No. 21-16118

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

PLAINTIFFS' REPLY TO RESPONSE TO EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL AND RESPONSE TO ACLU AMICUS BRIEF – DECISION REQUESTED BY JULY 30, 2021

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INTRODUCTION

The States have shown that an injunction pending appeal should be granted, and Defendants' ("DHS's") Response fails to rebut this. DHS unsurprisingly advances a flurry of procedural objections, since the substantive merits of the Interim Guidance are indefensible. DHS tellingly refuses to address *entirely* Director Tae Johnson's midnight email, which makes plain that the Interim Guidance is *precisely* what DHS vociferously contends it is not: an absolute or near-absolute prohibition on removals outside of its excepted categories. While DHS now depicts the Interim Guidance as non-binding and toothless, that simply cannot be reconciled with Johnson's absolute, unsubtle command prior to issuing the guidance: "*Effective immediately* … *only* those who meet the [Section B] priorities will be removed." ADD-137-38 (emphasis added).

As to section 1231(a)(1)(A), DHS refuses to address (1) the legislative history (Mot. at 13), which demonstrates that Congress intentionally amended the statute to preclude the boundless, unreviewable discretion that DHS now arrogates to itself, (2) *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003), which is *binding* authority here, and (3) *Texas v. United States*, __ F. Supp. 3d __, 2021 WL 2096669 (S.D. Tex. Feb. 23, 2021), addressing the identical issue. And DHS responds (at 16-17) to *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021) only by asserting that the Supreme Court either did not mean what it said or did not know what it was talking about. Finally, as to the actual administrative record here, DHS identifies *nothing* contradicting the district court's apt characterization that "[t]here's nothing in the Administrative Record that

shows any resource analysis." Mot. at 16 (quoting ADD-60:19-20). All of DHS's instant resource-constraint arguments merely double down on the demonstrably pretextual and record-evidence-free justification for the Interim Guidance.

DHS's procedural arguments fare little better than its substantive ones. DHS's argument that it enjoys unlimited and unreviewable discretion—which was the *sole* basis for the decision below—flouts section §1231, and all of the authorities that DHS now ignores or minimizes. The district court also properly found that the States have Article III standing, given the costs they directly incur as a result of DHS's pervasive abdications of its legal duties.

This Court should grant the States' motion for an injunction pending appeal preventing DHS from enforcing or implementing the Interim Guidance as it relates to removals of aliens with final orders of removal.

ARGUMENT

I. THE STATES ARE LIKELY TO PREVAIL ON APPEAL

A. The District Court Correctly Found That Plaintiffs Have Standing

The district court correctly concluded that the States have Article III standing.[1] Indeed, standing is neither novel nor complicated here: Arizona proved ongoing

[1] DHS briefly contends (at 8 n.1) this Court lacks jurisdiction because the complaint cited 28 U.S.C. §1346, and the Federal Circuit has exclusive jurisdiction. But jurisdiction was never actually based on that statute. DHS immediately disavowed the validity of the agreements, and the States also made clear that they were only referencing the agreements as evidence of their harm for their APA claims, not a contract claim. 2ADD-3-4. The District Court dismissed the complaint solely on APA

financial injury from having to place aliens being released from state prison onto community supervision. Arizona further proved that the Interim Guidance was the direct cause of DHS's non-removals. And if those aliens are removed, Arizona will not have to pay for community supervision. Mot. at ii-iv, 18.

In response, DHS argues (at 9) the States failed to show a "certainly impending" effect from the Interim Guidance. But the statements of DHS's own employees directly contradict and foreclose DHS's argument. ADD-12. And ICE officers lifting immigration detainers on state inmates led directly to criminals being placed on community supervision rather than removed, resulting in clear costs. *Id.* Finally, even a modest change in removal rates will have a real impact. *Id.*

B. The States Are Likely To Prevail In Their APA Challenges

1. The Interim Guidance Is Reviewable Under The APA

a. Adoption Of *A Rule* Governing Aliens With Final Orders of Removal Is Not Committed To Agency Discretion By Law, Given 8 U.S.C. §1231

The district court erroneously denied relief on the single ground that the Interim Guidance, as applied to removals, is unreviewable agency action committed to agency discretion by law under 5 U.S.C. §701(a)(2). Mot. at 10; ADD-20.

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grounds and made no mention of §1346. ADD-20. In any event, to avoid any possible doubt here, Plaintiffs disclaim any reliance on the Memorandum of Understanding for this appeal. This Court thus has jurisdiction. *Cf. Prize Frize v. Matrix Inc.*, 167 F.3d 1261, 1264 (9th Cir. 1999) (supers'd on other grounds); *Duncan v. Stuetzle*, 76 F.3d 1480, 1484 n.4 (9th Cir. 1996). And if Defendants truly believed this Court lacked jurisdiction, they would not have relegated the issue purely to a footnote.

