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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

State of Arizona; State of Montana; and Mark Brnovich, in his official capacity as Attorney General of Arizona,

Plaintiffs,

v.

United States Department of Homeland Security; United States of America; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; Troy Miller, in his official capacity as Acting Commissioner of United States Customs and Border Protection; Tae Johnson, in his official capacity as Acting Director of United States Immigration and Customs Enforcement; and Tracy Renaud, in her official capacity as Acting Director of U.S. Citizenship and Immigration Services,

Defendants.

No. 2:21-cv-00186-SRB

PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

EXPEDITED CONSIDERATION REQUESTED

INTRODUCTION AND REQUEST FOR EXPEDITED CONSIDERATION

Plaintiffs have moved for an emergency injunction or stay pending appeal that enjoins the February 18, 2021 Interim Guidance as it relates to removals, *see* Dkt. 93, which if granted would result in Defendants returning to "normal removal operations" by their own prior admission. Defendants have provided their response, *see* Dkt. 99, and Plaintiffs herein reply. As this motion is now fully briefed, Plaintiffs respectfully renew their request for expedited consideration by this Court. *See* Dkt. 93 at 1.[1]

Defendants' opposition to an injunction pending appeal rests heavily on (1) mischaracterizing both this Court's jurisdiction and the *status quo ante*, which its own administrative record belies, and (2) untenably denying that reasonable grounds for disagreement exist here, in the teeth of *Johnson v. Guzman Chavez*, -- S. Ct. --, 2021 WL 2653264 (U.S. June 29, 2021), *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003), and *Texas v. United States*, -- F. Supp. 3d --, No. 6:21-CV-00003, 2021 WL 2096669, at *52 (S.D. Tex. Feb. 23, 2021). Those premises should be rejected and, once they are, there is little left to Defendants' opposition. Plaintiffs' motion for an injunction pending appeal should therefore be granted.

ARGUMENT

I. This Court Has Jurisdiction To Grant The Requested Emergency Injunction Or Stay Pending Appeal, But If It Disagrees, Then It Should Promptly Deny Plaintiffs' Motion On That Basis

Relief under Rule of Civil Procedure 62(d) is proper here because an emergency injunction or stay pending appeal would maintain the status quo. *See* Dkt. 93 at 4-5. Moreover, Plaintiffs also moved for relief based on 5 U.S.C. § 705 and Federal Rule of Appellate Procedure ("FRAP") 8(a)(1). Dkt. 93 at 1. Defendants respond that this Court has jurisdiction only to preserve the status quo, is powerless to order *anything* else, and that the requested injunction pending appeal fails that limitation. *See* Dkt. 99 at 1; Dkt. 99 at 6-7. Not so.

[1] When the internal page numbers of a filing differ from the ECF header page numbers, this reply cites to the internal page numbers.

Even assuming *arguendo* that Defendants' jurisdictional contentions had merit, they nonetheless still fail as irrelevant because Defendants mischaracterize the status quo. The "status quo" here is "[s]tatus quo ante litem," which refers to "the last uncontested status which preceded the pending controversy." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (quoting *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000)). Indeed, this Court recently applied that very definition when evaluating a Rule 62(d) request. *See Miracle v. Hobbs*, 427 F. Supp. 3d 1150, 1165 (D. Ariz. 2019) ("[S]tatus quo means the last, uncontested status which preceded the pending controversy.").[2]

Here, Defendants' own administrative record establishes that the last, uncontested status which preceded the pending controversy was "normal removal operations." *See* Dkt. 93 at 4. Specifically, after the *Texas* court temporarily restrained Section C of the January 20, 2021 Memorandum on January 26, 2021, Defendants "return[ed] to normal removal operations as prior to the issuance of the" Memorandum. Dkt. 64 at 2 (citing Dkt. 64-2 at AR_AZ_0004631). Defendants also tellingly did not appeal the *Texas* court's subsequent preliminary injunction or make any record that it was vague or unworkable. The original complaint in the instant matter in this Court was filed on February 3, while that "normal removal operations" directive was in place. And, just like the *Texas* action, Plaintiffs' complaint seeks to enjoin and vacate the Memorandum as it relates to removals. *See* Dkt. 1 at 10-11; Dkt. 12 at 18. The Interim Guidance was not issued until *after* this case was filed. The clear record in this case therefore establishes that the last uncontested status preceding this suit was the "return to normal removal operations as prior to the issuance of the Memorandum."

