



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW, Rm. 7260
Washington, D.C. 20530-0001

Tel: (202) 514-3388

August 30, 2021

By ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119
(415) 355-8020

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 notifying this Court of a recent decision in *Texas v. United States*, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021).

In that case, the district court preliminarily enjoined the government from implementing the priorities framework at issue here, although that injunction was stayed on August 23, 2021. The court concluded that the plaintiff States were likely to succeed on their arguments that they had standing; their claims were reviewable; and the priorities violated the APA's procedural requirements and two provisions of the INA, 8 U.S.C. §§ 1226(c), 1231(a)(2), that are not at issue in this case. The government disagrees with the district court's reasoning, and appealed the order. *Texas v. United States*, No. 21-40618 (5th Cir.). The district court issued an administrative stay to allow the court of appeals to consider the government's emergency stay motion, and the Fifth Circuit administratively stayed the order while it considers that motion.

In any event, the *Texas* order does not support plaintiffs' interpretation of 8 U.S.C. § 1231(a)(1). Enforcement decisions are "generally committed to

an agency’s absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). This discretion persists “even in the presence of seemingly mandatory legislative commands.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005). A “stronger indication” than the use of the word “shall” is required. *Id.* And the INA evinces Congress’s intent to preserve—not circumscribe—the Executive’s discretion. *See* Opp. 12-17, Ren. Opp. 6-8.

The order likewise does not support plaintiffs’ notice-and-comment claim. The priorities offer guidance to federal officers on how to exercise their enforcement discretion; they do not require or prohibit any action by any State or noncitizen nor do they bind the agency with respect to any particular case. Any downstream consequences of those discretionary decisions are the result of the independent operation of other sources of law, and are not “direct and immediate” legal consequences of the priorities themselves. *Oregon Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) (quotation omitted). *See* Opp. 18-19, Ren. Opp. 10.

Sincerely,

H. THOMAS BYRON III
MICHAEL SHIH

/s/ Sean Janda
SEAN JANDA

Attorneys
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Avenue NW
Room 7260
Washington, D.C. 20530
(202) 514-3388