No. 21-16118

IN THE 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.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, *No. 2:21-cv-00186-SRB*

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, ET AL., AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF-APPELLANTS' MOTION FOR AN INJUNCTION PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the American Civil Liberties Union Foundation, ACLU of Montana, and ACLU of Arizona state that they do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in any of the *amici curiae*.

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INTEREST OF *AMICI CURIAE*

The ACLU is a nationwide, nonpartisan, public interest organization of nearly two million members dedicated to protecting the fundamental rights and liberties that U.S. law guarantees to all persons, including regarding immigration enforcement. The ACLU of Arizona and ACLU of Montana are the ACLU's state affiliates. The policies and legal issues in this case are of significant interest to *amici* and their members, because Plaintiffs' claims threaten the liberty interests of persons subject to immigration enforcement in Arizona, Montana, and across the country.[1]

ARGUMENT

The district court correctly dismissed this case, holding that 8 U.S.C. § 1231(a)(1)(A)—the statute on which Plaintiffs rest their entire argument for an injunction pending appeal—imposes no enforceable mandate on the federal government. *Arizona v. DHS*, 2021 WL 2787930, at *9 (D. Ariz. June 30, 2021). On appeal, Plaintiffs reiterate their position that the statute is "an unequivocal, non-discretionary mandate" to remove individuals with a final removal order. Mot. 2.

Amici write to emphasize two reasons an injunction pending appeal should be denied. First, as the Supreme Court has explained, statutes providing that an agency

[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part, and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

"shall" engage in an enforcement action generally do *not* create mandatory, enforceable duties. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005). Plaintiffs do not even cite this binding and dispositive case. And they resist its well-settled principles, relying instead on an outlier decision from a Texas district court. But that decision is flatly contrary to *Castle Rock*. Its reasoning—and Plaintiffs' position here—would rewrite dozens of law enforcement statutes to impose all kinds of mandatory duties on federal agencies enforceable by third parties, wreaking havoc on bedrock principles of prosecutorial discretion. The Court should reject this sea change, especially in an expedited posture with limited briefing.

Second, even assuming Plaintiffs could demonstrate a statutory violation under 8 U.S.C. § 1231(a)(1)(A), that violation would apply to only a vanishingly small percentage of cases governed by the enforcement priorities they challenge. Section 1231(a)(1)(A) addresses the 90-day "removal period" that generally begins when a removal order becomes administratively final. 8 U.S.C. § 1231(a)(1)(B). Even assuming ICE must remove individuals during that 90-day period, only a tiny percentage of all outstanding removal orders are within the removal period—the vast majority are outside the removal period and thus have nothing to do with § 1231(a)(1)(A), even under Plaintiffs' theory. And Plaintiffs' § 1231(a)(1)(A) arguments also have no bearing on those who do not yet have a final removal order. Yet based on this alleged violation applicable only to a handful of cases, Plaintiffs

seek an extraordinary remedy—an order enjoining the Interim Guidance across the board, as to everyone. That request far exceeds this Court's equitable powers.

I. THE *CASTLE ROCK* PRINCIPLE CONTROLS THIS CASE.

Plaintiffs' motion relies on 8 U.S.C. § 1231(a)(1)(A), which provides: "Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." In Plaintiffs' telling, this statute—and particularly its use of the term "shall"—creates a mandate enforceable against the federal government by the plaintiff States. Plaintiffs rely on this supposed mandate to argue both that the policy is reviewable and that it is substantively illegal. Mot. 10-14. As the district court explained, however, Supreme Court caselaw provides the statutory interpretation principle key to resolving this case: When it comes to purported enforcement mandates, "'a true mandate of police action would require some stronger indication' from Congress than simply placing the word 'shall' in the legislative command." *Arizona*, 2021 WL 2787930, at *9 (quoting *Castle Rock*, 545 U.S. at 761).