Defendants now feign ignorance (Dkt. 99 at 7) as what "normal removal

[2] In *Miracle*, this Court concluded that the requested injunction pending appeal would not preserve the status quo and was mandatory in nature. 427 F. Supp. 3d at 1164-65. *Miracle*, however, is distinguishable because the law at issue (the "Strikeout Law," A.R.S. §19-118(E)) was enacted in 2014 and yet suit was not brought until 2019 and also because the *Miracle* plaintiffs sought mandatory injunctive relief.

operations" means. But an official Notification by the ICE Deputy Director to all ICE employees following the *Texas* TRO referred to "normal removal operations" in a manner that apparently confused no one, *see* Dkt. 64 at 2 (citing Dkt. 64-2 at AR_AZ_0004631)—there is not a scintilla of evidence in the administrative record that *anyone* in DHS failed to understand that term. As common sense dictates, it simply means that officials at the ICE field offices, and other parts of ICE, are permitted to carry out removals irrespective of a substantive stamp of disapproval for removals outside of narrow "priority cases."

Moreover, the fact that returning to "normal removal operations" would have a significant, real-world impact is confirmed by Phoenix ICE Director Albert Carter's testimony about the effect of the Interim Guidance. *See* Dkt. 79 at 2. He agreed there was a "big drop off in removals from before" 2/2021 to after 2/2021. Dkt. 79-1 at 20 (Ex. DD, Carter Dep. Tr. at 87:1-88:1). He agreed that pre-2/2021, ICE was already prioritizing removals of aliens who threatened national security, with significant criminal records, and more recent entrants. *Id.* (Carter Dep. Tr. at 88:9-19). He testified the "*only factor*" he could think of for the drop off in 2/2021 was the enforcement priorities in the Interim Guidance, he did not observe any contributing factor, and further that resource constraints were not responsible. *Id.* (Carter Dep. Tr. at 88:20-89:11.4).[3]

[3] While Mr. Carter suggested 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 from Mr. Carter is that this could at most account for 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. Dkt. 79 at 3 n.4; Carter Depo. at 101:9-17, Dkt. 80-1; *see* Dkt. 79-1 at 30 (10 out of 17 preapproval requests were initially approved, or just 59%). Mr. Carter was the reviewer, so he has the best knowledge of what the quantity of requests could be. Dkt. 79at 2 n.3. 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 2/4 email and the 2/18 Interim Guidance were issued. Dkt. 79 at 3 n.4. Indeed, the Court has made no contrary finding that there were more than 90 such "other priority" requests per month. *See* Dkt. 91 at 19 n.14. And the Court's discussion was limited to the question of whether the exception from *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985), that ICE "was abdicating its responsibilities" applied, *see* Dkt. 91 at 19 n.14, not whether the Interim Guidance has, as intended, caused a significant decrease in the number of removals of aliens with final orders such that, if it is reviewable, it may be arbitrary and capricious, a legislative rule issued without notice and comment, or contrary to §1231.

More fundamentally, Plaintiffs' arguments fly in the face of FRAP 8(a), which generally requires parties seeking an injunction pending appeal to seek such relief in the district court first. But if this Court's jurisdiction is as hobbled as Defendants' suggest, that Rule 8(a) requirement makes little (if any) sense: indeed, it would effectively mandate that parties perform a futile and useless gesture.

In sum, this Court has ample authority under Rule of Civil Procedure 62(d), 5 U.S.C. § 705, and FRAP 8(a)(1), to issue the same type of prohibitive injunction pending appeal against the Interim Guidance that the *Texas* court issued on the January 20 Memorandum's 100-day removal pause. *See Texas v. United States*, -- F. Supp. 3d --, No. 6:21-CV-00003, 2021 WL 2096669, at *52 (S.D. Tex. Feb. 23, 2021) ("Defendants …. are hereby ENJOINED and RESTRAINED from enforcing and implementing the policies described in the January 20 Memorandum in Section C entitled 'Immediate 100-Day Pause on Removals.'"); *Texas v. United States*, -- F. Supp. 3d --, No. 6:21-CV-00003, 2021 WL 247877, at *8 (S.D. Tex. Jan. 26, 2021) (same). And it should exercise that authority to do so. By Defendants' own prior admission, this will result in a "return to normal removal operations." Dkt. 64 at 2.

