IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA, *et al.*, Plaintiffs-Appellants, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants-Appellees.	No. 21-16118

REPLY IN SUPPORT OF MOTION FOR ABEYANCE AND TO STAY BRIEFING PENDING CONSIDERATION OF THE MOTION

Pursuant to Federal Rule of Appellate Procedure 27(a)(4), defendants-appellees file this reply in support of their motion to place this appeal into abeyance and to stay the briefing schedule pending resolution of the motion.

As the government explained in the motion, the Secretary of Homeland Security on September 30 issued a memorandum establishing revised immigration enforcement priorities that "will become effective" on November 29, 2021, and that will, at that point, supersede and "serve to rescind" the two memoranda challenged in this case. *See* Dep't of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law* 6 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf. In light of those superseding priorities and given that this

appeal has not yet been fully briefed or calendared for oral argument, plaintiffs' challenges to the two earlier memoranda (which will be rescinded when the revised priorities become effective in less than two months) will likely become moot before this appeal is resolved. In light of those upcoming changes, abeyance is appropriate to avoid burdening the parties and the Court with unnecessary briefing that addresses soon-to-be-moot claims in a soon-to-be-altered context, and to allow the Court to resolve the mootness question first, once that question is ripe.

In their response, plaintiffs primarily argue that some of their legal arguments might also apply in a challenge to the revised priorities; on that basis, they contend that some aspects of this case might remain live following implementation of the superseding priorities. But this is an interlocutory appeal seeking review of the district court's denial of plaintiffs' request for a preliminary injunction against the interim priorities. Plaintiffs cannot explain how, if they were to prevail on any of their legal arguments, this Court could conclude that on remand the district court should enjoin the operation of the interim priorities pending resolution of the litigation. After all, those interim priorities will have been rescinded and there would be nothing left to enjoin.

The question of mootness has not yet been briefed because it is not yet presented. And plaintiffs' argument is inapposite to the specific relief sought in the government's motion—abeyance of proceedings on appeal and a stay of upcoming briefing deadlines. Abeyance is warranted even if plaintiffs are correct that they might

have colorable arguments concerning mootness. Implementation of the revised priorities will very likely moot all or most of the issues in this challenge to the interim priorities. At a minimum, once the revised priorities are effective, and the interim priorities have been rescinded, any remaining issues would be substantially narrowed and briefing would need to take account of subsequent developments. Abeyance will allow the parties and the Court to address the question of mootness before considering any issues that remain, and before addressing the appropriate disposition of this appeal.

Plaintiffs' arguments regarding mootness are both premature and incorrect on the merits. And in any event, in light of the upcoming changes in the relevant factual and legal context, the requested relief (abeyance) will not prejudice plaintiffs. Plaintiffs can (but have not yet taken steps to) pursue a timely challenge to the new priorities. But this appeal from a denial of a preliminary injunction in a case challenging the interim priorities is not the appropriate forum to bring such a challenge in the first instance.

1. Plaintiffs spend much of their response arguing that various vestiges of their appeal may not become moot once the superseding priorities take effect. *See* Resp. 2-6. As we explain below, plaintiffs' arguments are incorrect. But more importantly, in the context of this motion, the substantive question whether some kernel of this appeal will survive the implementation of the superseding priorities is beside the point. Plaintiffs cannot dispute that this appeal will not be ripe for resolution before

the superseding priorities take effect at the end of November; that at least some of plaintiffs' claims will become moot once that happens; that there is at least a serious question whether the remainder of their claims will also be moot; and that the superseding priorities will substantially change the factual and legal context of plaintiffs' challenge to the denial of preliminary injunctive relief concerning the (soon-to-be-rescinded) interim priorities. In light of those indisputable realities, considerations of judicial economy and preservation of the parties' resources more than justify placing this appeal into abeyance pending the superseding priorities' taking effect and anticipated motions to govern further proceedings or for disposition of the appeal in light of mootness concerns. Abeyance will allow the parties and the Court to sensibly address mootness first, deferring any further briefing on plaintiffs' substantive claims until after the Court has determined which if any aspects of this appeal remain live. And that relief will avoid burdening the parties and the Court with unnecessary briefing directed at soon-to-be moot issues and arguments in a soon-to-be-altered context.

Considerations of judicial economy tip in favor of staying ongoing briefing where even the possibility of mootness or of the narrowing of claims exists, and this Court and other courts have routinely granted similar relief even where an agency was only in the process of reconsidering an action that was on review in the court of appeals. *See, e.g.*, Order, Dkt. No. 79, *U.S. WeChat Users Alliance v. Biden* (9th Cir. No. 20-16908) (staying all proceedings pending further order of the Court); Order, Dkt.

No. 24, *State of California v. Cochran* (9th Cir. No. 20-16802) (vacating briefing schedule and staying proceedings for two months); *City of Arlington v. FCC*, 668 F.3d 229, 236 (5th Cir. 2012) (noting that the court had held a petition in abeyance while the agency was addressing a reconsideration motion); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 443 (3d Cir. 2011) (same); *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008) (same). The considerations animating those orders are even more forceful here, where the agency has concluded the administrative process and actually promulgated revised guidelines that supersede the interim priorities currently being challenged.

2. In any event, plaintiffs' mootness arguments—in addition to being premature and misdirected—are simply wrong. Their arguments ignore the posture of this appeal from the denial of a preliminary injunction in a case challenging the interim priorities. Instead, they suggest that this Court should consider in a vacuum their legal argument about the meaning of a particular provision in the Immigration and Nationality Act, the comprehensive and highly reticulated federal statute governing immigration law. That argument misunderstands both the nature of APA review and the Constitution's case-and-controversy requirement.

Plaintiffs contend (Resp. 2-4) that they could still receive effective relief on their claim that the interim priorities were not in accordance with law because the interim priorities violated 8 U.S.C. § 1231(a)(1)(A)'s alleged mandatory requirement to remove noncitizens within the removal period. That is so, according to plaintiffs, because the superseding guidance allegedly violates the same requirement and so "an

injunction prohibiting violations of Section 1231(a)(1)(A) would provide effective relief." Resp. 3. But an injunction generally prohibiting violation of the law is not available, either in this litigation or in any case before a federal court. Indeed, plaintiffs' argument is directly contrary to Article III's prohibition on advisory opinions. *Cf. California v. San Pablo & T.R. Co.*, 149 U.S. 308 (1893) ("[T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.").

A general injunction "prohibiting violations of Section 1231(a)(1)(A)" is also not relief available to plaintiffs under the APA. Even if plaintiffs were successful on the merits of their claims, they would be entitled to no more than an order "hold[ing] unlawful and set[ting] aside" the particular agency action that they challenge—that is, the interim priorities. 5 U.S.C. § 706(2). And indeed, the relief that plaintiffs have sought in this litigation—both in their complaint and in their motion for a preliminary injunction—properly stretches no further than vacating and enjoining reliance on the particular agency actions (the DHS and ICE Memoranda) that they challenge. *See* Am. Compl., D. Ct. Dkt. No. 12, at 18 (requesting as relief a judgment "[v]acating the [DHS] Memorandum and [ICE Memorandum] and enjoining Defendants from applying it"); Mot. for Prelim. Inj., D. Ct. Dkt. No. 17, at 44-45 (requesting a preliminary injunction prohibiting defendants "from enforcing and implementing the policies described in" portions of the DHS Memorandum and the ICE

Memorandum). As explained above, those memoranda will be rescinded when the revised priorities take effect at the end of November, and there will accordingly be nothing left to enjoin in this case. The new, superseding priorities represent an entirely different agency action, which is not at issue in this case.

Plaintiffs also contend (Resp. 4-6) that their arguments about notice-and-comment rulemaking will remain live following the superseding priorities because of the exception to mootness for "disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). But, as we have explained, those arguments are premature because mootness issues have not yet been briefed. In any event, the exception plaintiffs refer to "applies only in exceptional situations," *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quotation omitted), and plaintiffs' attempt to rely on it here fails because their notice-and-comment claim is neither capable of repetition nor will it evade review.

It is insufficient for plaintiffs to argue that an event—such as the issuance of interim enforcement guidance without notice-and-comment procedures—"may well recur in more generic form," Wright & Miller, *Federal Practice and Procedure*, § 3533.8.1 (3d ed. 2021); instead, they must show that they will be "subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Plaintiffs cannot generically contend that this Court should hear their arguments in this case because (they say) DHS could in the future promulgate without notice and comment a rule that "reduces immigration enforcement," Resp. 5. Instead, they must (and cannot)

show that DHS is likely to promulgate the "same action"—that is, the interim enforcement priorities—again.

