No. 21-16118

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA; MARK BRNOVICH, in his official capacity as Attorney General of Arizona; STATE OF MONTANA,
Plaintiffs-Appellants,
v.
U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA; ALEJANDRO N. MAYORKAS, in his official capacity as Secretary of Homeland Security; TROY A. MILLER, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; TAE JOHNSON, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; TRACY RENAUD, in her official capacity as Acting Director of U.S. Citizenship and Immigration Services,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

RESPONSE TO RENEWED EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiffs' renewed motion for an injunction pending appeal should be denied. The "federal power to determine immigration policy is well settled." *Arizona v. United States*, 567 U.S. 387, 395 (2012). Consistent with the reality that federal officials charged with enforcing the sprawling immigration laws have severely limited resources that must be deployed across numerous areas of responsibility, a "principal feature" of the immigration system is the "broad discretion exercised by immigration officials." *Id.* at 395-96.

Earlier this year, the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE), a component of DHS, issued two memoranda that, consistent with longstanding practice across many decades and multiple Administrations, articulated a framework to guide agency officials' allocation of resources across the enforcement system. The memoranda state that, given the agencies' resource limitations and other factors constraining the agency's operations, officials should prioritize enforcement against noncitizens who pose the greatest threats to national security, border security, and public safety. And the memoranda authorize officials to take enforcement actions against noncitizens beyond the presumed priorities, based on the facts of individual cases.

Arizona and Montana challenged those memoranda, claiming primarily that the Immigration and Nationality Act (INA) requires the Secretary to remove every noncitizen within 90 days after a final order of removal, 8 U.S.C. § 1231(a), and that

the memoranda contradict that supposed mandate. The district court rejected that argument and denied plaintiffs' motion for a preliminary injunction. When plaintiffs then moved in this Court for an injunction pending appeal, this Court initially denied that motion without prejudice. Now that the district court has denied plaintiffs' motion to reconsider its decision, plaintiffs have renewed their earlier motion for an injunction pending appeal.

Plaintiffs' renewed motion, however, fails to provide any additional persuasive argument. Thus, for the reasons already articulated in the government's opposition to plaintiffs' original motion, the motion should be denied. In short, plaintiffs' motion fails at every step. Plaintiffs have failed to prove that they have standing to sue or that they have suffered sufficient harm to warrant injunctive relief. The memoranda that plaintiffs seek to challenge are unreviewable under the Administrative Procedure Act (APA). And even setting aside those threshold issues, plaintiffs' claims are meritless.

Plaintiffs' renewed motion does not address any of these defects, any one of which is sufficient to warrant denying them the extraordinary relief that they seek. Instead, plaintiffs focus principally on inflammatory allegations about the government's conduct related to other issues raised in other cases with other plaintiffs. These allegations are baseless and do not support plaintiffs' motion for an injunction pending appeal in this case. Plaintiffs also assert that an injunction is necessary due to the recent increase in encounters with individuals who have unlawfully crossed the Southwest Border. But that only underscores why the priorities

framework—which focuses the agencies' limited resources on its most important goals, including enhancing border security by directing enforcement resources toward noncitizens who recently crossed the border—is reasonable.

ARGUMENT

A. FOR THE REASONS EXPLAINED IN THE GOVERNMENT'S PREVIOUS OPPOSITION, THIS COURT SHOULD DENY PLAINTIFFS' RENEWED MOTION FOR AN INJUNCTION

An injunction pending appeal, like a preliminary injunction in district court, "is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). To justify that relief, a movant must show that it is "likely to succeed on the merits," that it "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. As the government previously explained in its opposition to plaintiffs' initial motion for an injunction pending appeal, plaintiffs have failed to carry their burden with respect to each of those factors because they have failed to demonstrate standing to sue, much less irreparable injury or sufficient equities to warrant an injunction; the memoranda are unreviewable; and the memoranda comply with the APA.

1. Plaintiffs lack standing, much less sufficient harm to warrant an injunction. Plaintiffs contend that Arizona has standing because the memoranda will cause an overall reduction in the removal of noncitizens and that decrease in removals will lead

to an increase in Arizona's costs of community supervision for those noncitizens who are not removed. *See* Mot.18, Reply 2-3.

That theory of standing fails. *See* Opp. 9-11. At the outset, Arizona cannot establish standing as a legal matter because a litigant "lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). And beyond that, Arizona's anecdotal reference to four noncitizens subject to community supervision who Arizona believes would be detained and removed but for the priorities fails to demonstrate that a "*certainly* impending" effect, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted), of the memoranda will be any net increase in community supervision costs. That is true both because that evidence fails to establish that the overall effect of the memoranda—which require agency officials to prioritize enforcement actions against noncitizens who pose the greatest safety risks—will be a reduction in the removal of individuals subject to community supervision and because the evidence fails to prove that Arizona has incurred any specific additional cost traceable to any such reduction. *Cf.* Reply 2-3 (failing to adduce any additional evidence on either of those points). And even if plaintiffs could demonstrate the requisite certainly impending injury, they have failed to establish that any such injury is redressable, in light of the reality that ICE's limited resources mean that it "has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." Add.105.

