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**pro hac vice granted*

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

State of Arizona; State of Montana; and Mark Brnovich, in his official capacity as Attorney General of Arizona,

Plaintiffs,

v.

United States Department of Homeland Security; United States of America; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; Troy Miller, in his official capacity as Acting Commissioner of United States Customs and Border Protection; Tae Johnson, in his official capacity as Acting Director of United States Immigration and Customs Enforcement; and Tracy Renaud, in her official capacity as Acting Director of U.S. Citizenship and Immigration Services,

Defendants.

No. 2:21-cv-00186-SRB

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

The Defendants have failed in their attempt at distinguishing *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021), relying on flawed reasoning and irrelevant cases. The Supreme Court has definitively established that "shall" in 8 U.S.C. § 1231(a)(1)(A) , means "must." Plaintiffs' Motion for Reconsideration should therefore be granted.[1]

ARGUMENT

I. *Guzman Chavez* Holds that "Shall" Means "Must"

Defendants' argument boils down to the contention that the Supreme Court did not really mean what it said and that, in spite of clear language in *Guzman Chavez* to the contrary, "shall" actually means "may" in § 1231(a)(1)(A). Their argument relies on a misreading of *Guzman Chavez* that incorrectly claims that the Supreme Court's decision had "nothing to do" with whether the language of § 1231(a)(1)(A) is mandatory. (Dkt. 107, 4.) Whether the 90-day removal period in § 1231(a)(1)(A) is mandatory or discretionary, however, was squarely before the court. The respondents in *Guzman Chavez* specifically argued to the Supreme Court that "shall" in § 1231 means "must," and that therefore § 1226 had to be the controlling statute (because, they claimed, 90 days would not be long enough to complete the relevant proceedings):

> The detention provision of Section 1231 applies "[d]uring the removal period." 8 U.S.C. § 1231(a)(2). Of critical importance here, Congress expressly defined the "removal period" as the "period of 90 days" in which the DHS Secretary "*shall* remove the alien from the United States." 8 U.S.C. § 1231(a)(1)(A) (emphasis added).

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[1] Contrary to Defendants' assertion, an indicative ruling under Rule 62.1 is not required if the Court grants Plaintiffs' Motion. "[A]n appeal from an interlocutory order does not stay the proceedings, as it is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982); *see also Song v. MTC Fin., Inc.*, 812 F. App'x 609, 610 (9th Cir. 2020) ("The district court had jurisdiction to dismiss the . . . case while the interlocutory appeal was pending.").

In this case, Plaintiffs' interlocutory appeal relates to the denial of the Preliminary Injunction Motion. The Court granted leave to amend and thus still has jurisdiction over any amended complaint that is filed. The Court could grant reconsideration at least as far as it relates to the parameters that will govern an amended complaint. If the Court concludes that an indicative ruling is required, however, it should provide such a ruling under Rule 62.1, and Plaintiffs further ask that the Court stay the deadline for amending the complaint pending the outcome of the appeal at the Ninth Circuit.

> The word "shall" "'indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.'" *National Ass'n of Home Builders v. Defenders Of Wildlife*, 551 U.S. 644, 661 (2007). And the directive imposed by "shall" is especially pronounced when, as here, "a statute distinguishes between 'may' and 'shall;'" in these circumstances, "it is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016). Indeed, Section 1231 elsewhere repeatedly uses the permissive term "may," underscoring the obligatory nature of the word "shall" in the statutory context. See, e.g., 8 U.S.C. § 1231(a)(1)(C) ("the alien *may* remain in detention"); id. § 1231(a)(6) (a noncitizen "*may* be detained beyond the removal period"); id. § 1231(b)(2)(C) ("The Attorney General *may* disregard a designation.").

Brief for Respondent at 18, *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021) (No. 19-897), 2020 WL 6585851, at *18.

The Supreme Court considered and rejected the *Guzman Chavez* respondents' argument that the mandatory 90-day removal period meant that § 1226 was the governing statute, but the Court did *not* reject their argument that "shall" means "must." Instead, the Supreme Court rejected the argument on another basis: because § 1231 specifically provides for exceptions to the mandatory 90-day removal period. *Guzman Chavez*, 141 S. Ct. at 2291 (2021). The Supreme Court's discussion of the exceptions to § 1231 was thus directly relevant to the meaning of "shall" in § 1231(a)(1)(A).

