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' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR AN INJUNCTION PENDING APPEAL DECISION REQUSTED BY JULY 30, 2021

AUSTIN KNUDSEN
ATTORNEY GENERAL

David M. Dewhirst
Solicitor General
Christian Corrigan
Assistant Solicitor General
215 N Sanders St.
Helena, MT 59601
Telephone: (406) 444-4145
David.Dewhirst@mt.gov
Counsel for the State of Montana

MARK BRNOVICH
ATTORNEY GENERAL

Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III
Solicitor General
Drew C. Ensign
Deputy Solicitor General
Anthony R. Napolitano
Robert J. Makar
Assistant Attorneys General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-5
Drew.Ensign@azag.gov
Counsel for the State of Arizona and Mark Brnovich, Arizona Attorney General

Dated: July 15, 2021

CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3 Plaintiff-Appellants the States of Arizona and Montana, and Mark Brnovich, Arizona Attorney General, (hereinafter, "Plaintiffs" or the "States") respectfully submit this certificate in connection with their emergency motion for an injunction pending appeal.

This case involves a challenge to the so-called "Interim Guidance," which Defendants issued on February 18, 2021. For the vast majority of cases (in excess of 95%), the Interim Guidance prohibits the deportation of aliens that have final orders of removal (*i.e.*, have exhausted all immigration appeals) except for three categories. The excepted categories are 1) national security (engaged in terrorism or espionage-related activities), (2) border security (not present in the United States before November 1, 2020 or apprehended crossing the border thereafter), and (3) public safety (convicted of an aggravated felony as defined in § 101(a)(43) of the INA or involved in gang or transnational criminal organization activity). ADD-107-108. Aliens that are removable as a result of any other form of criminal convictions are "non-priority" cases and are generally not removable under the Interim Guidance.

The Interim Guidance does provide a process under which approvals for deportations for "non-priority" cases can be obtained. But they are rarely sought and infrequently approved. The district court concluded that of the 325 aliens with final orders of removal that would have been removed under ordinary procedures pre-Interim Guidance for the first 8 weeks it was in force, only 7 were actually removed.

As that court explained, "of 325 individuals who, before February 18th, would have been put into immigration detention and removed, only seven have." ADD-45-46. Thus, for approximately 98% of cases to which it applies, the Interim Guidance effectively operates as *de facto* prohibition on removal.

The "Interim Guidance" is something of a misnomer: (1) it is neither mere "guidance," and instead is almost uniformly dispositive—controlling in roughly 98% of cases where applicable (2) nor particularly "interim"—although DHS originally represented it would be in force for "less than 90 days," that expiration date has been repeatedly pushed back: Defendants' latest update is that they "expect that the Secretary will issue new immigration priorities by the end of August or beginning of September"—though even this latest representation is caveated based on "the needs of the agency and other contingencies." D. Ct. Doc. 89 at 1.

A. Contact Information Of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this certificate.

B. Nature Of The Emergency

The emergency consists of irrecoverable ongoing, and increasing, costs to Plaintiffs imposed by the Interim Guidance's severe reduction in the removal of aliens who would otherwise have been removed under normal operations, burdening state programs including supervised release programs for unremoved criminal alien convicts. And as the ICE Phoenix Field Office alone is estimated to be conducting roughly 325

fewer removals a month (over 10 fewer a day) under the Interim Guidance, each day the policy is in place compounds the ongoing costs Plaintiffs are already experiencing from the unremoved population by adding more individuals to it. *See* Carter Depo. at 96:6-17, Dkt. 79-1 at 22. The district court recognized "the increase in community supervision costs, both already suffered and likely to arise in the near future," which "constitutes a concrete and particularized injury" to Plaintiffs." ADD-12. These harms are not recoverable and will increase absent an injunction because DHS is continuing to lift (and now refusing to initiate) immigration detainers on incarcerated criminals nearing the end of their prison sentences, leading to their release into the community on supervised release programs. ADD-12-13 ("there is a substantial risk that those costs will occur in the near future given the sheer volume of noncitizens in Arizona state prisons subject to ICE detainers and the Government's clear willingness to lift detainers against criminal noncitizens in Arizona's custody."). And this is a direct and ongoing effect of the Interim Guidance: "ICE specifically relayed that it lifted the detainers because of the new enforcement priorities, which are embodied in the Interim Guidance." ADD-13 (noting that, by April, at least four criminal aliens have already been placed on supervised release after their detainers were lifted for this express reason).

