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By ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
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Re: *State of Arizona v. U.S. Department of Homeland Security*, No.
21-16118

Dear Ms. Dwyer:

We write in response to appellant’s August 24, 2021 letter pursuant to Federal Rule of Appellate Procedure 28(j) notifying this Court of recent decisions in *Texas v. Biden*, No. 21-10806, 2021 WL 3675780 (5th Cir. Aug. 19, 2021), and *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (S. Ct. Aug. 24, 2021), denying the government’s motions to stay a district court decision enjoining the rescission of the Migrant Protection Protocols (MPP).

In that case, the Fifth Circuit concluded that the rescission of MPP was likely reviewable under the APA and that the rescission was likely arbitrary and capricious. The government respectfully disagrees with the Fifth Circuit’s analysis. And the court’s analysis—which involved a different policy with a different administrative record—has no bearing on this case.

The Fifth Circuit’s conclusion that the MPP rescission was likely not committed to agency discretion by law was based on two factors: its belief that the termination of MPP would “create affirmative benefits for aliens such as work authorization,” and its observation that MPP “was a government program—replete with rules[,] procedures[,] and dedicated infrastructure”—such that MPP’s rescission constituted “much more than a

non-enforcement decision.” 2021 WL 367480, at *8 (quotation omitted). Those factors are not present here. The interim priorities framework does not create any affirmative legal benefits and does not alter any government program. It simply provides guidance and structure to agency officials with respect to how their enforcement discretion should be exercised and how enforcement efforts should be prioritized. *See* Opp. 12-17, Ren. Opp. 6-8.

Similarly, the Fifth Circuit’s arbitrary-and-capricious analysis rested on its conclusion that the agency was required to consider reliance interests implicated by MPP, and the Supreme Court’s order denying the government’s stay motion suggested a similar conclusion. But the priorities framework does not alter any comparable governmental program. And appellants’ letter does not identify any specific reliance interest that the priorities allegedly upended.

Sincerely,

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