II. Plaintiffs Have Also Met The Four Factors For An Injunction Pending Appeal

Plaintiffs Motion also established the correct test for an injunction pending appeal, *See* Dkt. 93 at 1 & n.1., and the Plaintiffs have met the test. *Id.* at 1-6.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Appeal

Plaintiffs' Motion demonstrated that they are likely to succeed on the merits because this Court agrees that they have Article III standing to bring their claims, the Interim Guidance is reviewable, and another court has granted a preliminary injunction after finding a likelihood of success on similar claims regarding the Interim Guidance's direct antecedent policy, the January 20 Memorandum. Dkt. 93 at 2. Courts have recognized that "[c]ommon sense dictates …. that the standard [for an injunction pending appeal] cannot … require that a district court confess to having erred in its ruling" to grant the motion. *Evans v. Buchanan*, 435 F. Supp. 832, 843 (D. Del. 1977); *Canterbury*

Liquors & Pantry v. Sullivan, 999 F. Supp. 144, 149 (D. Mass. 1998). So too here. This Court need only recognize that the State has a fair chance of success on appeal since reasonable minds could disagree—particularly given the clear language of *Johnson v. Guzman Chavez*, 2021 WL 2653264, at *4, and the *Texas* court's reasoning as to the other threshold defenses and merits of the underlying claims.

1. *Guzman Chavez* shows a likelihood of success on whether review is committed to agency discretion by law—the sole basis of the Court's dismissal and denial of preliminary injunctive relief

Defendants' response fundamentally misconstrues the import of *Guzman Chavez*. In addition to the construction of "shall" as "must," what that case adds is the emphasis on the "except as otherwise provided" language in the opening clause of §1231(a)(1)(A). *Guzman Chavez*, 2021 WL 2653264, at *10 ("[T]he 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 that the removal period can exceed 90 days."). That interpretation therefore limits DHS's enforcement discretion *solely* to the alternative avenues laid out in §1231 when removals are possible—which the uncontroverted testimony from Director Carter establishes. Dkt. 79 at 3. But the Interim Guidance effectively rewrites section 1231(a)(1)(A) to read "except as otherwise provided [by statute] *and also whatever other extra-textual exceptions the Administration chooses to add*."

So the point that "the statute itself" recognizes that not all removals happen in a 90-day period actually *precludes*—rather than endorses—the Interim Guidance's engrafting new exceptions onto the statutory language of §1231. Dkt. 99 at 4. In sum, the mandatory "shall," the 90-day time period, and the "except as otherwise provided" language result in sufficient indicia that Congress intended to limit DHS's discretion under §1231 regarding aliens with final orders of removal. *See Guzman Chavez*, 2021 WL 2653264, at *10. It is not—as Defendants believe—a grant of *carte blanche* authority to add *any and all* additional exceptions that the Administration might desire.

The policies by which DHS carries out those duties, such as the Interim Guidance, are therefore not committed to agency discretion by law under 5 U.S.C. §701(a)(2).[4] Rather, they are *expressly* constrained by Congress's explicit language cabining such discretion.

Moreover, *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003), and *Guzman Chavez* are not outliers or "stray lines" as Defendants contend. Dkt. 99 at 3. Interpretation of §1231(a), including subsection (a)(1)(A) and whether it presents a mandate, was integral to the decision in *Guzman Chavez*, and the statute was analyzed throughout the opinion's entirety. 2021 WL 2653264 (examining 8 U.S.C. § 1231(a)(1) on 9 of 10 pages and the "90-day removal requirement in §1231(a)(1)(A)" on pages *4, *6, *9-10, and *12). Certainly, this "is not a one-line description, but a pages-long analysis of the statutory text—and that discussion gives no support to the [Federal] Government." *Borden v. United States*, 141 S. Ct. 1817, 1833 n.9 (2021). Other cases from the Ninth Circuit and elsewhere are equally clear that DHS has a statutory duty to effect removal. *Xi v. U.S. I.N.S.*, 298 F.3d 832, 840 n.6 (9th Cir. 2002) ("This holding does not, however, absolve the INS of its statutory duty to effect the physical removal of individuals ordered removed within the statutorily specified 90–day 'removal period.' 8 U.S.C. § 1231(a)(1)(A)."); *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 497 (S.D.N.Y. 2009) ("Under § 1231(a), the Attorney General is required to remove an alien from the United States after an order of removal, within the ninety-day 'removal period.' 8 U.S.C. §1231(a)(1)(A). Thus, the DHS has a statutory duty to effect removal within the removal period, if possible."); *Cisse v. Chertoff*, No. CIV. 07-4972SRC, 2008 WL 724339, at *3 (D.N.J. Mar. 17, 2008) ("Once an alien such as Petitioner is ordered removed, the INA requires the Attorney General to remove him or her from the United

