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June 8, 2022

Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: 28(j) notice in *State of Arizona, et al. v. Biden, et al.*, No. 22-3272

Dear Ms. Hunt:

This letter is to inform the Court of a development in a related case.

DHS, in its application for a stay pending appeal, attached the declaration of Daniel Bible. *See* Addendum to Stay App, A122. In paragraph 20 of his declaration, he reports that bed space is limited—and that the agency must therefore be selective in which removals it pursues—because of an injunction issued in *Fraihat v. ICE*, 445 F.Supp.3d 709 (C.D. Cal. 2020). *See* Addendum to Stay App., A129. He also reports that the injunction “remains in effect.” *Id.* The Ninth Circuit reversed the injunction in October of 2021. *See Fraihat v. ICE*, 16 F.4th 613 (9th Cir. 2021). But it has not yet issued a mandate. That is because the plaintiffs-appellees have repeatedly moved for extensions of time in which to file a petition for *en banc* review. DHS did not oppose those requests. And on May 25, 2022, the Ninth Circuit granted another extension. *See Fraihat*, Order, No. 20-55634 (May 25, 2022). DHS again declined to oppose it. *Id.*

DHS’s failure to make even modest efforts to free itself from an injunction that was reversed months ago is consistent with its behavior generally, which indicates a disinterest in using the agency’s available resources to fulfill its duties. For example, as the States explained already, “ICE has canceled contracts with

detention centers and asked Congress to decrease its funding for detention resources.” Stay Opp., Doc.18, at 18. DHS’s attempt to justify its non-enforcement with reference to a bed-space shortage thus “calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan.” *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring). DHS should not be allowed to justify its policy choices by appealing to problems of its own making.

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

/s/ Benjamin M. Flowers

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