In addition, as the government has also previously explained, even if plaintiffs could establish some sufficiently impending, redressable financial injury to support standing, that injury could not support an injunction pending appeal. *See* Opp. 11-12. At most, plaintiffs have claimed that Arizona will have to spend some additional unspecified sum on community supervision. But those marginal financial costs cannot support injunctive relief in light of the grave harm to the Executive that any injunction would occasion. Any such injunction would "invade" the Executive's immigration-enforcement discretion, a "special province" that Article II commits to the President, *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 489 (1999); would have serious on-the-ground consequences for DHS and ICE's ability to effectively achieve its mission of protecting national security, border security, and public safety; and would undermine Congress's judgment that the agencies—not States and not the court—are best able "to deal with the many variables involved in the proper ordering of [their] priorities." *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *cf.* 6 U.S.C. § 202(5) (directing the Secretary to establish "national immigration enforcement policies and priorities").

2. Even beyond standing, plaintiffs' claims fail at the threshold because the memoranda are unreviewable under the APA. That is so for three reasons: the memoranda are unreviewable as "committed to agency discretion by law," 5 U.S.C. § 701(a)(2); plaintiffs do not fall within the zone of interests of 8 U.S.C. § 1231, the

statute they seek to enforce; and the memoranda are not final agency action subject to judicial review, 5 U.S.C. § 704. *See* Opp. 12-19.

a. First, as the district court correctly held, the memoranda are unreviewable because they are committed to the agency's discretion. *See* Opp. 12-17. The decision how to allocate an agency's limited enforcement resources is "generally committed to an agency's absolute discretion" because such decisions involve the "complicated balancing of a number of factors" that are singularly within the agency's expertise. *Heckler*, 470 U.S. at 831. That principle applies with particular force in the immigration-enforcement context, where Congress has constructed a removal system that relies heavily on the Executive's discretion, *see Arizona v. United States*, 567 U.S. 387, 396 (2012), and has explicitly instructed the Secretary of Homeland Security to establish enforcement priorities within that system, *see* 6 U.S.C. § 202(5).

Plaintiffs do not dispute these well-settled principles. They merely argue, Mot. 10-13, that § 1231(a) eliminates the government's enforcement discretion because the provision states that the Secretary "shall remove" a noncitizen with a final order of removal "within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). As the government previously explained (Opp. 14-16), that argument runs headlong into Supreme Court precedent, which has repeatedly emphasized that the bare use of "shall" in a statute does not overcome enforcement discretion without some "stronger indication." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005); *see also, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 47 n.2, 62 n.32 (1999); *Heckler*, 470 U.S. at 835. And here, the INA

contains no such "stronger indication" but instead repeatedly reinforces the background principle of enforcement discretion by demonstrating an express recognition that not "all reasonably foreseeable removals could be accomplished" within 90 days, *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); by repeatedly providing that various enforcement determinations under that statute—including those made under § 1231—are not subject to judicial review, *see, e.g.*, 8 U.S.C. §§ 1226(e), 1231(h), 1252(g); and by charging DHS with enforcing a wide range of provisions against many different groups of noncitizens in a way that necessarily requires the Secretary to determine how to allocate the agency's limited resources to accommodate enforcement responsibilities across the scheme, *cf.* 6 U.S.C. § 202(5).

Plaintiffs' only response is to cite several cases describing § 1231(a)(1) in seemingly mandatory terms. *See, e.g.*, Reply 4, Renewed Mot. 4-5. Those decisions are inapposite because they did not involve challenges to enforcement-discretion standards like those here. Thus, none of those decisions presented the question whether § 1231(a)(1) creates a mandatory and judicially enforceable duty. Particularly in light of the Executive's inherent Article II authority and the repeated indications in the INA that Congress did not intend to curb the Secretary's enforcement discretion (and certainly did not intend to provide an avenue for courts or third parties like plaintiffs to superintend the immigration-enforcement system), such passing references cannot support the States' request to circumscribe the Executive's discretion. *Cf. Hamad v. Gates*, 732 F.3d 990, 1000 (9th Cir. 2013) ("Unlike statutes,

judicial opinions are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis" and so "must be read in light of the facts before" the court. (quotation omitted)).

Finally, plaintiffs have not even attempted to demonstrate that the memoranda, which simply provides guidance to officials on how best to prioritize the agency's limited resources, constitutes a complete abdication of the agency's statutory enforcement duty. *See* Reply 5; *cf.* Second.Supp.Add.7 (explaining that between the ICE Memorandum's issuance and July 31, 2021, ICE Enforcement and Removal Operations processed more arrests of noncitizens with aggravated felony convictions than it did in the same period the previous year).

b. Plaintiffs' claims fail at the threshold for the additional independent reason that they do not fall within the zone of interests of 8 U.S.C. § 1231. The zone-of-interests inquiry asks whether Congress intended for a particular plaintiff to invoke a "particular provision of law" to challenge agency action. *Bennett v. Spear*, 520 U.S. 154, 175-76 (1987). Plaintiffs cannot establish that Congress intended that they be able to invoke § 1231 to contest federal immigration-enforcement priorities. *See* Opp. 17; *cf. Linda R.S.*, 410 U.S. at 619 (explaining that a litigant does not have a "judicially cognizable interest" in another's prosecution); *Sure-Tan, Inc. v. NLRB*, 457 U.S. 883, 897 (1984) ("[P]rivate persons such as petitioners have no judicially cognizable interest in procuring enforcement of the immigration laws by the INS."). To the contrary, § 1231 specifically reflects Congress's determination that third parties should not

enforce that provision, providing that "[n]othing in [that] section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States," 8 U.S.C. § 1231(h).

In a footnote, plaintiffs dispute this conclusion by asserting that the "context of the statute makes clear that the term 'party' refers only to a 'party' to a removal proceeding." Reply 6 n.3. That unsupported contention is incorrect. The word "party" means "one by or against whom a lawsuit is brought." PARTY, *Black's Law Dictionary* (11th ed. 2019). And the word "any," "read naturally, . . . has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-19 (2008) (quotation omitted). Plaintiffs are a party to their own lawsuit, which indisputably attempts to enforce § 1231 against the United States. Accordingly, plaintiffs' suit is barred by the plain text of § 1231(h).

If there were any doubt about that question, Congress resolved it by using narrower language in other provisions of the INA when it wished to refer only to "any cause or claim by or on behalf of an alien," 8 U.S.C. § 1252(g). By using the far more expansive phrase "any party" in § 1231(h), Congress clearly intended to foreclose any claim on behalf of anyone—not merely noncitizens in removal proceedings—to enforce § 1231 against the government. *Cf. Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("[W]hen Congress includes particular language in one section of a statute but omits it in another," courts "presume[] that Congress intended a difference in meaning." (quotation omitted)).

c. Plaintiffs' claims independently fail because the memoranda are not final agency action subject to APA review. Agency action is only "final" for purposes of the APA if, among other requirements, it determines legal "rights or obligations." *Bennett*, 520 U.S. at 178 (quotation omitted). The memoranda do not determine any legal rights or obligations because the agency's use of the priorities to guide its enforcement discretion does not alter any noncitizen's rights or obligations, and no noncitizen may rely on the priorities as a defense in enforcement proceedings. *See* Op. 18-19. And although plaintiffs have repeatedly claimed that the memoranda are final because of their effects within the agency, *cf.* Mot. 17-18; Reply 6-7 (arguing that the memoranda are final because they have had practical effects on "DHS's day-to-day operations" and because DHS expected officers' "immediate compliance with" the memoranda (quotation omitted)), they have never explained how such internal effects are sufficient to create finality. To the contrary, and as the government has previously explained (Opp. 18-19), the focus of the finality inquiry is on whether the action creates "direct and immediate" legal consequences for "the subject party." *Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (quotation omitted); *cf. National Mining Ass'n v. McCarthy*, 758 F.3d 243, 250, 252 (D.C. Cir. 2014). Because plaintiffs have failed to explain how the memoranda "require" any third party (such as a State) "to do anything" or how the memoranda "prohibit" any third party "from doing anything," *National Mining Ass'n*, 758 F.3d at 252, they have failed to demonstrate that the memoranda constitute reviewable final agency action.

3. Plaintiffs' claims are also unlikely to succeed on the merits. *See* Op. 19-23. Each of plaintiffs' APA claims—that the memoranda violate 8 U.S.C. § 1231(a)(1)(A)'s purported mandate, that the memoranda improperly failed to go through notice-and-comment rulemaking, and that the memoranda are arbitrary and capricious—is unavailing.

First, the memoranda do not violate § 1231(a). Plaintiffs' contrary argument misunderstands § 1231, which does not override the Executive's enforcement discretion and which no "party" can enforce in a lawsuit against the government, *see* 8 U.S.C. § 1231(h). But even beyond those issues and even assuming such an enforceable mandate existed, the memoranda would not violate that mandate because they do not forbid the removal of any particular noncitizen and, in fact, they create a process by which rank-and-file officers have "regularly," Supp.Add.26, been granted approval to pursue justified actions against other-priority individuals.

Second, the memoranda are "general statements of policy," 5 U.S.C. § 553(b)(3)(A), that do not need to be issued through notice-and-comment rulemaking procedures. *See* Op. 20-21. The "critical factor" in determining whether an action is a general statement of policy is the extent to which the agency retains "discretion to follow, or not to follow, the [announced] policy in an individual case." *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 507 (9th Cir. 2018) (alteration in original) (quotation omitted), *rev'd in part on other grounds*, 140 S. Ct. 1891 (2020). And here the memoranda preserve such discretion twice over: the Secretary himself retains

the discretion to amend the memoranda at any time, and each individual agent retains the ability to "exercise [her] discretion thoughtfully" and consider "all relevant facts and circumstances" when deciding whether to pursue any given action in an individual case. Add.106, 110, 114.

