No. 21-16118

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA, et al.,
Plaintiff-Appellants.
v.
U.S. DEPARTMENT OF HOMELAND SECURITY et al.,
Defendant-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:21-cv-00186-SRB

PLAINTIFFS' MOTION FOR RECONSIDERATION UNDER CIRCUIT RULE 27-10

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INTRODUCTION

Pursuant to Circuit Rule 27-10, Plaintiff-Appellants the States of Arizona and Montana, and Mark Brnovich, Arizona Attorney General, (hereinafter, "Plaintiffs" or the "States") respectfully submit this motion for reconsideration of this Court's Order of July 30 (Doc. 22) denying the States' Emergency Motion for an Injunction Pending Appeal. Reconsideration is warranted because the Court's order apparently relied on a perceived jurisdictional obstacle that did not actually exist, and which has, in any event, evaporated now that the district court denied State's motion for reconsideration last night. *See* D. Ct. Doc. 133. Furthermore, the Court's Order did not account for the exigencies in this case. In addition, new developments and evidence further illustrate the seriousness of the State's harms and the need for judicial relief.

ARGUMENT

I. THE COURT'S ORDER APPEARS TO RELY ON A JURISDICTIONAL OBSTACLE THAT DID NOT EXIST AND NOW, IN ANY EVENT, HAS EVAPORATED

This Court's Order (Doc. 22) denying without prejudice the States' motion alluded to a possible jurisdictional obstacle, but did not actually hold that it actually existed. It did not at the time, and indisputably does not now. This Court should therefore reconsider its denial of the States' motion for an injunction pending appeal.

The potential jurisdictional impediment that this Court appeared to perceive was the filing of a motion for reconsideration below. *See generally* Doc. 18. But that motion for reconsideration (1) was filed *after* the States had filed their notice of appeal and

(2) did not challenge the decision actually on appeal (*i.e.*, the denial of a preliminary injunction, which was appealed under 28 U.S.C. § 1292(a)(1)).

In that posture *all* parties agreed that there was no jurisdictional obstacle. Indeed, to the extent that *any* court lacked jurisdiction, it would be the district court, since the States' notice of appeal deprived it of jurisdiction over its specific denial of a preliminary injunction (lest it present this Court with a moving target). But even that theoretical (and unpresented) issue would be readily navigable: Rule 62.1 would allow the district court to issue an indicative ruling if it felt that its resolution of the motion for reconsideration below would have an impact on its denial of the preliminary injunction.

There was thus no question of appellate jurisdiction that justified this Court's July 30 order. But even if there were, that potential obstacle has now been cleared: the district court denied reconsideration last night. *See* D. Ct. Doc. 113. That denial removes any conceivable question about this Court's jurisdiction. This Court should therefore reconsider its prior denial given that (1) appellate jurisdictional always existed and (2) the only conceivable hurdle is now gone.

II. THE COURT'S ORDER FAILED TO ACCOUNT FOR THE EXIGENCIES OF THIS CASE

Beyond just the jurisdictional reasons for deciding the States' motion now, there are practical reasons as well. The Interim Guidance is likely to be replaced soon, and the status quo ante should be restored before DHS has a chance to further entrench its new, likely-unlawful policies. Furthermore, the States continue to suffer irreparable

harm that compounds the longer the Interim Guidance remains in effect.

A. The Interim Guidance Is Likely To Be Replaced Soon

When the Interim Guidance was issued on February 18, it stated that Secretary Mayorkas anticipated issuing replacement guidance within 90 days. That deadline passed on May 19, and it has now been 176 days since the Interim Guidance was issued. Defendants' most recent projection was that it would "issue new immigration priorities by the end of August or beginning of September," D. Ct. Doc. 89 at 1—*i.e.*, any day now (although this is DHS's third projected deadline). DHS would presumably do so again without notice-and-comment rulemaking, and no proposed replacement has issued for commenting.

Given the potential and imminent replacement of the Interim Guidance, this Court should decide the States' motion for an injunction pending appeal now so that DHS cannot attempt to evade judicial review further. Notably, the Interim Guidance itself was only issued after its predecessor 100-Day Moratorium was enjoined, even though the Interim Guidance contains nearly all of the same legal infirmities.

B. The Delay Frustrates The States' Ability To Seek Relief From The Supreme Court If Necessary

This Court's July 30 refusal to decide the States' motion for an injunction pending appeal on the merits notably has frustrated the States' ability to seek relief from the Supreme Court if necessary, given that the Supreme Court would presumably expect the States to exhaust first in this Court and obtain a merits decision.

