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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

State of Arizona, et al.,
Plaintiffs,

v.

United States Department of Homeland Security, et al.,
Defendants.

No. 2:21-cv-00186-SRB

DEFENDANTS' OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Arizona and Montana sought to preliminarily enjoin the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) from adhering to immigration enforcement priorities established by the new Presidential administration.[1] *See* ECF Nos. 17, 64. Defendants opposed and moved to dismiss. *See* ECF Nos. 26, 69, 59. This Court granted Defendants' motion to dismiss and denied the motion for preliminary injunction. ECF No. 91; *see also* ECF No. 42. The States have noticed an interlocutory appeal of the denial of a preliminary injunction, ECF No. 92, and now move for an emergency injunction pending appeal, Pls.' Emerg. Mot. for Inj. Pending Appeal, ECF No. 93.

"In deciding a motion for injunction pending appeal, courts apply the same standard used to decide a motion for preliminary injunction." *Protecting Arizona's Res. & Child. v. Fed. Highway Admin.*, No. CV-15-00893-PHX-DJH, 2016 WL 9080879, at *1 (D. Ariz. Oct. 26, 2016) (citing *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *Tribal Village of Akutan*, 859 F.2d 662, 663 (9th Cir. 1988); and *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). Thus, a "party may obtain an injunction under Rule [62(d)] by showing that it is likely to succeed on appeal, that it is likely to suffer irreparable harm in the absence of injunctive relief, that the balance of hardships tips in its favor, and that an injunction is in the public interest." *Gila River Indian Cmty. v. United States*, No. CV-10-1993-PHX-DGC, 2011 WL 1656486, at *1 (D. Ariz. May 3, 2011). But under Rule 62, a district court "only 'retains jurisdiction during the pendency of an appeal to act to preserve the status quo.'" *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Loc. 200, AFL-CIO*, 611 F.3d 483, 495 (9th Cir. 2010) (quoting *Natural Res. Def. Council, Inc. v. Sw. Marine, Inc.,* 242 F.3d 1163, 1166 (9th Cir. 2001)).

I. The States are unlikely to succeed on appeal.

The States contend that they are likely to prevail in appealing the denial of their motion for preliminary injunction. They are mistaken. As this Court held in denying their initial motion, the policy the States challenge is not subject to judicial review. *See* Order at 15–19.

[1] The Court is familiar with the additional factual and procedural background in this case, which it summarized in its recent Order. *See* ECF No. 91 at 1–7.

The Court, quite correctly, concluded that an agency's enforcement priorities were "committed to agency discretion by law," and that judicial review was therefore barred by § 701(a)(2). *Id.* at 19. The Court rejected the States' argument, renewed here, that § 1231(a)(1) imposed a judicially enforceable mandate that the Secretary remove *all* noncitizens with final orders of removal. *See* Order at 16–18.

A. The Supreme Court's recent decision in Guzman Chavez does not help Plaintiffs.

In their briefing and at the hearing, the States relied on the Ninth Circuit's statement in *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003), that "ordinarily, the INS must remove an alien in its custody within ninety days from the issuance of a final removal order." *See* Pls.' Supp. Br. at 15–16, ECF No. 61; May 27, 2021 Hr'g Tr. at 11:10–:13. But the Court rejected the States' contention that *Lema* resolved whether § 1231(a)(1) imposed an enforceable mandate on the Secretary. *See* Order at 18.

The States now argue that the Supreme Court's recent decision in *Johnson v. Guzman Chavez*, No. 19-897 (U.S. June 29, 2021), also supports its position. It does not. Like the Ninth Circuit in *Lema*, the Supreme Court in *Guzman Chavez* sometimes described § 1231(a)(1) in terms consistent with a mandate. *E.g.*, slip op at 3 ("must physically remove within 90 days"). But just like *Lema*, *Guzman Chavez* had nothing to do with whether § 1231(a)(1) imposes an enforceable mandate on the Secretary. The only question before the Supreme Court was whether § 1231 or instead § 1226 governed the detention of a noncitizen with a reinstated order of removal who sought "withholding" of a removal order. Like the Ninth Circuit's decision in *Lema*, then, the Supreme Court's decision in *Guzman Chavez* "does not address whether all noncitizens with final orders of removal must be removed within the 90-day removal period" and it "did not concern judicial review under the APA nor present the opportunity for the [court] to address whether 'shall' means 'must' in this statute," in a manner that might create a judicially enforceable duty on the Secretary. Order at 18, ECF No. 91.