Plaintiffs respond by citing extrarecord evidence that, in their telling, proves that the memoranda decreased the number of removals of noncitizens who fall outside the specified priorities. Reply 8. But plaintiffs' APA claims must be assessed solely in light of the administrative record. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Moreover, plaintiffs' interpretation of their own evidence is flawed, because it ignores both that the record demonstrates a significant increase in preapproval requests for other-priority removals as officials became familiar with the priority scheme, *see* Add.19 n.14, and that the witness plaintiffs rely on repeatedly emphasized that the relevant determinations are made based on the particular facts and circumstances of any given case, *see* Add.205; Opp. 21. Finally, the fact that priorities have led to fewer overall removals does not mean that the priorities eliminated line-level officers' authority to exercise discretion in individual cases. To the contrary, the priorities expressly preserve officers' discretion to make enforcement determinations on a "case-by-case basis on the totality of the facts." Add.205, *see also* Add.106, 110, 114.

Third, the memoranda are not arbitrary and capricious. Review under that standard is "deferential," requiring "only a rational connection between facts found

and conclusions made." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 920 (9th Cir. 2018) (quotation omitted). And the memoranda easily clear that bar: they properly explain that limited resources and various other specific factors constrain agency operations, Add.105, 112, and in light of those constraints, they identify enforcement priorities to focus the agencies' limited resources on ensuring the agencies' ability to meet their mission to "protect[] national security, border security, and public safety," Add.112. *See* Opp. 21-21. The APA demands no more.

In response, plaintiffs have repeatedly and unpersuasively relied on the testimony of a single ICE Field Office Director that his office was not constrained by resource limitations to argue that the agencies' explanation was irrational or pretextual. Mot. 16-17, Reply 9-10. But as the government previously explained (Opp. 22-23), plaintiffs' argument is incorrect. Their one piece of inadmissible extrarecord evidence aside, plaintiffs have not seriously disputed that the agencies suffer from severe resource limitations, which the government has repeatedly stressed for the last four decades. *See, e.g.*, Supp.Add.26-27; *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982); *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015). In light of those resource limitations, the memoranda properly rely on the agencies' experience and expertise, *cf. Sacora v. Thomas*, 628 F.3d 1059, 1068-69 (9th Cir. 2010), to justify the priorities framework. Finally, despite plaintiffs' unsubstantiated claims to the contrary, nothing in the ICE Field Office Director's testimony comes anywhere close to justifying plaintiffs' claim that the memoranda's explanation was contrived.

B. TO THE EXTENT CIRCUMSTANCES HAVE CHANGED SINCE PLAINTIFFS' INITIAL MOTION, THOSE CHANGES ONLY FURTHER WEIGH AGAINST GRANTING PLAINTIFFS' MOTION

In their renewed motion for an injunction pending appeal, plaintiffs do not advance any new arguments supporting the extraordinary remedy of an injunction pending appeal. Instead, they principally argue that changed "factual circumstances"—which they identify as the current "Administration's brazen defiance of legal requirements," Ren. Mot. 6, and a recent "unprecedented surge of unlawful migration" at the Southern border, *id.* at 10—demonstrate the need for an injunction. For the reasons explained above and previously, this Court may deny plaintiffs' renewed motion for failure to establish a likelihood of success on the merits alone. But even if this Court were to evaluate any new factual circumstances, those circumstances only weigh further in the government's favor.

1. Plaintiffs contend (Ren. Mot. 7-10) that an injunction is warranted because the government allegedly violated a different injunction issued on behalf of different plaintiffs that involved different facts and issues.[1] *See Texas v. United States*, 2021 WL

[1] Similarly, plaintiffs briefly contend that the federal government recently issued an unlawful moratorium on certain evictions in light of the current COVID-19 pandemic. Ren. Mot. 6-7. That unsupported allegation concerning a different government action by a different federal agency at issue in different cases with different plaintiffs has no bearing here. But it is in any event false. As the government has repeatedly explained in cases challenging the moratorium, the moratorium constitutes a valid exercise of the Centers for Disease Control and Prevention's statutory authority to "make and enforce such regulations as in [the agency's] judgment are necessary to prevent the introduction, transmission, or spread of

2096669 (S.D. Tex. Feb. 23, 2021) (enjoining implementation of 100-day removal pause). In plaintiffs' view, the agency's use of the memoranda's priorities framework to guide its discretion in determining who to remove following that injunction improperly circumvented the court's injunction. Ren. Mot. 9-10.