The *Guzman Chavez* opinion shows that the Supreme Court understands the difference between "must"[2] and "may"[3] in this statutory context. It strains credulity to

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[2] "Once an alien is ordered removed, DHS *must* physically remove him from the United States within a 90-day 'removal period.'" Guzman Chavez, 141 S. Ct. at 2281 (emphasis added); "[T]he most natural reading of the 'except as otherwise provided' clause is that DHS *must* remove an alien within 90 days *unless* another subsection of § 1231 specifically contemplates that the removal period can exceed 90 days." *Id.* at 2288 (emphasis added).

[3] "The INA further provides that DHS *may* arrest and detain the alien 'pending a decision on whether the alien is to be removed from the United States.' § 1226(a). . . . Either the alien or DHS *may* appeal the immigration judge's decision to the Board of Immigration Appeals (BIA). . . . Under § 1231, the removal period *may* be extended in at least three circumstances, such that an alien remains detained after 90 days have passed. First, the removal period *may* be extended if the alien fails to make a timely application for travel documents or acts to prevent his removal. § 1231(a)(1)(C). Second, DHS *may* stay the immediate removal of certain aliens if it decides that such removal is not practicable or proper, or if the alien is needed to testify in a pending prosecution. § 1231(c)(2)(A). And finally, the statute provides that an alien *may* be detained beyond the removal period . . . ." *Id.* at 2280–81.

argue that the Supreme Court did not really mean to decide that "shall" in § 1231(a)(1)(A) means "must," especially when that issue was specifically raised in the case. Indeed, if "shall" in § 1231(a)(1)(A) really meant "may," it would have been easier for the Court to dispose of the respondents' argument on that ground instead. It should be dispositive for the present issue that the Court did not, and instead chose to use the word "must" to explain the meaning of "shall" in § 1231(a)(1)(A).

II. Defendants Do Not Have Discretion to Ignore the 90-Day Removal Period of § 1231(a)(1)(A)

"[A]lthough prosecutorial discretion is broad, it is not 'unfettered.' " *Texas v. United States*, 787 F.3d 733, 757 (5th Cir. 2015) (alteration in original) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). And whatever discretion the Secretary of Homeland Security may possess, it cannot extend to an area where Congress has specifically limited that discretion. *See, e.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754, 759 (2021) (noting that the discretion to cancel removal orders is "limited by Congress's command" in the Immigration and Nationality Act, 8 U.S.C. § 1229b(e)(1), that such discretion may not be exercised for a total of more than 4,000 aliens in any fiscal year). "'[P]rosecutorial discretion only encompasses the Executive Branch's power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions. It does not include the power to disregard statutory obligations that apply to the Executive Branch.' In other words, the Executive Branch may not re-write the statute." *WildEarth Guardians v. United States Dep't of Just.*, 283 F. Supp. 3d 783, 790 (D. Ariz. 2017), *vacated and remanded on other grounds*, 752 F. App'x 421 (9th Cir. 2018) (citations omitted, alterations in original).

None of the cases Defendants cite for the general proposition about the Secretary's discretion in immigration matters actually interpreted the meaning of—or even mentioned—8 U.S.C. § 1231. Indeed, the Ninth Circuit has limited the language in *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) about the Executive Branch's discretion to defer action in immigration as applying only to "*individual* 'no deferred action' decisions" and *not* to "programmatic shift[s]" in decisions about

immigration enforcement, such as those the Defendants are trying to impose in the Interim Guidance. *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 503 (9th Cir. 2018), *rev'd in part on other grounds, vacated in part sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). Where, as here, Defendants purport to make new rules effecting a "programmatic shift" in decisions about immigration enforcement, they cannot hide behind their power to exercise discretion in individual immigration cases.

III. The Cases Cited by Defendants Support a "Must" Interpretation

The cases that Defendants cite to argue that "shall" does not mean "must" do not actually support this proposition. For example, Defendants quote from *Gutierrez de Martinez v. Lamagno* in support of this proposition, but they fail to quote the beginning of the sentence where the Supreme Court said that, in statutory construction, "'shall' generally means 'must.'" 515 U.S. 417, 434 n. 9 (1995).

