No. 21-16118

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,

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

PLAINTIFFS' REPLY IN SUPPORT OF RENEWED EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Federal Defendants' evasiveness regarding the cases interpreting Section 1231(a)(1)(A) it is astonishing. Apparently, none of: (1) the Supreme Court's decision in in *Johnson v. Guzman*, 141 S. Ct. 2271 (2021), directly addressing the operation of that provisions and holding its "shall" means "must," (2) this Court's trio of decisions in *Lema*, *Xi*, and *Coyt*[1] all similarly holding that "shall" means "must," or (3) any of the decisions of the Second, Fifth, Sixth, Tenth, and Eleventh Circuits cited by the States holding or explaining as much, (*see* Doc. 23 at 4) actually means what they say. And apparently none has a holding binding on them, even though they or the United States were parties in virtually all of them.

Instead, in the Defendants' view (at 7), *all* of those cases are "inapposite because they did not involve challenges to enforcement-discretion standards like those here." But "shall" either means "must" or it does not. And if it does—as the Supreme Court, this Court, and five other circuits have held—then they are *dispositive* here. Moreover, even if this Court's reasoning in *Lema*, *Xi*, and *Coyt* were mere dicta, they would still be binding on subsequent panels, *see*, *e.g.*, *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc)—a proposition that Defendants have never contested. And Defendants' "inapposite" characterization is merely "dicta" by another name.

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[1] *Xi v. INS*, 298 F.3d 832, 840 n.6 (9th Cir. 2002), *Lema v. INS*, 341 F.3d 853, 855 (9th Cir. 2003); and *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) (Doc. 23 at 4-5).

Nor can a decision be "committed to agency discretion" if the agency has no such discretion. *See*, *e.g.*, *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991) (where "enforcement provisions leave no discretion to determine which cases to pursue, the [agency's] enforcement decisions are not committed to agency discretion by law."). Defendants' extensive reliance on enforcement discretion is thus defeated completely by the fact that such discretion *does not exist* under Section 1231(a)(1)(A).

Also quite telling is something that Defendants *never* cite: a *single* precedent interpreting Section 1231(a)(1)(A) in the manner they do *except* for the decision below. Moreover, as explained previously and in greater detail in the States' Opening Brief, Defendants' interpretation also remarkably violates not just the text's plain meaning and *all* precedential authority construing it, but also (1) the legislative history and context, (2) canons of *expressio unius* and avoiding surplus age, (3) the legislative history and context, and (4) the Federal Government's own representations to the Tenth Circuit. *See* Opening Br.31-67.

The Interim Guidance's violation of *virtually all* applicable authority is sadly part of a pattern of lawless behavior by this Administration. From (1) pursuing an eviction moratorium extension the President *admitted* was virtually certain to be struck down by the Supreme Court as unlawful (as it was) to (2) first demonstrating their understanding that the *Texas I* TRO required a return to "normal removal operations" *by actually doing so*, only to revert back a few days later by repurposing a non-enjoined section to replicate the functions of the enjoined section (all without informing the district judge of the

change), (3) the Interim Guidance now continues a pattern of escalating disrespect for the rule of law. Such disregard for legal requirements merits swift and decisive correction by federal courts. And an injunction is further warranted by the escalating crisis at the border (which even Defendants acknowledge), which causes certain harm to the States that grows by the day.

ARGUMENT

I. THE INTERIM GUIDANCE IS UNLAWFUL

As explained previously, above, and in greater detail in the States' Opening Brief, the Interim Guidance plainly violates Section 1231(a)(1)(A)—indeed so completely that it impressively runs afoul of a Supreme Court decision, no less than three decisions of this Court, the precedents of *five* other circuits, and an on-point decision of the Southern District of Texas considering its application to the policy challenged here. *Supra* at 1; Doc. 23 at 4. The Interim Guidance's nearly unprecedented feat of violating so much precedent simultaneously is as remarkable as it is disturbing.

Defendants appear to have two responses. *First*, they hand-waive off all such decisions as merely "inapposite." But whether Section 1231(a)(1)(A) imposes a mandatory duty was directly at issue in most of the cases. *See Guzman Chavez*, 141 S. Ct. at 2291 (considering respondents' argument that Section 1231(a)(1)(A)'s mandatory removal period meant that they were being detained under 8 U.S.C. §1226 and were thus entitled to bond hearings); *Coyt*, 593 F.3d at 907 (explaining need to "harmonize [INA] provisions simultaneously affording the petitioner a ninety day right to file a

motion to reopen [under 8 U.S.C. §1229a(c)(7)] and *requiring* the alien's removal within ninety days" under §1231(a)(1)(A) (emphasis added)).

Second, Defendants advance an avalanche of dubious justiciability arguments—which courts have roundly rejected, including in the *Texas II* decision to which Defendants offer only conclusory responses. This Court should reject them too.

