No. 21-40618

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF LOUISIANA,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, ACTING COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UR M. JADDOU, DIRECTOR OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

No. 21-40618

State of Texas and State of Louisiana v. United States of America, et al.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Sean Janda
SEAN JANDA
Counsel for Appellants

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INTRODUCTION

As our opening brief explained, the district court's preliminary injunction was legally unjustified and practically untenable. But the interim enforcement priorities that gave rise to the injunction have now been rescinded by revised guidance that differs from the priorities in significant and substantive ways. Given that rescission, plaintiffs have filed an amended complaint and shifted their focus in district court to the revised guidance. *See* First Amended Complaint, *Texas v. United States*, No. 6:21-cv-16 (S.D. Tex. Oct. 22, 2021), Dkt. No. 109. And the district court has set plaintiffs' claims about the revised guidance for trial beginning on February 1, 2022. Order, *Texas v. United States*, No. 6:21-cv-16 (S.D. Tex. Dec. 23, 2021), Dkt. No. 140. Because the focus of the underlying litigation has changed to the revised guidance (from the now-defunct interim priorities at issue in this appeal), the government moved—with plaintiffs' consent—to voluntarily dismiss its appeal under Federal Rule of Appellate Procedure 42(b).

The government's motion should be granted and its appeal dismissed. Such motions are "generally granted" even when they are opposed, which this motion is not. *See American Auto. Mfrs. Ass'n v. Commissioner, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994). And any denial would raise significant separation-of-powers concerns. The Solicitor General is responsible for determining whether and in what circumstances the United States will appeal an adverse decision. Forcing the United States to maintain an appeal despite the contrary determination of the Solicitor

General would be an extraordinary and unprecedented intrusion into the Executive's authority to manage its own litigation.

The appeal should be dismissed for the independent reason that the claims underlying the disputed injunction are moot. Those claims relate only to the interim priorities, and the preliminary injunction applies only to those priorities. ROA.1441-42. As noted, those priorities have now been rescinded by the Department of Homeland Security (DHS). And the government is no longer enforcing or implementing the interim priorities. Consistent with that reality, the Eleventh Circuit recently granted the State of Florida's motion to voluntarily dismiss its appeal as moot in a case involving the interim priorities. This Court should likewise dismiss the government's appeal here.

ARGUMENT

THE COURT SHOULD DISMISS THIS APPEAL

1. The Court should grant the government's consent motion to voluntarily dismiss its own appeal under Federal Rule of Appellate Procedure 42(b), which provides that "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties." *See* Consent Motion to Voluntarily Dismiss Appeal (Dec. 6, 2021). The motion provides for the dismissal of the appeal with each party to bear its own costs. The motion satisfies Rule 42(b), and there is no basis for denying it.

Even where a motion for voluntary dismissal is opposed, courts apply a "presumption in favor of dismissal," *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th

Cir. 2004), and have emphasized that such motions are "generally granted," *American Auto. Mfrs. Ass'n v. Commissioner, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994); *HCA Health Servs. of Va. v. Metropolitan Life Ins.*, 957 F.2d 120, 123 (4th Cir. 1992). Indeed, notwithstanding the fact that Rule 42(b) states that an appeal "may" be dismissed, "the premises behind the adversary system—and the Article III requirement of a case or controversy—suggest the problems that would arise if a court were to refuse to dismiss an appeal that the appellant no longer wished to maintain." 16AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3988 (5th ed. Apr. 2021 update) (footnote omitted). Courts have thus been "reluctant to determine an issue presented in the abstract" and are "especially cautious of doing so when it appears that one of the parties is not willing to fully contest the issue." *See United States v. Washington, Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978).

The Judicial Conference Committee on Rules of Practice and Procedure has recently proposed an amendment to Rule 42(b) that reflects these concerns. The amendment is designed to "restore[] the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree." *See* Proposed Fed. R. App. P. 42(b) & cmt. note, https://go.usa.gov/xtjbK (transmitted to Supreme Court on Oct. 18, 2021); *accord* S. Ct. R. 46(2) (providing similarly that if a petitioner files a motion to dismiss and the

respondent does not object, the Clerk "will enter an order of dismissal"). If approved, the amendment will take effect on December 1, 2022.

