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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

IMMIGRANT DEFENDERS LAW CENTER, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

Case No. 2:20-cv-09893-JGB-SHK

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION (DKT. 205) AND OPPOSITION TO MOTION TO DISMISS (DKT. 207)

Judge: Honorable Jesus G. Bernal
Crtrm: 1
Date: October 3, 2022
Time: 9:00 a.m.

Action Filed: October 28, 2020

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I. INTRODUCTION

Plaintiffs brought this putative class action to challenge Defendants' unlawful implementation of the Migrant Protection Protocols from January 2019 through June 2021 ("MPP 1.0"). Individual Plaintiffs are twelve asylum seekers subjected to MPP 1.0 whose cases became inactive due to termination or a final order of removal, and who remained stranded outside the United States when the Second Amended Complaint ("SAC") (ECF No. 200-1) was filed. Organizational Plaintiffs are two legal service providers in California who serve individuals subjected to MPP 1.0, among others.

Despite Defendants' termination of MPP 1.0 in June 2021 and their recognition of the flawed nature of MPP 1.0 proceedings,[1] Individual Plaintiffs and the putative class suffer ongoing grievous harm from their placement in MPP 1.0. Nothing in Defendants' response to the Supreme Court's *Biden v. Texas* decision, 142 S. Ct. 2528 (2022), or the Texas district court's subsequent vacatur of the preliminary injunction in that case, has addressed or mitigated these harms. This Court can grant relief to Individual Plaintiffs and the putative class in this lawsuit and should permit this action to proceed by denying Defendants' Motion to Dismiss (ECF No. 189) and granting Plaintiffs' Motion for Class Certification (ECF No. 205).

II. FACTUAL BACKGROUND

In January 2019, Defendants instituted MPP 1.0, thereby sending asylum-seeking individuals to Mexico to await their hearings in U.S. immigration court.[2] This policy remained in effect from January 2019 to June 2021, during which time all Individual Plaintiffs and putative class members were subjected to MPP 1.0. Forcing these asylum

[1] *See* Decl. of Hannah R. Coleman ("Coleman Decl.") at Ex. A ("Termination of the Migrant Protection Protocols Program") at 4 (expressing concern as to whether MPP 1.0 "provided enrollees an adequate opportunity to appear for proceedings to present their claims for relief, and whether conditions faced by some MPP enrollees in Mexico, including the lack of stable access to housing, income, and safety, resulted in the abandonment of potentially meritorious protection claims").

[2] References to "asylum" encompass the statutory and regulatory processes by which any noncitizen may seek all relevant forms of protection available under U.S. immigration laws, including asylum, withholding of removal, and relief under the Convention Against Torture. *See* 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. § 1208.17(a).

seekers to await their hearings under dangerous conditions in Mexico, Defendants deprived them of meaningful access to the U.S. asylum system (SAC ¶¶ 333, 335); frustrated their ability to identify, retain, and consult with legal representatives (SAC ¶¶ 104, 374–79); and thwarted their Fifth Amendment due process rights (SAC ¶¶ 355–59).

In June 2021, Department of Homeland Security ("DHS") Secretary Alejandro Mayorkas formally terminated MPP 1.0. Four months earlier, beginning in February 2021, the Biden Administration had implemented the "wind-down," providing a pathway for certain individuals subjected to MPP 1.0 to enter and pursue their asylum claims in the United States. This policy was initially available for individuals with active MPP 1.0 cases, and later was expanded to include those previously subjected to MPP 1.0 with terminated cases or *in absentia* removal orders. SAC ¶¶ 3, 81, 83–84.

On August 13, 2021, following a challenge by Texas and Missouri to the termination of MPP 1.0, the Northern District of Texas issued an injunction prohibiting the Government from implementing or enforcing the June 2021 termination memo and requiring it to "reimplement MPP in good faith." *Texas v. Biden*, 554 F. Supp. 3d 818, 857 (N.D. Tex. 2021). Although the court indicated that implementation of the wind-down of MPP 1.0 was independent of the Government's June 2021 termination, Defendants nonetheless chose to end the wind-down in August 2021. *Id.* at 855. In so doing, Defendants foreclosed any avenue for people, including Individual Plaintiffs and putative class members, who (1) were subjected to MPP 1.0, (2) had terminated cases or *in absentia* orders of removal, and (3) qualified for the wind-down but were unable to enter the United States before its termination, to meaningfully access the asylum process.