This inflammatory allegation is entirely without merit. Neither the plaintiffs that requested the injunction nor the district court that entered it ever disputed the adequacy of the government's compliance efforts. The allegation also has no bearing on these plaintiffs' ability to satisfy any of the preliminary-injunction factors. And it does not make sense even on its own terms. Plaintiffs' argument depends on the premise that the priorities framework "has not applied to removals." Ren. Mot. 8. But the DHS Memorandum expressly states that the priorities "shall apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions." Add.112. Although the Memorandum then lists a number of specific enforcement decisions as examples of those to which the priorities apply, *see id.*, nothing in the Memorandum suggests that the list is meant to be exclusive. And in any event, nothing in the *Texas* court's injunction suggests that it was intended to interfere with the agency's subsequent prioritization decisions. To the contrary, the court's preliminary injunction decision makes clear that it did not intend to prevent DHS "from refocusing its priorities," *Texas*, 2021 WL 2096669, at

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communicable diseases . . . from one State or possession into any other state or possession." 42 U.S.C. § 264(a).

*49, and that the injunction was limited to the pause on removals and did "not prohibit the Government from carrying out or adhering to" the DHS Memorandum's other sections, including the priorities framework, *id.* at *52.[2]

2. Plaintiffs also contend (Ren. Mot. 10-12) that the recent large increase in the number of noncitizens DHS is encountering at the border weighs in favor of an injunction pending appeal—apparently because, in plaintiffs' view, the priorities framework is somehow causing the "increase in attempted border crossings because it eliminates one of the disincentives to being caught." Ren. Mot. 10 (quotation omitted).

Plaintiffs' speculation that the priorities framework has caused an increase in attempted border crossings defies common sense and is unsupported by the record. Under the framework, one of the presumed-priority categories (related to border security) encompasses any noncitizen who is either apprehended at the border after November 1, 2020, or who was not physically present in the United States before that day. Add.107, 112. Far from offering noncitizens an additional incentive to attempt an unlawful border crossing, the priorities framework reduces such incentives by

[2] The same district court has recently entered a different preliminary injunction prohibiting the government from implementing the priorities framework contained in the DHS and ICE memoranda. *See* Order, Dkt. No. 79, *Texas v. United States*, No. 6:21-cv-16 (S.D. Tex. Aug. 19, 2021). The district court then entered an administrative stay of its injunction, the government moved for a stay pending appeal in the Fifth Circuit, and that court granted a further administrative stay and has scheduled argument for next Thursday, September 2. *See Texas v. United States*, No. 21-40618 (5th Cir.).

elevating recent unlawful border crossers to presumed enforcement priorities. Indeed, since the priorities took effect, they have "assisted" the agency's border-security efforts by allowing ICE to "re-deploy[] assets to meet the current threat and reality." Second.Supp.Add.8. For example, ICE has "re-tasked several field operations teams to assist [U.S. Customs and Border Protection] in responding to state and local requests for assistance in the Rio Grande Valley, Del Rio, and Tucson areas to address increasing activity along the Southwest Border" and has "detailed" approximately 300 officers "to the Southwest Border to support CBP operations." *Id.* In short, the memoranda have enabled ICE "to prioritize border security" by "focusing its resources on targeting noncitizens who recently unlawfully entered the United States." *Id.* Enjoining the priorities would disrupt those efforts by forcing the agency to divert its limited resources to plaintiffs' preferred enforcement priorities.

CONCLUSION

For these reasons, the Court should deny plaintiffs' renewed motion.

Respectfully submitted,

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AUGUST 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 4219 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

/s/ Sean Janda
SEAN JANDA

No. 21-16118

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FOR THE NINTH CIRCUIT

STATE OF ARIZONA; MARK BRNOVICH, in his official capacity as Attorney General of Arizona; STATE OF MONTANA,
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v.
U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA; ALEJANDRO N. MAYORKAS, in his official capacity as Secretary of Homeland Security; TROY A. MILLER, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; TAE JOHNSON, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; TRACY RENAUD, in her official capacity as Acting Director of U.S. Citizenship and Immigration Services,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

SECOND SUPPLEMENTAL ADDENDUM TO RESPONSE TO EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS, STATE OF LOUISIANA Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendants.	)	No. 6:21-cv-00016

DECLARATION OF PETER B. BERG

I, Peter B. Berg, declare the following under 28 U.S.C. § 1746:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Acting Deputy Executive Associate Director. I have held this position since October 4, 2020. As Acting Deputy Executive Associate Director, I oversee the mission of ERO's eight headquarters divisions: Enforcement, Removal, Non-Detained Management, Custody Management, Field Operations, ICE Health Service Corps, Law Enforcement Systems and Analysis, and Operations Support.
2. Prior to this position, I served as the Assistant Director for Field Operations beginning on June 21, 2020 and had been acting in that role since January 31, 2020. In these capacities, I was responsible for the oversight, direction, and coordination of immigration enforcement activities, programs, and initiatives carried out by ERO's 24 Field Offices and 188 sub-

offices. I further managed ERO Headquarters components, including Domestic Operations, Special Operations, and Law Enforcement Systems and Analysis.

3. I have been a career law enforcement officer since 1996, serving in various capacities with both ICE and the former Immigration and Naturalization Service (INS). Other leadership positions I have held within ICE include: Field Office Director and Deputy Field Office Director for the St. Paul Field Office, Acting Deputy Assistant Director for the ERO Headquarters Criminal Alien Division, and Acting Deputy Assistant Director for the ERO Headquarters Field Operations Division.

