IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CASA DE MARYLAND, INC., *et al.*,

Plaintiffs,

v.

MAYORKAS, *et al.*,

Defendants.

Case No. 20-2118-PX

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS [ECF NO. 202]

Plaintiffs submit this brief in opposition to Defendants' motion to dismiss their claims as moot. Defs.' Mot. to Dismiss ("Defs.' MTD"), ECF No. 202; *see* ECF No. 205. The controversy raised by the Complaint remains live because Plaintiffs have not obtained full relief for injuries that the Asylum EAD Rules[1] caused them, notwithstanding another court's order of vacatur. Defendants' pre-vacatur implementation of the challenged Rules created a massive EAD application backlog that continues to injure Plaintiffs, yet Defendants will not commit to *any* timeline to redress that harm. Also, Defendants' changes to the form instructions for EAD applications retain the substance of the now-vacated Discretionary Denial Rule. Because an injunction can provide effective relief from these remaining harms, Defendants have not carried their burden to show this case is moot. Moreover, the Court has inherent authority to remedy the government's violation of its preliminary injunction. The Court should deny the motion to dismiss and adjudicate Plaintiffs' pending motions.

I. Statement of Relevant Facts

Two years ago, Plaintiffs filed a complaint challenging the Asylum EAD Rules. *See* Compl., ECF No. 1, ¶¶ 68–72, 89, 157–210. In addition to requesting that the rules be set aside, Plaintiffs asked the Court to enjoin Defendants from enforcing or implementing the Asylum EAD Rules in their entirety and to award such other and further relief that the Court may deem just, equitable, and proper. *Id.*, Prayer for Relief ¶¶ 3, 6. This Court issued a preliminary injunction ("PI") enjoining portions of the Asylum EAD Rules as to members of Plaintiffs CASA and ASAP

[1] Plaintiffs use "the Asylum EAD Rules" and "the challenged Rules" herein to refer to the rules limiting and/or eliminating asylum seekers' access to Employment Authorization Documents ("EADs"). *See Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applicants*, 85 Fed. Reg. 37,502 (Jun. 22, 2020), and *Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38,532 (Jun. 26, 2020).

("Members"), including, *inter alia*: (i) the rule repealing the mandatory 30-day timeline for adjudicating initial EAD applications ("Timeline Repeal Rule"); and (ii) the rule permitting denial of asylum seekers' EAD applications as a matter of agency discretion ("Discretionary Denial Rule"). Notwithstanding the Court's conclusion that the Asylum EAD Rules likely were invalid, Defendants implemented the rules against scores of asylum applicants not covered by the PI.

On February 7, 2022, the district court in *AsylumWorks v. Mayorkas* ordered the vacatur of the Asylum EAD Rules.[2] Despite the order of vacatur, Plaintiffs and Members continue to be injured by Defendants' implementation of the challenged Rules in two ways. First, before the *AsylumWorks* court issued its vacatur order, Defendants partially implemented the Timeline Repeal Rule, which resulted in the accumulation of a backlog of 93,639 initial asylum seeker EAD applications. Pls.' MSJ at 13. Months after the vacatur order, Defendants redirected processing resources away from Member EAD applications to non-Member applications to "address[] the backlog . . . consisting largely of non-CASA and ASAP cases." *Id.* at 13–14, 19 (internal quotation marks omitted and cleaned up). Although this Court's PI of the Timeline Repeal Rule preserved Members' entitlement to 30-day processing of their applications under the prior rules, Member applications are not being adjudicated within that mandated 30-day period. *Id.* at 6–7, 14. Second, USCIS continues to instruct asylum seekers applying for EADs that the agency may use its

[2] *See* ECF No. 185-2. Following that order, this Court held several status conferences to discuss, *inter alia*: (i) Plaintiffs' concerns that Defendants were failing to implement the vacatur order; (ii) the continuing impact of the PI and that it remained in effect; and (iii) the appropriate next steps in this action. *See* Mem. Of Law in Supp. Of Pls.' Mot. for Summ. J., or in the Alt., Mot. for Contempt, and Opp. to Defs.' Mot. to Stay ("Pls.' MSJ"), ECF No. 189-1, at 4–5. The Court set a briefing schedule for the parties' cross-motions. ECF Nos. 175, 183, 190. Defendants moved to stay the case, ECF No. 185; *see also* ECF No. 199, and Plaintiffs cross-moved for summary judgment, or in the alternative for contempt, ECF No. 189. Defendants moved for a two-week extension to submit their reply brief, ECF No. 192, and the Court denied that motion, ECF No. 194. The Court later denied Defendants' stay motions. ECF No. 201.

discretion to deny their applications, which harms Plaintiffs by making EAD application assistance more time- and resource-intensive, requiring them to divert resources to continue to provide this assistance to clients and Members. *See id.* at 6–7, 15.

II. Legal Standards

A Rule 12(b)(1) motion to dismiss a complaint for lack of subject matter jurisdiction may make either: (a) a facial challenge, arguing that even taking all allegations as true, the complaint "simply fails to allege facts upon which subject matter jurisdiction can be based"; or (b) a factual challenge, arguing that the jurisdictional allegations of the complaint are not true, requiring the court to look behind the allegations. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009).

In some factual challenges, the "facts necessary to prove jurisdiction overlap with facts necessary to prove the merits of the case." *Kuntze v. Josh Enterprises*, 365 F. Supp. 3d 630, 638 (E.D. Va. 2019). Where such "intertwined" facts are involved, the district court should assume jurisdiction and assess the merits of the claim. *Kerns*, 585 F.3d at 193. In particular, the court "should resolve the relevant factual issues only after appropriate discovery, unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous." *Id*. (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

Defendants' "burden of demonstrating mootness is a heavy one." *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks omitted). A case becomes moot and may be dismissed for that reason "only if it is impossible for a court to grant any effectual relief whatever." *Mission Prod. Holdings, Inc v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (internal quotation marks omitted); *see also Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."); *Davis*, 440 U.S. at 631 (case becomes moot

where "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"). Although "[r]elief granted in another tribunal can moot a claim," it does so only "where the relief granted is complete." *Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 746 (8th Cir. 2004). "'Partial relief in another action, on the other hand, does not moot an action seeking additional relief.'" *Id.* (quoting 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.2 & n.31 (1984 & 2003 Supp.)).

III. Argument

The Complaint seeks equitable relief from the implementation of the Asylum EAD Rules. Because Defendants cannot satisfy their burden to show that they have completely eradicated the effects of their implementation of the challenged Rules, the Court retains jurisdiction to provide that relief. Moreover, the Court has inherent authority to enforce its preliminary injunction.

A. Complete Relief Extends Beyond Vacatur

Defendants mischaracterize the Complaint, arguing that the requested relief was limited to vacatur of the challenged Rules. Defs.' MTD at 14. Not so. The Complaint invoked equity and requested a comprehensive remedy for harms flowing from the unlawful promulgation of the Asylum EAD Rules. Specifically, the Complaint requested that the Court "[e]njoin Defendants and all those acting on their behalf from enforcing or implementing the Asylum EAD Rules in their entirety." Compl., Prayer for Relief ¶ 3; *see also* Pls.' MSJ at 2 (Plaintiffs sought "to stop the irreparable harm that would result if the 30-day processing rule were eliminated and the other constraints on asylum seekers' access to work authorization went into effect.").

In addition, Defendants' argument that Plaintiffs must file a new case for any relief beyond vacatur is wrong on the law. *See* Defs.' MTD at 19–20. Indeed, the established rule in the Fourth Circuit is that "the relief to which a claimant is entitled is not limited to the relief it requested" in

the complaint. *Minyard Enters. v. Se. Chem. & Solvent Co.*, 184 F.3d 373, 385 (4th Cir. 1999); *see also* Fed. R. Civ. P. 54(c) ("Every . . . final judgment [other than default judgment] should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."). This "fundamental point" rests on the principle that "the dimensions of a lawsuit are measured by what is pleaded and proven, not what is demanded." *Minyard*, 184 F.3d at 386.

B. Defendants' Factual Challenge to Jurisdiction Should Be Rejected

Defendants purport to bring a "facial" challenge to this Court's subject matter jurisdiction. Defs.' MTD at 11. But their challenge is factual, not facial, because their sole argument is predicated on post-Complaint facts that they contend have afforded complete relief to Plaintiffs. *Id.* at 4–12, 14–17; *see Kerns*, 585 F.3d at 192. Moreover, Defendants' assertion that the *AsylumWorks* vacatur order means Plaintiffs' injuries have "ceased to exist," Defs.' MTD at 14, ignores Plaintiffs' evidence that they continue to suffer injury directly attributable to Defendants' implementation of the challenged Rules, Pls.' MSJ at 6–7, 11–12. Under *Kerns*, dismissal under Rule 12(b)(1) is inappropriate because the central issue—whether, after the order of vacatur, Plaintiffs still have unredressed injuries caused by Defendants' pre- and post-vacatur implementation of the challenged rules—"is determinative of both jurisdiction and the underlying merits" of Plaintiffs' claim for injunctive relief. *Kerns*, 585 F.3d at 195. Accordingly, the Court "should assume jurisdiction and assess the merits" of Plaintiffs' claim for injunctive relief.[3] *Id*. This reason alone compels denial of Defendants' motion.