In December 2021, Defendants responded to the *Texas v. Biden* injunction by unveiling a new version of the Migrant Protection Protocols—MPP 2.0. *See* Coleman Decl. at Ex. B at 1 ("Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols"). Meanwhile, the Government appealed that injunction,

leading to the Supreme Court's June 30, 2022, decision in *Biden v. Texas*, 142 S. Ct. 2528 (2022), that concluded that the Northern District of Texas's injunction violated 8 U.S.C. § 1252(f)(1) and affirmed Defendants' authority to end MPP, *id.* at 2538, 2541–48. Pursuant to this decision, the Northern District of Texas vacated the injunction on August 8, 2022. *Texas v. Biden*, No. 2:21-cv-00067-Z, ECF No. 147 (N.D. Tex. Aug. 8, 2022). That same day, DHS announced its intent to end "the court-ordered implementation of MPP [2.0] in a quick, and orderly, manner," referencing Secretary Mayorkas' prior statements that "MPP has endemic flaws, [and] imposes unjustifiable human costs . . . ." Coleman Decl. at Ex. C ("DHS Statement on U.S. District Court's Decision Regarding MPP"). DHS explained that "[i]ndividuals are no longer being newly enrolled in MPP [2.0], and individuals currently in MPP [2.0] in Mexico will be disenrolled when they return for their next scheduled court date." *Id.*

Vacatur of the *Texas v. Biden* injunction enabled Defendants to end MPP 2.0 and take steps to permit those subjected to the second iteration of the policy to pursue their asylum claims inside the United States. But these steps by Defendants have provided no redress to Individual Plaintiffs or the putative class, whose injuries flow from MPP 1.0, not MPP 2.0, and who continue to languish in legal purgatory without meaningful access to the U.S. asylum system.[3]

III. PROCEDURAL HISTORY

Currently pending before this Court are Defendants' Motion to Dismiss (ECF No. 189) and Plaintiffs' Motion for Class Certification (ECF No. 205). On May 16, 2022, the Court heard argument on Defendants' Motion to Dismiss. At the conclusion of the hearing, the Court indicated that it was "inclined to wait to issue [the] ruling until after" the Supreme Court issued its decision in *Biden v. Texas*, which occurred in June 2022. Coleman Decl. at Ex. D (May 16, 2022 Hrg. Tr.) at 33:14–17. The Court has not yet heard argument on Plaintiffs' Motion for Class Certification.

[3] The status of each Individual Plaintiff is discussed more fully *infra* in Section IV.B.

On September 2, 2022, this Court held a status conference and requested supplemental briefing regarding the impact of the vacatur of the *Texas v. Biden* injunction on these proceedings. ECF No. 237. Plaintiffs submit this brief in response.

IV. ARGUMENT

A. No legal impediments preclude the Court from moving forward with this case.

Plaintiffs have consistently maintained—and Defendants ultimately agreed (*see* Coleman Decl. at Ex. D at 7:18–23)—that the *Texas v. Biden* injunction was forward-looking in scope and thus did not impact the Individual Plaintiffs, the putative class, or their claims in this case. At the very least, Defendants' response to the vacatur of the *Texas v. Biden* injunction leaves no doubt that action by this Court is necessary to provide redress to the Individual Plaintiffs and putative class members. This Court can and should proceed with this case.

1. The vacatur of the *Texas v. Biden* injunction does not provide relief to Individual Plaintiffs or the putative class.

The vacatur of the *Texas v. Biden* injunction affects only *future* enrollments in MPP 2.0. *See* Coleman Decl. at Ex. C ("DHS Statement on U.S. District Court's Decision Regarding MPP"). Neither the *Texas v. Biden* injunction nor its vacatur affected the fate of asylum-seeking individuals who had *previously* been enrolled in MPP 1.0 and were never enrolled in MPP 2.0. By contrast, this case concerns *only* individuals enrolled in MPP 1.0 before its rescission. *See* SAC ¶¶ 8–9; ECF No. 205-1 at 3. In short, *Texas v. Biden* and this case are concerned with entirely distinct subsets of asylum seekers.[4] Accordingly, neither the Supreme Court's holding nor the vacatur of the *Texas* injunction offers any relief to putative class members in *this* case or affects

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[4] In their Motion to Dismiss, Defendants argued that Plaintiffs' Complaint should be dismissed because the "relief Plaintiffs seek would conflict with the nationwide permanent injunction entered in the Northern District of Texas" in *Texas v. Biden*. ECF No. 189 at 4. Defendants' interpretation of the injunction was wrong before it was vacated. *See* ECF No. 207 at 3–7. Now that the injunction has been vacated pursuant to the Supreme Court's decision in *Biden v. Texas*, 142 S. Ct. 2528, the specter of dueling injunctions is completely irrelevant.

their ability to re-enter the country and pursue their asylum claims from within the United States.[5]

Putative class members lack any avenue for relief except through this lawsuit. Following the vacatur of the *Texas* injunction, Defendants promptly terminated MPP 2.0, ending new enrollments into that program. *See* Coleman Decl. at Ex. E ("Court Ordered Reimplementation of the Migrant Protection Protocols"). Defendants additionally announced that "individuals *currently* in MPP [2.0] in Mexico will be disenrolled when they return for their next scheduled court date." *Id*. (emphasis added).

