No. 21-16118

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA, et al.,
Plaintiff-Appellants.
v.
U.S. DEPARTMENT OF HOMELAND SECURITY et al.,
Defendant-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:21-cv-00186-SRB

PLAINTIFF STATES' RESPONSE TO DEFENDANTS' MOTION TO DISMISS APPEAL AS MOOT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

A claim is not moot where "'the new [law] is sufficiently similar to the previously challenged [law] that it is permissible to say that the challenged conduct continues.'" *Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019) (quoting *Northeast Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 n.3 (1993)) (cleaned up).

That is just so for the States' statutory claim, which contended that the Interim Guidance violated Section 1231(a)(1)(A) by treating that provision's mandatory "shall" as a mere discretionary "may." *See* Opening Br.32-55. Just as with the Interim Guidance, the successor Permanent Guidance continues to treat Section 1231(a)(1)(A) as being entirely discretionary—and Defendants tellingly do not even bother to contend otherwise. The questions of statutory interpretation for this Court are thus the *exact same* and still very much live issues: (1) does the "shall" in Section 1231(a)(1)(A) create a mandatory duty or discretionary option, and (2) if it is discretionary, is it immune to judicial review as "committed to agency discretion"? The validity of both the Interim Guidance and Permanent Guidance rise or fall on those questions, which hence continue to present a live controversy here.

Moreover, this Court would have to create a square circuit split with the Fifth Circuit to dismiss the States' statutory claim as moot. That court has explicitly held that "when a government repeals the challenged action and replaces it with something substantially similar, the injury remains," and the case is not moot. *Texas v. Biden*, __

F.4th __, 2021 WL 5882670, at *15 (5th Cir. 2021). The Permanent Guidance does just that: it might tinker at the margins with *how* DHS implements Section 1231(a)(1)(A)'s putative discretion, but it is plainly "substantial similar" to the prior rule in continuing to treat the "shall" command as a mere "may" suggestion.

As to the States' notice-and-comment claim, that challenge falls within the "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). Notably, both the Interim Guidance's predecessor (the 100-Day Moratorium) *and* its successor (the Permanent Guidance) were issued without complying with notice-and-comment requirements. The violation is not only "capable of repetition," it has now repeated. *Twice*. And there is far more than a reasonable chance that DHS will seek to do so again with similar sorts of short-term guidance (which it is hardly disclaiming authority to do, and did so while this case was on appeal).

To be sure, part of the States' case is now moot. Specifically, the States' substantive arbitrary-and-capricious challenge to the Interim Guidance was based upon the reasons offered for that particular rule and its particular record. Because the Permanent Guidance is based on a different record and offers several justifications not advanced by the Interim Guidance, the State agrees that this claim should be dismissed as moot.

Finally, if this Court concludes this entire appeal is moot, it should vacate the decisions below under *United States v. Munsingwear*, 340 U.S. 36 (1950). The States sought

DHS's position on such a vacatur, and DHS has responded that "[i]f the plaintiffs were to seek *Munsingwear* vacatur of the opinions issued to date in light of the claims' mootness, the government would not oppose that motion." The States therefore conditionally seek such a vacatur in the event that this Court concludes that their entire appeal/case is moot.

ARGUMENT

I. THE PLAINTIFF STATES' STATUTORY CLAIM IS NOT MOOT

The States' main challenge to the Interim Guidance is that it violates Section 1231(a)(1)(A) by treating removal of aliens with final orders of removal as merely discretionary—despite the unambiguous statutory language making the obligation mandatory, context and legislative history, multiple canons of construction, and decisions of the Supreme Court and *every* circuit that has construed the provision—including the Second, Fifth, Sixth, Tenth, and Eleventh Circuits and this Court (three separate times). *See* Opening Br.46-52. The Supreme Court in June, for example, held that under Section 1231(a)(1)(A), "[o]nce an alien is ordered removed, *DHS must physically remove him* from the United States *within a 90-day 'removal period.*'" *Johnson v. Guzman Chavez*, 141 S.Ct. 2271, 2281 (2021) (emphasis added). Similarly, this Court has held that this statutory provision "*requires* the Attorney General to effectuate physical removal of petitioners subject to a final order of removal within ninety days of the order." *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) (emphasis added).

The States' suit sought an injunction against the Interim Guidance insofar as it purports to make removals of those with final orders of removal discretionary, and this appeal involves the denial of the States' request for a preliminary injunction to that effect. Federal Defendants have never disputed that, if the States were to prevail on their statutory claim, an injunction directing DHS to comply with the mandates of Section 1231(a)(1)(A) would provide effective relief.

To be sure, the caricature of the relief sought by the States in DHS's telling (at 6)—*i.e.*, "a general injunction 'prohibiting violations of Section 1231(a)(1)(A)'" purely in the ether—is not "relief available." But as long as DHS has an extant regulation that purports to treat Section 1231(a)(1)(A) as merely discretionary, an injunction against *that* regulation—whether that is against the Permanent Guidance in effect now, or some "2.0" or "3.0" version down the road—is "effective relief" that prevents mootness. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (holding that a case is moot "only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." (cleaned up) (emphasis added)).

Under the Permanent Guidance, DHS intends to continue to treat removals of aliens with final orders of removal as discretionary. The Permanent Guidance thus declares, for example, that "[i]t is well established in the law that federal government officials have *broad discretion* to decide … the execution of removal orders." Permanent Guidance at 2 (emphasis added). It further argues that "enforcement discretion extends

throughout the entire removal process, and at each stage of it the executive has the discretion to not pursue it." *Id.* (emphasis added). DHS tellingly does not deny any of this.

As a result, the Permanent Guidance is "sufficiently similar to the [Interim Guidance] that it is permissible to say that the challenged conduct continues.'" *Cuviello*, 944 F.3d at 824 (quoting *Northeast Florida Chapter*, 508 U.S. at 662). Indeed, the *very same conduct*—refusing to remove aliens with final orders of removal notwithstanding Section 1231(a)(1)(A)'s unequivocal command to do so—continues to this day.

Similarly, this Court has held that a case was not moot where a "new … program is substantially similar to the prior program and is alleged to disadvantage [plaintiffs] 'in the same fundamental way.'" *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013) (quoting *Northeast Florida Chapter*, 508 U.S. at 662). That is just so here: DHS's programs injure the States in the "same fundamental way"—by refusing to carry out Section 1231(a)(1)(A)'s non-discretionary mandate.

Indeed, while DHS implies (at 2-3) that the differing contours of the Permanent Guidance might injure Plaintiffs States less, that is irrelevant even if true: "If the amended [regulation] threatens to harm a plaintiff in the same fundamental way—even if to a lesser degree—the plaintiff will still have a live claim for prospective relief." *Cuviello*, 944 F.3d at 824.

Similarly, DHS's refusal to disavow the putative discretion it has illegally arrogated to itself further militates against any mootness dismissal, since DHS "has not

repudiated its previous practice." *Hymas v. U.S. Dep't of the Interior*, 789 F. App'x 43, 44 (9th Cir. 2019). To the contrary, the Permanent Guidance doubles down on the same statutory violation rather than repudiating it.

DHS also suggests (at 9) that the States' statutory claim depends on "data about how often certain groups of noncitizens were in fact removed under the priorities." But the statutory questions at issue here are *pure* questions of law: either Section 1231(a)(1)(A) imposes a mandatory command or not, and the issue of DHS's compliance with the requirement is either committed to agency discretion or not. Resolution of those pure questions of law does not turn on the record facts at all. It simply requires this Court to determine what the statute means.

To be sure, that data at issue does bear on the *magnitude* of the States' injuries. But that is of no moment since this case would not be moot even if the Permanent Guidance only injured the States "to a lesser degree." *Cuviello*, 944 F.3d at 824.

A dismissal here would also create a square circuit split with the Fifth Circuit. That court explained that DHS's actions there did not moot the case because DHS "ha[d] not shown the effects [of the new action] would cure the unlawfulness of the [original action]. Nor that they would eliminate the States' ongoing injuries from that decision." *Texas*, 2021 WL 5882670, at *14. So too here: the Permanent Guidance does not cure the violation of Section 1231(a)(1)(A) but rather perpetuates it, along with the State's harms from the statutory violation.

Similarly, the Fifth Circuit explained that "when a government repeals the challenged action and replaces it with something substantially similar, the injury remains. In such a case, the court can still 'grant effectual relief to the prevailing party,'" *Id.* at *15 (quoting *Knox*, 567 U.S. at 307) (cleaned up). While the Permanent Guidance might not perfectly clone the Interim Guidance, it is undoubtedly "something substantially similar."

Ultimately, here, as in *Texas*, DHS is engaging in "faux-metaphysical quibbling [that] ignores the 'gravamen' of the States' challenge." *Id.* at *16. The basic dispute is the same—*i.e.*, the meaning of Section 1231(a)(1)(A) —which is the gravamen of the States' claim. [1]

[1] DHS's reliance (at 8-9) on the briefing of its transfer motion in the *Ohio* case is unavailing and misleading. Notably, DHS's reply brief specifically argued that transfer was warranted *because* Arizona and Montana were arguing this appeal was *not moot*. *See* Doc. 12 at 2 (contending that transfer was warranted because "[a]lthough Arizona and Montana's challenge to the Interim Guidance is now undoubtedly moot in light of the September Guidance, Arizona and Montana … insist otherwise").

Having argued (unsuccessfully) that transfer was warranted because Arizona and Montana contended that this appeal was *not* moot, DHS's instant position that the States' transfer opposition somehow supports this appeal being moot is specious. The States have always argued that this appeal was not moot, both in this Court and in the Southern District of Ohio. Any suggestion otherwise is an outright distortion of the States' consistent position.

DHS is correct (at 8) that the States have argued that the Interim Guidance and Permanent "are distinct policies," at least insofar as they are distinct final agency actions. That much is obvious: both actions would, for example, have separate statute-of-limitation clocks running against each because they are not literally identical. But that is not the operative standard. Instead, because they are "sufficiently similar," the statutory challenge to the Interim Guidance is not moot. *Cuviello*, 944 F.3d at 824.

II. THE STATES' NOTICE-AND-COMMENT CLAIM FALLS WITHIN THE CAPABLE-OF-REPETITION, YET-EVADING-REVIEW EXCEPTION TO MOOTNESS

The States' claim that DHS violated APA's notice-and-comment procedures in the promulgation of the Interim Guidance is also not moot because it "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Wisconsin Right To Life*, 551 U.S. at 462. That "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* (quoting *Spencer v. Kemna,* 523 U.S. 1, 17 (1998)).

Both requirements are satisfied here. The Interim Guidance was exceedingly short in duration—only supposed to last 90 days, and only actually lasting about nine months in fact. The Supreme Court has held that even a full two-year election cycle is insufficient time to fully litigate a case to judgment and through appeal. *Id.*; *accord Davis v. FEC*, 554 U.S. 724, 735 (2008); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1002 (9th Cir. 2010) ("'[T]he inherently brief duration of an election is almost invariably too short to enable full litigation on the merits.'" (citation omitted)). The even-shorter duration of the Interim Guidance thus evades review.

DHS's violation of notice-and-comment requirements in promulgating a legislative rule with substantive criteria that drastically reduces immigration enforcement also is "capable of repetition." Indeed, the Interim Guidance's

promulgation without notice-and-comment rulemaking was itself a repetition of DHS's promulgation of the 100-Day Moratorium without complying with such procedures (or invoking the good cause exception). And DHS has again violated those APA requirements by now promulgating the Permanent Guidance, again without notice-and-comment rulemaking procedures. The Interim Guidance's notice-and-comment violation is thus literally book-ended by violations of its predecessor and successor.

Given DHS's views that publishing such rules do not require notice-and-comment procedures, there is far more than "a reasonable expectation that [the States] 'will again be subjected to the alleged illegality,'" *Wisconsin Right to Life*, 551 U.S. at 463 (citation omitted). That is particularly true as DHS may release further short-term rules regarding immigration enforcement, particularly if the Permanent Guidance were to be vacated.

Indeed, after the Permanent Guidance was issued, DHS released a further diminished-enforcement policy on October 12, 2021 with an announced duration of 60 days, again without opportunity for notice and comment.[2] That action belies DHS's inaccurate contention (at 8) that the States "have not suggested that DHS intends to issue new short-term interim priorities." The States *are* suggesting just that, and the short-term policy issued on October 12 provides powerful evidence that repetition of

[2] *See* DHS, Policy Statement 065-06 (Oct. 12, 2021), *available at* https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf

the notice-and-comment violation is not only "capable of repeating," but highly likely to do so. Indeed, DHS has tellingly not identified *any* short-term immigration enforcement policies that it has adopted *with* notice-and-comment procedures under the Biden Administration. Instead, there is *every* indication here that if any further short-term policies are promulgated, they will again be without notice-and-comment—just like *all* prior policies appear to have been.

Notably, this Court has held that "[a] declination to renounce a practice is sufficient to satisfy the exception." *Planned Parenthood of Greater Washington & N. Idaho v. HHS*, 946 F.3d 1100, 1110 (9th Cir. 2020). Here, DHS has certainly not declined to issue further short-term guidance with substantial substantive effects without complying with notice-and-comment requirements. Indeed, given the unprecedentedly high numbers of encounters at the Southern Border, it would be surprising (and disappointing) if DHS did not undertake some short-term surge activities to attempt to regain control of the border.[3]

DHS also appears to contend (at 7) that the capable-of-repetition, yet-evading-review exception could only apply if DHS promulgated the "the interim enforcement

[3] *See*, *e.g.*, DHS, *Southern Border Encounters*, *available at* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters (showing unprecedentedly high numbers of encounters); Miroff, Nick, *Border arrests have soared to all-time high, new CPB data shows*, Washington Post (Oct. 20, 2021) *available at* https://www.washingtonpost.com/national/border-arrests-record-levels-2021/2021/10/19/289dce64-3115-11ec-a880-a9d8c009a0b1_story.html ("[D]uring the 2021 fiscal year that ended in September, and arrests by the Border Patrol soared to the highest levels ever recorded.").

priorities—again"—*i.e.*, only if it were to reissue the Interim Guidance in identical form again. That is specious.

Wisconsin Right to Life, for example, only required that the plaintiff group planned to run "materially similar" ads in the future—not identical ones. 551 U.S. at 460. "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule [*Storer v. Brown*, 415 U.S. 724 (1974)] by making this [capable-of-repetition, yet-evading-review] exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by FEC." *Id.* at 463. DHS effectively now demands that same "level of specificity" that *Wisconsin Right to Life* disclaimed.

The effect of adopting DHS's arguments would be pernicious as well. Under its position, an agency could moot a challenge to a regulation by changing only minor details—or perhaps even just fixing a typo or changing comma placement. Nothing less than literally identical regulations would seemingly satisfy DHS's proffered standard. That simply is not the law, however, as *Wisconsin Right to Life* demonstrates. Because the basic controversy has *already recurred*—*i.e.*, the Interim Guidance repeated the 100-Day Moratorium's notice-and-comment violation—no more is required.

Nor does DHS's reliance on challenges to the Permanent Guidance demonstrate that the notice-and-comment violation here will not evade review. By definition, the Permanent Guidance is intended to be long term, and thus litigation about it cannot resolve the issue of whether DHS's issuance of *short-term* rules without notice-and-

comment violate the APA. Thus while the Permanent Guidance is instructive as to likelihood of recurrence as further evidence DHS's willingness to violate the APA's requirements, litigation concerning it will not prevent the Interim Guidance's notice-and-comment violation from evading review.

III. AT A MINIMUM, THE MOOTNESS ISSUE IS SUFFICIENTLY CLOSE THAT IT SHOULD BE FULLY BRIEFED

At a bare minimum, the mootness issues will not be so clear-cut that dispositive resolution of this entire appeal/case is appropriate by mere motion. Instead, if this Court does not deny DHS's mootness arguments outright, it should deny them without prejudice to DHS renewing them in its Answering Brief, along with any merits arguments it may have. Particularly as a dismissal would require creating a split with the Fifth Circuit, full merits briefing and consideration by a merits panel is warranted here.

IV. ALTNERATIVELY, VACATUR UNDER *MUNSINGWEAR* IS WARRANTED IF THIS COURT CONCLUDES THIS CASE IS MOOT

Alternatively, if this Court concludes that this case is moot, it should vacate the decisions below under *Munsingwear*. *Munsingwear*, 340 U.S. at 39 (When a civil case becomes moot pending appellate adjudication, "the established practice ... in the federal system ... is to reverse or vacate the judgment below and remand with a direction to dismiss."). DHS has indicated it does not oppose such a vacatur if this case is moot. *Supra* at [[XX]]. If that is indeed so, the decisions below should be vacated.

CONCLUSION

For the foregoing reasons, this Court should deny outright Plaintiffs' motion to dismiss based on mootness as to the States' statutory and notice-and-comment claims and reinstate a briefing schedule. The States agree that their substantive arbitrary-and-capricious challenge is now moot, however, and agree that claim should be dismissed.

Alternatively, this Court should deny Plaintiffs' motion without prejudice and direct them to brief the mootness question along with the merits in their Answering Brief.

Finally, if this Court concludes that this entire challenge is moot, it vacate all decisions below under *Munsingwear*.

Respectfully submitted,

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Dated: December 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December, 2021, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Drew C. Ensign
Drew C. Ensign

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