The States thus once again ask the Court to rely on stray lines from an opinion. As the Supreme Court also observed this term, even that Court "sometimes" does "not paraphrase complex statutory language as well as we might" and that "[w]hat matters . . . is not a one-line

description, but a pages-long analysis." *Borden v. United States*, No. 19-5410, slip op. at 22. It is therefore "generally undesirable" to "dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993); *see also Illinois v. Lidster*, 540 U.S. 419, 424 (2004) ("We must read this and related general language in [a previous case] as we often read general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.").

Underscoring that the litigation context of *Guzman Chavez* renders its descriptions of § 1231 inapplicable here, the Supreme Court itself acknowledged that removal often will not happen in that 90-day period and that the statute itself recognizes that a noncitizen may remain in the United States beyond the 90-day period if he or she "is not removed" in that time. Slip op. at 13 (quoting 8 U.S.C. § 1231(a)(3)); *see also id.* (observing "that alternative-country removal is rare" but remains "statutorily authorized"). Moreover, the Court recognized the numerous factors that may delay removal, including "practical" factors or "geopolitical" concerns. *Id.* at 22. The Supreme Court's decision in *Guzman Chavez* could not have silently overruled the Supreme Court's longstanding recognition of the discretion attendant to immigration enforcement. *See Arizona v. United States*, 567 U.S. 387, 396–97 (2012) (identifying some considerations relevant to the "broad discretion" that is a "principal feature of the removal system"); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (observing that "[a]t each stage" of the removal process "the Executive has discretion to abandon the endeavor . . . for humanitarian reasons or simply for its own convenience"). Nor does anything in *Guzman Chavez* upset the Supreme Court's similarly longstanding recognition of the inherent discretion a law enforcement agency retains even in the face of a statute using the word "shall," such that judicial enforcement is unavailable. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005).

B. The States would be unlikely to prevail on appeal in any event.

Regardless, the States make no effort to engage with the many other reasons that their claims would fail at the outset even if § 701(a)(2) did not bar review, and which this Court did

not (and did not need to) resolve. *See* Order at 19 n. 15. Thus, even in the unlikely event that the Court of Appeals did disagree with this Court's analysis on § 701(a)(2), the States would still be unlikely to prevail on the merits because, for the reasons Defendants have briefed at length,[2] review would be precluded by other restrictions found within the APA. Section 701(a)(1) also bars the States' claims because other statutes and the statutory review scheme as a whole "preclude judicial review." *See, e.g.*, Defs.' Supp. PI Opp'n at 10–11, ECF No. 69. Section 702 independently bars review because the States are not "aggrieved within the meaning of a statute" because, in § 1231(h), Congress excluded them from the zone of interests. *See id.* at 11–12. And § 704 bars these claims because the ICE Memo is not "final agency action" which may be challenged under the APA. *See id.* at 9–10.

Plaintiffs also cannot succeed on the merits of their claims, should this Court or any other court reach them. The ICE Memo was not required to undergo notice-and-comment because it is a statement of policy that governs internal agency operations. *See id.* at 18–20. Nor, even if this Court or any other court believed that § 1231(a)(1) did impose an enforceable mandate, would the ICE Memo violate it. *Id.* at 21. As this Court recognized, the ICE Memo does not preclude the agency from removing any individual; instead, it merely guides the agency's discretion in using its limited resources to remove those subject to removal. Order at 18–19.

Nor is the ICE Memo arbitrary and capricious. *See* Defs.' Supp. PI Opp'n at 12–18, ECF No. 69. The States emphasized at oral argument and in their briefing their view that the Administrative Record did not adequately bear out the agency's claim that prioritization was necessary in light of the agency's limited resources. *See* May 27, 2021 Hr'g Tr. at 33:20-35:6 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983) and *FCC v. Prometheus Radio Proj.*, 141 S. Ct. 1150, 1160 (2021)); *see also* Pls.' 3-Page Supp. at 2, ECF No. 79. But the States' error in this argument is two-fold. First, contrary to the States' repeated assertions—and contrary to the very authority they cited—an agency need not produce or rely

[2] Defendants incorporate their prior briefing in this litigation. *See* ECF Nos. 26, 59, 69, 78, 80, 87.

on quantitative analysis to justify its choices. *See Prometheus Radio Proj.*, 141 S. Ct. at 1160 ("The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."); *see also Sacora v. Thomas*, 628 F.3d 1059, 1068–69 (9th Cir. 2010) ("[I]t was reasonable for the [agency] to rely on its experience, even without having quantified it in the form of a study." (citing *State Farm,* 463 U.S. at 43)). The agency here reasonably relied on its decades of experience enforcing immigration laws to conclude that it lacks the resources to immediately remove all of the over one million noncitizens with final orders of removal. Second, the States appear to conflate the relevance of the agency's limited resources to the policy set out in the ICE Memo. As the ICE Memo makes clear, and as the States cannot reasonably contest, the agency needs to have some priorities in light of its limited resources and its inability to pursue all possible enforcement actions. But as to which cases to prioritize, the agency relied on additional factors, as reflected in the Administrative Record. *See* Defs.' Supp. PI Opp'n at 13-18 (discussing relevant factors).

The States cannot show a likelihood of success on appeal, and thus an injunction pending appeal is unwarranted.

II. The States Have Not Established Irreparable Harm Warranting an Injunction.

This Court concluded that Arizona has standing to challenge the ICE Memo. *See* Order at 15. Defendants respectfully disagree. But regardless, this Court did not reach the issue of irreparable harm. The Court's conclusion that Arizona had standing was based on Arizona's asserted "increase in community supervision costs," *id.* at 12, and the Court's assessment that "there is a substantial risk that those [additional] costs will occur in the near future," *id.* at 13. But even if such potential future costs, had the States proven them, might establish *standing*, they do not establish irreparable harm that would warrant an immediate injunction pending appeal. *See Midgett v. Tri-Cty. Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 850 (9th Cir. 2001) (rejecting "the argument that a determination that a plaintiff has suffered sufficient injury to support standing logically requires the court to conclude that the plaintiff necessarily has demonstrated a sufficient fear of immediate and substantial injury to warrant an injunction"). Although the ICE Memo has now been in effect for nearly five months, the States still have

not presented any specific evidence to show an *actual* increase in the costs in administering Arizona's community supervision program. Even assuming such an increase may eventually occur (and that such increase is fairly traceable to the challenged policy), the States have not met their separate higher burden to "*demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original).

III. An Injunction Pending Appeal Would Upset the Status Quo and Disrupt Agency Operations.

An injunction pending appeal, as the States seek, is distinct from a *stay* pending appeal in at least one very important way. As the Supreme Court has explained, "a request for an injunction pending appeal 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld,'" *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (quoting *Respect Maine PAC v. McKee,* 562 U.S. 996 (2010)). And, once an appeal is taken, a district court "only 'retains jurisdiction during the pendency of an appeal to act to preserve the status quo.'" *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Loc. 200, AFL-CIO*, 611 F.3d 483, 495 (9th Cir. 2010) (quoting *Natural Res. Def. Council, Inc. v. Sw. Marine, Inc.,* 242 F.3d 1163, 1166 (9th Cir. 2001)); *see also, e.g.*, *Tribe v. United States Bureau of Reclamation*, 319 F. Supp. 3d 1168, 1174 (N.D. Cal. 2018) (district court retains jurisdiction under Rule 62 only to maintain the status quo "as of when the appeal of the injunction order was filed"). An injunction pending appeal as the States seek would upend the status quo, not preserve it.

