No. 18-16981

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTA RAMOS, *et al.*,

Plaintiffs – Appellees,

vs.

CHAD F. WOLF, *et al.*,

Defendants – Appellants.

On Appeal from the United States District Court
for the Northern District of California
Honorable Edward M. Chen, District Judge
Case No. 3:18-cv-01554-EMC

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO DISMISS APPEAL AND REMOVE THIS CASE FROM THE ARGUMENT CALENDAR

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INTRODUCTION

This case presents a live controversy of paramount importance to more than three hundred thousand TPS holders and their U.S. citizen children. Defendants' eleventh-hour press release proves nothing, except perhaps that Defendants do not wish to defend before this en banc panel the positions they have held for more than five years. The hearing should go forward for two principal reasons.

First, Defendants already have confirmed that any "forthcoming" Federal Register Notices will *not* disavow the position that triggered this litigation—namely, that TPS extensions must be directly tied to the "originating conditions" that justified the initial TPS designations. ER 26; Declaration of Ahilan Arulanantham in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Arulanantham Decl.") ¶ 14. Nor will the Notices declare the challenged terminations unlawful (*id.*), despite a "wealth of record evidence" that they violated the Administrative Procedures Act. ER 19. Equally problematic, the Notices will surely not disclaim Defendants' absolutist position that federal courts lack jurisdiction to review even arbitrary and capricious TPS decisions.

Therefore, Plaintiffs (and hundreds of thousands of other TPS-holders) will still remain at risk that, in future TPS decisions, the Department of Homeland Security ("DHS") will refuse to consider intervening events, and then seek to limit judicial review of such arbitrary action. TPS decisions necessarily and inevitably recur. If this appeal is dismissed, Plaintiffs could be confronted with improper terminations as soon as early spring 2025. Absolutely nothing in

Defendants' proposal prevents the federal government from issuing new terminations in 2025 for exactly the same reasons that gave rise to this action—that the conditions rendering these countries unsafe are not directly tied to the bases for initial TPS designations.

Second, even if Defendants' press release otherwise rendered this case moot, it could not justify dismissal at this time because Defendants' proposed decisions rescinding the prior Administration's TPS terminations could be challenged by States opposed to TPS extensions. In several suits brought by States, federal courts have enjoined immigration measures enacted by this Administration to undo the prior Administration's immigration policies. Given that risk, Plaintiffs could end up subject to *these same* termination decisions, not just new ones.

For these reasons, it is not "absolutely clear" the unlawful action at issue here could not reasonably be expected to recur. *See Friends of the Earth, Inc. v. Laidlaw Env't. Servs (TOC), Inc.*, 528 U.S. 167, 189 (2000). Because the case is not moot, this matter is fully briefed, and the issues presented raise significant questions, the Motion should be denied, and the en banc argument should go forward as scheduled.

BACKGROUND

Plaintiffs filed this action in March 2018, and the district court granted the preliminary injunction the following October. This case has been on appeal ever since. In September 2020, the three-judge panel issued its opinion. Plaintiffs timely petitioned for rehearing en banc. After the Biden Administration came to office, the Parties entered into settlement discussions and then formal mediation. Starting in February

2021, this Court granted multiple stays to permit those talks to occur. It also inquired as to whether Defendants intended to take any action with respect to TPS. Defendants repeatedly stated that they would take such action. *See* Arulanantham Decl." ¶¶ 6, 9-10.[1]

Defendants did eventually issue new designations for Haiti and Sudan on August 3, 2021 and April 19, 2022, respectively. However, Defendants did not issue any further new designations, the parties failed to reach settlement, and the case was returned from the mediation program. *Id.* ¶ 10.

This Court voted to rehear the case en banc on February 10, 2023. Plaintiffs promptly contacted Defendants seeking to restart settlement discussions, but Defendants declined. *Id.* at ¶ 11.

On June 12, 2023, the Court announced the members of the en banc panel. By that evening, news reports circulated stating Defendants planned to rescind the TPS terminations challenged in this case and replace them with extensions. *Id.* ¶ 12. Defendants issued a press release to that effect the next day. *Id.* ¶ 13. That release is attached to their Motion.

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[1] *See* Arulanantham Decl. ¶ 9 (citing Dkt. No. 109 (April 19, 2021 Joint Status Report and Motion to Continue Stay stating, "DHS is currently in the process of reviewing the prior Administration's termination of the TPS designations for El Salvador, Haiti, Honduras, Nicaragua, Nepal, and Sudan"); Dkt. No. 116 (June 22, 2021 Joint Motion to Refer to Circuit Mediation Program describing forthcoming TPS designation for Haiti and then stating, "DHS is also still in the process of reviewing the prior Administration's termination of the TPS designations for the other countries at issue in this litigation")).

The press release says almost nothing about the content of the "forthcoming" Federal Register Notices other than that Defendants will rescind the terminations challenged in this case and replace them with extensions. It lacks even a date-certain by when the new decisions will issue.

Plaintiffs sought clarification shortly after Defendants issued the press release concerning the scope of the measures Defendants intended to implement. In response, Defendants made clear that the forthcoming Federal Register Notices would not disavow the view that TPS extensions must be tied to the conditions that triggered the original designation (or conditions directly tied thereto), and further confirmed that nothing in the forthcoming Notices would state that the prior terminations were unlawful. Arulanantham Decl. ¶ 14.

ARGUMENT

Defendants invoke this Court's authority to dismiss appeals under Federal Rule of Appellate Procedure 42(b)(2). Even though this is Defendants' appeal, that Rule does not require dismissal. Rather, it gives this Court discretion. The Court "may," but need not, dismiss on terms agreed to by the parties or fixed by the Court. *Naruto v. Slater*, No. 16-15469, 2018 WL 3854051, at *1-2 (9th Cir. April 13, 2018) (denying joint Rule 42(b) motion; collecting cases denying Rule 42(b) motions in multiple settings, including due to untimeliness, the importance of issues presented, or out of concern for the "government's tactics" in trying to avoid a ruling after a matter has been fully litigated).

Defendants suggest the Court should grant their motion because "this case is now moot," Mot. at 3.[2] But Defendants bear a "heavy" burden to establish mootness. *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017) (quoting *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006)). Defendants must prove "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome …." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Defendants cannot do so here.

Two aspects of mootness doctrine are particularly germane. One concerns the availability of relief. "[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *Wild Wilderness*, 871 F.3d at 724 (internal quotation and citation omitted). Because the "doctrine of mootness is more flexible than other strands of justiciability doctrine" (*Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc), Defendants need "to establish that relief is not simply unlikely or conjectural but *impossible*." *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 894 F.3d 1005, 1011 (9th Cir. 2018) (emphasis added). Even if a court is not "able to return the parties to the status quo ante," this case "is not moot if the court can fashion some form of meaningful relief." *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1000 (9th Cir. 2004).

The other relevant strand of mootness doctrine requires Defendants to establish "there is no reasonable expectation that the wrong will be

[2] That statement is in tension with Defendants' later statement that they are not asking this Court to rule that the case is moot. Mot. at 4.

repeated," and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992). This "heavy burden" requires persuading the court that "subsequent events [have] made it absolutely clear" that the challenged conduct "could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs (TOC), Inc.*, 528 U.S. 167, 189 (2000). Indeed, as the Supreme Court recently explained, abandoning a practice in the midst of a preliminary injunction appeal does not moot a case where, as here, the allegedly unlawful practice could recur. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 141 S. Ct. 63, 68 (2020) (rejecting mootness argument where applicants remained under "threat" of future action). This independent test for mootness should carry particular force where, as here, Defendants stood by their TPS termination decisions for more than five years—until the day the en banc panel was announced—and reserve the right to engage in the challenged conduct in the future.

Given the facts and law, Defendants cannot satisfy their heavy burden to establish that this case is moot.

First, even if the anticipated Federal Register Notices do what the press release says they will, Plaintiffs would continue to face a very real "threat" of the challenged practice recurring, potentially as soon as early 2025. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68. Defendants would need to revisit each of the TPS extensions in no more than 18 months. The complaint alleges—and the district court found—that the Trump Administration adopted a new interpretation of the TPS statute that broke sharply with past TPS practice by requiring the agency to

disregard intervening country conditions when determining whether to extend TPS. If this case is dismissed now, nothing would prevent a future administration (or even this one) from doing the same thing again. Defendants have confirmed that the "[s]oon-to-be-published Federal Register notices" will not disavow that interpretation. Arulanantham Decl. ¶ 14. Nor will the notices say the terminations were unlawful. *Id.* Indeed, to this day Defendants refuse to admit they adopted a new interpretation of the TPS statute at all, despite a mountain of evidence to the contrary. ER 19-25.

Similarly, Defendants will surely persist in their view that federal courts lack authority to review even arbitrary and capricious decisions to grant or deny TPS extensions. Absent any assurance the government will not again adopt an overly-restrictive interpretation of the TPS statute, and given that the government would surely again assert that courts lack jurisdiction to review that interpretation, Defendants cannot pretend it is "certain" that the harm challenged in this case cannot reasonably be expected to recur. *Laidlaw*, 528 U.S. at 189.