4. This declaration is based on my personal knowledge and experience as a law enforcement officer and information provided to me in my official capacity.

II. Overview of ERO

5. Following enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including INS and the U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the enforcement of criminal and civil federal laws governing border control, customs, trade, and immigration. Within ICE, ERO oversees programs and conducts operations to identify and apprehend removable noncitizens, to detain these individuals when necessary, and to remove noncitizens with final orders of removal from the United States. ERO manages and oversees all aspects of the removal process within ICE, including domestic transportation, detention, alternatives to detention programs, bond management, supervised release, and removal to more than 170 countries around the world. As part of the removal process, ERO manages a non-detained docket of more than 3.2 million cases, which

includes noncitizens currently in removal proceedings and those who have already received removal orders and are pending physical removal from the United States.

III. Guidance for Immigration Enforcement and Removal Actions

6. On February 18, 2021, ICE's Acting Director, Tae D. Johnson, issued interim guidance titled, *Civil Immigration Enforcement and Removal Priorities* (Johnson Memorandum) (Feb. 18, 2021), which implements with revisions the priorities set forth in DHS's January 20, 2021 Memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (January 20 Memorandum). The Johnson Memorandum lays out a process to allocate ICE's limited law enforcement resources to achieve its mission by focusing on cases that fall within three "presumed priority" categories: national security, border security, and public safety.

7. Further, the Johnson Memorandum emphasizes that the priorities do not prohibit the arrest, detention, or removal of any noncitizen; to the contrary, the memorandum presumes and sets out a process with respect to actions involving cases that fall outside the three priority categories. As a result, under the Johnson Memorandum, ICE has continued to arrest and remove individuals who meet the three presumed priorities, as well as those who constitute "other priority cases." Under the memorandum, no immigration enforcement action or removal is categorically prohibited. Rather, actions that do not meet the presumed priority criteria require preapproval by the appropriate ERO Field Office Director or Homeland Security Investigations Special Agent in Charge except where exigent circumstances and public safety make preapproval impracticable. Pursuant to this guidance, ICE took approved enforcement actions against individuals with serious and violent pending criminal charges, non-aggravated felon sexual predators, individuals with a nexus to national security threats to

the United States, individuals who are identified as members of Transnational Organized Crime groups, individuals with warrants from foreign governments identified by an INTERPOL issued "Red Notice," and individuals with a range of violent criminal convictions.

IV. Irreparable Harm to ICE from Issuance of the Preliminary Injunction

8. I have read and am familiar with the preliminary injunction issued by the U.S. District Court for the Southern District of Texas in this case.

Inability to Prioritize Use of Finite Resources

9. On August 19, 2021, the U.S. District Court for the Southern District of Texas enjoined DHS from enforcing and implementing the policies described in: Section B of the January 20 Memorandum entitled "Interim Civil Enforcement Guidelines." (Dkt. No. 1-1 at 3–4); the section entitled "Civil Immigration Enforcement and Removal Priorities" in the Johnson Memorandum. (Dkt. No. 1-2 at 4–6); and the section entitled "Enforcement and Removal Actions: Approval, Coordination, and Data Collection" in the Johnson Memorandum, with certain exceptions. (Dkt. No. 1-2 at 6–8). Implementing the terms of the injunction and the reporting requirements, discussed in more detail below, would be unreasonably and unduly burdensome, if not entirely impossible.

10. First, the number of noncitizens who likely would fall within the scope of the court's order and nationwide preliminary injunction significantly exceeds ICE's capacity to detain. In July of this calendar year alone, CBP apprehended a total of over 212,000 individuals seeking to cross the southwest border. *See* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited August 19, 2021). Even with over 95,000 expelled pursuant to the U.S. Centers for Disease Control and Prevention's (CDC) Title 42

authorities, over 116,000 were processed under Title 8. Another 64,000 Title 8 cases were apprehended in March; 66,000 in April; 67,000 in May; and 83,000 in June. Given these numbers and the Department's important border security mission, ERO's detention population is increasingly occupied by recent border crossers apprehended by CBP and processed pursuant to Title 8 of the U.S. Code.

11. Enforcement actions against the entire population covered by the court's order and preliminary injunction would require ICE bedspace, personnel, and other resources that simply do not exist. ERO is currently appropriated sufficient funding for approximately 34,000 detention beds nationwide, including approximately 31,500 single adult beds and approximately 2,500 family unit beds, to support its mission to enforce immigration law. ICE's access to its full inventory of bedspace is severely limited due to various court orders limiting the intake of noncitizen detainees, an increase in detention facility contract terminations, detention facility contract modifications, and the ongoing COVID-19 pandemic. Specifically, ICE's Pandemic Response Requirements (PRR) for its detention facilities, which are informed by the Centers for Disease Control and Prevention's COVID-19 guidelines, require that facilities undertake efforts to reduce populations to approximately 75% capacity.[1] Last year, the U.S. District Court for the Central District of California issued a nationwide preliminary injunction recognizing the 75% capacity limit, and ordering ICE to maintain additional strict standards to reduce the risk of COVID-19 infection. *See Fraihat v. ICE*, 445 F.Supp.3d 709 (C.D. Cal. Apr. 20, 2020). In light of these mandates, ICE's currently available bedspace inventory is only approximately 26,800 beds.

