seek to relate the future cases to this case as well.

Nor is the possibility of future litigation speculative. The government is subject to a permanent injunction requiring it to implement MPP in "good faith." The government has been working in good faith to re-start MPP in compliance with the order, and continues to do so. *See* Notice of Compliance, Dkt. 105, *Texas v. Biden*, 21-cv-67 (N.D. Tex.); Notice of Compliance, Dkt. 105, *Texas v. Biden*, 21-cv-67 (N.D. Tex.); First Supplemental Notice of Compliance, Dkt. 111, *Texas v. Biden*, 21-cv-67 (N.D. Tex.). The government has also announced that it "intends to issue in the coming weeks a new memorandum terminating the [MPP]." *See* DHS Announces Intention to Issue New Memo Terminating MPP, https://www.dhs.gov/news/2021/09/29/dhs-announces-intention-issue-new-memo-terminating-mpp. Indeed, Plaintiffs rely on these developments to suggest "the lives of the MPP Plaintiffs will be colored by a range of unpredictable considerations." Mot. 19. But whatever those considerations may be, "it is clearly preferable as a general matter to review a set of claims in the context of an extant rather than a defunct rule …." *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 473 (D.C. Cir. 2014). Although the government does not believe Plaintiffs have any colorable claim against MPP, to the extent they or others might

have future claims to raise against MPP in any respect, they should do so in an appropriate future case. But the district court's prior decision should not prejudge those claims, and so vacatur is appropriate.

4. Furthermore, equitable considerations may apply differently depending on the identity of the party moving to vacate a decision. 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.'" *Arevalo*, 386 F.3d 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) and the legality of MPP] to be litigated

fully in a more appropriate case." *Id.*

5. Finally, although vacatur is appropriate at this time, should the Court disagree, in light of recent developments, including the *Texas* injunction requiring re-implementation of MPP, *Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, *27 (N.D. Tex. Aug. 13, 2021), and DHS's announcement that it intends to terminate MPP "in the coming weeks," *see* DHS Announces Intention to Issue New Memo Terminating MPP, https://www.dhs.gov/news/2021/09/29/dhs-announces-intention-issue-new-memo-terminating-mpp, the Court may wish to place this appeal in abeyance. *See, e.g.*, *Devia v. Nuclear Regul. Comm'n*, 492 F.3d 421, 426 (D.C. Cir. 2007) (explaining an abeyance may be appropriate where "considerations of prudential ripeness" suggest further expenditure of "judicial resources when it might not be necessary").

For the foregoing reasons, and those raised in the government's prior submissions, 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. Alternatively, the Court may place the case in abeyance pending further developments concerning MPP's re-implementation and possible termination.

Dated: October 22, 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 2,552 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: October 22, 2021

CERTIFICATE OF SERVICE

I certify that on October 22, 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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