II. THE STATES HAVE STANDING, AND THE INTERIM GUIDANCE IS FINAL AGENCY ACTION

A. The States Have Standing And Fall Within the Zone Of Interests

The district court correctly found that the States have standing. ADD-10-15. This Court should adopt the district court's thorough, and correct, standing analysis.

DHS argues the States lack standing because they do not have an "interest in the prosecution or nonprosecution of another." (Doc 27 at 4.) Similarly, DHS also argues that the States do not fall within the "zone of interests" because the States' claims are barred by 8 U.S.C. § 1231(h), which says that § 1231 does not "create any substantive or procedural right ... legally enforceable by any party against the United States."

Both arguments fail. This Court has held that parties have standing to challenge "programmatic shift[s]" in immigration enforcement even if they could not challenge "individual ... decisions." *Regents of the Univ. of California v. U.S. DHS*, 908 F.3d 476, 503 (9th Cir. 2018), *rev'd in part on other grounds,* 140 S. Ct. 1891 (2020).

Furthermore, Defendants' recourse to legal dictionaries to construe the meaning of § 1231(h) is futile, as Congress already explained what it means. Congress adopted

§1231(h) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The IIRIRA House Conference Report explains that § 1231(h) "is intended, among other things, to prohibit the litigation of claims *by aliens who have been ordered removed* from the U.S. that they be removed at a particular time or to a particular place." H.R. Conf. Rep. 104-828 at 219 (emphasis added). If Congress had intended §1231(h) as a limitation on challenges to programmatic shifts in enforcement, it would have explicitly said so. Section 1231(h) has no applicability here. *See Texas v. United States*, No. 6:21-CV-3, 2021 WL 2096669, at *26–28 (S.D. Tex. Feb. 23, 2021) (rejecting Defendants' argument); *See also Texas v. United States*, No. 6:21-CV-16, 2021 WL 3683913, at *21 (S.D. Tex. Aug. 19, 2021) (same); *Texas v. United States*, 515 F. Supp. 3d 627, 634 (S.D. Tex. 2021) (same).

The rest of DHS's arguments on standing, including about financial injury, as well as its other arguments on the zone of interest, merely re-hash its prior briefs, to which the States have already replied. Doc. 10-1 at 18-20; Doc. 16-2 at 5-6, and 10-12. And while Defendants appear to challenge (at 4) the States' standing as a factual matter as well, they do not even attempt to argue that the district court's factual findings as to standing are clearly erroneous. They are not, and Defendants cannot set them aside based on their own mere disagreement with them.

B. The Interim Guidance Is A Final Agency Action Promulgated Contrary To The Requirements Of The APA

As this Court has held, "In determining whether an agency's action is final, we

look to whether the action [1] amounts to a definitive statement of the agency's position or [2] has a direct and immediate effect on the day-to-day operations of the subject party, or [3] if immediate compliance with the terms is expected." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv. ("ONDA"),* 465 F.3d 977, 982 (9th Cir. 2006) (cleaned up). The test is notably stated in the disjunctive, so satisfying any of those three criteria can suffice. *Id.* The Interim Guidance actually satisfies all three.

As the district court observed, the Interim Guidance drastically affects Defendants' day-to-day operations: in the period after the guidance was issued, of 325 individuals who would have been deported previously, only 7 were—a 98% drop in "other priority" (*i.e.*, non-priority) removals. ADD-45-46. Overall arrests and removals are also down considerably. Doc. 10-1 at 7-9. Similarly, there is every indication that the Interim Guidance was the "definitive statement of the agency's position," and "*[i]mmediate compliance* with the terms [wa]s expected," *ONDA*, 465 F.3d at 982 (emphasis added). Indeed, Acting Director Johnson's midnight email makes plain his expectation of *immediate* compliance: "*Effective immediately* … *only* those who meet the [Section B] priorities will be removed." ADD-137-38 (emphasis added).

Defendants' principal response (at 10) is to quibble with the meaning of "subject party." But agency actions are either final or not—they are not final for some parties and not others. And the Interim Guidance plainly has "direct and immediate" legal consequences for the "other priority" aliens governed by its terms: of those that previously that would have been deported, roughly 98% are now not being removed.

Nor do Defendants explain how that massive drop in enforcement—being almost indistinguishable from complete non-enforcement—is not a "direct and immediate legal consequence" to the 98% now escaping removals that Congress mandated through Defendants' abdications.

