No. 20-55279

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTIAN DOE, et al.,

Petitioners-Appellees,

v.

ALEJANDRO N. MAYORKAS,
Secretary of Homeland Security, et al.,

Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of California

RESPONSE TO MOTION TO RECONSIDER

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INTRODUCTION

On September 1, 2021, Appellees moved the Court to reconsider its order remanding this case to the district court with instructions to vacate as moot the preliminary injunction that had formed the basis of this appeal. On September 3, 2021, the Court ordered the government to file a response to the motion within 14 days. The government respectfully opposes the motion to reconsider. The district court already vacated as moot the preliminary injunction that was the subject of this appeal on July 30, 2021. And, because there have been other factual developments affecting the issues in this case, it would be an inefficient use of judicial resources to reinstate this appeal even if there were a basis to do so. If Appellees believe that their complaint still presents a live issue and that they can satisfy the requirements for a preliminary injunction based on current circumstances, they should seek that relief from the district court.

BACKGROUND

Plaintiffs filed this suit in November 2019, arguing that the access to counsel available to noncitizens who were placed in the Migrant Protection Protocols (MPP) and undergoing *non-refoulement* interviews before being returned to Mexico violated the Administrative Procedure Act (APA). Dist. Ct. Dkt. No. 1. The district court granted a temporary restraining order and later, on January 14, 2020, a classwide preliminary injunction requiring the Department of Homeland Security

(DHS) to provide in-person access to counsel before *non-refoulement* interviews conducted for individuals in MPP who were detained in California and had retained counsel, and telephonic access to counsel during those interviews. Dist. Ct. Dkt. No. 40. The preliminary injunction was based on the district court's finding that Plaintiffs were likely to succeed on their claim that the APA's right-to-counsel provision, 5 U.S.C. § 555(b), applied to *non-refoulement* interviews conducted as part of MPP. *Id*. On March 12, 2020, the government appealed the preliminary injunction order.

On December 15, 2020, following briefing and argument, the Court stayed this appeal pending the Supreme Court's resolution of *Mayorkas v. Innovation Law Lab*, No. 19-1212, a case that involved a nationwide preliminary injunction that had enjoined DHS from implementing MPP. While *Innovation Law Lab* was still pending before the Supreme Court, the Secretary of Homeland Security issued a memorandum on June 1, 2021, terminating MPP. *See* Memo. from Alejandro N. Mayorkas regarding Termination of the Migrant Protection Protocols Program (June 1, 2021), *available at* https://go.usa.gov/x6s7E. Following that, on June 21, 2021, the Supreme Court issued an order in *Innovation Law Lab* directing that "[t]he 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."

On July 19, 2021, following the Supreme Court's order in *Innovation Law Lab*, this Court issued the following order in this appeal:

> 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.

On July 30, 2021, the district court issued an order vacating as moot its January 14, 2020 order granting a classwide preliminary injunction requiring certain access to counsel before and during MPP *non-refoulement* interviews. Dist. Ct. Dkt. No. 74.

On August 13, 2021, the District Court for the Northern District of Texas entered an injunction requiring DHS to reimplement MPP in good faith. *State v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, at *27 (N.D. Tex. Aug. 13, 2021). The court held that the June 1 DHS memorandum terminating MPP violated the APA and 8 U.S.C. § 1225, the statutory authority for MPP. The government promptly appealed that order, and that appeal remains pending. *State v. Biden*, 10 F.4th 538 (5th Cir. 2021). DHS is currently taking steps necessary to reimplement MPP, but MPP is not yet operational. *See* Notice of Compliance with Injunction, No. 2:21-CV-067-Z (N.D. Tex. Sept. 15, 2021).

ARGUMENT

The government respectfully opposes the motion to reconsider and reinstate this appeal. If Appellees believe they have a basis for a preliminary injunction related to MPP based on current circumstances, they should seek that relief from the district court.

First, the district court has already vacated the preliminary injunction that formed the basis of, and provided jurisdiction for, this appeal. The government filed this appeal based on 28 U.S.C. § 1292(a)(1), which provides jurisdiction for an appeal from an interlocutory order from a district court, here the district court's January 14, 2020 preliminary junction order. As that order has already been vacated, there is no longer any basis for an appeal challenging it.

Appellees rely on the fact that the district court vacated the injunction before this Court's mandate issued, Mot. 5-6. This is true, but does not militate in favor of reviving the appeal. This case was clearly moot when this Court, and the district court, acted, and both courts acted "based upon the limitations of [their] power" because courts "do not have the constitutional authority to decide moot cases." *Armster v. U.S. Dist. Ct. for Cent. Dist. of California*, 806 F.2d 1347, 1355 (9th Cir. 1986). Factual developments after that time are more properly considered by the district court in the first instance, and there is no basis to delay the mandate or action by the district court based on speculation that facts might later arise to make live the

issues that this Court (and the Supreme Court) rightfully found moot at the time of the July 19, 2021 remand order. Appellees concede that their motion "is based on facts that occurred after the July 19 Order" and were thus "beyond the scope of a petition for rehearing." Mot. at 1, n.1 (quoting *Armster*, 806 F.2d at 1356-57); *see also United States v. Mageno*, 786 F.3d 768, 775 n.6 (9th Cir. 2015) (explaining that a party cannot seek rehearing based on "facts that *occurred* after [the Court's] initial decision, even if those later events prove the assumptions on which an opinion was based to have been incorrect").

Second, in 2020, while MPP was still operational, DHS amended its policy guidance implementing MPP to provide greater access to counsel than the former version of the policy Plaintiffs initially challenged. In particular, on December 7, 2020, DHS announced that it would "ensure the ability to have retained counsel participate telephonically in USCIS's MPP *non-refoulement* assessments" where it does not delay the interview. DHS Supplemental Policy Guidance for Additional Improvement of the Migrant Protection Protocols, at 1-2 (Dec. 7, 2020), https://www.dhs.gov/sites/default/files/publications/supplemental_policy_guidance.pdf. DHS noted that "[t]his policy both updates and supersedes in part section *A. Interview* of USCIS' January 28, 2019 Policy Memorandum PM-602-0169 which notes, 'DHS is currently unable to provide access to counsel during the assessments.'" *Id.* n.1. Accordingly, the issue of access to counsel during MPP *non-*

refoulement interviews is moot for reasons independent of the June 1, 2021 memorandum terminating MPP and the order from the District Court for the Northern District of Texas.

In addition, while the government continues to challenge the injunction requiring DHS to restart MPP on appeal, DHS is making good faith efforts to restart the program, but doing so will require DHS to first take a number of actions without which MPP cannot operate. *See* Notice of Compliance with Injunction, No. 2:21-CV-067-Z (N.D. Tex. Sept. 15, 2021). As a result, MPP is not yet operational. *Id*. And, among the steps DHS is taking before MPP restarts, is updating its policy guidance related to MPP, which could further affect the issues in this case. *Id.*

Given the changes in procedures with respect to access to counsel during *non-refoulement* interviews, the potential for additional changes, and the fact that MPP is not currently operational, reinstating this appeal would be an inefficient use of the Court's resources. Instead, if new enrollments in MPP begin and Appellees believe they have some basis for a preliminary injunction based on the access to counsel provided under MPP as it is implemented at that time, the proper course of action is for them to seek that relief from the district court if their complaint presents an ongoing controversy and they can satisfy the requirements for a preliminary injunction based on current circumstances.

CONCLUSION

The government thus respectfully opposes the motion to reconsider.

Respectfully submitted,

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September 17, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, I electronically filed this response with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Brian C. Ward
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