And even if plaintiffs could frame the relevant agency action at such a generic level, they cannot demonstrate that any future actions—including the revised priorities—are likely to evade judicial review. Plaintiffs improperly focus on the short-term nature of the interim priorities and their inability to litigate this case through the appellate process. But the appropriate question is "whether, if the otherwise mooted dispute is repeated, a future challenge will again evade review." Wright & Miller, *Federal Practice and Procedure*, § 3533.8.2 (3d ed. 2021). And plaintiffs cannot make that showing for the superseding priorities. Unlike the interim priorities, the superseding priorities are not intended to be in effect for only a short period of time. Therefore, there is no reason to believe that plaintiffs will be unable to fully litigate their notice-and-comment claim through the appellate courts in a new challenge to the superseding priorities.

Plaintiffs' own opening brief underscores that the issues presented in this preliminary injunction appeal focus on features of the interim priorities and those priorities' implementation that will not necessarily reoccur with the superseding priorities. For example, plaintiffs' argument that the interim priorities violate § 1231(a)(1)(A) rests not just on some abstract legal feature of the interim priorities but also on data about how often certain groups of noncitizens were in fact removed under the priorities. *See* Pl. Br. 68. Similarly, plaintiffs' notice-and-comment argument

rests in large part on the same data. *See* Pl. Br. 69-70. But the superseding priorities both modify the substantive priorities categories and eliminate the requirement for advance supervisory approval of certain enforcement actions. Even setting aside the inappropriate nature of plaintiffs' reliance on extrarecord evidence to ground their APA claims, there is no reason to believe that the data plaintiffs rest on will be the same under the superseding priorities, and the administrative record (the proper source of any factual information in this APA case) supporting the superseding priorities is substantially different from the administrative record that undergirded the interim priorities.

3. Plaintiffs will not be unduly prejudiced by a brief abeyance allowing the parties and the court to address mootness and consider the proper disposition of the appeal. Plaintiffs claim only that abeyance will prejudice them by "creating needless delay of resolving their appeal." Resp. 7. But that argument ignores the fact that in light of the substantial factual and legal changes resulting from implementation of the superseding priorities, it is likely that the parties would be forced to engage in additional briefing following the implementation of those priorities even if the Court declined to place this appeal into abeyance now. Such briefing would not only burden the parties and the Court but would likely have the effect of delaying resolution of the appeal in any event. In addition, given that most or all of plaintiffs' claims will likely become moot before this appeal can be resolved, plaintiffs are unlikely to receive any effectual relief, whether or not the Court places the appeal in abeyance now.

To the extent that plaintiffs believe they will be injured by the implementation of the superseding priorities (a showing that they have not yet even attempted to make) and that those priorities are unlawful, plaintiffs remain free to amend their complaint or to file a new lawsuit in district court raising those claims and seeking preliminary relief. That plaintiffs have not chosen to pursue that path to timely relief only underscores the lack of any prejudice.

Plaintiffs complain that "this case has already dragged on far too long," Resp. 8, but they fail to mention that their own litigation conduct has delayed resolution of their claims. Plaintiffs failed to adequately develop any challenge to the enforcement priorities in their initial preliminary injunction briefing in district court. *See* D. Ct. Dkt. Nos. 17, 42. They requested that the district court permit discovery even before the motion-to-dismiss stage in this APA case. *See* D. Ct. Dkt. No. 18. They moved for reconsideration in district court. *See* D. Ct. Dkt. No. 96. And they did not file their opening brief in this Court until 63 days after filing their notice of appeal, *see* Dkt. Nos. 1, 42—more than "double the 28 days that [they] are supposed to receive under Circuit Rule 27-3," Resp. 7-8.

Finally, plaintiffs request leave to file a surreply, but there is no basis for additional briefing on the government's motion. Not only would additional briefing further delay resolution of this motion, contrary to plaintiffs' own expressed preference, but plaintiffs have failed to demonstrate any reasonable need to extend the briefing on this procedural motion. Instead, the sole basis for plaintiffs' request is

that defendants did not fully brief the question of mootness in the original motion. *See* Resp. 9-10. But, as is explained above, the legal question whether the priorities will render this appeal moot in its entirety is not presented at this stage, and abeyance of this appeal is appropriate based on the serious questions regarding mootness and the narrowing of any remaining claims once the superseding priorities take effect. Therefore, there is no reason to delay resolution of this motion simply to allow plaintiffs to provide additional argument on that ancillary issue.

Respectfully submitted,

H. THOMAS BYRON III
MICHAEL SHIH

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

OCTOBER 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 2557 words, according to the count of Microsoft Word.

s/ Sean Janda
Sean Janda