Additionally, as discussed above, the Interim Guidance guidance also affects the obligations of the States because §1231(a)(1)(A) and its prior corollary statutes, 8 U.S.C. § 1252(i) and 8 U.S.C. § 1252(c), were intended to *remove* burdens on state and local governments, not increase them. *See*, *e.g.*, *Campos v. INS*, 62 F.3d 311, 314 (9th Cir. 1995); *Prieto v. Gluch*, 913 F.2d 1159, 1165 (6th Cir. 1990); 8 U.S.C. § 1231(i). Congress has already recognized the direct legal consequences of federal under-enforcement on the States. Thus, while Defendants do not believe that their refusal to enforce federal immigration laws does not have legal consequences for the States, Congress begs to differ. Congress's findings are binding here—and are also plainly correct for all the reasons that the States have standing.[2]

III. THE ADMINISTRATION'S SERIAL VIOLATIONS OF THE RULE OF LAW UNDERSCORE THE NEED FOR RELIEF HERE

Defendants offer only a half-hearted, single-footnote defense (at 14 n.1) of President Biden intentionally engaging in conduct that he *admitted* was almost assuredly

[2] For the same reasons that the district court found that the States have standing and the States have explained in prior briefs, they have also established that they will suffer irreparable harm absent an injunction pending appeal here.

illegal and likely to be struck down by courts—but not immediately, such it was likely to be substantially effective, illegality notwithstanding. While Defendants suggest that the policy was a "valid exercise" of CDC's authority, the Supreme Court had little trouble in validating President Biden's initial admission of its patent illegality: a day after Defendants' filing, the Supreme Court reinstated an injunction against the moratorium extension. *See Alabama Ass'n of Realtors v. HHS*, __ U.S. __, 2021 WL 3783142 (Aug. 26, 2021). In doing so, the Court explained that the Plaintiffs were—as President Biden correctly predicted—"virtually certain to succeed on the merits." *Id.* at *1. Indeed, it was "difficult to imagine them losing." *Id.* at *3.

Defendants suggest (at 14 n.1) that this intentional violation of legal requirements "has no bearing here." Not so. Defendants' intentional exploitation of federal courts' delay in reacting to the Administration's unlawful conduct has obvious importance here: underscoring the need for federal courts to act quickly and decisively to eliminate the opportunity to profit from the Administration intentionally violating the law.

That is starkly presented here: as discussed above, the Interim Guidance is contrary to *virtually all* precedent construing Section 1231(a)(1)(A). It is even more clearly illegal that the extension of the eviction moratorium. And while President Biden may not have admitted its illegality in public, no fair reading of the precedents of the Supreme Court, this Court (thrice), and five other circuits could have led DHS to believe that its conduct was lawful.

Similarly, DHS's defense (at 15-16) of its circumvention of the *Texas I* TRO is

unavailing, and belied by DHS's own conduct. DHS demonstrated its own understanding that—Section B notwithstanding—the *Texas* TRO required return to "normal removal operations" by doing just that. Briefly. ADD-125. There is no indication in the administrative record that DHS's understanding of that TRO changed in the subsequent five days, but ample indication that such good-faith compliance was deeply unpopular with outside pressure groups. ADD-135-136.

Defendants' response simply never explains why they initially thought that the *Texas* TRO required one thing, but meant something very different after it provoked a special-interest outrage. Nor do they deny that they never informed the *Texas* court of their late-night change in policies, under which they violated their own initial understanding of what the *Texas* TRO required, and easily could have violated the *Texas* court's understanding too. If their midnight change of heart was as above board as they now contend, they would have had no reason to hide it.

IV. INJUNCTIVE RELIEF IS WARRANTED

Finally, Defendants protest that an injunction would harm border control efforts because, in their view, the Interim Guidance is working well. They thus contend (at 17) that the Interim Guidance has "enabled ICE "to prioritize border security" by "focusing its resources on targeting noncitizens who recently unlawfully entered the United States." In other words: "Trust us: it's working."

But the alarming and unprecedented increase in border encounters belies Defendants' instant rose-colored analysis, which here flirts with the surreal. Indeed, one

look no further than the recent admissions of Secretary Mayorkas himself, who recently confessed (on a hot mic) that "if our borders are the first line of defense, *we're going to lose and this is unsustainable*."[3] Defendants' contrary contentions to this Court now thus not only blink reality but their own private assessments of the situation. Indeed, if Defendants consider the Interim Guidance to be a success story vis-à-vis border control given the last seven months, one shudders to think what a failure would look like.

Nor would the relief that the States are seeking—a return to pre-Interim Guidance normal removal operations—be difficult for Defendants to implement. They are manifestly capable of performing such actions since, as recently as January 19, they were doing just that. What is lacking here is not resources, but political will to carry out Congress's unequivocal commands. Thankfully an injunction coupled with the threat of contempt can supply the necessary motivation that unambiguous statutory obligations alone sadly have failed to provide.

CONCLUSION

The border is in crisis. This Administration is increasingly and alarmingly lawless. And the States continue to suffer escalating irreparable harm as the border slips further and further away from the Administration's control. This Court should grant the States' motion for an injunction pending appeal.

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[3] Edmund DeMarche et al., "Mayorkas says border crisis 'unsustainable' and 'we're going to lose' in leaked audio," *Fox News* (August 13, 2021), https://www.foxnews.com/politics/mayorkas-leaked-audio-border (emphasis added).

Respectfully submitted,
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Dated: September 1, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,556 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Drew C. Ensign
Drew C. Ensign

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 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
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