But far from committing removals of aliens with final orders of removal so completely to DHS's discretion as to render *a rule* on the subject completely beyond judicial review, the governing law actually imposes a duty and constrains DHS's discretion. Mot. at 10-12. Specifically, Congress commanded that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, [DHS] *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added). The Supreme Court interpreted these "except as otherwise provided" and "shall" directives as an affirmative mandate to either remove or fit within one of the §1231 exceptions. *Guzman Chavez*, 141 S.Ct. at 2281, 2288. DHS does not dispute that the Interim Guidance does not fit within any of the §1231 exceptions, such as staying "an alien['s]" removal. Mot. at 11 n.2.

Other courts similarly hold "shall" is mandatory here—all of which DHS ignores. *Lema*, 341 F.3d at 855; *Xi v. INS*, 298 F.3d 832, 840 n.6 (9th Cir. 2002); *Texas*, 2021 WL 2096669, at *34-35. And the history and context of §1231 were to "reduc[e] prison overcrowding and cost to the government"—the basis of the States' claims here. *Id.* at *34; Mot. at 13. And once an alien has a final order of removal, prosecution is concluded (absent affirmative steps), making this status distinguishable from earlier steps. Mot. at 13-14. Holding the Interim Guidance, as applied to final orders of removal, reviewable would thus not upset other parts of immigration law.

DHS and ACLU rely on *Heckler v. Chaney*, 470 U.S. 821 (1985), and *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), to argue that courts cannot even *review*

DHS's rule despite the language and context of §1231. Resp. at 3, 12-14; ACLU Br. at 1-8. But *Heckler* permits review where (as here) the substantive statute itself provides guidelines or the agency has adopted a general policy that amounts to an abdication. 470 U.S. at 832-33 & n.4. And *Town of Castle Rock* was not about the APA at all, but rather whether an individual could sue under §1983 for damages for failure to enforce a restraining order in a particular instance. 545 U.S. at 761; *Texas*, 2021 WL 2096669, at *34-35 (distinguishing *Castle Rock* in part on this Court's *Lema* decision).[2]

b. The States Are Within The Zone Of Interests

The States are in the zone of interests "within the meaning of a relevant statute." 5 U.S.C. §§702, 706; *Texas*, 2021 WL 2096669, at *21-24. This test is not especially demanding, requiring only that the States be "arguably" within what is protected or regulated by the statute. *See Match-E-Be-Nash-She-Wish v. Patchak*, 567 U.S. 209, 225 (2012). The States easily satisfy this "lenient" standard for an APA claim. *Sierra Club v. Trump*, 929 F.3d 670, 703 n.26 (9th Cir. 2019) (applying *Bennett* and

[2] And contrary to DHS's arguments, neither *Arizona v. United States*, 567 U.S. 387 (2012), nor *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999), render the federal executive all-powerful to the exclusion of the other branches in this area. *Arizona* involved preemption of a state law empowering state and local enforcement of immigration laws. But that preemption *strengthens* the need for judicial review under the APA, since this is one of the States' few remedies to prevent unlawful under-enforcement of immigration law.

And this Court interpreted the language in *Reno* about Executive Branch discretion to defer action in immigration as applying only to "*individual* 'no deferred action' decisions" not to "programmatic shift[s]" in decisions about enforcement, such as those DHS is trying to impose in the Interim Guidance. *Regents of Univ. of Cal. v. DHS*, 908 F.3d 476, 503 (9th Cir. 2018), *rev'd and vac't in part*, 140 S. Ct. 1891 (2020).

Clarke). Specifically, §1231(a)(1)(A), and its prior corollary statutes 8 U.S.C. §1252(i) and 8 U.S.C. §1252(c), were intended to *remove* burdens on the State and local governments. *Supra* at 4; *see, e.g., Campos v. I.N.S.*, 62 F.3d 311, 314 (9th Cir. 1995); s*ee also Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) ("[F]ederal regulation does not diminish the importance of immigration policy to the States," which "bear[] many of the consequences of unlawful immigration." (quoting *Arizona*, 567 U.S. at 397)).[3]

c. The Interim Guidance Is Final Agency Action

"In determining whether an agency action is final, [Courts] look to whether the action [1] amounts to a definitive statement of the agency's position or [2] has a direct and immediate effect on the day-to-day operations of the subject party, or [3] if immediate compliance with the terms is expected." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 983 (9th Cir. 2006) (cleaned up). As the States have explained, the Interim Guidance satisfies all three alternative tests. *See* Mot. at 17-18.

