IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, *et al.*, Plaintiffs-Appellees, v. UNITED STATES OF AMERICA, *et al.*, Defendants-Appellants.	No. 21-40618

REPLY IN SUPPORT OF MOTION FOR ABEYANCE AND TO STAY BRIEFING PENDING CONSIDERATION OF THE MOTION

Defendants-appellants file this reply in support of their motion to place this appeal into abeyance and to stay the briefing schedule pending resolution of the motion.

As the federal government explained in the motion, the Secretary of Homeland Security on September 30, 2021, issued a memorandum establishing revised immigration enforcement priorities that "will become effective" on November 29, 2021, and that will, at that point, supersede and "serve to rescind" the two memoranda challenged in this case. *See* Dep't of Homeland Security, *Guidelines for the Enforcement of Civil Immigration Law* 6 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf. In light of those superseding priorities and

given that this appeal has not yet been fully briefed or calendared for oral argument, plaintiffs' challenges to the two earlier memoranda (which will be rescinded when the revised priorities become effective in less than six weeks) will likely become moot before this appeal is resolved. Therefore, abeyance is appropriate to avoid burdening the parties and the Court with unnecessary briefing that addresses soon-to-be-moot claims in a soon-to-be-altered context, and to allow the Court to resolve the mootness question first, once that question is ripe.

In addition, the government's motion asked this Court to stay the briefing schedule pending resolution of the abeyance motion. Given the upcoming briefing deadlines in this case, such an administrative stay is warranted to allow the Court to consider the motion in an orderly fashion and do so without unduly burdening the parties. Even if the Court were to decline to hold the appeal in abeyance, a stay of briefing and extension of the existing deadlines is appropriate. Plaintiffs do not respond at all to the requested administrative stay of briefing deadlines, and the Court should grant relief based on the absence of any such response.

1. Plaintiffs do not dispute that this appeal will not be ripe for resolution before the superseding priorities take effect at the end of November or that plaintiffs' claims will become moot once those priorities take effect. Nor do plaintiffs contend that a brief period of abeyance pending that effective date will cause them any serious prejudice. In light of those undisputed realities, considerations of judicial economy and preservation of the parties' resources more than justify placing this appeal into

abeyance pending the superseding priorities' taking effect and anticipated motions to govern further proceedings or for disposition of the appeal in light of mootness concerns. Such relief will avoid burdening the parties and the Court with unnecessary briefing.

Considerations of judicial economy tip in favor of staying ongoing briefing where even the possibility of mootness or of the narrowing of claims exists, and this Court and other courts have routinely granted similar relief even where an agency was only in the process of reconsidering an action that was on review in the court of appeals. *See, e.g.*, *City of Arlington v. FCC*, 668 F.3d 229, 236 (5th Cir. 2012) (noting that the court had held a petition in abeyance while the agency was addressing a reconsideration motion); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 443 (3d Cir. 2011) (same); *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008) (same); *see also, e.g.*, Order, Dkt. No. 79, *U.S. WeChat Users Alliance v. Biden* (9th Cir. No. 20-16908) (staying all proceedings pending further order of the Court); Order, Dkt. No. 24, *State of California v. Cochran* (9th Cir. No. 20-16802) (vacating briefing schedule and staying proceedings for two months). The considerations animating those orders are even more forceful here, where the agency has concluded the administrative process and actually promulgated revised guidelines that supersede the interim priorities currently being challenged.

For similar reasons, plaintiffs' observation that this Court has recently denied motions for abeyance in two other cases is irrelevant here. In both of those cases, the

government sought to place the appeal in abeyance pending the outcome of ongoing—rather than completed—administrative proceedings. *See* Motion to Place Appeal in Abeyance at 1, *Texas v. United States*, No. 21-40680 (5th Cir. Oct. 4, 2021); Motion to Hold Appeal in Abeyance at 3, *Texas v. Biden*, No. 21-10806 (5th Cir. Sept. 29, 2021). Here, by contrast, the government has already completed the relevant administrative proceedings and has actually promulgated the superseding priorities.

2. Instead of disputing the basis of the government's motion—that plaintiffs' challenge to the interim priorities will be moot once the superseding priorities take effect—plaintiffs primarily focus their response on two points. First, plaintiffs contend that the Court should deny the government's motion because the government had previously sought expedited relief from the district court's preliminary injunction. Second, plaintiffs argue that this appeal may not actually become moot at the end of November because plaintiffs intend to seek relief against the superseding priorities in district court before those priorities' effective date. Neither of those arguments is persuasive.

First, plaintiffs do not suggest that the government acted improperly in pursuing emergency relief against a first-of-its-kind, nationwide preliminary injunction—which the district court originally entered without concurrently providing even a brief administrative stay to allow for orderly litigation in this court—that precluded the Executive from exercising its deep-rooted enforcement discretion to determine which non-citizens to arrest, charge, and remove. That emergency relief

averted serious, imminent harm to the Executive. Indeed, a panel of this Court agreed, after briefing and argument, that the district court's "novel" injunction imposed irreparable injury on the Executive, "undermine[d] the separation of powers," and should largely be stayed pending appeal. *See Texas v. United States*, -- F.4th --, 2021 WL 4188102, at *5-6 (5th Cir. Sept. 15, 2021). And nothing about the government's successful pursuit of emergency relief undermines the basis of the abeyance motion: that continued briefing on the merits of this appeal, which will likely become moot well before it is ripe for decision, would constitute an unwarranted expenditure of the parties' and the Court's limited resources for no benefit.

Second, plaintiffs suggest that they may seek a stay or injunction delaying the effectiveness of the superseding priorities. But that is no basis for the parties and the Court to continue expending resources on this appeal now. For one, as explained above, this Court and other courts have regularly granted similar relief even while an agency is still engaged in the process of reconsidering a previous decision, where there is no guarantee that the agency will ultimately choose to rescind that decision. Here, DHS has already decided to replace the interim priorities at issue in this appeal. At most, plaintiffs suggest that they would seek to delay the implementation of that decision, but any delay would not provide grounds for proceeding with this appeal. And the possibility that plaintiffs will be successful in obtaining a stay of the superseding priorities does not undermine the considerations of judicial economy that support a stay in this case.

But even beyond that, plaintiffs nowhere explain how they could reasonably move for a stay of the superseding priorities. In seeking a preliminary injunction of the interim priorities, plaintiffs have repeatedly contended that those priorities cause them irreparable injury. But to obtain a stay of the superseding priorities under § 705, plaintiffs would have to demonstrate exactly the opposite: that allowing the interim priorities (rather than the superseding priorities) to continue in effect is "necessary to prevent irreparable injury." 5 U.S.C. § 705. In reality, any such effort to seek a stay of the superseding priorities would be no more than a transparent attempt to artificially create fictional jurisdiction in this Court to seek an advisory opinion regarding a challenge to a policy that no party wants to keep in place. Neither this Court nor the district court should abet such disingenuous litigation behavior.

Respectfully submitted,

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OCTOBER 2021

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)(C) because it contains 1284 words, according to the count of Microsoft Word.

s/ Sean Janda
Sean Janda

CERTIFICATE OF SERVICE

I hereby certify that, on October 19, 2021, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

s/ Sean Janda
SEAN JANDA
Counsel for Appellants