Thus, a ruling by this Court that there is jurisdiction over arbitrariness claims, that the agency has discretion to consider intervening conditions, and, at minimum, that the agency must explain its decision to categorically disregard past practice, would provide Plaintiffs relief beyond the anticipated Federal Register Notices.

Second, even if the press release had claimed the "forthcoming" Federal Register Notices would eliminate the risk of future arbitrary TPS decisions like those at issue here, there is a non-trivial risk that those Notices will not take effect. In the last two years, federal courts have

repeatedly enjoined or "set aside" immigration policies, particularly those that attempt to undo immigration policies adopted by the prior Administration.[3] If this case were dismissed as moot, and Defendants' rescissions were also enjoined through other litigation, the net effect could be to restore the original terminations; Plaintiffs would find themselves in the very jeopardy they sought to eliminate through this

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[3] *See, e.g.*, *Texas v. Biden*, 554 F.Supp.3d 818 (N.D. Tex. 2021) (vacating DHS decision to terminate its Migration Protection Protocols and issuing nationwide permanent injunction requiring DHS to implement the Protocols), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *rev'd and remanded*, 142 S. Ct. 2528 (2022); *Louisiana v. CDC*, 603 F.Supp.3d 406 (W.D. La. 2022) (issuing nationwide preliminary injunction prohibiting implementation of CDC order terminating Title 42 restrictions on immigration into the US); *Texas v. Biden*, 589 F.Supp.3d 595 (N.D. Tex. 2022) (issuing preliminary injunction prohibiting enforcement of CDC order exempting unaccompanied children from Title 42 restrictions on immigration into the US); *Texas v. United States*, No. 6:21-CV-00003, 524 F. Supp. 3d 598 (S.D. Tex. 2021) (issuing nationwide preliminary injunction prohibiting implementation of DHS 100-day deportation moratorium); *Arizona v. Biden*, 593 F.Supp.3d 676 (S.D. Ohio) (issuing nationwide preliminary injunction prohibiting implementation of DHS guidance on civil immigration enforcement priorities), *rev'd and remanded*, 40 F.4th 375 (6th Cir. 2022); *Texas v. United States*, 555 F.Supp.3d 351 (S.D. Tex. 2021) (same), *appeal dismissed*, No. 21-40618, 2022 WL 517281 (5th Cir. Feb. 11, 2022), *cert. granted*, *United States v. Texas*, 213 L. Ed. 2d 1138, 143 S. Ct. 51 (July 21, 2022) (No. 22-58); *Florida v. Mayorkas*, No. 3:23CV9962-TKW-ZCB, 2023 WL 3398099 (N.D. Fla. 2023) (issuing TRO preventing implementation of DHS policy of parole, with conditions, to expedite processing and relieve overcrowding at Southern border upon expiration of Title 42); *Florida v. United States*, No. 3:21-CV-1066-TKW-ZCB, 2023 WL 2399883 (N.D. Fla. 2023) (vacating DHS policy of parole plus alternatives to detention to expedite processing and address overcrowding at the border).

litigation. That possibility independently gives Plaintiffs the right to seek a ruling from this Court, which—were they to prevail—would provide additional protection for themselves and their families.

Finally, as of the time of this filing there are no Federal Register Notices. There is only a press release describing an intent to issue Notices at some undisclosed future date, and Defendants have a poor track record of predicting the timing of the agency's TPS decisions.[4] The lack of actual Notices makes obvious that Defendants have overreached by asserting "this case is now moot." Mot. at 3. Even the press release acknowledges that TPS holders will only be able to register "[o]nce the notices are published." *See* Mot. Attachment at 1.

For each of these reasons, cancelling the en banc argument now based on Defendants' recent public announcement could leave Plaintiffs subject to the same types of arbitrary terminations at issue in this appeal.

CONCLUSION

The core issues in this case remain live. Absent a decision by the Court, Defendants remain free to commit the exact same wrong with their next TPS decision, harming these Plaintiffs as well as many others. Plaintiffs therefore ask the Court to deny the Motion and proceed with oral argument as currently scheduled.

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[4] *See, e.g.*, *Centro Presente v. Biden*, No. 1:18-cv-10340, Dkt. 167 (D.Mass. Dec. 13, 2022) (representing that "[Defendants] anticipate completing their review [of TPS decisions for El Salvador and Honduras] by April 2023").

DATED: June 15, 2023

Respectfully submitted,

/ s / Ahilan T. Arulanantham
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