"Arizona spends a significant amount of money on conducting community supervision of individuals released from state prison—almost $23,000,000 in 2019—and unremoved noncitizens are being added to the ranks of those under community

supervision, which almost certainly increases the overall cost to Arizona." ADD-13. The Interim Guidance exacerbates this problem, affecting the "over 6% of Arizona's prison population … [with] ICE detainers lodged against them," and "ICE has drastically reduced the number of detainers it is issuing the in first place: from approximately 300 per month throughout 2020 to less than 100 per month under the Interim Guidance." ADD-12. Prior to the Interim Guidance, where ICE had placed a detainer on an inmate, that inmate would be taken into ICE custody before being released from jails or prisons into the community, but when a detainer is lifted, the state must release these individuals, instead. Carter Depo. at 84:6-14, ADD-200. Without an injunction, inmates whose detainers have been lifted (or were never placed to begin with) will continue to complete the incarceration portion of their sentences and be shifted into supervised release instead of being removed, increasing the population in a program that costs Arizona "$4,163.60 per individual" annually. ADD-11.

In addition, as an increasing number of criminals are released who would have previously been removed, the likelihood of Plaintiffs suffering direct law enforcement costs (including costs of reincarcerating repeat offenders) and crime-based injuries also increases. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. The release of convicts into the community pursuant to the Interim Guidance makes it virtually certain that Plaintiffs will incur additional costs of

recidivism. Some of these costs are calculable, such as the 71% increase in personnel costs involved in immigration-related pursuits experienced by the Pinal County Sheriff's Office and the $70 per person per day that office spends to incarcerate inmates. Decl. of Mark Lamb, Ex. N, D. Ct. Doc. 17 at 38-40. In 2019 alone, Arizona reported costs of $19,019,255.68 related to the incarceration of certain alien criminals under the federal SCAAP program. Ex. Y, . Ct. Doc. 64-5. Of this, less than 10% was reimbursed. *Id.* And beyond incarceration, Plaintiffs will suffer the costs of crime from these recidivists. Other costs, such as the threat to communities and the irreparable impact on victims of crime, are more difficult to quantify, but both federal and state officials agree that the lifting of detainers and decrease in removals poses a threat to public safety. *See* Carter Depo. at 79:16-24, ADD-199 (a reduction in the lodging of immigration detainers will "absolutely" harm public safety); Suppl. Decl. of Mark Lamb, Ex. Q, Dkt. 38 at 39 (53% of individuals with ICE detainers in custody in 2019 had previous jail time).

Additionally, Plaintiffs are required by federal law to include unauthorized aliens in their Emergency Medicaid Programs, 42 C.F.R. § 440.255(c), and the Supreme Court in *Plyler v. Doe* required that States provide public education to school-age unauthorized aliens. 457 U.S. 202, 230 (1982). For instance, one Arizona hospital, Yuma Regional Medical Center ("YRMC"), has provided care to at least 111 patients in ICE custody, alone, in February, March, and April 2021, and experiences $861 in unreimbursed costs of care for each patient it sees in that population. *See* Trenschel Decl., Ex. Z, Dkt. 64-5

at 7-10. As the Interim Guidance continues to be in effect, severely reducing the number of removals, these mandates will force Plaintiffs to incur the costs of providing such services to aliens who would have otherwise been removed. And Plaintiffs have also suffered procedural harm tied to their unrecoverable monetary damages, having been deprived of the opportunity to provide input through notice-and-comment rulemaking for the substantive change in Defendants' policy and of the protections enacted by Congress in 8 U.S.C. § 1231 to remove aliens with final orders of removal within 90 days.

The persistence of the Interim Guidance and its effects lead to a daily increase in the unrecoverable costs to Plaintiffs, compounded as additional individuals—at a rate of over 300 per month—are passed over for removal without DHS expressing plans to make up for this lost volume in the future.

C. Notification Of Counsel For Other Parties

The State notified all parties of its intent to seek an emergency stay pending appeal this morning.

The States and Federal Defendants have agreed upon the following briefing schedule:

- Thursday, July 15: State's Emergency Motion filed
- Friday, July 23: Federal Defendants' Response Due
- Monday, July 26 at Noon Pacific Time: State's Reply to Response Due

Appendix A: Contact Information Of Attorneys

Joseph A. Kanefield
Brunn W. Roysden III
Drew C. Ensign
Anthony R. Napolitano
Robert J. Makar
2005 N. Central Ave
Phoenix, AZ 85004-1592
Phone: (602) 542-8958
Joe.Kanefield@azag.gov
Beau.Roysden@azag.gov
Drew.Ensign@azag.gov
Anthony.Napolitano@azag.gov
Robert.Makar@azag.gov