Notably, the issue of whether Section 1231(a)(1)(A) is mandatory would have substantial cert. worthiness if this Court were to hold the Interim Guidance were lawful: *i.e.*, that Section 1231(a)(1)(A)'s "shall" does not impose an actual mandate, and instead is merely a non-binding suggestion conferring unbounded and unreviewable discretion not to remove. Notably, it appears that *every* other circuit reaching the issue—*i.e.*, the Second, Fifth, Sixth, Tenth, and Eleventh Circuits—has reached a conclusion directly contrary to the district court's holding:

- *Hechavarria v. Sessions*, 891 F.3d 49, 55 (2d Cir. 2018) ("Section 1231 assumes that the immigrant's removal is *both imminent and certain*" (emphasis added)).

- *Tran v. Mukasey*, 515 F.3d 478, 481 (5th Cir. 2008) ("[W]hen a final order of removal has been entered…, the government *must* facilitate that alien's removal … within ninety days[.]" (emphasis added)).

- *Martinez v. Larose*, 968 F.3d 555, 561 (6th Cir. 2020) ("§1231(a)(1)(A) *mandates* that … Attorney General shall remove the alien … within [the removal period]."' (emphasis added)).

- *United States v. Barrera-Landa*, 964 F.3d 912, 922 (10th Cir. 2020) (noting that an alien with a final order of removal is, under §1231(a)(1)(A), "subject to *mandatory* ... removal within 90 days under §1231(a)" (emphasis added)); *accord United States v. Ailon-Ailon*, 875 F.3d 1334, 1339 (10th Cir. 2017) ("Section 1231 created a "statutory duty to promptly remove individuals who are subject to reinstated removal orders.")

- *United States v. Chinchilla*, 987 F.3d 1303, 1309 (11th Cir. 2021) ("Generally, an alien *must* be physically removed from the United States within ninety days of a final removal order...." (emphasis added)).

This Court has also held as much in *Xi v. INS*, 298 F.3d 832, 840 n.6 (9th Cir. 2002), *Lema v. I.N.S.*, 341 F.3d 853, 855 (9th Cir. 2003), and *Coyt v. Holder*, 593 F.3d 902,

907 (9th Cir. 2010), though Defendants argue unpersuasively that these are all dicta. If this Court were to accept that argument and affirm the district court, however, the States would have a clear (and distinctly lopsided) circuit split from which to seek Supreme Court review.

Given the cert. worthiness of the issues presented, this Court should either grant the States' motion for an injunction pending appeal or, at a bare minimum, deny it on the merits so that the States can seek such relief from the Supreme Court.

C. The States Are Suffering Irreparable Harm That Compounds By The Day

The harms that the States set forth in their emergency motion for injunction pending appeal (Doc. 10 at ii-vi, 7-9, 18-19) worsen with every passing day. As outlined below, every month sees ever-higher number of illegal border crossings. *Infra* at 10-12. These border crossings increase local law enforcement expenses in Arizona, because of the need to investigate the deaths of deceased attempted border crossers, and because of greater numbers of law enforcement pursuits of trespassing illegal border crossers. D. Ct. Doc. 17 at 18-20. The explosion in illegal border crossings is also causing intensified activity from drug cartels and human traffickers, which brings concomitant increases in law enforcement expenses in both Arizona and Montana. *Id.* at 19.

III. NEW FACTUAL CIRCUMSTANCES AND NEW CASE LAW SHOW THE NEED FOR AN INJUNCTION PENDING APPEAL

A. The Need For Reconsideration Is Underscored By The Biden Administration's Lawless Acts

The Biden Administration's brazen defiance of legal requirements underscores the need for this Court to act quickly and forcefully to break the Administration's escalating pattern of disrespect for the rule of law.

1. Knowing Issuance Of An Unlawful Eviction Order

On June 29, the Supreme Court issued an opinion in which five justices apparently concurred that the Centers for Disease Control lacked statutory authority to impose a nationwide eviction moratorium, absent new legislation from Congress. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2320 (2021). President Biden acknowledged this, affirming that "[t]he bulk of the constitutional scholarship says that [an additional moratorium is] not likely to pass constitutional muster."[1] Similarly, White House Press Secretary Jen Psaki admitted that "CDC Director Rochelle Walensky and her team have been unable to find legal authority for a new, targeted eviction moratorium."[2] The next day, Ms. Psaki again said that "the Supreme Court ... made clear ... that any further

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[1] Joseph Biden, Remarks at the White House (August 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

[2] Jen Psaki, Statement on Eviction Prevention (August 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/statement-by-press-secretary-jen-psaki-on-eviction-prevention-efforts/.

action [on an eviction moratorium] would need legislative steps forward."[3]

