



MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
APPEALS AND CONSTITUTIONAL LITIGATION DIVISION

DREW C. ENSIGN
DEPUTY SOLICITOR GENERAL
DIRECT PHONE NO.: (602) 542-5252
DREW.ENSIGN@AZAG.GOV

August 24, 2021

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Arizona v. DHS*, No. 21-16118

Dear Ms. Dwyer:

Pursuant to Rule 28(j), Appellant the State of Arizona hereby submits the Fifth Circuit's decision from August 19, 2021 in *Texas v. Biden*, No. 21-10806, 2021 WL 3674780 (5th Cir. Aug. 19, 2021) and the Supreme Court's denial of the government's stay motion in the same case in *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (Aug. 24, 2021).

Texas v. Biden concerns the Migrant Protection Protocols ("MPP") created by DHS in 2018 and purportedly rescinded on June 1, 2021. See 2021 WL 3674780, at *1. The Fifth Circuit's decision rejecting the government's motion for a stay in this case (and the Supreme Court's subsequent denial of a stay) supports Arizona's case in several ways.

First, the Fifth Circuit rejected the government's arguments that it was likely to show that the MPP was unreviewable. For example, as here, the government argued that the MPP was simply a general policy statement and did not determine rights or obligations. *Id.* The Fifth Circuit, echoing the District Court's opinion below (*Texas v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, at *14 (N.D. Tex. Aug. 13, 2021)), explained that because a document is a "general policy statement" it is not precluded from being "final agency action." 2021 WL 3674780, at *6. Similarly, the government argued that the MPP simply involved non-

Molly C. Dwyer
August 24, 2021
Page 2

reviewable enforcement discretion. The Fifth Circuit rejected this argument as well, explaining that the MPP set forth a distinct policy; it was “much more than a non-enforcement decision.” *Id.* at *8.

Second, Fifth Circuit’s concluded that the government was unlikely to show that the MPP was not arbitrary and capricious. In particular, the Court highlighted how the government likely failed to consider important aspects of the problem and available alternatives. *Id.* at *10-13. For example, DHS should have “assess[ed] whether there were reliance interests, determine[d] whether they were significant, and weigh[ed] any such interests against competing policy concerns.” *Id.* at *10. With MPP (as with the Interim Guidance), this was not done, dooming the policy.

Sincerely,

s/ Drew C. Ensign

Drew C. Ensign

Deputy Solicitor General

Counsel for the State of Arizona