[1] ICE's Enforcement and Removal Operations COVID-19 Pandemic Response Requirements (PRR), Version 6.0 (March 16, 2021), https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf (last visited August 19, 2021).

12. Due to this finite number of detention beds, to meet the Department's important mission, ERO must prioritize its detention resources to facilitate the detention of certain noncitizens, including those who are convicted criminals, public-safety threats, and/or recent border entrants. According to data last viewed on August 20, 2021, the currently-detained population of 25,596 noncitizens constitutes more than 95% of the approximately 26,800 currently available beds. The court's order and the preliminary injunction would make it impossible for ICE to prioritize the use of its finite detention resources to carry out its public safety and national security mission in a fair, consistent, and effective manner. Specifically, the injunction and the order would likely result in the release of noncitizens ICE has deemed priorities for removal.

13. Second, the order and the preliminary injunction could adversely impact the ability of ICE to take immediate enforcement action against noncitizens who pose a security threat or other real harm to U.S. communities. Indeed, implementation of ICE's interim priority structure has enabled the agency to focus resources on arresting and detaining the most dangerous noncitizens.

14. If ICE were required to arrest, take into custody, and detain all known noncitizens subject to detention under section 1226(c) or section 1231(a)(2) without the ability to prioritize the most serious offenders, it would significantly curtail ERO's ability to protect communities from public safety threats. And given the limited detention capacity described above, detaining such individuals may well prevent ICE from detaining other individuals not subject to detention under section 1226(c) or section 1231(a)(2), even where those individuals present a danger to the community or a flight risk.

15. Third, compliance with the nationwide preliminary injunction would adversely impact ICE's ability to plan targeted enforcement operations focused on security or public safety threats. ICE's best understanding is that there are approximately 11 million noncitizens in the United States who do not have authorization to reside here. It is critical that ICE focuses its finite law enforcement resources on its public safety mission and targeted enforcement operations like Operation SOAR (Sex Offender Arrest and Removal), a coordinated enforcement operation that builds on ongoing efforts to arrest and remove noncitizen sex offenders from our communities. Historically, ICE has used targeted operations like Operation SOAR as a mechanism to focus agency resources on the most egregious offenders in the interest of public safety, even where those offenders may not be subject to the statutory provisions at issue in this case.

16. The Johnson Memorandum focuses agency resources on enforcement actions against the most serious offenders. From February 18, 2021, through July 31, 2021, ERO processed 25,916 administrative arrests. Almost 20% of those arrests were noncitizens convicted of aggravated felony offenses. For the same period in the year 2020, ERO processed 39,107 administrative arrests. However, less than 8% of those arrests were noncitizens convicted of aggravated felony offenses.

17. Fourth, compliance with the nationwide preliminary injunction would effectively eliminate the ability of the Secretary to "[e]stablish[] national immigration enforcement … priorities" consistent with 6 U.S.C. § 202(5).. The former INS, one of DHS's predecessor agencies, exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909 to maximize use of scarce agency resources, to protect the United States from national security threats and to protect our citizens and communities from harm. *See Department of*

Justice Circular Letter Number 107, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also, e.g.,* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

18. The implementation of the enforcement priorities set forth in the DHS January 20 Memorandum and the Johnson Memorandum has assisted ERO in re-deploying assets to meet the current threat and reality. Through effective prioritization of resources, ERO is better able to adjust in real time to pressing operational needs. For example, ERO re-tasked several field operations teams to assist CBP in responding to state and local requests for assistance in the Rio Grande Valley, Del Rio, and Tucson areas to address increasing activity along the Southwest Border. Additionally, to date, approximately 300 officers have been detailed to the Southwest Border to support CBP operations. The support ERO provides at the Southwest Border includes, but is not limited to: transporting; processing; enrollment in alternatives to detention; removals; bedspace management of those taken into custody, including those subject to expedited removal proceedings pursuant to 8 U.S.C. § 1225(b); and transfers of those taken into custody. This support has significantly increased over the past few months.

19. This flexibility has enabled ERO to prioritize border security, consistent with the Johnson Memorandum, by focusing its resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States. Implementing the terms of the court's order and the preliminary injunction would likely force ERO to realign field teams and other assets to allocate limited time and resources on non-criminal and other lower priority targets. Such a reallocation would likely disrupt ERO's ability to have a meaningful impact on important border security efforts.