Counsel for the State of Arizona and Arizona Attorney General Mark Brnovich

David M. Dewhirst
Christian Corrigan
215 N Sanders St.
Helena, MT 59601
Phone: (406) 444-4145
David.Dewhirst@mt.gov

Counsel for the State of Montana

H. Thomas Byron, III
Sean Janda
Michael Shih
950 Pennsylvania Avenue, NW
Washington, DC 20530

Adam D. Kirschner
20 Massachusetts Ave. NW
Washington, DC 20530

Erez Reuveni
450 5th Street, N.W.
Washington, DC 20530

Phone: (202) 514-3388
h.thomas.byron@usdoj.gov
sean.r.janda@usdoj.gov
michael.shih@usdoj.gov
adam.kirschner@usdoj.gov
erez.r.reuveni@usdoj.gov

Counsel for Defendants-Appellees

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The rule challenged in this suit, known as the "Interim Guidance," establishes a substantive command not to remove aliens with final orders of removal unless they fit within three narrow categories or a supervisor approves an "other priority" removal. Defendants' issuance of this rule accomplishes a rare trifecta of illegality. It notably:

1) Squarely violates the unequivocal command of the statute it purports to implement, which is obvious both from the statute's plain text, as well as the precedents of the Supreme Court and this Court interpreting it;

2) Is plainly a substantive/legislative rule, issued without notice-and-comment procedures or good cause for avoiding them; and

3) Is arbitrary, capricious, and pretextual: its putative rationale based almost entirely on purported "resource constraints" for which there is no record evidence and that Defendants have admitted in a deposition do not exist.

The Interim Guidance is a *de facto* near-complete prohibition on deportation of aliens with final orders of removal that fall outside of certain categories: national security, border security, and public safety. ADD-104. Those priorities notably exclude convicted felons who have fully exhausted immigration appeals, as long as their crimes do not fall within those categories. As a direct result of the Interim Guidance, the Plaintiff States are forced to place numerous felon aliens on community supervision (akin to federal supervised release) that otherwise would have been deported in all prior administrations within the last half century. ADD-11-12.

The district court properly concluded that the Interim Guidance caused the State direct harm and thus that the State had standing. ADD-12-13. But it nonetheless held that the decision as to whether to deport aliens with final orders of removal was "committed to agency discretion by law" under 5 U.S.C. §701(a)(2), and thus completely "unreviewable." ADD-20.

But far from committing these (non-)deportation decisions so completely to Defendants' discretion as to render them completely beyond judicial review, the governing law actually imposes an unequivocal, non-discretionary mandate upon Defendants precisely to do what the Interim Guidance prohibits. Specifically, Congress commanded that: "[e]xcept as otherwise provided in this section, when an alien is ordered removed, [Defendants] *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added). Both the Supreme Court and this Court have described this "shall" directive as an affirmative mandate. *Johnson v. Guzman-Chavez* 141 S. Ct. 2271, 2288 (2021); *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003). So too has a district court, which enjoined the Interim Guidance's predecessor, the 100-day Moratorium. *See Texas v. United States*, __ F. Supp. 3d __, 2021 WL 2096669 at *34-35 (S.D. Tex. Feb. 23, 2021).

Because Congress actually intended to *eliminate* Defendants' discretion to decline to deport aliens with final orders of removal, rather confer discretion so unbounded as to be completely unreviewable, the district court's judgment rests on patent error and is likely to be reversed on appeal. And the States are likely to prevail on their challenges

to the Interim Guidance given the violation of section 1231(a)(1)(A), the APA's notice-and-comment requirement, and its pretextual and unsupported nature.

The remaining requirements for an injunction pending appeal are also satisfied here. The district court's standing analysis amply demonstrates the States' irrecoverable harms, and hence irreparable injury. Moreover, the balance of harms and public interest favor the States since an injunction (1) will vindicate the public interest, as set by Congress, (2) will permit the public participation through commenting, as the APA requires, (3) protect the public from dangerous felons, and (4) prevent substantial harms to the States. Nor can Defendants claim genuine harm, since they have admitted that the putative basis for the Interim Guidance is a concocted "resource constraints" fiction that is purely pretextual.

This Court should accordingly enjoin the Interim Guidance pending appeal.

BACKGROUND

Initial Issuance of Ghostwritten Memorandum Pausing Removals, Brief Return to Normal Removal Operations, and Midnight Email Reinstating the Removal Pause

On the Biden Administration's first day in office, the Acting DHS Secretary issued a Memorandum on "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities," which in Section B imposed "Interim Civil Enforcement Guidelines" and in Section C imposed an "Immediate 100-Day Pause on Removals" outside of narrow categories. ADD-111-14. A stated rationale for suspending removals was prioritizing "limited resources." ADD-113.

Despite this stated rationale, there is no evidence or analysis by DHS supporting it. The Memorandum's entire administrative record is only 7 pages, and the Memorandum was "author[ed]" by an incoming White House staffer—which was discovered only because DHS briefly posted a version with metadata. ADD-118.

Six days after the Memorandum's issuance, a federal court issued a temporary restraining order 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). The "pause" on removals was thus itself briefly paused.

On January 27, the acting head of ICE Enforcement and Removal Operations ("ERO") emailed data to inform "potential impacts of the interim guidance." ADD-128. Again, there is no reference to removals in the email. Instead, it estimates "book-ins," defined as "an individual entering [ICE] custody from a single event (arrest by CBP or ICE)," to "be reduced by 50% of historical numbers and the vast majority of book-ins would come from CBP transfers." *Id.*; *see also* ADD-131 (chart).

On Sunday January 31, the Acting DHS Secretary issued guidance for compliance with the *Texas* TRO. ADD-133-34. That guidance never suggests that Section B governed removals. Instead it says, "[a]bsent further notice, ICE should continue to conduct removal operations without implementing, and without taking into consideration, the pause on removals set forth in Section C." *Id.*

Activist groups, however, quickly became incensed by this compliance with the *Texas* TRO. On February 1, they wrote to the White House and DHS Secretary, stating:

> Just this morning, on the first day of Black History month, there was another deportation flight from San Antonio to Haiti…. In a continued attempt to thwart the new administration's priorities, we believe ICE has scheduled yet another deportation flight for this Wednesday to Angola, Cameroon, and the Democratic Republic of Congo. We believe some or all of the individuals scheduled to be deported on this flight fall outside of the interim enforcement guidelines which take effect today.… The administration must step in now to stop this injustice before it is too late.

ADD-135-36. Defendants themselves included this email as one of the relatively few documents in their administrative record.

This pressure campaign quickly paid off. 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, which only applied to Section C (presumably because it was the only section actually governing removals).

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.*

On February 7, the *Washington Post* published an article revealing the request for cancellation of the deportation flight to "majority Black countries … during Black History Month" and stating "[w]ithin hours, the acting director of ICE wrote to senior staff, stopping the deportations." ADD-139-41. The article states the *Post* had a copy of a "draft memo circulating the agency" and even quoted from that draft memo as referring to "limited resources," ADD-139, but no such draft or related communications have been produced in this case. The *Washington Post* article is one of few documents that Defendants produced in the administrative record, however.

On February 9, the *Texas* court extended its TRO through 2/23/2021. ADD-143-48. On 2/10, the Acting ICE Deputy Director notified ICE employees of the TRO's extension. ADD-149. He admitted in this communication that when the TRO first issued ICE "employees were advised to return to normal removal operations as prior to the issuance of the" Memorandum, and it was only later that they were instructed that "removals should be conducted according to the priorities set forth in Section B" of the Memorandum. *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 made effectively by Director Johnson's midnight email, of applying the priorities in Section B of the Memorandum to removals. ADD-137-38.

The purported basis for the Interim Guidance was "limited resources." ADD-106.[1]

The Interim Guidance Dramatically Decreased Removals, and the Phoenix ICE Director Testified the "Limited Resources" Rationale Was Pretextual

ICE publishes data and has provided discovery responses in this case showing that the Memorandum Section B enforcement guidelines—expanded to removals on February 4 and carried forward in the Interim Guidance—have resulted in a dramatic overall decrease in ICE enforcement. This decrease is on top of the prior substantial coronavirus-related decreases in 2020. ICE's book-ins by preceding month through 4/24/21 (the latest data provided by ICE in discovery) are as follows:

10/20	**11/20**	**12/20**	**01/21**		**02/21**	**03/21**	**04/21**		**Total**
6,804	5,978	6,071	5,118		1,985	2,343	2,156		30,455

ADD-155.

ICE also provided the number of Removals through 4/16/21 showing a dramatic drop in removals:

10/20	**11/20**	**12/20**	**01/21**		**02/21**	**03/21**	**04/21**		**Total**
10,367	5,840	5,886	5,732		3,180	3,687	1,448		36,140

ADD-166-67.

The *Washington Post* similarly reported that the number of removals carried out by ICE in April "fell to the lowest monthly level on record," 2,962 according to

[1] The *Texas* court subsequently issued a preliminary injunction against Section C of the Memorandum. *See* ADD-150. Defendants never appealed that decision.

preliminary data, and this is "the first time the monthly figure has dipped below 3,000 … a 20 percent decline from March." ADD-175. It further reported that "ICE has recorded about 37,000 [removals] during the past seven months, putting the agency on pace for fewer than 55,000 deportations for the 2021 fiscal year. It would be the first time that figure has fallen below 100,000." *Id.*

Because ICE has approximately 6,000 ERO officers, they are now averaging 1 interior arrest per 2.5 months per officer, on pace for 4-5 arrests per year. *See* ADD-178. "In private, ICE officials say their work is being essentially abolished through restrictions on their ability to make arrests and deportations." ADD-175.

Testimony from Acting Phoenix ICE Director Albert Carter addressed the purported resource constraints and the effect of the Interim Guidance as follows.

Purported Resource Constraints: Although the Interim Guidance claims "limited resources" as its sole rationale, Director Carter expressly confirmed he has sufficient monetary and other resources to effect his mission and carry out normal removal operations. ADD-198 at 76:10-16, 77:15-22. The administrative record is also completely bereft of any documents discussing the purported resource limitation rationale, and Defendants did not point to a single document below that could substantiate the Interim Guidance's asserted rationale. ADD-60:16-20.

ICE Arrests: Director Carter agreed there was a "big drop-off in ICE arrests from before" to after the Memorandum and Interim Guidance. ADD197 at 73:10-14. He agreed with data showing 86% and 92% of ICE arrests in recent years were for

aliens with criminal convictions or charges. ADD-196 at 67:19- 23, ADD-204 at 157:14-22. Importantly, he testified that, other than the Interim Guidance priorities, he cannot think of *any* new factor that was in effect in February 2021 that could account for the sudden dropoff, including COVID-19. ADD-198 at 74:15-75:15.

ICE Removal of Criminal Aliens: Carter further testified that although removals decreased substantially due to coronavirus, there was a further "big drop off in removals from before" 2/2021 to after 2/2021. ADD-201 at 86:1-88:1. He testified the "only factor" he could think of for the drop-off in February 2021 was the new enforcement priorities and he did not observe any contributing factor *Id.* at 88:20-89:11.

Proceedings Below

This action was filed on February 3, 2021, and following issuance of the Interim Guidance, Plaintiffs moved for a preliminary injunction on March 8. The district court heard oral argument on April 8, denied the motion without prejudice, and ordered discovery. ADD-22, 66-103. Following expedited discovery, Plaintiffs renewed their motion, and the district court heard argument on May 27. On June 30, it denied Plaintiffs' motion, concluding that Plaintiffs had Article III standing, ADD-15, but held that "the Interim Guidance is unreviewable as agency action committed to agency discretion by law." ADD-20.

Plaintiffs appealed the same day and sought an injunction pending appeal below the next day, which was denied today. ADD-25-26, 208-12.

LEGAL STANDARD

To obtain an injunction pending appeal, Plaintiffs must demonstrate either (1) "a probability of success on the merits and the possibility of irreparable injury," or (2) "that serious legal questions are raised and that the balance of hardships tips sharply in [their] favor." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

ARGUMENT

I. THE STATES ARE LIKELY TO PREVAIL ON APPEAL

A. The District Court's Unreviewable-Discretion Argument Is Likely To Be Reversed

The district court's denial of a preliminary injunction rests on a single ground: *i.e.*, "the Interim Guidance is unreviewable as agency action committed to agency discretion by law" under 5 U.S.C. §701(a)(2). ADD-20. That holding was patent error.

1. The District Court's Reasoning Is Contrary To Both 8 U.S.C. §1231's Text and Controlling Precedent Construing It

Far from committing the decision as to whether aliens with final orders of removal should be deported to Defendants' unreviewable discretion, Congress actually did the precise opposite: virtually *eliminating* agency discretion by enacting an explicit command. Specifically, Congress mandated: "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the [government] *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A) (emphasis added).). This language is unequivocal and expressly states that the only exceptions are those "otherwise provided" in section 1231, none of which relate to the Interim

Guidance in the slightest[2]

The district court's reasoning upends the statutory text and converts what should be a judicially enforceable mandate into a shield against any scrutiny. Indeed, it not only transmuted section 1231's "shall remove" to "*may* remove," but now, the section in reality may as well read that DHS "will not remove in virtually all relevant cases, and always in Defendants' sole and completely unreviewable discretion." Under that reasoning, Defendants could halt deportations of all aliens with last names beginning "A-M" while continuing those beginning "N-Z," and no court could review such arbitrary distinctions *at all*. Violations of plain statutory text rarely come any plainer. Nor do agency claims of impunity from judicial review come starker. "[T]his wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

But the district court's reading of section 1231(a)(1)(A) does not merely violate the plain text, but *also* multiple court decisions construed that text, including controlling precedents. This Court, for example, explained that this "shall" means "must": the Defendants "*must remove* an alien in its custody within ninety days from the issuance of a final removal order." *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003) (emphasis added). Similarly, this Court has described section 1231(a)(1)(A) as creating a "*statutory duty* to effect the physical removal … within the statutorily specified 90-day 'removal period.'"