That principle is particularly important in the context of immigration enforcement. "It is common for the term 'shall' to mean 'may' when it relates to decisions made by the Executive Branch" that pertain to "DHS's exercise of its prosecutorial discretion." *Matter of E-R-M- & L-R-M-*, 25 I.&N. Dec. 520, 522 (BIA

2011); *see also Asika v. Ashcroft*, 362 F.3d 264, 268 n.5 (4th Cir. 2004) (per curiam). And the Supreme Court has emphasized that the federal government has broad discretion to refrain from immigration enforcement. In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 484 (1999) ("*AADC*"), the Court explained that "execut[ing] removal orders" is part of "the deportation process," and "[a]t each stage the Executive has discretion to abandon the endeavor." *Id.* at 483 (first alteration in original). The Court thus made clear that executive branch authorities "may . . . decline to execute a final order of deportation." *Id.* at 484; *see id.* at 483-84 (describing with approval the executive branch's "regular practice . . . of exercising that discretion for humanitarian reasons or simply for its own convenience"); *Nken v. Holder*, 556 U.S. 418, 439–40 (2009) (Alito, J., dissenting) ("Once an order of removal has become final, it may be executed at any time"—but "the Executive Branch" may still "stay its own hand."); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017) ("[T]he federal statutory and regulatory scheme, as well as federal case law, vest the Executive with very broad discretion to determine enforcement priorities.").

Accordingly, for decades DHS and its predecessors have exercised their discretion to stay removals.[2] DHS regulations and policies make clear that the

[2] *See generally* Ben Harrington, Cong. Rsch. Serv., R45158, An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others (2018) (providing overview of the historical and contemporary practice).

agency has the authority to "grant a stay of removal or deportation" to "an alien under a final order" "for such time and under such conditions as [the agency] may deem appropriate." 8 C.F.R. § 241.6(a); *see* ICE Form 246, Application for a Stay of Deportation or Removal (Nov. 2020), https://bit.ly/3d3BR7j. Thus, the principle of enforcement discretion in *Castle Rock*, its heightened importance in the immigration context, and the history of executive action all underline that § 1231(a)(1)(A) does *not* impose an enforceable duty on the federal government to remove every noncitizen within 90 days of their removal order becoming final.

Plaintiffs do not even cite *Castle Rock*, but obliquely suggest that § 1231(a)(1)(A) rebuts the general rule that such enforcement statutes do not impose enforceable mandates. Plaintiffs rely heavily on a recent Texas district court decision addressing § 1231(a)(1)(A), characterizing it as "significantly more persuasive" than the decision below. Mot. 12-13 (citing *Texas v. United States*, __ F. Supp. 3d. __, 2021 WL 2096669, at *34-35 (S.D. Tex. Feb. 23, 2021)).

But *Texas* does not so much interpret *Castle Rock* as reject it. The *Texas* court recognized that *Castle Rock* speaks to the statutory question at issue, but, rather than apply its clear holding, invented a brand new doctrine from whole cloth.[3] In *Texas*'s

[3] *Texas* purported to rely on stray phrases from inapposite decisions that long predated, and were not even mentioned in, *Castle Rock*. Both involved efforts to enforce *limits* on enforcement, not efforts to require the government to take enforcement action. *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935), involved a duty to present arrested probationers to a court, with no mandate of any enforcement

view, a "shall" in a law enforcement statute *is* indeed mandatory if "the statute's manifest purpose is to protect the public or private interests of innocent third parties." *Texas*, 2021 WL 2096669, at *34. And because, the court concluded, "the prior corollary immigration statutes to section 1231 in general and subsection 1231(a)(1)(A) in particular . . . clearly demonstrate a purpose to protect 'public or private interests,' . . . the word 'shall' in section 1231(a)(1)(A) means *must*—even as against the Government here." *Id*. (quoted in Mot. 13).

That reasoning would eliminate the *Castle Rock* principle. It is hard to imagine a law enforcement directive whose purpose is to protect neither "the public" nor "innocent third parties." Indeed, if *Texas*'s rule had applied, *Castle Rock* would have come out the opposite way. *Castle Rock* involved one of a "wave" of statutes enacted "for the benefit of the narrow class of persons who are beneficiaries of domestic restraining orders." 545 U.S. at 779 (Stevens, J., dissenting); *see id.* at 781 (describing purpose to "reduce batterer recidivism"). The *Castle Rock* majority did not dispute that history or the goal of protecting domestic violence survivors. *See id*. at 759 n.6, 760 (noting legislative history); 762-63. On *Texas*'s reasoning, the statute's obvious purpose to "protect . . . [the] interests of innocent third parties"

activity. And in *Richbourg Motor Co. v. United States*, 281 U.S. 528, 533-35 (1930), the Court enforced a provision requiring the government to pay "innocent lienors" from the proceeds of forfeiture sales, relying on the use of "shall" simply to reconcile two apparently overlapping forfeiture schemes by concluding the government could only proceed under the scheme that protected lienors.

should have made the arrest provision mandatory and enforceable. *Texas*, 2021 WL 2096669, at *34. Yet that is the opposite of the Court's holding. Despite the statute's "shall arrest" language and its purpose to protect innocent third parties, the Court held that there was no enforceable mandate based on the "well established tradition of police discretion [having] long coexisted with apparently mandatory arrest statutes." 545 U.S. at 760 (citing *Chicago v. Morales*, 527 U.S. 41, 62 n.2 (1999)).

No other court has ever understood *Castle Rock* as subject to a "public or private interests" exception. To the contrary, courts have consistently read *Castle Rock* to mean what it says. *See, e.g.*, *Burella v. City of Philadelphia*, 501 F.3d 134, 146 (3d Cir. 2007) (rejecting "attempt to limit the Supreme Court's holding in *Castle Rock*" and explaining "it is clear after *Castle Rock* that the phrase 'shall arrest' is insufficient"); *id.* at 152-53 (Ambro, J., concurring in part) (even "deliberate and strong indication" that statute was meant to be mandatory, including addition of the term "shall," was insufficient to overcome *Castle Rock*'s "substantial roadblocks").

Nor can Plaintiffs bypass *Castle Rock* by pointing to inapposite cases that did not even address that precedent. Mot. 13 (citing *Texas*, 2021 WL 2096669, at *35 (collecting various such cases)). Indeed, no court other than *Texas* has ever held that § 1231(a)(1)(A) overcomes *Castle Rock*'s rule of enforcement discretion. Plaintiff cites several cases that describe § 1231(a)(1)(A), but none of them so much as mentions *Castle Rock* or holds that the statute imposes a mandate enforceable by

third parties. *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003), and *Xi v. INS*, 298 F.3d 832, 840 n.6 (9th Cir. 2002), involved challenges to detention after the removal period was over, not an attempt to force removals. Similarly, *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2283 (2021), involved a challenge to detention without a bond hearing, not an attempt to enforce § 1231(a)(1)(A) against ICE to mandate removals—and did not question the federal government's longstanding authority to stay removals, *cf. AADC*, 525 U.S. at 484.[4]

Plaintiffs' attempt to gut *Castle Rock* would have far-reaching consequences across the administrative state. Dozens of statutes spell out agencies' law enforcement duties using the word "shall." For instance, Congress has provided that the IRS "shall investigate" the failure to pay certain taxes on firearms and other goods, "shall enter the premises" where certain taxable items are held, and "shall" file collection actions for any unpaid estate taxes. 26 U.S.C. §§ 5557(a), 6021, 7404. Likewise, the EPA "shall issue an [enforcement] order" or "file a civil action" when "any person" violates certain clean-water regulatory requirements. 42 U.S.C. §§ 300h-2(a)(1), (2). Other examples are legion.[5] Under Plaintiffs' approach, all of

[4] Plaintiffs note that § 1231(a)(1)(A) says "except as otherwise provided." Mot. 12. That merely acknowledges provisions "mandating or authorizing DHS to extend *detention* beyond 90 days." *Guzman Chavez*, 141 S. Ct. at 2288 (emphasis added). It does not limit DHS's authority to stay removal during the removal period.

[5] *See, e.g.*, 31 U.S.C. §§ 3541(b), 3542(a), 3542(b)(2), 3545 (Treasury "shall" issue certain warrants, seize property, and bring civil actions); 42 U.S.C. § 1987 (U.S. attorneys are "required" to prosecute "all persons" who violate the civil rights laws);

these might become mandatory and enforceable, severely eroding agency discretion and expanding the reach of administrative enforcement across the board.

II. ANY STATUTORY VIOLATION WOULD APPLY TO A TINY SUBSET OF CASES, AND COULD NOT SUPPORT THE INJUNCTIVE RELIEF PLAINTIFFS SEEK.

Even if § 1231(a)(1) did override the government's discretion to stay removals, Plaintiffs' motion should still be denied because their statutory theory reaches only a sliver of the cases to which the enforcement priorities apply. The relief they seek—wholesale injunction of the priorities—is entirely disproportionate and unjustified by their statutory theory, even were it correct.

By the plain terms of the statute, any duty it imposes could only apply during the "removal period"—generally the 90 days after an order becomes final. *See* 8 U.S.C. § 1231(a)(1)(A), (B); *see also id*. § 1231(a)(1)(C) (limited exception). But the vast majority of individuals with final orders of removal are well past the 90-day removal period. *See* Declaration of David Hausman ¶ 18, ECF No. 82-2, *Texas*, No. 6:21-cv-00003 (S.D. Tex. *filed* Feb. 12, 2021) (estimating that removal orders issued through regular removal proceedings that are currently in the removal period

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42 U.S.C. §§ 9152(b)(1), (2), 18 U.S.C. § 2322, 49 U.S.C. § 80502(d), 33 U.S.C. § 1514, 45 U.S.C. § 823(j); 12 U.S.C. § 1731b(h) (DOJ "shall commence a civil action" in a variety of contexts); 15 U.S.C. §§ 78*o*(m), 80b-11(i) (the SEC "shall . . . prosecute and sanction" any violator of the applicable standards of conduct for investment advisers and broker dealers); 15 U.S.C. § 9074(c)(2) (DOT "shall initiate an action" to recover unspent stimulus funds); 14 U.S.C. § 522 (all individuals who appear to be arrestable "shall be arrested" by the Coast Guard).

represent just 0.84% of all outstanding removal orders).[6] Plaintiffs do not, and could not, offer any argument that the government is under a statutory obligation to remove individuals who are outside the removal period within a specific period of time. *See* 8 U.S.C. § 1231(a)(3). Thus, even as to those with removal orders, the percentage of individuals potentially impacted by Plaintiffs' arguments is tiny.

Moreover, the priorities reach far beyond those who already have removal orders. The priorities govern discretion at every stage, including: whether to issue an immigration detainer; stop, question, or arrest; commence removal proceedings; detain or release individuals from custody; or grant deferred action or parole. Interim Guidance at 3. Plaintiffs' statutory theory has nothing to say about any of these circumstances, yet they seek to block the priorities as applied to all of them.

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 680 (9th Cir. 2021) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The Court cannot and should not enjoin the priorities based on a legal claim—and a claim of reviewability—that at most impacts a tiny subset of people to whom they apply.

CONCLUSION

The Court should deny the motion.

[6] A copy of this declaration is attached for the court's convenience. The Court may take judicial notice of the underlying governmental data. *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015).

Dated: July 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 27-1(1)(d) because it contains ten pages, exclusive of the portions of the brief that are exempted by Rule 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Cody Wofsy
Cody Wofsy
July 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I electronically filed the foregoing Brief of Amici Curiae with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. A true and correct copy of this brief has been served via the Court's CM/ECF system on all counsel of record.

/s/ Cody Wofsy
Cody Wofsy
July 23, 2021

Attachment A

Declaration of David K. Hausman

DECLARATION OF DAVID K. HAUSMAN

I, David K. Hausman, upon my personal knowledge, hereby submit this declaration pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a postdoctoral fellow in political science at Stanford University, where I study immigration enforcement and administrative courts. I previously worked for the ACLU Immigrants' Rights Project as an attorney and occasionally consult for the project, but I have not done paid work on this case.

2. I have been asked to estimate the number of individuals with final removal orders who are still within the 90-day removal period as defined in 8 U.S.C. § 1231(a)(1). That period is generally 90 days after a removal order becomes administratively final, as defined in § 1231(a)(1)(B)(i). It may start later if the noncitizen seeks judicial review and obtains a stay from the court, § 1231(a)(1)(B)(ii), or is incarcerated in criminal custody at the time the order becomes final, § 1231(a)(1)(B)(iii); it may extend longer than 90 days if the noncitizen falls within the limited exception in § 1231(a)(1)(C).

3. In order to estimate the number of individuals with final removal orders who are in the removal period, I relied on public data, which was current as of December 31, 2020 at the time I performed the analysis, from the Executive Office of Immigration Review, a component of the Department of Justice. That public dataset, available at https://www.justice.gov/eoir/foia-library-0, contains records of all decisions made by Immigration Judges ("IJs") and the Board of Immigration Appeals ("BIA").

4. Removal orders become final if the noncitizen fails to appeal or if the BIA affirms the decision of the IJ. 8 U.S.C. § 1101(a)(47). Noncitizens have 30 days to appeal. 8 C.F.R. § 1003.38(b).

5. I first calculated an estimate of the number of individuals in the removal period at a given point in time.

6. I began by counting IJ removal decisions issued in the 90-day-period ending at least 30 days before the last day in the data—in other words, IJ decisions in the 90-day period ending on December 1, 2020. I excluded decisions from the most recent 30 days because there was no way to know from this data whether those individuals appealed. December 1, 2020, is therefore the most recent day for which the dataset I used is complete, including data about whether an appeal was filed.

7. I found **6,032** IJ removal orders entered during the 90-day period ending December 1, 2020 in which the noncitizen did not appeal (6,019 cases) or in which the BIA had already affirmed the decision, dismissed the appeal, or marked the appeal as withdrawn as of December 31, 2020 (13 cases).[1]

8. In addition, I counted the number of affirmances, dismissals, and withdrawals issued by the BIA in the same 90-day period ending December 1, 2020, but where the individual did not receive a removal order from an IJ during that 90-day period. I found **3,956** such cases.

9. Adding these numbers together (6,032 + 3,956), I concluded that, as of December 1, 2020, there were approximately **9,988** removal orders that became final during the previous 90-day period.

10. This calculation provides a snapshot of how many cases were within the removal period on a single day, December 1, 2020. For example, the removal period for an order that became final on November 30 would run for 90 days from that date, so that individual would

[1] In counting BIA decisions, I considered only case appeals, since circuit court remands and appeals concerning motions to reopen or bond determinations generally do not result in the entry of a new removal order.

be near the beginning of the removal period on December 1. Which particular people are in the removal period changes every day, but this count from a recent day offers my best estimate of how many people are in the removal period on any given day.

11. This number is approximate as a measure of the total number of individuals in the removal period on December 1, 2020. For example, some of the individuals who lost before the BIA may have sought judicial review and obtained a stay, tolling their removal period. At the same time, other individuals whose orders became final in the past may have lost their cases before federal courts (for which they obtained a judicial stay), beginning their own removal period. Similarly, the other exceptions to the general rule that the removal period begins after the BIA rules could affect the overall number. For example, some who seek judicial review prevail.

12. The deportation pause at issue in this case lasts 100 days. I therefore next estimated how many people might be in the removal period at any point over the course of a given 100 day period. To do so, I calculated how many people were in the removal period over the course of the 100 days ending December 1, 2020. I followed the same procedure as above, except that instead of looking at removal decisions over the 90 days before December 1, 2020, I looked at removal decisions over the 190 days before December 1, 2020. That way, I included all removal decisions reached by IJs or the BIA in the 90 days before each of the 100 days in the 100-day period ending on December 1, 2020.

13. I found **11,902** IJ removal orders entered during the 190-day period ending December 1, 2020 in which the noncitizen either did not appeal (11,495 cases) or in which the BIA had already affirmed the decision, dismissed the appeal, or marked the appeal as withdrawn as of December 31, 2020 (407 cases).

14. In addition, I counted the number of affirmances, dismissals, and withdrawals issued by the BIA in the same 190-day period ending December 1, 2020, but where the individual did not receive a removal order from an IJ during that 190-day period. I found **9,261** such cases.

15. Adding these numbers together (11,902 + 9,261), I concluded that, as of December 1, 2020, there were approximately **21,163** removal orders that became final during that 190-day period.

16. These figures reflect final removal orders issued through the ordinary removal process, under section 240 of the Immigration and Nationality Act. They do not include expedited removal orders or other summary procedures, which typically result in swift removal.

17. I understand from the Declaration of Peter Berg filed in this case that there are approximately 1.19 million outstanding removal orders.

18. My estimate of **9,988** individuals in the removal period on any given day represents .**84%** of the total number of outstanding removal orders.

19. My estimate of **21,163** individuals in the removal period during any given 100-day period represents **1.77%** of the total outstanding number of removal orders.

20. I declare under penalty of perjury and under the laws of the United States that the foregoing is true and correct. Executed on February 12, 2021.

David Hausman

David K. Hausman