But despite acknowledging the patent illegality of extending the eviction moratorium, the Biden Administration did so anyway. And not only that, but admitted that the slowness of courts in responding to such unlawful behavior meant that such action was likely to be substantially effective despite its unlawfulness. President Biden thus admitted that "by the time it gets litigated, it will probably give some additional time ... to people who are, in fact, behind in the rent."[4]

This brazen defiance of Supreme Court precedent and the rule of law underscores the need for courts to take expeditious and decisive action in response to such actions: another of which is squarely presented here. And indeed the Supreme Court took such quick action yesterday by enjoining New York's similar eviction moratorium. *See* Order, *Chrysafis v. Marks*, No. 21A8 (Aug. 12, 2021), https://www.supremecourt.gov/opinions/20pdf/21a8_3fb4.pdf

This Court should take similar action with respect to the Interim Guidance.

2. Repurposing Part Of 100-Day Moratorium To Avoid Texas TRO/PI

In the specific context of this dispute, the federal government has employed

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[3] Jen Psaki, Press Briefing (August 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/08/03/press-briefing-by-press-secretary-jen-psaki-august-3-2021/.

[4] Joseph Biden, Remarks at the White House (August 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

aggressive tactics to avoid a preliminary injunction and violate the commands of the Immigration and Nationality Act.

Six days after the Memorandum's issuance, a federal court issued a TRO against Section C's removal moratorium. *Texas v. United States*, __ F. Supp. 3d __, 2021 WL 247877, at *1 (S.D. Tex. Jan. 26, 2021). That night, ICE notified its employees that "until further notice, in order to comply with the TRO, employees should return to *normal removal operations* as prior to the issuance of the" Memorandum. ADD-125 (emphasis added). As DHS took steps to implement the *Texas* court's TRO, none of its initial guidance ever suggested that Section B of the Memorandum governed removals.

But that good-faith compliance with the *Texas* court's TRO (and later preliminary injunction) against the 100-Day Moratorium proved exceptionally short lived—indeed, it can be clocked at less than 200 hours. Activist groups soon began to complain about DHS's compliance with the *Texas* TRO. ADD-135-36. DHS then folded under their pressure almost immediately. And completely.

Shortly before midnight on February 4, Acting ICE Director Tae Johnson emailed senior staff regarding "ICE's Removal Priorities." ADD-137. Despite being sent in the dead of night, it was "[e]ffective immediately." *Id.* It contained no discussion whatsoever of limited resources, but instead simply engrafted the enforcement priorities in Section B onto removals, even though it was well-understood Section B had not applied to removals. *Id.* In doing so, it effectively circumvented the Texas TRO/PI, which only applied to Section C (presumably because it was the only section actually

governing removals). DHS did not inform the *Texas* court, however, that it had effectively restored the state of affairs that the *Texas* court thought that it had enjoined. (Nor is the violation of Section 1231(a)(1)(A) that the *Texas* court found meaningfully different as applied to either Section B or Section C.)

Director Johnson's dead-of-night email further made clear that the Section B priorities were no mere guidance, but instead imposed a near-absolute prohibition on removal: "Over the next few days until formal guidance is issued, removal flights will continue and should be prioritized *so that only those who meet the [Section B] priorities will be removed*." ADD-138 (emphasis added). The email then adds a boilerplate disclaimer that ICE is "not foreclosed" from taking other actions, including removal. *Id.*

The Acting ICE Director issued the Interim Guidance on February 18, which is the rule challenged here. ADD-104. As to removals, the Interim Guidance largely continued the policy, previously created by Director Johnson's midnight email, of applying the priorities in Section B of the Memorandum to removals. ADD-137-38.

* * * * *

The upshot is this: the *Texas* court held that DHS violated, *inter alia,* Section 1231(a)(1)(A) by treating its "shall" as a mere "may" (and "usually won't"). DHS could have appealed that decision if it thought its statutory interpretation were correct. But it did not.

Instead, it elected to avoid the *Texas* court's ruling. It did so first by circumventing the TRO/PI by repurposing a non-enjoined section to replicate the

functions of the enjoined section. It then issued the Interim Guidance, which simply clads the Section 1231 violation in new garb. That is brazen conduct fairly crying out judicial correction.

B. The Situation At The Border Worsens Every Day That The Interim Guidance Continues In Force

In their motion for preliminary injunction at the district court, the States predicted that the Interim Guidance's moratorium on removals would "lead to an increase in attempted border crossings because it eliminates one of the disincentives to being caught" and that this would in turn "increase Arizona's law enforcement expenses related to the flow and traffic of individuals across the border." D. Ct. Doc. 17 at 18-19. Unfortunately, this prediction has proven all-too prescient.

DHS itself has recently admitted in a sworn declaration that it is "encountering record numbers of noncitizens ... at the border" that "have strained DHS operations and caused border facilities to be filled beyond their normal operating capacity." Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. August 2, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and meltdown of DHS's control of the border. July 2021 had the highest number of encounters in *decades*. *Id.* at 7 ("[T]he highest monthly encounter number since Fiscal Year 2000.") The most recent data, released yesterday with July's figures, shows the trend since 2018 (copied below). Notably, the number of encounters in July 2021 was

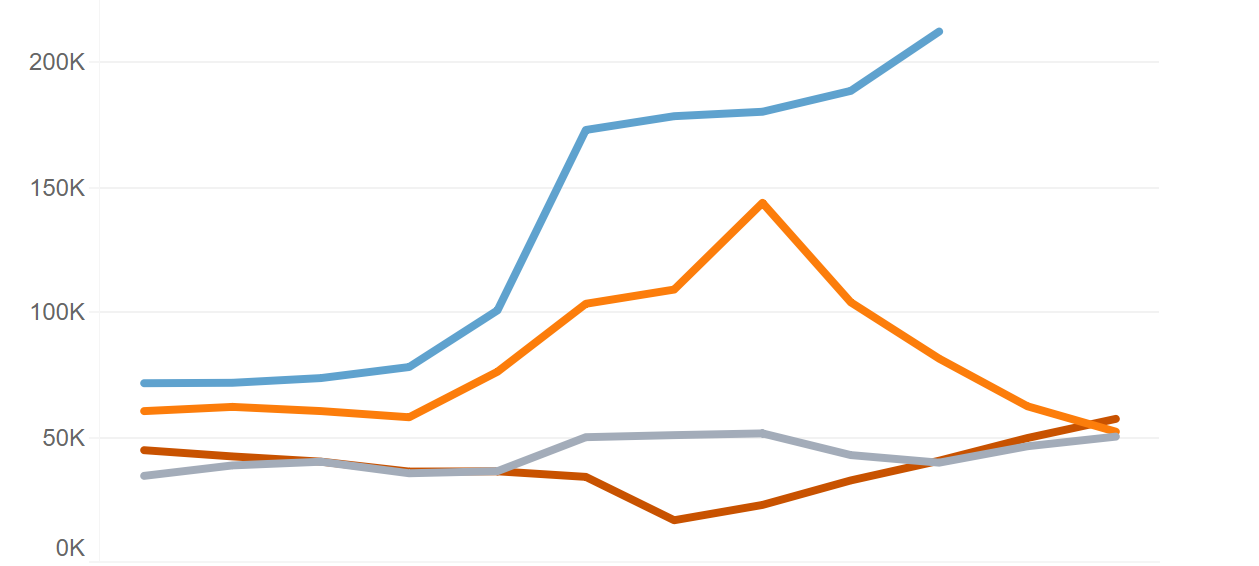
more than *five times* the July 2020 and July 2018 numbers, and roughly *2.5 times* July 2019.

U.S. Customs and Border Protection

U.S. Customs and Border Protection (CBP) Encounters
US Border Patrol (USBP) Title 8 Apprehensions,
Office of Field Operations (OFO) Title 8 Inadmissible Volumes,
and Title 42 Expulsions by Fiscal Year (FY)

FY: All | Component: All | Demographic: All
Citizenship Grouping: All | Title of Authority: All | Reset Filters

FY 2018 2019 2020 2021 (FYTD)



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	71,944	72,113	73,995	78,417	101,098	173,283	178,797	180,569	188,934	212,672			1,331,822
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090

Source: https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters

The States are thus facing an unprecedented crisis, and every day that the Interim Guidance remains in force further compounds the consequences of that crisis. The worsening situation at the border thus constitutes a changed factual circumstance justifying reconsideration.

IV. THIS COURT SHOULD UNSTAY BRIEFING

In addition to reconsidering its denial of the State's motion for an injunction pending appeal, this Court should also dissolve its de facto stay of the briefing schedule. The State intends to file its Opening Brief next week, and respectfully requests that this Court make Defendants' Answering Brief due 42 days later, which would be the same 42-day period previously in force. *See* Doc. 12.

CONCLUSION

For the foregoing reasons, the States respectfully request that this Court reconsider its July 30 denial without prejudice of their motion for an injunction pending appeal and grant that motion. The States also respectfully request that this Court unstay briefing and reinstate a briefing schedule.

The States also respectfully request that this Court act upon this motion expeditiously, for all the same reasons underlying the States' emergency request for an injunction pending appeal as well as the new developments and evidence set forth above.

Respectfully submitted,

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Dated: August 13, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign

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