On February 18, 2021, the Acting Director of ICE issued the memorandum the States challenge in this litigation. Twenty days later, Arizona and Montana filed a motion with this Court to preliminarily enjoin a *different* policy—the one set out in Section C of the DHS Memo, and which had already been enjoined by another district court.[3] This Court denied the motion as to the Section C but permitted the States to file supplemental briefing regarding the ICE Memo itself. Per the Parties' agreement and this Court's Order, the States filed that

[3] The States' motion also challenged Section C "as embodied in" the ICE Memo, *see* Pls.' PI Mem. at 3. As the Court recognized, the ICE Memo is explicit that it does not implement Section C. *See* April 8, 2021 Hr'g Tr. at 12:3-12:14.

supplemental briefing on May 6, 2021—seventy-seven days after the issuance of the ICE Memo—and additional briefing on May 19, 2021—ninety days after the ICE Memo. The Court denied the motion for preliminary injunction and dismissed the Amended Complaint on June 30, 2021. Order, ECF No. 91. And on July 1, 2021—after the ICE Memo had been in effect for one hundred and thirty-three days—the States moved for an emergency injunction pending appeal asking this Court to enter an injunction that "maintains the status quo." Pls.' Emerg. Mot. at 4.

As this brief litigation history illustrates, an order enjoining implementation of the ICE Memo would not "maintain[] the status quo," either as it existed when the appeal was filed or even as it existed when the States first referenced the ICE Memo in their March 8 filing. An emergency injunction pending appeal would severely disrupt agency operations, which have been guided by the ICE Memo for nearly five months, and would hamper the agency's ongoing efforts to adopt final priorities that are informed by its experience working under the interim priorities. *See* Berg Decl. ¶ 23, ECF No. 69-1. As the former Acting Field Office Director for Arizona testified, it takes significant time and effort for line agents to adapt to new enforcement prioritization policies. *See* Carter Depo. at 105:1–106:11, ECF No. 80-1. An injunction at this stage would create confusion for agency officials seeking to protect the nation and enforce its laws.

Moreover, it is not clear what specific relief the States seek. Their proposed order simply asks the Court to grant their motion. *See* ECF No. 93-2 at 2. In their motion, the States insist that they do not seek a mandatory injunction, but describe "the relief sought" as an order that DHS "return to normal removal operations." Emerg. Mot. at 5. The States do not define what they mean by "normal removal operations" except to note that they would be governed by statute and agency policy. *Id.* And if the States mean (as they obliquely suggest) that the Court should require the agency to "exercise discretion on an individualized case by case basis," *id.* (quoting *Texas v. United States*, 2021 WL 2096669, at *19), then no injunction is necessary: As the ICE Memo and Mr. Carter's deposition testimony make clear, existing policy *does* require an individualized case-by-case analysis. *See* ICE Memo at 3; Carter Depo. at

112:21–:22, 116:24–:25, 118:3–:6, 133:20–:24, 159:23–:25.

Whatever specific relief the States seek, it is unwarranted by the at-most modest financial harm they speculate they may suffer. An injunction pending appeal would severely harm the government and the public interest by improperly intruding on the Executive's constitutional and statutory prerogatives to set immigration enforcement priorities, and would displace the judgment made by the agencies that Congress has charged with determining the best way to protect public safety and foreign relations concerns. An injunction pending appeal would sow confusion among enforcement officials and would interfere with DHS's ongoing efforts to collect information to inform superseding enforcement policies. *See* Berg Decl. ¶ 10–23. In this context, the balance of equities weighs strongly against an injunction pending appeal.

CONCLUSION

The Court should deny Plaintiffs' Emergency Motion for an Injunction Pending Appeal.

RESPECTFULLY SUBMITTED this 9th day of July, 2021.

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