[4] The mandatory interpretation of "shall" in §1231(a)(1)(A) is also distinguishable from the "shall" in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005), by comparing the language of the statutes themselves: §1231(a)(1)(A) provides a single, clear statement with only express exemptions as noted in *Guzman Chavez*, pages 4-5 *supra*, while the Colorado statute at issue in *Castle Rock* provides for discretion on its face, and the Supreme Court noted its "indeterminacy." 545 U.S. at 763; Dkt. 38 at 9-11.

States within a 90–day 'removal period.'"); *Ulysse v. Dep't of Homeland Sec.*, 291 F. Supp. 2d 1318, 1324 (M.D. Fla. 2003) ("Therefore, the DHS has a statutory duty to effect removal within the 90–day period, if possible."). Defendants ask the Court to ignore all of these cases.

In sum, Defendants primarily attack a straw man (the notion that every alien with a final order of removal must be removed within 90 days) to support an entirely different point—that the clear directives of §1231 are actually a blank-check grant of discretion so absolute as to render the entire field "committed to agency discretion by law" and thus unreviewable under 5 U.S.C. 701(a)(2). [5] In contrast, Plaintiffs' position is that given the statute (§1231), there is a statutory duty that supports APA claims that the Interim Guidance is 1) a legislative rule requiring notice and comment, 2) arbitrary and capricious, or 3) contrary to law.

2. Defendants' other threshold defenses are likely to be rejected, and Plaintiffs are also likely to succeed on the merits of at least one of the APA claims

As to Defendants' other threshold defenses, Plaintiffs incorporate their prior arguments. *See, e.g.*, Dkt. 70 at 8-16 (response to Motion to Dismiss); Dkt. 64 at 16-17. The States are aggrieved within the meaning of the statute, here the APA, where Congress provided a cause of action for redress against the federal government for violation of federal laws or the APA's own procedural requirements. Dkt. 70 at 14-15. Defendants' reliance on the language in §1231(h) ignores Plaintiffs' standalone APA claims and misinterprets the text, which is limited in application to a "party" to a removal proceeding. *Id.* The Interim Guidance is also final agency action under Ninth Circuit precedent because it "has a direct and immediate … effect on the day-to-day business of the subject party," and "immediate compliance with its terms is expected." *Oregon*

[5] Defendants' claims that the statutory scheme denies jurisdiction (Dkt. 99 at 4) also fail as stated in Plaintiffs' prior briefing and in light of the Supreme Court's declaration of jurisdiction in *Guzman Chavez* (despite §1252). Dkt. 70 at 8-11; 2021 WL 2653264 at *6 n.4.

Natural Desert Ass'n v. U.S. Forest Service, 465 F.3d 977, 987 (9th Cir. 2006) (internal quotation marks omitted). Director Carter testified to the effect on day-to-day business of the Interim Guidance (which demanded immediate compliance), which caused a large drop-off in removal activity, and its impact on officers including "hesitancy" and "confusion" where they "didn't want to bring any undue attention upon the field office for, you know, going outside the priorities." Carter Depo. at 105:17-106:11, Dkt. 80-1; Dkt. 79 at 2-3. And the Interim Guidance is an action "'by which rights *or* obligations have been determined, *or* from which legal consequences will flow." *Id.* at 986 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)); Dkt. 70 at 15-16.