Denying the consent motion to dismiss would be especially anomalous here, where the appellant is the federal government. The Solicitor General is responsible for "[d]etermining whether, and to what extent, appeals will be taken by the Government to all appellate courts." 28 C.F.R. § 0.20. "Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors . . . before authorizing an appeal." *United States v. Mendoza*, 464 U.S. 154, 161 (1984). And an appeal may not proceed without the Solicitor General's authorization. Requiring the government to proceed with an appeal that the Solicitor General has decided not to pursue would raise significant separation-of-powers concerns. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (recognizing the constitutional problems that would arise from interference with the Executive Branch's authority to control its own litigation). We are aware of no case in which any court has forced the United States to litigate an appeal notwithstanding the Solicitor General's contrary determination.

2. The appeal should be dismissed for the independent reason that the claims underlying the preliminary injunction are now moot.

The Constitution limits 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). Article III 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).

The preliminary injunction was premised on the alleged unlawfulness of two memoranda issued by DHS and U.S. Immigration and Customs Enforcement (ICE) in early 2021. Both memoranda were intended as interim measures that would remain in effect pending completion of a "Department-wide review of policies and practices concerning immigration enforcement." ROA.49; *see* ROA.50 (explaining that the DHS memorandum would "remain in effect until superseded by revised priorities developed in connection with the review" discussed above); ROA.54 (explaining that the ICE memorandum would "remain in effect until [DHS] issues new enforcement guidelines").

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), https://go.usa.gov/xe2CP (Revised Guidance). The revised guidance became effective on November 29, 2021. 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.

The revised guidance maintains the three priority categories referenced by the interim priorities but functions in a different manner. For example, with respect to public safety priorities, the revised guidance avoids "bright lines or categories." Revised Guidance 3. Instead, it instructs officers to make enforcement decisions in light of the "individual and the totality of the facts and circumstances" and to consider a variety of aggravating and mitigating factors in each individual case. *Id.* at 3-4. Similarly, the guidance directs officers to "exercise their judgment" when determining whether an individual poses a threat to border security in light of the facts of each case. *Id.* at 4. In all respects, however, "the guidance leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel." *Id.* at 5. The guidance "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 preapproval infeasible. ROA.58-59. The revised guidance does not contain any such requirement. Second, the interim priorities applied to a broad range of immigration enforcement and removal decisions, including decisions with respect to "whom to detain or release." ROA.49. The revised priorities, by contrast, only "provide[]

guidance for the apprehension and removal of noncitizens." Revised Guidance 1. They do not apply to decisions relating to whether to continue to detain or instead to release noncitizens who have been arrested. That distinction is particularly relevant here, as the bulk of plaintiffs' statutory arguments respecting the interim priorities relate to alleged violations of statutes governing detention.

The district court's preliminary injunction applies only to the interim priorities set forth by the DHS and ICE memoranda. *See* ROA.1440-41. But those interim priorities have been rescinded, and the government is no longer implementing or enforcing them. The government replaced the interim priorities with revised guidance that is substantively different from the interim priorities and that was issued on the basis of a different administrative record. Thus, the dispute over the interim priorities no longer presents a live controversy. And because plaintiffs' challenge to the interim priorities is now moot, this Court should dismiss the appeal. *Cf.* Order, *Florida v. United States*, No. 21-11715 (11th Cir. Dec. 14, 2021) (granting the State of Florida's motion to dismiss its challenge to the interim priorities as moot, which was not opposed by the United States). Indeed, plaintiffs consented to the government's motion to voluntarily dismiss its appeal on this basis. *See* Consent Motion to Voluntarily Dismiss Appeal.

CONCLUSION

For these reasons, this appeal should be dismissed.

Respectfully submitted,

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January 2022

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system and service will be accomplished on all parties through that system.

/s/ Sean Janda
Sean Janda

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,692 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Sean Janda
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