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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity as Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STAY

INTRODUCTION

Defendants ask this Court to stay this case pending the Supreme Court's decision in *Biden v. Texas*, No. 21-954 (U.S.). The two cases, however, challenge different agency actions and present several distinct questions of law. Moreover, a stay will cause Plaintiffs (hereinafter, "Arizona") harm, and the Defendants will not be prejudiced in the absence of a stay.

Another case in the Northern District of Florida involves nearly identical claims, in which Defendants recently moved for a stay and made virtually identical arguments as here. To no avail. The Northern District of Florida quickly determined that those arguments lack merit. *Florida v. United States*, 21-CV-1066, ECF no. 25 (N.D. Fla. March 11, 2022) (attached hereto as Exhibit A). This Court should too.

Denial of a stay is particularly warranted given federal courts' repeated conclusions that DHS has flouted its statutory obligations and the APA in seeking to degrade immigration enforcement in the U.S. both intentionally and radically—including as recently as two days ago. *See, e.g.*, *Arizona v. Biden*, No. 3:21-CV-314, 2022 WL 839672 (S.D. Ohio Mar. 22, 2022) (granting nationwide injunction against DHS Permanent Guidance); *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021) cert. granted, 2022 WL 497412 (U.S. 2022) (holding MPP Termination unlawful); *Texas v. United States*, __ F. Supp. 3d ___, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021) (granting preliminary injunction against DHS's Interim Guidance) (DHS dismissed its appeal); *Texas v. United States*, 524 F. Supp. 3d 598 (S.D. Tex. 2021) (holding that DHS 100-day moratorium was unlawful and granting preliminary injunction, which DHS did not appeal).

Moreover, federal courts have quite pointedly and correctly recognized that "DHS has repeatedly exhibited gamesmanship in its decisionmaking." *Texas*, 20 F.4th at 962. The instant motion is simply more of that gamesmanship in service of avoiding judicial review of the agency's unlawful actions through delay.

ARGUMENT

"The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both."

Landis v. N. Am. Co., 299 U.S. 248, 255 (1936).

This is particularly true when the basis for the requested stay is a grant of certiorari. "Courts of Appeals typically disfavor granting stays pending the Supreme Court's resolution of separate cases." *Childress v. DeSilva Auto. Servs., LLC*, 2020 WL 3572909, at *13 (D.N.M. July 1, 2020) (collecting cases). This is "because grants of certiorari do not themselves change the law." *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1298 (11th Cir. 2007); *see also Strubel v. Cap. One Bank (USA), N.A.*, 179 F. Supp. 3d 320, 324 (S.D.N.Y. 2016) (quoting *United States v. Brooks*, 2009 WL 3644122, at *12 (E.D.N.Y. Oct. 27, 2009)) ("a grant of certiorari does not effect new law, and has no precedential value").

There is already-binding Supreme Court and Ninth Circuit precedent on point in this case. (*See* Doc. 167 at 30–31.) And "once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and *have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority*." *Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) (emphasis added).

In any event, Defendants overstate the overlap between *Texas* and this case, and the other factors do not favor a stay.

I. Arizona's Challenge Is Not Sufficiently Similar to the Texas Challenge to Warrant a Stay

On February 18, 2022, the Supreme Court granted the federal government's petition for certiorari in *Biden v. Texas*, No. 21-954, 2022 WL 497412 (U.S. Feb. 18, 2022). The two questions presented were: (1) "Whether 8 U.S.C. 1225 requires DHS to continue implementing [the Migrant Protection Protocols (MPP)]"; and (2) "Whether the court of appeals erred by concluding that the Secretary's [October 29, 2021] decision terminating MPP had no legal effect." Pet. Writ Cert. at I, *Biden v. Texas*, No. 21-954 (Dec. 29, 2021) *available at* https://bit.ly/3utgSUi.

While the Supreme Court's decision in *Texas* may touch on certain issues in this case—particularly the scope of DHS's duty to detain arriving aliens under 8 U.S.C. § 1225—it may not. And it will certainly not address several key issues in this case.

First, Arizona challenges a different agency action than the one at issue in *Texas*.

Arizona challenges the Biden Administration's Non-Detention and Parole Policies under the APA and the Constitution.[1] (Doc. 134 ¶¶ 115–16, 121–26, 131–32, 134, 137–38, 140–43, 145, 148–49, 216–34.) In *Texas*, the plaintiffs challenged the suspension of MPP, under which DHS "returned certain undocumented aliens to Mexico for the duration of their removal proceedings." *Texas*, 20 F.4th at 944. Thus, whatever the Supreme Court says in *Texas*, it will not address the validity of the policies challenged here.

Second, insofar as the Supreme Court's interpretation of § 1225 may affect this case, it is not a foregone conclusion that the Supreme Court will even address the scope of that statute at all. Texas has already been to the Supreme Court once—when the federal government requested a stay—and the Supreme Court denied a stay solely on the ground that the termination of MPP was arbitrary and capricious under the Administrative Procedure Act (APA). *Biden v. Texas*, 142 S. Ct. 926, 927 (2021) (citing *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020)). The Supreme Court may affirm the Fifth Circuit's decision on that same ground (or some other ground) and sidestep the § 1225 issue altogether. *See Texas*, 20 F.4th at 988–93. After all, the relevant question in *Texas* is not the abstract question of what § 1225 requires but only whether the Biden Administration validly terminated the MPP program. *Cf. Boxer X v. Harris* 459 F.3d 1114, 1116 (11th Cir. 2006) (Carnes, J., concurring in denial of rehearing en banc) ("[T]he role of our court system in civil cases is not to decide how many analytical angels can dance on the head of a particular injury. Our role is to determine whether the plaintiff before the court is entitled to relief.")

Third, Defendants stretch *Texas* when they suggest that the Court will address the parole authority in 8 U.S.C. § 1182, the other principal statute at issue in Arizona's challenge.

[1] In a footnote, Defendants contend (Doc. 175 at 2 n.1) that Plaintiffs abandoned Count XIII of the Third Amended Complaint, the Take Care Clause claim. Not so. The State specifically argued: "The border is suffering a crisis that has been caused almost entirely by Defendants' abandonment of their duty to '*take care that the laws be faithfully executed,*' U.S. Const. art. II, § 3. The INA requires mandatory detention for unauthorized aliens (or their return to Mexico), and Defendants do not have the power to create a program for the broad grant of parole to unauthorized aliens. Their Parole and Non-Detention Policies thus violate clear statutory commands." Doc. 167 at 35 (emphasis added). Arizona thus both identified the laws that were being violated through Defendants' abdications of their legal duties, and argued that those abdications violated the Take Care Clause, which was specifically cited page and verse (*i.e.*, article and section). Specifically arguing a claim cannot constitute abandonment of it.

(Doc. 175 at 8; Doc. 134 ¶¶ 116, 122–124, 218–219, 232.) The federal government's own petition for certiorari, however, emphasized that the plaintiffs in *Texas* never challenged the government's parole policies. *See* Pet. Writ Cert., *supra* at 2, at 19 (quoting the plaintiffs' statement that "they were 'not challenging' DHS's 'parole policies'"). And neither that statute nor even the concept of parole appears in the questions presented.

Finally, Arizona brings several claims that the Supreme Court will not even conceivably address. For example, Arizona contends that promulgation of both the Non-Detention and Parole Policies violated the APA's notice-and-comment requirements. (Doc. 134 ¶¶ 228–230.) DHS's violations of those procedural requirements are by now rather notorious. *See*, *e.g.*, *Arizona v. Biden*, 2022 WL 839672, at *36 (holding that Plaintiffs states had established "strong likelihood the States prevail on their notice-and-comment claim" against the Permanent Guidance); *Texas v. United States*, 2021 WL 3683913, at *51–58 (holding Interim Guidance's issuance violated notice-and-comment requirements); *Texas v United States*, 524 F. Supp. 3d at 656–62 (holding same for 100-day moratorium's, which DHS did not appeal). Indeed, Justice Kagan recently observed at oral argument that "[t]he real issue to me is [DHS's] evasion of notice-and-comment." Transcript at 47-48, *Arizona v. San Francisco*, No. 20-1775 (Feb. 23, 2022) *available at* https://bit.ly/3itwfq7. Defendants do not identify any basis for believing that the Supreme Court's decision in *Biden v. Texas* will even *touch upon*—let alone resolve conclusively—Arizona's notice-and-comment claims.

Similarly, Arizona claims that the polices are arbitrary and capricious. (Doc. 134 ¶¶ 222–227.) Defendants, of course, point to the Fifth Circuit's holding in *Texas* that the MPP suspension was arbitrary and capricious. (Doc. 175 at 8–9) (citing *Texas*, 20 F.4th at 989–93). But the fact that one government policy is or is not arbitrary and capricious has little to do with whether a separate government policy is arbitrary and capricious—particularly where the decisions were independent and have entirely independent records. The fact that the Supreme Court accepted *one* DHS petition this term is no license to stay all other challenges to DHS policies where the claims will not even conceivably be resolved in that single case. This is simply yet more of DHS's "repeatedly exhibited gamesmanship," *Texas*, 20 F.4th at 962, which

this Court should reject for the same reasons that the Northern District of Florida already has.

II. The Balance of Harms Weighs Against a Stay of Proceedings.

The balance of harms also weighs in favor of denying Defendants' motion. Arizona faces ongoing financial and other harm as a result of the Biden Administration's unlawful policies. (Doc. 134 ¶¶ 144–149.) Defendants claim that a stay should be granted because, they assert, Arizona "will not be seriously prejudiced" and will not suffer "undue prejudice" from a stay. (Doc. 175 at 2:7 and 10:23.) Defendants' sly shoehorning of inapposite modifiers "serious" or "undue" that do not exist in the governing legal standard merits firm rejection from this Court. Rather, the controlling Ninth Circuit standard provides that a stay is inappropriate "if there is even a *fair possibility* that the stay will work damage to someone else." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting *Landis*, 299 U.S. at 255) (cleaned up) (emphasis added). And even Defendants concede the possibility that Arizona may suffer a "little ... prejudice." (Doc. 175 at 10:17.)

In any event, the potential prejudice to Arizona easily satisfies DHS's conjured-from-pure-ether "serious" and "undue" prejudice hurdles. (Doc. 134 ¶¶ 144–149; Doc. 167 at 13–15.) Indeed, if DHS's policies are *unlawful* as the State contends, how could any resulting prejudice not be "undue"?

Furthermore, contrary to Defendants' assertion, the *Texas* injunction does not address Arizona's claims in this case. (Doc. 175 at 10.) The *Texas* injunction only requires the federal government to continue to implement the MPP policy in good faith and does not enjoin enforcement of the two policies Arizona challenges. *See Texas v. Biden*, No. 2:21-cv-067, 2021 WL 3603341, at *27–28 (N.D. Tex. Aug. 13, 2021). In fact, Defendants released over 51,000 arriving aliens at the border in December 2021. (Doc. 167 at 1.) It is thus remarkable that Defendants would suggest that the *Texas* injunction even remotely remedies Arizona's harm.

Further, Arizona has already suffered delays at Defendants' hands in this case. Arizona first challenged Defendants' policy of issuing "notices to report" on October 22, 2021 (Doc. 14), and Defendants soon thereafter issued their memo about the Parole + ATD policy on November 2, 2021. (Doc. 167 at 3–6.) Defendants, however, did not reveal to Arizona this

apparent attempt to moot part of this case until 73 days later, when they filed their motion to dismiss on January 3, 2022. (Doc. 146 at 4.)

Moreover, Arizona faces the continued threat that Defendants will once again change policies in an attempt to moot this case and prevent judicial review of their actions. Several times since January 2021, the federal government has attempted to moot States' immigration challenges by issuing substantially similar policies to replace the policy being challenged, including in this case. *See, e.g.*, *Arizona v. DHS*, No. 21-16118, Dkt. 46, 49, and 50 (9th Cir. Jan. 21, 2022); *Arizona v. DHS*, 2021 WL 2787930, at *1–4 (D. Ariz. June 30, 2021); *Texas*, 20 F.4th at 941–942; *Texas v. United States*, 2021 WL 3683913; *Florida v. Nelson*, No. 8:21-cv-2524, 2021 WL 6108948, at *4 (M.D. Fla. Dec. 22, 2021); *Florida v. Becerra*, No. 8:21-cv-839 (M.D. Fla.); *Florida v. DHS*, No. 8:21-cv-541 (M.D. Fla.).

Defendants, on the other hand, did not—and indeed cannot—identify any harm they will suffer if the case proceeds. No discovery has been served in this case. Defendants have already filed a motion to dismiss and face no impending deadlines. The case is not even set for trial. As such, it is not clear from what "burden of litigation" Defendants need to be "spar[ed]." (Doc. 175 at 9). *See Landis*, 299 U.S. at 255 ("[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else."). In truth, the "burden" that DHS seeks to spare itself of is judicial review of its unlawful decisions. But that "burden" does not constitute any cognizable prejudice.

Indeed, Defendants made nearly the exact same arguments in favor of a stay in similar litigation proceeding in Florida. Those arguments were soundly rejected, with the court "find[ing] that this case has languished long enough and that whatever would be gained in this case from having the Supreme Court's views on the overlapping issues raised in *Texas v. Biden*, No. 21-954, is outweighed by the harm that Plaintiff (and the nation) will continue to suffer if this case continues to be delayed and illegal immigrants are allowed to continue flooding into the country under the challenged 'Parole + ATD' policy that, according to the amended complaint, violates the letter and spirit of the immigration laws." Exhibit A at 1.

CONCLUSION

For the foregoing reasons, the Court should deny the government's request to stay this case.

RESPECTFULLY SUBMITTED this 24th day of March, 2022.

MARK BRNOVICH
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By: */s/ James K. Rogers*
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants who have appeared are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers
Attorney for Plaintiffs Mark Brnovich, in his official capacity as Attorney General of Arizona; and the State of Arizona

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

STATE OF FLORIDA,

Plaintiff,

v. **Case No. 3:21cv1066-TKW-EMT**

UNITED STATES OF AMERICA, et al.,

Defendants.
_____/

ORDER DENYING STAY

This case is before the Court based on Defendants' motion to stay (Doc. 20) and Plaintiff's response in opposition (Doc. 24). Upon due consideration of these filings and the case file, the Court finds that this case has languished long enough and that whatever would be gained in this case from having the Supreme Court's views on the overlapping issues raised in *Texas v. Biden*, No. 21-954, is outweighed by the harm that Plaintiff (and the nation) will continue to suffer if this case continues to be delayed and illegal immigrants are allowed to continue flooding into the country under the challenged "Parole + ATD" policy that, according to the amended complaint, violates the letter and spirit of the immigration laws.

Accordingly, it is **ORDERED** that Defendants' motion to stay is **DENIED**.

DONE and ORDERED this 11th day of March, 2022.

T. Kent Wetherell, II

T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE