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

PLAINTIFFS' RESPONSE TO DEFENDANTS' REQUEST FOR AN ABEYANCE AND STAY OF BRIEFING AND AFFIRMATIVE REQUEST FOR RELIEF (LEAVE TO FILE A SURREUPLY)

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INTRODUCTION

Federal Defendants seek an abeyance and stay of briefing so that they can seek dismissal of this appeal as moot once their Permanent Guidance[1] becomes effective on November 29, 2021. Two problems with that though: *First*, the Permanent Guidance will not moot most of this case. In particular, Defendants plan to continue to violate 8 U.S.C. §1231(a)(1)(A), which provides in relevant part that, for aliens with final orders of removal, Federal Defendants "*shall* remove the alien … within a period of 90 days." *Id.* (emphasis added). Defendants' Interim Guidance violated that mandate by reading it to be completely discretionary. *See generally* Opening Br.32-55. The Permanent Guidance carries on this legal violation by continuing to treat that statutory mandate as completely optional and aspirational (at best).

This Court can therefore award "effectual relief" by enjoining the statutory violation that Defendants are currently engaged in, and intend to continue engaging in after November 29. That precludes mootness, as a "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (cleaned up).

Moreover, the States' notice-and-comment claim is capable of repetition yet evading review, since it involves a short-lived program that inherently evades review and Defendants have once again—now for the third time—violated the APA by issuing

[1] *See* DHS, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf

substantive standards to cripple immigration enforcement without complying with notice-and-comment requirements.

Second, Defendants have all the facts they need to file a suggestion of impending mootness *now*, and the abeyance/stay they seek is thus purely gratuitous delay. This is not a case where the details of the future program are not yet known. Defendants possess all the information they need to file a motion to dismiss for impending mootness now and do not identify *any* reason why they require a delay to draft and file such a brief. And by the time that such a motion is fully briefed and ready for decision before a panel, November 29 will likely have passed. There is thus no basis for Defendants' proposed delay.

ARGUMENT

I. THE BULK OF THIS APPEAL WILL NOT BE MOOTED BY THE PERMANENT GUIDANCE BECOMING EFFECTIVE

The essential premise of Defendants' motion (at 3) is that "this case will become moot" when the Permanent Guidance becomes effective, because "the new guidance will supersede the agency actions challenged in this appeal." That premise is wrong.

A. Plaintiffs' Section 1231(a)(1)(A) Statutory Claim Will Not Be Mooted After The Permanent Guidance Takes Effect

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).

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 prohibiting violations of Section 1231(a)(1)(A) would provide effective relief.

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).

The States attempted to confirm this interpretation with DHS's counsel. In an October 4 email before Defendants' filing, the States explained their position that this

appeal would not be moot because the Permanent Guidance appears to continue to treat Section 1231(a)(1)(A) as merely discretionary and stated that they "therefore expressly request that in your filing you make clear whether the Secretary's position on whether Section 1231(a)(1)(A) is discretionary has changed in the Permanent Guidance and, if not, why the case should be held in abeyance given the absence of mootness."

Despite this express request, Defendants refused to address this issue.

B. 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." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). 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. 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. 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. 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, just today DHS released a further diminished-enforcement policy with an announced duration of 60 days, again without opportunity for notice and comment.[2]

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

For all of these reasons, the States' notice-and-comment claim will not be moot when the Permanent Guidance becomes effective. And as the States specifically told DHS before its filing: "DHS also issued the Permanent Guidance without notice and comment, as it did with the 100-Day Moratorium. We therefore believe that our notice-and-comment claim falls easily [into] the 'capable of repetition, yet evading review' [exception.] Indeed, the violation is not only capable of repetition, DHS has now repeated it twice."

But despite having complete awareness of the States' position as to the capable-of-repetition-yet-evading-review exception, DHS tellingly offered no response.[3]

II. PLAINTIFFS HAVE ALL AVAILABLE INFORMATION THEY REQUIRE TO FILE A SUGGESTION OF MOOTNESS NOW AND THUS DO NOT REQUIRE AN ABEYANCE OR STAY

Although Defendants seek an abeyance so they can presumably file a suggestion of mootness/motion to dismiss on mootness grounds once the Permanent Guidance becomes effective, there is no reason why Defendants cannot file such a motion *now*.

DHS has issued the Permanent Guidance in its final form and no changes are anticipated. This is not an Interim-Final Rule where an agency is taking comment on a rule that it put into effect. DHS neither intends to take comments nor amend the Permanent Guidance based on the comments it is not taking.

[3] The States are currently evaluating how the Permanent Guidance affects their substantive APA challenge to the Interim Guidance. Because their statutory and procedural challenges are plainly not moot, at least most (and perhaps all) of the States' claims on appeal are not moot.