Lack of Clear Guidance for Nationwide Workforce

20. Absent clear priorities, ERO immigration officers may be left with only very general guidance—or without guidance at all—on the exercise of their discretion, leading to disparate prioritization across the country and a lack of consistency in enforcement actions. This could result in an undesirable shift in enforcement away from those who present the greatest risk to public safety and undermine public confidence in the nation's immigration enforcement efforts. Further, an attempt to initiate enforcement actions indiscriminately among this population, instead of against certain prioritized noncitizens, would not be an efficient or reasonable apportionment of ICE's limited resources and would likely prevent ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety.

Unduly Burdensome and Impossible Reporting Requirements

21. The court's order requires ICE to produce monthly reports stating the number of noncitizens known to be "covered by or subject to 8 U.S.C. § 1226(c)(1)(A)-(D), who were released from custody during the previous month, and whom ICE did not detain immediately upon their release," and to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1226(c) reporting requirement"). The order further requires ICE to produce monthly reports stating the number of noncitizens "in their removal period as defined in 8 U.S.C. § 1231(a)(1)," along with the number of those "who were not detained pursuant to 8 U.S.C. § 1231(a)(2)," to include last known residence, the offense for which the noncitizen had been arrested, the reason why the noncitizen was not detained, and the individual who made that determination ("the 1231(a) reporting requirement").

22. ICE's ability to comply to the court's satisfaction with the 1226(c) reporting requirement, for instance, depends almost entirely on ICE's ability to determine whether a noncitizen is covered by or subject to § 1226(c) prior to a decision whether to take the noncitizen into custody, but that would be exceedingly burdensome or, in some instances, impossible to accomplish. When ICE receives information from a state or local law enforcement agency about a noncitizen in detention, the agency only needs probable cause of removability in order to lodge a detainer request. The probable cause standard constitutes neither a conclusive determination that a noncitizen is in fact removable nor a determination that the noncitizen may be covered by one of the statutes at issue in this case. It is only after ICE encounters the individual, assumes custody, and conducts an initial intake screening, that those formal determinations are currently made. In fact, in light of the complexities of the immigration laws, although a removability determination may be possible, a determination regarding the applicable detention authority may require obtaining and reviewing criminal records and ever-evolving developments in caselaw.
23. ICE's ability to determine whether a noncitizen in state or local custody would be covered by or subject to § 1226(c) is further limited by the fact that some states have enacted laws barring information sharing with ICE and/or prohibiting ICE access to facilities.
24. Additionally, even where ICE would be able to make determinations upfront that a noncitizen in state or local custody is covered by or subject to § 1226(c), ICE's ability to learn when a noncitizen may be released from custody is significantly limited in many jurisdictions. Many jurisdictions across the country neither honor ICE detainers nor notify ICE when inmates are released from custody. As of July 19, 2021, ICE had identified 463 jails or prisons that do not notify ICE prior to the release of a noncitizen, and 155 jails or

prisons that provide notification to ICE prior to a noncitizen's release from custody but do not provide adequate hold time for ICE to take an individual into custody. For many cases in these jurisdictions, ICE is not aware when noncitizens are released from criminal custody and has no knowledge of their last known residence. Some jurisdictions have also significantly limited ICE's access to state and local databases, which would include some of the information being sought by the court.

25. The 1231(a) reporting requirement similarly poses significant burdens for ICE and may, depending upon the court's interpretation of the requirement, apply to a very large class of individuals. There are currently an estimated 1.2 million noncitizens in the United States who have been issued final orders of removal. If the 1231(a) reporting requirement is intended to include both noncitizens who were detained at the time the order of removal became administratively final and those who were not detained, providing updated information on this population every month would significantly strain ICE's capacity to manage and track statistical data for any other purpose, including its mandatory congressional reporting requirements, statutory FOIA obligations, and myriad reporting requirements in this and other litigation.

26. The requirement that ICE make contemporaneous records of the decision not to detain will impose a serious administrative burden on the line officers making those decisions. Because of the constraints on available bedspace, the number of noncitizens subject to detention under either § 1231(a)(2) or § 1226(c) who will not be detained will likely be significant. Under the terms of the order, the line officers will be required to document that decision, thus diverting them from other important duties, including other enforcement efforts.

27. Simply put, it would be impossible for ICE to accurately and completely comply with these requirements. And it would pose extraordinary burdens on ICE to attempt to do so. ICE simply does not collect and retain data in the way that the court has requested. Moreover, with respect to noncitizens against whom no enforcement action has been taken, ICE's databases and systems do not (and cannot) capture information pertaining to the detention authority that would have applied to those noncitizens. In other words, ICE can only track the detention authority of individuals who are presently in ICE custody. Even then, ICE systems are not designed to capture the level of granularity needed to accurately report the number of noncitizens subject to § 1226(c) mandatory custody or the subset of noncitizens subject to § 1231(a) custody authority for whom custody is mandatory.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 20th day of August, 2021.

PETER B BERG

Digitally signed by PETER B BERG
Date: 2021.08.20 23:13:13 -04'00'

Peter B. Berg
Acting Deputy Executive Associate Director
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement