IN THE 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.	No. 21-16118

DEFENDANTS-APPELLEES' MOTION TO DISMISS APPEAL AS MOOT

Pursuant to this Court's order of October 29, 2021, defendants-appellees respectfully request that the Court dismiss this appeal as moot. Plaintiffs have informed defendants that they intend to review this motion before taking a position on it.

1. This appeal involves two memoranda issued by the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) earlier this year. The memoranda were issued to guide DHS and ICE officers' exercise of prosecutorial and enforcement discretion in the immigration context while DHS undertook a more fulsome policy review and developed new priorities based on that review. In particular, the memoranda adopted interim priorities to focus limited

resources on the detention and removal of noncitizens who pose the greatest threat to public safety, national security, and border security.

After the interim priorities were issued, DHS reviewed its current policies, solicited input from relevant stakeholders, and reviewed the interim priorities' effectiveness. Following that process, on September 30, 2021, DHS issued a memorandum adopting revised immigration-enforcement guidance. DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021) (Revised Guidance), https://go.usa.gov/xe2CP. The revised guidance maintains the three priority categories referenced by the interim priorities but functions in a different manner. Unlike the interim priorities, the revised guidance avoids "bright lines or categories." *Id.* at 3. The guidance instead instructs officers to make enforcement decisions in light of the "individual and totality of the facts and circumstances." *Id.* To determine whether a particular noncitizen poses a threat to public safety, officers should consider a variety of aggravating and mitigating factors. *Id.* at 3-4. Officers should conduct a similar inquiry to determine whether a particular noncitizen poses a threat to border security, and should "exercise their judgment accordingly." *Id.* at 4. In every case, however, "the guidance leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel." *Id.* at 5. It "does not compel an action to be taken or not taken." *Id.*

The revised guidance differs from the interim priorities in two other significant respects. First, under the interim priorities, officers were required to seek supervisory

approval before initiating an enforcement action against a noncitizen who fell outside the presumed priority categories unless exigent circumstances made obtaining pre-approval infeasible. 3-ER-503. The revised guidance does not contain any such requirement. Instead, the guidance relies on training, data-collection, and case-review mechanisms to ensure that the guidance is applied with "quality and integrity." Revised Guidance 6. Second, the interim priorities "applied to all civil immigration enforcement and removal decisions," including the decision "whether to detain or release from custody" any noncitizen. 3-ER-500. The revised priorities, by contrast, only "provide[] guidance for the apprehension and removal of noncitizens" and so do not, by their terms, apply to decisions relating whether to continue to detain or instead to release noncitizens who have been arrested. Revised Guidance 1.

The revised guidance became effective on November 29, 2021. *See* DHS, *DHS Begins Implementation of Immigration Enforcement Priorities* (Nov. 29, 2021), https://go.usa.gov/xey6b. Upon that date, the guidance "rescind[ed]" the DHS and ICE memoranda at issue in this case. Revised Guidance 6.

2. Arizona and Montana challenged the interim priorities in district court. Their complaint requested a judgment "[v]acating the [DHS] Memorandum and [ICE Memorandum] and enjoining Defendants from applying [them]." Am. Compl., D. Ct. Dkt. No. 12, at 18. They also asked the district court to enter a preliminary injunction prohibiting the government "from enforcing and implementing" the interim priorities set forth in those memoranda. Mot. for Prelim. Inj., D. Ct. Dkt. No. 17, at 44-45. The

district court denied plaintiffs' motion. 1-ER-11. Plaintiffs appealed that denial to this Court and twice requested that the Court enjoin the interim priorities pending appeal. The Court denied both requests. Dkt. No. 22; Dkt. No. 36.

After DHS issued the revised guidance in September 2021, the government moved to hold plaintiffs' appeal in abeyance until the guidance took effect. The government explained that, because implementation of the revised guidance would likely moot all or most of the issues presented on appeal, abeyance was appropriate to allow the parties and the Court to address mootness before briefing on plaintiffs' appeal continued. The Court granted the motion and directed the government to "file a status report and/or motion for appropriate relief" no later than December 6, 2021. Dkt. No. 45.

3. In this appeal, plaintiffs challenge the district court's denial of their motion to preliminarily enjoin implementation of the interim priorities. Now that those priorities have been rescinded, plaintiffs' request to enjoin those priorities is moot and this appeal should be dismissed.

The Constitution limits the federal courts' authority to "adjudicat[ing] 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) (quoting U.S. Const. art. III). That limitation requires that an "actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Id.* at 90-91 (quotation omitted). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purpose of Article III—when the issues presented are no longer

live or the parties lack a legally cognizable interest in the outcome." *Id.* at 91 (quotation omitted). That is to say, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit," the federal courts lose jurisdiction once "the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Id.* (quotation omitted).

Because the interim priorities challenged by the plaintiffs have now been rescinded, this case is moot. As is explained above, plaintiffs' complaint (and their motion for a preliminary injunction) claimed that the promulgation of the interim priorities was unlawful and sought to prohibit the government from implementing or enforcing them. But now the interim priorities have been rescinded, and the government is no longer implementing or enforcing them. In light of those developments, neither the vacatur nor the injunction sought by plaintiffs would have any concrete effect, and so it would be impossible for plaintiffs to obtain "any effectual relief" even if they were to prevail on their claims, *Knox v. Service Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quotation omitted). Thus, this appeal is moot.

4. Plaintiffs have wrongly contended that this appeal would remain live even after the interim priorities were rescinded.

First, plaintiffs have argued that they could still receive effective relief on their claim that the interim priorities were not in accordance with law because the interim priorities violated 8 U.S.C. § 1231(a)(1)(A)'s alleged mandatory requirement to remove

noncitizens within the removal period. That is so, according to plaintiffs, because the revised guidance allegedly violates the same requirement and so "an injunction prohibiting violations of Section 1231(a)(1)(A) would provide effective relief." Resp. 3. But this case does not allege any shortcomings in the revised guidance, and an injunction based on plaintiffs' arguments about the now-rescinded interim priorities would not be an appropriate remedy for any new claim plaintiffs might assert. Nor does this case present an abstract question about the meaning of the statute, and an injunction generally prohibiting violation of the law is not available, either in this litigation or in any case before a federal court. Indeed, plaintiffs' argument is directly contrary to Article III's prohibition on advisory opinions. *Cf. California v. San Pablo & T.R. Co.*, 149 U.S. 308 (1893) ("[T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.").

A general injunction "prohibiting violations of Section 1231(a)(1)(A)" is also not relief available to plaintiffs under the APA. Even if plaintiffs were successful on the merits of their claims, they would be entitled to no more than an order "hold[ing] unlawful and set[ting] aside" the particular agency action that they challenge—that is, the interim priorities that have now been rescinded. 5 U.S.C. § 706(2). And indeed, as is explained above, the relief that plaintiffs have sought in this litigation—both in their complaint and in their motion for a preliminary injunction—properly stretches no

further than vacating and enjoining reliance on the particular agency actions (the DHS and ICE Memoranda) that they challenge. The new, revised guidance represents an entirely different agency action, which is not at issue in this case.

Second, plaintiffs have suggested that their arguments respecting notice-and-comment rulemaking would remain live after the revised guidance took effect because of the exception to mootness for "disputes capable of repetition, yet evading review." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). But that exception to mootness does not avail plaintiffs here. It is insufficient for plaintiffs to argue that an event—such as the issuance of interim enforcement guidance without notice-and-comment procedures—"may well recur in more generic form," Wright & Miller, *Federal Practice and Procedure*, § 3533.8.1 (3d ed. 2021); instead, they must show that they will be "subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Plaintiffs cannot generically contend that this Court should hear their arguments in this case because (they say) DHS could in the future promulgate without notice and comment a rule that "reduces immigration enforcement," Resp. 5. Instead, they must (and cannot) show that DHS is likely to promulgate the "same action"—that is, the interim enforcement priorities—again.

Even if it were permissible for plaintiffs to frame the relevant agency action at a generic level, plaintiffs have failed to show that any future actions—including the revised guidance—are likely to evade judicial review. Plaintiffs have improperly focused on the short-term nature of the interim priorities and their inability to litigate

this case through the appellate process. But the appropriate question is "whether, if the otherwise mooted dispute is repeated, a future challenge will again evade review." Wright & Miller, *Federal Practice and Procedure*, § 3533.8.2 (3d ed. 2021). Plaintiffs have not suggested that DHS intends to issue new short-term interim priorities. They have simply suggested that the revised guidance would evade review. But unlike the interim priorities, the revised guidance is not intended to be in effect for only a short period of time. Therefore, there is no reason to believe that plaintiffs will be unable to fully litigate their notice-and-comment claim in a new challenge to the revised guidance.

5. Finally, plaintiffs' own statements in this and other litigation underscore that although both the interim priorities and the revised guidance relate to immigration enforcement prioritization, they are separate and meaningfully distinct agency actions that must each be evaluated on their own merit. After this Court granted the government's motion to place plaintiffs' appeal in abeyance pending the effective date of the revised guidance, plaintiffs—joined by the State of Ohio—filed a new lawsuit in the Southern District of Ohio challenging the revised guidance. *See State of Arizona v. Biden*, No. 3:21-cv-314 (S.D. Ohio). In opposing a motion to transfer that case to the District of Arizona, plaintiffs repeatedly argued that the interim priorities and revised guidance (and their challenges to those actions) are distinct policies. *See, e.g.*, Resp. to Mot. to Transfer at 2, Dkt. No. 10, *Arizona v. Biden*, No. 3:21-cv-314 (S.D. Ohio) ("[T]he February 18 Memorandum ('Interim Guidance') being challenged in the Ninth Circuit constitutes a separate administrative action from

the Permanent Guidance being challenged here."); *id.* at 3 ("DHS has promulgated the Permanent Guidance, a new policy, meaning its instant transfer motion lacks merit, since the Interim Guidance case does not present a vehicle for the Ninth Circuit to resolve the disputes at issue here.").[1]

The distinctive nature of the two agency actions is further highlighted by plaintiffs' opening brief, which itself demonstrates that the issues presented in this preliminary injunction appeal focus on features of the interim priorities and those priorities' implementation that will not necessarily reoccur with the revised guidance. For example, plaintiffs' argument that the interim priorities violate § 1231(a)(1)(A) rests not just on some abstract legal feature of the interim priorities but also on data about how often certain groups of noncitizens were in fact removed under the priorities. *See* Pl. Br. 68. Similarly, plaintiffs' notice-and-comment argument rests in large part on the same data. *See* Pl. Br. 69-70. But the revised guidance both modifies the priority categories and eliminates the requirement from the interim priorities for advance supervisory approval by Field Office Directors or Special Agents in Charge of certain enforcement actions. Even setting aside the inappropriate nature of plaintiffs' reliance on extra-record evidence to ground their APA claims, there is no reason to believe that the data plaintiffs cite will be the same under the revised guidance. And the administrative record—the proper source of any factual

[1] The district court in plaintiffs' Ohio suit denied the motion to transfer on December 6, 2021, and that case remains pending in district court in Ohio.

information in any APA lawsuit—supporting the revised guidance is substantially different from the administrative record that undergirded the interim priorities.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court dismiss this appeal as moot.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2199 words, according to the count of Microsoft Word.

s/ Sean Janda
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