[2] Defendants have not pointed to any other provision of §1231 that authorizes the Interim Guidance. None do. For example, while §1231(c)(2) allows an extension of removal pending DHS temporarily staying "an alien['s]" removal, Defendants do not claim that they are staying any removals.

Xi v. INS, 298 F.3d 832, 840 n.6 (9th Cir. 2002) (emphasis added).

The district court essentially distinguished *Lema*'s reasoning as mere dicta, and not addressing "judicial review under the APA." ADD-18. Two problems with that: *First*, this Court is bound not only by the holdings but also the dicta of prior panel decisions. *See*, *e.g.*, *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc). District courts are no less bound. *Second*, the district court's reasoning rests on a logic flaw: if section 1231(a)(1)(A) imposes a mandatory duty on Defendants, it necessarily precludes the existence of unreviewable discretion to act directly opposite of that mandate. So while *Lema* (and *Xi*) may not have addressed APA reviewability specifically, their binding reasoning necessarily precludes an unreviewable-discretion holding.

Similarly, the Supreme Court's recent decision in *Johnson v. Guzman Chavez* recognized that §1231 imposes a non-discretionary duty. 141 S.Ct. at 2281. *Guzman Chavez* explained that "the most natural reading of the 'except as otherwise provided' clause is that DHS *must remove* an alien within 90 days *unless* another subsection of § 1231 specifically contemplates [otherwise]." *Id.* at 2288 (emphasis added). In addition to the construction of "shall" as "must" in §1231, this binding interpretation of "except as otherwise provided" limits DHS's enforcement discretion *solely* to the alternative avenues laid out in §1231 when removals are possible—which the Interim Guidance does not even attempt to squeeze within. *See supra* at 11 n.2.

Moreover, the Southern District of Texas has also construed Section 1231(a)(1)(A) and reached the opposite outcome in a significantly more persuasive

opinion. *See Texas*, 2021 WL 2096669. Notably, the district court here reasoned that no "stronger indication is present" that "shall" actually meant "shall." ADD-16. But the *Texas* court persuasively identified two such "stronger indications," which the district court here simply ignored. In particular, statutory amendments that added the "shall" language "clearly demonstrate[d] a purpose" that led "inexorably to a single conclusion: the word 'shall' … means *must*—even as against the Government here." *Id.* at *34. Statutory context further supported this interpretation: "numerous federal courts have recognized that *other* parts of section 1231 itself uses 'shall' as a mandatory command." *Id.* at *35 (collecting cases). But the district court here considered neither the statutory history nor this statutory context.

For all of these reasons, the district court's conclusion that Defendants enjoy unreviewable discretion as to deportation decisions under section 1231(a)(1)(A) is plainly wrong. Far from conferring unbounded discretion on Defendants, Congress actually imposed a specific mandate that the Interim Guidance squarely contravenes.

2. The District Court's "Enforcement Action" Analogy Is Inapt

Even aside from §1231's unequivocal text, the district court's analogy of a refusal to deport an alien subject to a final order of removal to a "decision not to take an enforcement action," such as "'an agency's decision not to prosecute'" is inherently flawed. ADD-15 (citation omitted).

The (non-)deportations governed by the Interim Guidance are nothing like prosecutors or agencies not filing charges. This case is not about Defendants *initiating*

removal actions, where that analogy might hold. Instead, not only have those actions been commenced, but—as "final orders of removal" implies—they have been *fully litigated* to final judgment with all appeals exhausted. This case is more akin to the Bureau of Prisons (1) deciding that it disapproves of federal securities fraud crimes on policy/political grounds and (2) asserting unreviewable discretion to refuse to carry out final securities-fraud-based sentences of imprisonment imposed by district courts. Such a claim would rightfully be met with scorn by federal courts. The Interim Guidance's equivalently audacious pretense should be too.

B. Plaintiffs Are Likely To Prevail On Their Challenges To The Interim Guidance

Plaintiffs are likely to prevail on the merits because the Interim Guidance violates §1231(a)(1)(A), is a substantive policy issued without notice and comment, and is arbitrary and capricious. The district court did not reach these arguments. ADD-20.