As to the merits of Plaintiffs' three APA claims, the Interim Guidance is 1) a legislative rule requiring notice and comment, 2) arbitrary and capricious and pretextual, or 3) contrary to law. *See, e.g.*, Dkt. 64 at 5-13, 15-16. In the Response, Defendants take issue with whether the Interim Guidance is arbitrary and capricious. Dkt. 99 at 4-5. But the Interim Guidance is arbitrary and capricious and in direct violation of the requirement clearly set out in *DHS v. Regents of the Univ. of Cal.* and *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*. that an agency present a "reasoned analysis" of its policy's implications and alternatives to it, something DHS failed to do. 140 S.Ct. 1891, 1912 (2020); 463 U.S. 29, 51 (1983); Dkt. 64 at 9-10.[6]

The new reasons advanced by Defendants are untethered from the record and unpersuasive. *See* Dkt. 99 at 4-5. Defendants provide no specific cite to support the argument that the guidelines were based on decades of experience; and the record suggests that the decision to expand Section B of the January 20 Memorandum to removals was made because of an order the Acting ICE Director received following a letter from activists about Black History month. Dkt. 64 at 3. Defendants similarly

[6] And Defendants misstate the rule in *FCC v. Prometheus Radio Project*, which upheld the *State Farm* and *Regents* standard that analysis is required while the Court noted that the FCC was allowed to have a different interpretation of data presented and to value different data more highly. 141 S.Ct. 1150, 1159 (2021). Here DHS presents *no* data.

presented no explanation or analysis of their claimed justification of limited resources, which are not even a consideration for field office directors reviewing "other priority" removal requests. 5/27/21 Tr. at 34:4-35:6 ("It is the duty of the agency to include that reasoned analysis, and it is missing here."); Carter Depo. at 63:2-6, 65:8-12 ("WITNESS … So there are no resource restrictions, you know, that we have at this time to carry out our mission." "Q. … do you take into consideration the availability of space on removal bus trips? A. I do not, no.").

And contrary to what Defendants argue, Plaintiffs are not asking for the Court to order "immediate[] removal" of all one million aliens with final orders of removal. Dkt. 99 at 5. Nor is that what "normal removal operations" means. *See* page 2-3 *supra*. Finally, as to "humanitarian reasons or [DHS's] own convenience," Congress has already weighed those in enacting §1231. *See Guzman Chavez*, 2021 WL 2653264, at *10 ("[T]he 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 that the removal period can exceed 90 days."). Nor is there anything in the record about foreign policy concerns requiring expanding the "priority categories" to removals. Instead, the record reveals naked *domestic* political pressure.

Defendants are again battling straw men in that they are answering arguments that Plaintiffs do not advance and defending a rule on bases that do not exist in the administrative record.

B. The Other Factors Also Support An Injunction Pending Appeal

As noted in the motion, this Court's prior order already recognizes that Plaintiffs are harmed by Defendants' refusal to carry out deportations consistent with §1231(a)(1)(A). Dkt. 91 at 10-15. And this type of harm is properly considered irreparable injury because it is monetary injury that will not be recoverable from the federal government. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677 (9th Cir. 2021) ("Irreparable harm is 'harm for which there is no adequate legal remedy, such

as an award for damages.'" (quoting *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)); *see also id.* ("[W]here parties cannot typically recover monetary damages flowing from their injury—as is often the case in APA cases—economic harm can be considered irreparable." (citing *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018))). The *Texas* court reached a similar conclusion. 2021 WL 2096669, at *47.[7]

Moreover, Defendants will not be harmed by an injunction because they will merely return to "normal removal operations." Also, the balancing of the harms has already been done by Congress when it enacted §1231(a)(1), and Courts cannot second guess that balancing. *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)).

The requested injunction will emphatically not "severely disrupt agency operations"—what they will disrupt is improper and unlawful political pressure on agency operations by the White House and other political higher-ups when Congress has spoken clearly in §1231. For the same reason public policy favors granting the injunction.

CONCLUSION

For the forgoing reasons, Plaintiffs move for an injunction or stay pending appeal that enjoins the February 18, 2018 Interim Guidance as it relates to removals.

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[7] In addition, "a significant portion of criminal aliens and state offenders 'historically' recidivate." *Texas*, 2021 WL 2096669, at *16.

RESPECTFULLY SUBMITTED this 11th day of July, 2021.

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Attorneys for Plaintiff State of Montana

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2021, I electronically transmitted the attached document to the Clerk's office using CM/ECF System for filing. Notice of this filing is sent by email to all parties by operation of the Court's electronic filing system.

/s/ Anthony R. Napolitano