[3] Defendants failed to controvert Plaintiffs' evidence that the Asylum EAD Rules continue to injure them. But even if Defendants' submissions had created a genuine issue of material fact, the proper course in a case with jurisdictional facts intertwined with the merits is not dismissal, but to "afford the plaintiff the procedural safeguards—such as discovery—that would apply were the plaintiff facing a direct attack on the merits." *See Kerns*, 585 F.3d at 193.

C. The Court Has the Power to Order Effective Relief That Would Stop the Ongoing Harms to Plaintiffs and Members

Even if Defendants' factual attack on jurisdiction were not intertwined with the merits, Defendants' motion must be denied: Plaintiffs continue to suffer harm resulting from Defendants' pre- and post-vacatur implementation of the Asylum EAD Rules, and the Court has the power to order effective relief to stop those ongoing harms. *See* Pls.' MSJ at 6–7, 11–20.

Defendants are wrong on the facts and on the law when they argue that vacatur of the Rules *per se* eliminates Plaintiffs' injuries. *See, e.g.*, Defs.' MTD at 14. On the facts, Plaintiffs have introduced uncontroverted evidence showing that they and Members continue to suffer injury as a result of Defendants' implementation of the challenged Rules. *See* Pls.' MSJ at 6–7, 11–12. Specifically, the pre-vacatur implementation of the Timeline Repeal Rule generated a substantial backlog of applications, and after the *AsylumWorks* vacatur, Defendants opted to shift processing resources away from Member applications to non-Member applications to address the backlog. *See id.* at 19; *see also* Nolan Decl. ¶ 35, ECF No. 185-5, Exh. D (Defendants' actions resulted in "longer than expected processing times"). In addition, the post-vacatur revision of the Form I-765 instructions still informs asylum seekers that their EAD applications may be discretionarily denied, requiring Plaintiffs to do substantial additional work to assist their clients. *See* Pls.' MSJ at 6–7, 15.

On the law, courts take a *practical* approach to whether a party's injuries have been remedied. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (asking whether a requested injunction will have a "meaningful practical effect independent of [the rule's] vacatur"). For example, in *Kiakombua v. Wolf*, the district court held that vacatur of the agency's unlawful immigration-related policy was "not sufficient to redress Plaintiffs' injuries fully," and it therefore granted additional injunctive relief to restore the *status quo ante*—which entailed

requiring the federal government to return individual plaintiffs back to the United States after they had been removed. 498 F. Supp. 3d 1, 57–59 (D.D.C. 2020) (Jackson, J.). Moreover, even where courts are unwilling to order injunctive relief simultaneously with a vacatur order, they instruct plaintiffs to "return to the [c]ourt for further relief if warranted," recognizing that—on a later record—vacatur may prove insufficient to provide complete relief. *See, e.g.*, *O.A. v. Trump*, 404 F. Supp. 3d 109, 153–54 (D.D.C. 2019).

This Court has the power to remedy Plaintiffs' ongoing injuries, which will continue absent the Court's intervention. Plaintiffs' Complaint sought injunctive relief in addition to vacatur, and in any event, this Court has power to grant relief based on what is pleaded and proven. *See supra* § III.A. Unless the Court intervenes, Defendants will continue to inform asylum applicants that their EAD applications may be denied as a matter of discretion. *See* Defs.' MTD at 7 (asserting form instructions are in "full compliance with the *Asylumworks* vacatur"). Moreover, Plaintiffs' requested Implementation Plan would provide them "effectual relief" by requiring Defendants to commit to the actions necessary to remedy the processing delays caused by their implementation of the challenged Rules and a timeframe for completing those actions. *Mission Prod. Holdings*, 139 S. Ct. at 1660; *see* Pls.' Proposed Order, ECF No. 189-2; Pls.' MSJ at 13.

D. Defendants' Unfounded Policy Concerns Do Not Implicate the Court's Jurisdiction

Unable to show that this case is moot under Article III's demanding standard, Defendants craft arguments that are wholly irrelevant to their jurisdictional challenge—postulating, for example, that Plaintiffs should look to "other means to litigate their alleged harms." Defs.' MTD

at 19–20.[4] However, Defendants' preference to litigate elsewhere does not implicate the Court's jurisdiction.

With respect to the Timeline Repeal Rule, Defendants argue that this is "a *Rosario* issue." *Id.* at 20. However, the question before the Court is not whether the Western District of Washington is a preferable forum, but whether this Court has the power under Article III to grant Plaintiffs' requested relief. It does—it is well-settled that "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 816 (1976).