By contrast, Defendants have announced no plans to provide relief in any form to the putative class in this case, all of whom were *previously* enrolled in MPP 1.0, never enrolled in MPP 2.0, and now have no scheduled court dates. Instead, after the *Texas* district court entered its now-vacated injunction, Defendants chose to end the wind-down of MPP 1.0, even though no such action was required by the injunction. *See* ECF No. 207 at 4–5. At the time Defendants ended the wind-down, thousands of individuals with final orders of removal or terminated cases resulting from MPP 1.0 remained stranded outside the United States. SAC ¶ 8.

That situation continues for the putative class members in this case, who remain in legal limbo, deprived of their rights to legal representation, to a full and fair hearing, and to petition the courts. *See id*. ¶¶ 85, 97–102. Putative class members with final orders of removal must move to reopen their immigration proceedings—something that is nearly impossible to do from outside the United States and without the assistance of immigration counsel. *See id*. ¶ 88. Individuals with terminated cases must navigate the complex set of immigration policies in place at the border in order to seek protection under U.S. asylum law. *See id*. ¶ 89. Meanwhile, the Government continues to

[5] The *Texas v. Biden* litigation is ongoing in the Northern District of Texas. However, even if the relief currently requested by the plaintiffs in that case—postponing the effective date of the Government's most recent memorandum terminating MPP— is granted, it would not impact this Court's ability to proceed with this case, for the reasons discussed in this section. *See Texas v. Biden*, Case No. 2:21-cv-00067-Z, ECF No. 149 at 6 (N.D. Tex. Aug. 8, 2022).

emphasize the "substantial and unjustifiable human costs on the migrants" in MPP, including "the substantial risk of kidnapping migrants faced while waiting for their hearings as a part of MPP," "serious threats to their personal safety, inadequate and unreliable access to food and shelter, . . . lack of adequate notice of their hearings," and "abandonment of potentially meritorious asylum claims." *Texas v. Biden*, No. 2:21-cv-00067-Z, ECF No. 163 at 27, 29–32 (N.D. Tex. Sept. 2, 2022) (internal quotation marks omitted). Yet, even after the *Texas* injunction has been vacated, Defendants continue to ignore the ongoing harms to putative class members.

The Court should proceed with this case because the vacatur of the *Texas* injunction is irrelevant to Individual Plaintiffs and putative class members and Defendants continue to obstruct their access to the U.S. asylum process.

2. ***Biden v. Texas*** **confirms that this Court has subject matter jurisdiction and can grant meaningful relief.**

In *Biden v. Texas*, the Supreme Court confirmed that the district court had subject matter jurisdiction over claims challenging MPP. 142 S. Ct. at 2538–40. Although 8 U.S.C. § 1252(f)(1) restricts classwide injunctive relief in certain immigration actions, it does not affect a court's power to adjudicate cases. *Id.* at 2540 (noting that "the question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims").

Further, consistent with its holding in *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022), the Supreme Court affirmed that declaratory relief remains appropriate, notwithstanding § 1252(f)(1). *Texas*, 142 S. Ct. at 2540 (quoting *Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) ("[T]he District Court had jurisdiction to entertain the plaintiffs' request for declaratory relief." (cleaned up))).[6] Accordingly, following *Texas* and

[6] *See Aleman Gonzalez*, 142 S. Ct. at 2065 n.2; *id.* at 2077–78 (Sotomayor, J., dissenting) ("[T]he Court rightly does not embrace the Government's eleventh-hour suggestion at oral argument to hold that § 1252(f)(1) bars even classwide declaratory relief."); *see also Reno v. American-Arab Anti–Discrimination Comm.*, 525 U.S. 471, 481–82 (1999) ("By its plain terms, and even by its title, [Section 1252(f)] is nothing more or less than a limit on *injunctive* relief." (emphasis added)); *Jennings v. Rodriguez*, 138 S. Ct. 830, 875 (2018) (Breyer, J., dissenting) (concluding that "a court could order

(Footnote Cont'd on Following Page)

1 *Aleman Gonzalez*, at least one district court in this circuit has already granted
2 declaratory relief to a class of asylum-seeking individuals, *see Al Otro Lado, Inc. v.*
3 *Mayorkas*, No. 17-cv-2366 BAS-KSC, 2022 WL 3135914, at *15 (S.D. Cal. Aug. 5,
4 2022), and the government did not contest its authority to do so, *see id.* at *11 (citing
5 the defendants' argument that, notwithstanding § 1252(f)(1), "if this Court issues class-
6 wide declaratory relief, Plaintiff class members can . . . rely upon this Court's
7 declaratory judgment as a predicate to further relief, including [an] injunction" (cleaned
8 up)).