1. The Interim Guidance Violates § 1231(a)(1)(A)

As set forth above, Section 1231(a)(1)(A) actually imposes a non-discretionary mandate on Defendants to remove aliens with final orders of removal absent an exception not relevant here. *Supra* at 10-11. That the section's "shall" actually means "shall" (*i.e.*, "must") is confirmed by the Supreme Court's decision in *Guzman Chavez*, this Court's decisions in *Lema* and *Xi*, and the *Texas* decision. Plaintiffs are therefore likely to prevail on their statutory claim that the Interim Guidance violates Section 1231.

2. Defendants Violated Notice-And-Comment Requirements

Plaintiffs are also likely to prevail on their procedural/notice-and-comment challenge. The Interim Guidance promulgates a legislative rule requiring such procedures, since it is neither the general statement of policy nor the procedural rule exceptions apply, and Defendants did not invoke the good cause exception.

A general statement of policy must "not impose any rights and obligations" and may only "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); and *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012-13 (9th Cir. 1987). But the Interim Guidance does just that: it confers a new "right" to avoid removal for the vast majority of aliens falling within its scope. And, unlike mere policy statements, the Interim Guidance plainly has substantive bite. *Infra* at 17-18.

Similarly, a rule is not procedural if it "encodes a substantive value judgment" thereby "put[ting] a stamp of [agency] approval or disapproval on a given type of behavior." *Chamber of Commerce of the U.S. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (cleaned up). The "stamp of disapproval" on removals could hardly be clearer here. As the district court recognized for the first eight weeks of the Interim Guidance, "of 325 individuals *who, before February 18th, would have been put into immigration detention and removed, only seven have*." ADD-45-46 (emphasis added). The Interim Guidance's disapproval is thus so resounding as to be 98% as effective as a blanket and exception-less prohibition. This substantive value judgment is evident both in the tremendous drop in removals—

down 45%—and in testimony that DHS officers were afraid to "bring any undue attention upon the field office for … going outside the priorities."[3] ADD-207:3-6.

The Interim Guidance thus bear the hallmark of a substantive rule by imposing substantive criteria with powerful and demonstrable effects.

3. The Interim Guidance Is Arbitrary, Capricious, And Pretextual

Finally, Plaintiffs are likely to prevail on their claim that the Interim Guidance is arbitrary and capricious. ICE's primary stated rationale was "limited resources." ADD-213-17. But the administrative record is utterly devoid of *any* support for this contention. As the district court aptly observed, "There's nothing in the Administrative Record that shows any resource analysis." ADD-60:19-20. Moreover, Director Carter admitted that no such shortages existed, and stated that he had sufficient resources to carry out pre- Interim Guidance operations. ADD-195 at 63:2-6, 65:8-12.

Because there is *zero evidence* in the administrative record to support Defendants' proffered rationale, the Interim Guidance is patently arbitrary and capricious.[4]

Moreover, because the record reveals that Defendants' stated reasons are not

---

[3] *See* Ex. T (Ds' discovery responses). The change was calculated by comparing the sum of removals for 11/20, 12/20, and 01/21 with the sum for 2/21, 3/21, and (30/16)*4/21.

[4] To The Interim Guidance appears to cite humanitarian or foreign policy concerns in passing. But those bases likewise fail. As to humanitarian concerns, Congress has already spoken by enacting §1231. And as to foreign policy, Director Carter testified that those concerns play no role in his decision to approve or disapprove a particular removal, and further there is nothing in the administrative record regarding specific foreign policy concerns.

their *actual* reasons—the sole discernable actual motivation from the administrative record is appeasing special interest groups—the Interim Guidance's rationale is pretextual and thus violates the APA on that basis as well. *See Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573 (2019) (decision resting on a "pretextual basis" "warrant[s] a remand"). In addition, the remarkable procedural irregularities here (the Memorandum issued after being ghostwritten on the first day of the new administration, then reinstituted through a midnight email following crude pressure from outside groups in a transparent effort to circumvent the *Texas* TRO/PI) further militates in favor of the States' motion.

C. The Interim Guidance Is Reviewable As Final Agency Action

Plaintiffs anticipate that Defendants may contend (as they did below) that the Interim Guidance is not final agency action. Such an attempt would be unavailing.

As this Court has held, "In determining whether an agency's action is final, we 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." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.,* 465 F.3d 977, 982 (9th Cir. 2006) (cleaned up). The test is notably stated in the disjunctive, so satisfying any of those three criteria can suffice. *Id.* But the Interim Guidance actually satisfies all three.

As the district court observed, the Interim Guidance drastically affects Defendants' day-to-day operations: of 325 individuals who would have been deported

previously, only 7 were—a 98% drop. *Supra* at 15. Overall arrests and removals are also down considerably. *Supra* at 8-9. Similarly, there is no indication that the Interim Guidance is not the "definitive statement of the agency's position," and "*[i]mmediate compliance* with the terms [wa]s expected," *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d at 982 (emphasis added). Indeed, Acting Director Johnson's midnight email makes plain his expectation of *immediate* compliance: "*Effective immediately* … *only* those who meet the [Section B] priorities will be removed." ADD-137-38 (emphasis added).

II. PLAINTIFFS FACE IRREPARABLE HARM ABSENT INJUNCTION

The Interim Guidance directly and irreparably harms Plaintiffs by increasing the unreimbursed costs they must bear due to the decrease in removals, including the "increase in community supervision costs, both already suffered and likely to arise in the near future," which the district court found were "'causally linked' to the Interim Guidance" and thus supported standing. APP-12-13. And as time passes, "unremoved noncitizens" continue to be "added to the ranks of those under community supervision, which almost certainly increase the overall cost to Arizona." *Id.* at 13. It is well established that irrecoverable economic harms constitute irreparable injury.[5] And there is no dispute here that Plaintiffs have no avenue of recovering damages from the federal government. Moreover, this Court has specifically recognized that a state suffers irreparable harms where it is likely to bear the "heavy financial costs" of supporting an

[5] *See, e.g.*, *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021); *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

increased number of immigrants "on state and local programs" as a consequence of a federal agency rulemaking. *City & County of San Francisco v. United States Citizenship & Immigration Services*, 981 F.3d 742, 762 (9th Cir. 2020).

In addition, Plaintiffs will suffer direct law enforcement costs (including costs of reincarcerating repeat offenders) and crime-based injuries due to the Interim Guidance's non-removals and all-too predictive recidivism. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. The release of convicts into the community under to the Interim Guidance makes it virtually certain that Plaintiffs will incur additional costs of recidivism.[6]

Finally, Plaintiffs have also suffered procedural harm tied to their unrecoverable monetary damages, having been deprived of the opportunity to provide input through notice-and-comment rulemaking. *East Bay*, 993 F.3d at 677 (9th Cir. 2021) ("Intangible injuries may also qualify as irreparable harm."

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION

Since "the Government is a party" the "balance of the equities and public interest

[6] Additionally, Plaintiffs are required by federal law to include unauthorized aliens in their Emergency Medicaid Programs, 42 C.F.R. § 440.255(c), and the Supreme Court in *Plyler v. Doe* required that States provide public education to school-age unauthorized aliens. 457 U.S. 202, 230 (1982). The Interim Guidance severe reduction in removals will thus force Plaintiffs to incur the costs of providing such services.

factors merge." *Doe #1 v. Trump*, 984 F.3d 848, 861-62 (9th Cir. 2020). Both factors favor an injunction pending appeal.

As set forth above, the Interim Guidance imposes considerable burdens on the Plaintiff States. Conversely, Defendants will not be harmed by an injunction maintaining the prior status quo. *See, e.g.*, *Doe #1 v. Trump*, 957 F.3d 1050, 1068-69 (9th Cir. 2020) ("lack of irreparable harm to the United States" due to delay in immigration policy implementation by injunction). DHS also has no legitimate interest in the implementation of an unlawful policy. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Where Plaintiffs face irreparable harm without an injunction while DHS faces none if the status quo is maintained, the public interest and balance of equities favor granting the preliminary injunction. *E.g.*, *Doe #1*, 957 F.3d at 1069.

Moreover, Congress itself has already balanced the public interest here in section 1231(a)(1)(A) and mandated the removals that the Interim Guidance effectively prohibits. An injunction against that unlawful near-complete prohibition thus serves the public interest as set by Congress. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("[A] court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" (citation omitted)).

CONCLUSION

For the foregoing reasons, the States respectfully request that the Court issue an injunction pending appeal against enforcement of the Interim Guidance.

Respectfully submitted,

AUSTIN KNUDSEN
ATTORNEY GENERAL

David M. Dewhirst
Solicitor General
Christian Corrigan
Assistant Solicitor General
215 N Sanders St.
Helena, MT 59601
Telephone: (406) 444-4145
David.Dewhirst@mt.gov
Counsel for the State of Montana

MARK BRNOVICH
ATTORNEY GENERAL

Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III
Solicitor General
Drew C. Ensign
Deputy Solicitor General
Anthony R. Napolitano
Robert J. Makar
Assistant Attorneys General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-5
Drew.Ensign@azag.gov
Counsel for the State of Arizona and Mark Brnovich, Arizona Attorney General

Dated: July 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 15th 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.

s/ Drew C. Ensign
Drew C. Ensign

.