Moreover, the issues before this Court are different than (albeit related to) those in *Rosario*. *Rosario* concerns whether the government is complying with its 30-day processing rule. In contrast, this case concerns whether Plaintiffs and Members continue to suffer harms as a result of: (i) Defendants' pre-vacatur implementation of the challenged Rules; and (ii) Defendants' post-vacatur actions, specifically, maintaining the Discretionary Denial Rule in the I-765 instructions and reallocating processing resources away from Member EAD applications to non-Member applications—in violation of this Court's PI. Plaintiffs have pleaded and proven their injuries resulting from the challenged Rules, and they have not received complete relief. *See Kennedy Bldg. Assocs.*, 375 F.3d at 746 (citations omitted); *see* Pls.' MSJ 6–7, 11–20.

Likewise, Defendants' observation that Plaintiffs could hypothetically ask for revision of the form instructions in "a subsequent lawsuit," Defs.' MTD at 20, misses the point. Defendants re-inserted language into the form instructions stating that USCIS may, in its discretion, deny work

[4] Defendants' other policy argument, that "Plaintiffs could use this action to seek all matter [*sic*] of relief into perpetuity," Defs.' MTD at 19, is simply a more strident articulation of their contention that Plaintiffs' motion for summary judgment requests relief not embraced by the Complaint. Both arguments should be rejected for the same reasons. *See supra* § III.A.

authorization to asylum applicants. Pls.' MSJ at 6. They bear the burden to show that they have completely and irrevocably eradicated the effects of the challenged Rules, *Davis*, 440 U.S. at 631, which they have failed to do.[5] The Court, therefore, has jurisdiction to fashion a remedy.

E. The Court Possesses Inherent Authority to Enforce Its Order

The Court has the power to determine whether its order has been violated and to provide a remedy for that violation. *See* Pls.' MSJ at 10, 17–20. In resisting this conclusion, Defendants conflate whether a *party* must obey an existing court order with whether a *court* may modify or dissolve its prior order in response to changed circumstances. *See* Defs.' MTD at 18–19. Their case law supports only the latter proposition. *See id.* But as to the former, the law is clear: an enjoined party must obey an injunction, even if it believes the injunction is invalid. *Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967). It is for the Court alone to determine "the question of the validity of the law," and "its orders based on its decision are to be respected." *Id.* Disobedience of a court order constitutes "contempt of its lawful authority, to be punished." *Id.*

The preliminary injunction has continuously been in effect since September 11, 2020, as this Court has reiterated in successive court conferences.[6] Nonetheless, Defendants have openly and unapologetically disregarded it. *See* Pls.' MSJ at 5, 18–19. If Defendants believed in good faith that another court's judgment undermined the validity of this Court's order and that they were

[5] Defendants assert—without evidence—that their revised instructions repackage language "present" in an earlier version of the document, Defs.' MTD at 7, but they make no effort to show what language was in use during which period of time. Even if they had, it is undisputed that discretionary denials of asylum seeker EAD applications were not permitted under the *status quo ante*; the challenged Rules permitted discretionary denials for the first time; this Court preliminarily enjoined the Discretionary Denial Rule; and *AsylumWorks* ordered that the Discretionary Denial Rule be vacated. *See* Pls.' MSJ at 15. And Plaintiffs' evidence of the resulting harms they suffer remains unconverted. *See id*. at 7.

[6] *See* Pls.' MSJ at 4–5 (citing conference transcripts); Manfredi Decl. Ex. G, at 5, ECF No. 189-11 (Court stated: "I'm not going to modify the injunction as it stands.").

unable to simultaneously comply with both orders, the proper course would have been to apply to this Court to dissolve its injunction.[7] *See Walker*, 388 U.S. at 314. It is for the Court to decide whether its preliminary injunction should be dissolved; it is not up to Defendants to choose whether to obey an injunction that is in place.

IV. Conclusion

Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss, ECF No. 202, and grant Plaintiffs' Motion for Summary Judgment, or in the Alternative, Motion for Contempt, ECF No. 189.

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[7] Defendants' unilateral decision that the PI is invalid and that they need not abide by it mirrors their disregard for this Court's multiple scheduling orders. The Court issued a Scheduling Order for Defendants to make whatever motions they deemed appropriate and for Plaintiffs to cross-move for the relief they deemed appropriate. ECF No. 190. Defendants flouted that order, missing the deadline to submit papers opposing Plaintiffs' motions; seeking an extension of the same; and—even after the extension was denied—filing successive briefs long after the deadline. ECF Nos. 192, 198, 199, 202, 203. Moreover, the central contention of Defendants' motion to dismiss—that the vacatur of the challenged Rules necessarily moots Plaintiffs' case—should have been brought to the Court's attention two months ago when Defendants' opening brief was due. Such actions have shown disregard for the Court's orders and resources, and have burdened Plaintiffs, their Members and clients, and their counsel.

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Respectfully submitted,

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