9 Adjudication of the pending motions here is thus appropriate and necessary, as
10 Plaintiffs and putative class members retain an indisputable legal interest in this action
11 based, at a minimum, on their request for declaratory relief. *See* SAC, Prayer for Relief,
12 (c). As in *Biden v. Texas*, this Court retains federal question jurisdiction over Plaintiffs'
13 claims—which arise under the First and Fifth Amendments to the U.S. Constitution, the
14 INA, and the APA—and declaratory relief remains an appropriate remedy
15 notwithstanding section 1252(f)(1).[7] 142 S. Ct. at 2538–40; 28 U.S.C. §§ 2201–02; *see*
16 *also Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174–75 (9th Cir. 2002)
17 (affirming district court's independent "duty to decide the merits of [a] declaratory
18 judgment claim"). Because this Court has subject matter jurisdiction and no government
19 action to date has provided putative class members with relief, this Court should
20 proceed with adjudication of Defendants' Motion to Dismiss and certification of
21 Plaintiffs' proposed class.

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24 declaratory relief" notwithstanding section 1252(f)(1)); *Rodriguez v. Hayes*, 591 F.3d
25 1105, 1119–20 (9th Cir. 2010) (explaining that § 1252(f) does not bar classwide declaratory relief), *abrogated in part by Aleman Gonzalez*, 142 S. Ct. 2057.

26 [7] Plaintiffs do not concede that declaratory relief is the only available remedy. However,
27 this Court need not decide which remedies remain available at this juncture. It is sufficient to proceed with the case knowing that, per *Biden v. Texas* and *Garland v.*
28 *Aleman Gonzalez*, this Court has subject matter jurisdiction and, at a minimum, classwide declaratory relief remains available.

B. Neither *Biden v. Texas* nor the vacatur of the injunction obviate the need for this Court to certify Plaintiffs' proposed class.

The vacatur of the *Texas* injunction has no impact on the need for class certification in this case: putative class members, who were subjected to MPP 1.0 and remain outside the United States with inactive cases, have no other avenue to relief. Moreover, nothing in the Supreme Court's opinion in *Aleman Gonzalez* forecloses this Court's ability to certify the proposed class. Where, as here, the Court can grant relief and all the elements of Rule 23(b) are met, class certification is appropriate.

Changes in the circumstances of various Individual Plaintiffs also do not prevent class certification. As discussed more fully in Plaintiffs' Motion for Class Certification, all named Individual Plaintiffs were adequate class representatives at the time the SAC was filed. *See* ECF No. 205-1 at 2 n.2; *see also* ECF No. 216 at 9–11. Moreover, although eleven of the twelve Individual Plaintiffs are now in the United States,[8] they may serve as class representatives because their claims are "inherently transitory." *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1087 (9th Cir. 2011); ECF No. 205-1 at 2 n.2. Even if the Court does not certify the U.S.-based Individual Plaintiffs as class representatives, Plaintiff Chepo Doe may still represent the class. *See Wortman v. Air New Zealand*, 326 F.R.D. 549, 557 (N.D. Cal. 2018) (finding that class would survive even if one of the four named plaintiffs did not meet the class definition).

[8] Ten Individual Plaintiffs have entered the United States under grants of humanitarian parole and/or Title 42 exemptions. Title 42 is a separate policy that has effectively closed the U.S.-Mexico border to all asylum seekers since March 2020. These ten Individual Plaintiffs were able to secure the limited assistance of immigration counsel (for purposes of humanitarian parole and/or Title 42 exemption requests only) by virtue of their participation in this lawsuit. Another Individual Plaintiff is currently being detained by ICE and has been placed in immigration court proceedings. The other Individual Plaintiff, Chepo Doe—who was among those covered by Plaintiffs' November 2021 TRO (ECF No. 157)—remains stranded outside the United States with no ability to meaningfully access the U.S. asylum process. Both Chepo Doe and his teenage daughter, who was also subjected to MPP 1.0, had to return to El Salvador during their proceedings to access life-saving emergency medical care for the daughter. *See* SAC ¶¶ 16, 152–64. They continue to shelter in a church under precarious conditions in El Salvador. *See id.* ¶ 165.

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V. CONCLUSION

Individual Plaintiffs and the putative class have been waiting for as long as three years for some form of remedy for the harm caused by Defendants' implementation of MPP 1.0. Now, in light of the vacatur of the *Texas* injunction, Defendants have run out of excuses for why they cannot provide such relief. The motions before the Court are ripe for adjudication, and the Court should promptly deny Defendants' Motion to Dismiss and grant Plaintiffs' Motion for Class Certification.

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