Here, the Interim Guidance drastically affects DHS's day-to-day operations: of 325 individuals outside of the priority categories who previously would have been deported, only 7 were—a 98 percent drop. Mot. at 15. DHS's response ignores this powerful statistic entirely. Overall arrests and removals are also down considerably. Mot. at 8-9. And there is no indication that the Interim Guidance is not the "definitive

[3] DHS misinterprets the phrase "any party" in §1231(h) as applying to *all* challenges by States to DHS policy. Not so. The context of the statute makes clear that the term "party" refers only to a "party" to a removal proceeding under §1231. *See Lexmark v. Static*, 572 U.S. 118, 128 (2014) (court must "determine [term's] meaning").

statement of the agency's position," and "immediate compliance with the terms was expected," *Or. Nat. Desert Ass'n*, 465 F.3d at 983—particularly given Director Johnson's unacknowledged, unequivocal late-night commands. *Supra* at 1.

The Interim Guidance is thus hardly "purely advisory and in no way affect[s] the legal rights of the relevant actors." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). As the *Texas* court recognized for the predecessor January 20 Memorandum, that policy was reviewable since it "alter[ed] DHS's obligation under section 1231(a)(1)(A) to remove persons with final orders of removal" and release aliens in detention due to no reasonable probability of removal in the near future. *Texas*, 2021 WL 2096669, at *31. DHS itself understood the likely resulting substantive effect. ADD-119 (admin. record document noting that "potential releases will be front and center").

2. The States Proved The Interim Guidance, As Applied To Removals, Violates the APA In Multiple Ways.

a. The Interim Guidance Violates 8 U.S.C. §1231(a)(1)(A)

As explained previously and above, 8 U.S.C. §1231(a)(1)(A) imposes a non-discretionary mandate on DHS that the Interim Guidance flouts: that section's "shall" means "must," which is confirmed by *Guzman Chavez*, *Lema*, *Xi*, and *Texas*. Mot. at 10-11, 14; *supra* at 1. In response, DHS merely recycles (at 19-20) its unpersuasive committed-to-agency-discretion and §1231(h) arguments.[4] DHS also briefly contends

[4] DHS cites 6 U.S.C. §202(5) as a source of authority to establish enforcement policies and priorities. Resp. at 2, 13. However, that general statute cannot override the specific command in §1231(a)(1)(A), or make it non-reviewable. *Supra* 4.

that the Interim Guidance does not "forbid the removal of any particular noncitizen." *Id.* But the same could be said of the January 20 Memorandum (which the *Texas* court enjoined and DHS tellingly did not appeal) and the midnight email halting deportation flights. ADD-114, 137.[5]

b. DHS Violated Notice-And-Comment Requirements

The Interim Guidance also promulgates a legislative rule requiring notice and comment, since neither the general-statement-of-policy nor the procedural-rule exceptions apply, and DHS did not invoke the good cause exception. Mot. at 15. DHS cites a self-serving declaration that says approval has "regularly" been granted, Resp. at 6, but the actual evidence is that for Phoenix, removals outside of the priority categories dropped by 98 percent as discussed above. *Supra* 6.

In response, DHS points (at 6) to boilerplate language in the Interim Guidance that claims it is "not intended to, do[es] not, and may not be relied upon to create any" enforceable "right or benefit." That is certainly not how Director Johnson

[5] Mot. at ii, 7-8, 15-16; ADD 45-46. While Acting Phoenix ICE Director Carter postulated that there might be some modest increase in requests for removals as his team better understood how to fill-out ICE's internal form for "other priority" cases, the uncontested evidence was that there were at most 3 preapproval requests per day, or 90 per month if weekends are counted, and there is no guarantee that those requests would even be approved. 2ADD-6 n.4; 2ADD-11:9-17; see 2ADD-8-9 (10 out of 17 preapproval requests were initially approved, or just 59%). That 90 "other priority" case requests per month comes nowhere close to the 330 per month drop-off in removals for the Phoenix field office beginning in February 2021, when the 2/4 email and the 2/18 Interim Guidance were issued. 2ADD-6 n.4. Indeed, the District Court made no contrary finding that there were more than 90 such "other priority" requests per month in Arizona. *See* ADD-19 n.14.

intended it to be implemented, nor how it actually was: it effectively created a right against removal in hundreds of cases that would otherwise not have existed. Mot. at 15; *supra* at 6-7. DHS also never refutes that the Interim Guidance "encodes a substantive value judgment." *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002); *see also Chamber of Comm. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999). It plainly does (even without Director Johnson's exclamation point on that value judgment).

c. The Interim Guidance's Promulgation Was Arbitrary And Capricious

Plaintiffs are also likely to prevail on their arbitrary-and-capricious claim as well. As the States have explained (at 3-8, 16-17), the administrative processes for the Interim Guidance and its predecessor the January 20 Memorandum was highly politicized and irregular, and the record *completely* bereft of analysis of actual resource constraints or how the chosen prioritization related to them—even though that was the purported basis for the rule. And Director Carter testified that his office has the necessary resources to effect his mission and carry out normal removal operations and that he was aware of no changes in agency resources that that caused the precipitous decline in the number of removals beginning in February 2021—only the issuance of the Interim Guidance. Mot. at 8-9; ADD-200. Put simply, DHS does not lack for resources to carry out prior/normal removal operations; it simply lacks the political will to do so.

DHS protests (at 23) that this is "extra-record evidence." But that is both

irrelevant—since the *complete absence* of any evidence in the administrative record supporting DHS's purported resource-limitation rationale (uncontradicted here) *alone* violates the APA—and incorrect, since several exceptions apply here (including DHS's bad-faith/pretextual rationale, the evidence is "necessary to explain technical terms or complex subject matter," and the evidence is "necessary to determine whether the agency has considered all relevant factors"). *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 600 (9th Cir. 2018).

Finally, because the evidence reveals that Defendants' stated reasons are not their *actual* reasons, the Interim Guidance's rationale is pre-textual and violates the APA on that basis as well. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

II. THE STATES HAVE ALSO ESTABLISHED IRREPARABLE HARM AND THE OTHER FACTORS FOR AN INJUNCTION

The States have shown irreparable injury that is ongoing, and thus by definition "likely to occur during the period before the appeal is decided." *See Doe #1 v. Trump*, 957 F.3d 1050, 1058-59 (9th Cir. 2020). Specifically, the District Court correctly credited Arizona's showing that it is incurring irrecoverable financial costs from having to place aliens released from prison on community supervision, when those aliens would have been removed but for the Interim Guidance. Mot. at 18 (citing APP-12-13). This is a textbook irreparable injury. *Id.* at 18 n.5 (citing cases).

The States also set forth multiple grounds why the balance of equities and public interest, which merge here, favor an injunction. Mot, at 20. An injunction

(1) will vindicate the public interest, as set by Congress, (2) permit public participation through commenting, as the APA requires, (3) protect the public from dangerous felons and recidivism, and (4) prevent substantial harms to the States.[6] In contrast, Defendants will not be harmed by an injunction maintaining the *status quo ante*. *See id.* (citing *Doe #1*, 957 F.3d at 1068-69 (finding "lack of irreparable harm").

In response, DHS does not contest that the injury found by the district court is irrecoverable. Instead it focuses (at 11) only on whether the injury is sufficiently "substantial" to warrant injunctive relief. That is both not the governing standard and irrelevant, given the substantial nature of the States' injuries. The ACLU also (at 9-10) argues harm doesn't support the scope of relief sought here, but it misstates the scope and type of injunction sought.[7]

DHS also focuses (at 11-12) on interference with the Executive Branch and speculates about possible effects of returning to "normal removal operations." But

[6] Director Carter testified that ICE's core missions, including removing criminal aliens, are "absolutely" important for public safety and that reducing removals of criminal aliens will likely harm public safety. ADD-200 (Tr. 85).

[7] The ACLU's opposition to the scope injunctive relief (at 9-10) relies on the theory that DHS's duty to remove aliens expires once the 90-day removal period ends. It, moreover, makes the blatantly false assertion (at 10) that Plaintiffs "do not, and could not offer any argument that [DHS] is under a statutory obligation to remove individuals who are outside the removal period within a specific period of time." The duty to carry out removals does not vanish after the 90-day period expires. The ACLU's interpretation would perversely incentivize DHS (and aliens) to delay compliance with § 1231(A)(1) until the 90-day period expires to avoid complying with Congress's clear mandate. Finally, in addition to relying on outdated data and the moot 100-day pause, the Hauser Declaration (at 1-2) is based entirely on this flawed premise and should be dismissed on its face.

this argument fails because Congress has spoken on the matter under §1231, expressly precluding a contrary policy by DHS. The Constitution vests Congress with the enumerated power "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, §8. DHS has no legitimate interest in implementation of an unlawful policy. *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). In any event, the administrative record itself shows that when the January 20 Memorandum was enjoined in *Texas*—something DHS never appealed—there was no improper interference, but merely a "return to normal removal operations." ADD-125, 149.

Moreover, if the purported interference with Executive Branch prerogatives were actually as great as DHS now contends, it would have appealed the *Texas* preliminary injunction. It did not, precisely because it could live with the return to "normal removal operations" that the *Texas* preliminary injunction necessarily occasioned. It can equally live with the similar return that the States now seek here.

CONCLUSION

The States' request for an injunction pending appeal should be granted.

Respectfully submitted,

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Dated: July 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 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.

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