In this posture, Defendants have all the information and evidence they need to file their motion *now*. While this appeal would not be moot until November 29 if Defendants' arguments were correct (and will not be moot at all if the States' arguments are), there is nothing that prevents Defendants from filing such a motion now. Nor does Defendants' filing provide any reason why they could not file a suggestion/motion now.

III. A STAY OF BRIEFING IS UNWARRANTED HERE

For similar reasons, Defendants' request to stay their deadline to file an Answering Brief should be rejected. As explained above, at least some of the States' claims will not be moot when the Permanent Guidance becomes effective. *See supra* Section I. It will also prejudice the States by creating needless delay of resolving their appeal—which is particularly acute since this case is *supposed* to be expedited under Circuit Rule 27-3 as a preliminary injunction appeal.

At a bare minimum, the mootness issues will not be so clear-cut that Defendants should be permitted to avoid addressing the merits entirely. Instead, this Court should order Defendants to file their Answering Brief without benefit of a stay.

That said, the States do not wish to place counsel for Defendants in a personally difficult position of finalizing an Answering Brief in short order. They therefore do not oppose a short extension of time (if sought) by 7 days, to October 21. That represents 50 days since the States' September 1 Opening Brief—or nearly double the 28 days that

Defendants are supposed to receive under Circuit Rule 27-3. The States strongly oppose, however, the open-ended stay of briefing that Defendants now suggest.

A stay is also unwarranted because this case has already dragged on far too long. The Interim Guidance was only supposed to be in force for 90 days, or until May 19. The States could not even obtain a decision on their March 8 motion for a preliminary injunction until June 30. *See* Doc. 91. Briefing in this Court was further stayed based on a jurisdictional concern that all parties agreed did not exist, Docs. 19, 21, and was not cleared for weeks even after that potential issue had been definitely resolved. *See* Doc. 23.

For all of these reasons, Defendants' request for an open-ended stay of their brief deadline should be rejected.

IV. THIS COURT SHOULD GRANT PLAINTIFFS LEAVE TO FILE A SURREPLY TO ADDRESS DEFENDANTS' BELATED ARGUMENTS (REQUEST FOR AFFIRMATIVE RELIEF)

The States also respectfully seek, as affirmative relief, leave to file a surreply on Defendants' motion if this Court does not deny it summarily following filing of Defendants' reply brief.

As set forth above, the States attempted to obtain Defendants' positions on whether the Permanent Guidance continues to treat removals under Section 1231(a)(1)(A) to be discretionary, as well as Defendants' response to the States' arguments that their claims were not moot, by expressly asking them to address those issues in their motion. *Supra* at 3-4, 6. Defendants refused to do so.

Following Defendants' filing of the instant motion, the States on the same day wrote to Defendants' counsel stating that "We noticed your filing did not address the issue of whether the Permanent Guidance continues to treat removals as discretionary under Section 1231(a)(1)(A). Could you please let us know DOJ's position on that issue by tomorrow at COB so that we can appropriately respond to your motion?"

Federal Defendants wrote back that "I don't think we can respond to that question in the abstract. We understand your position is that the new priorities will not render the appeal and the underlying case moot, and we'll address your arguments on that issue in our reply."

To help clarify the issues, the States attempted to clarify the issue by stating: "Maybe I can make this a bit less abstract then: for aliens that have final orders of removal, does DOJ/DHS continue to believe that removal within 90 days is discretionary under Section 1231(a)(1)(A), or will it treat them as mandatory?"

That drew a response that "Sorry I wasn't clearer. We will address your arguments in the course of motion practice, not by email."

Because Defendants have repeatedly refused to address the principal issues here until their reply brief, the States would be prejudiced by allowing Defendants to raise all of their primary arguments in a posture where the States ordinarily could not respond. Indeed, Defendants' initial motion raised only the contention that this appeal would become moot, with little or no actual argument in support. Because Defendants have expressly refused to address the States' arguments in any context other than their

reply brief, well-established principles of waiver require either treating all such arguments as waived or permitting the States to file a surreply.

The States attempted to avoid the necessity of seeking leave for a surreply by repeatedly asking Defendants to make clear their positions *before* the State filed this response brief: both prior to filing of their motion and after. Because Defendants have expressly refused to do so, the States should be granted leaved to file a surreply unless this Court denies Defendants' request outright after receiving their reply brief.

CONCLUSION

For the foregoing reasons, Federal Defendants' request for an abeyance and stay of briefing should be denied. The States do not oppose a short extension of time on the Federal Defendants' Answering Brief. In addition, this Court should grant the States leave to file a surreply unless it denies the Defendants' motion summarily.

Respectfully submitted,

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Dated: October 12, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 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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