Furthermore, *Gutierrez de Martinez* involved an ambiguous statute "susceptible to divergent interpretation" and which "most interpreters have found far from clear." *Id.* at 434. "[B]oth sides" in the case had "tendered plausible constructions" of the statute's meaning, and the ambiguity was so great that the U.S. government had "changed its position" on the statute's meaning during the course of the dispute. *Id.* That case is hardly analogous to this one. It cannot plausibly be argued that the meaning of § 1231(a)(1)(A) is ambiguous. Indeed, the Supreme Court held in *Guzman Chavez* that the meaning of § 1231 was so clear that the government was not even entitled to *Chevron* deference of its interpretation of the statute. 141 S. Ct. at 2291 n. 9.

Additionally, the small number of examples in *Gutierrez de Martinez* that the Supreme Court provided for when the word "shall" might actually mean "may" all involved passive voice constructions that describe the effect of some condition, and not constructions that command action from some party, as in § 1231(a)(1)(A): "Fed.Rule Civ.Proc. 16(e) ("The order following a final pretrial conference *shall* be modified only to prevent manifest injustice.")"; "Fed.Rule Crim.Proc. 11(b) (A *nolo contendere* plea

"*shall* be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."; "Upon certification by the Attorney General . . . any civil action or proceeding . . . *shall* be deemed an action against the United States . . . , and the United States *shall* be substituted as the party defendant. [28 U.S.C.] § 2679" *Gutierrez de Martinez*, 515 U.S. at 432 and 434 n. 9 (alterations in original, except insertion in brackets).

Nor does *Town of Castle Rock v. Gonzales* command a different result. 545 U.S. 748 (2005). *Gonzalez* was a case about whether the Constitution requires local police to prevent harm to crime victims (specifically, whether a crime victim had a justiciable constitutionally protected property interest when police failed to enforce mandatory "shall" language in a restraining order). It was not a case about whether the Administrative Procedure Act allows a federal agency to engage in rulemaking that ignores and directly contradicts mandatory statutory language. The difference between denying an individual constitutional right to sue local police for failing to enforce mandatory language in court orders is quite different—some might say totally distinguishable—from determining whether a federal agency can establish programmatic rules that directly contradict mandatory language in a statute.

Similarly, the other cases Defendants cite regarding enforcement discretion were all challenges to actions in *individual* cases. They did not involve rulemaking about programmatic shifts in enforcement, and they did not involve rulemaking that directly contradicts the requirements of the underlying statute. Moreover, in two of the three cases, the government action being challenged was not an exercise of discretion not to enforce a law at all, but enforcement action that took longer than the statutory deadlines to accomplish. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62–63 (1993) (individual convicted of drug offenses challenging civil forfeiture where "the Government filed within the statute of limitations, but without complying with certain other statutory timing directives"); *Brock v. Pierce Cty.*, 476 U.S. 253, 265 (1986) (local county challenging Department of Labor determination that county had to repay misused

Comprehensive Employment and Training Act funds, but where the determination took longer than the statutory mandate of 120 days); *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001) (environmental groups challenging EPA failure to enforce Clean Water Act against a particular wastewater treatment plant and holding that "the presumption that the EPA has discretion to decide when to enforce is only a presumption and can be overcome by indications that Congress intended otherwise"). Neither the instant record nor Defendants have provided any indication that Defendants *ever* intend to reverse the Interim Guidance's presumption against deportations of aliens with final orders of removal outside of the purported "priority" categories.

CONCLUSION

"'[S]hall' generally means 'must,'" *Gutierrez de Martinez*, 515 U.S. at 434 n. 9. In *Guzman Chavez*, the Supreme Court confirmed that "shall" specifically means "must" in § 1231(a)(1)(A). Defendants lack discretion to make programmatic changes to immigration enforcement that contradict the mandatory commands of the underlying statute. Accordingly, the Court should reconsider its finding that the Interim Guidance is not subject to judicial review and should deny Defendants' Motion to Dismiss (Dkt. 59).

RESPECTFULLY SUBMITTED this 23rd day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I electronically transmitted the attached document to the Clerk's office using CM/ECF System for filing. Notice of this filing is sent by email to all parties by operation of the Court's electronic filing system.

/s/ Brunn W. Roysden III