No. 19-15716

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INNOVATION LAW LAB, *et al.*,

Plaintiffs-Appellees,

v.

KEVIN K. MCALEENAN, Acting Secretary of Homeland Security, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California
No. 3:19-cv-00807-RS

PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION

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CORPORATE DISCLOSURE STATEMENT

Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Appellees.

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Plaintiffs-Appellees respectfully move for reconsideration of this panel's decision to publish its May 7, 2019, stay decision so as not to preclude fuller consideration of the legal issues in this case by the merits panel assigned to the preliminary-injunction appeal. Plaintiffs request that the motions panel depublish its opinion and substitute an identical but unpublished order or memorandum disposition.

Under this Court's precedent, published decisions that definitively resolve legal issues constitute "law of the circuit" and bind future three-judge panels. *See Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (en banc) (explaining that the "law of the circuit" rule provides, subject to certain "recognized exceptions," "that a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so'") (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)). The law-of-the-circuit rule applies even when the published decision is issued by a motions panel in an emergency stay posture. *See Lair v. Bullock*, 798 F.3d 736, 744, 747 (9th Cir. 2015) (holding that "a motions panel's published opinion" on "emergency motion to stay" injunction "binds future panels the same as does a merits panel's published opinion").

Although the Court designated its decision as a published opinion, the per curiam and two concurrences suggest that the Court did not intend for its decision addressing certain of the legal issues in the case to bind future three-judge panels.

Notably, Judge Fletcher explained his view on this matter at some length, and expressed his understanding that a merits panel would be able to revisit the legal issues addressed by the motions panel in its per curiam stay decision:

> Acting as a motions panel, we are deciding the Government's emergency motion to stay the order of the district court pending appeal. Because it is an emergency motion, plaintiffs and the Government were severely limited in how many words they were allowed. Our panel heard oral argument on an expedited basis, a week after the motion was filed.
>
> … I am hopeful that the regular argument panel that will ultimately hear the appeal, with the benefit of full briefing and regularly scheduled argument, will [reach a different result].

Innovation Law Lab v. McAleenan, 2019 WL 2005745, at *4 (9th Cir. May 7, 2019) (Fletcher, J., concurring only in the result).

The per curiam decision also used qualifying language when discussing its assessment of Plaintiffs' statutory claim. *See id.* at *2 (per curiam) (stating that "the plaintiffs in this case … thus *seem* to fall within the sweep of § 1225(b)(2)(C)) (emphasis added); *id.* at *3 ("We are *doubtful* that subsection (b)(1) 'applies' to [plaintiffs] ….") (emphasis added). Judge Watford's concurrence likewise used qualifying language suggesting that the Court's assessment of the statutory claim

was not meant to be binding. *Id.* at *4 (Watford, J., concurring) ("8 U.S.C. § 1225(b) *appears to* authorize DHS's new policy ….") (emphasis added).

To make clear that the legal issues addressed in this Court's per curiam stay decision do not bind the merits panel, Plaintiffs respectfully request that the Court reissue its decision as an unpublished order or memorandum disposition. *See, e.g.*, *Termine ex rel. Termine v. William S. Hart Union High Sch. Dist.*, 360 F.3d 1141, 1141 (9th Cir. 2004) (ordering clerk to "depublish the order and substitute the unpublished memorandum disposition"); *cf. United States v. Verdugo-Urquidez*, 29 F.3d 637, 1994 WL 279226 (9th Cir. June 22, 1994) (issuing unpublished memorandum disposition in a case following reversal and remand by the Supreme Court).

Dated: May 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Judy Rabinovitz
Judy Rabinovitz
Dated: May 13, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 589 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Judy Rabinovitz
Judy Rabinovitz
Dated: May 13, 2019