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 Northern District of Texas

OPPOSITION TO PETITION FOR REHEARING EN BANC

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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
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INTRODUCTION

In January 2021, the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) adopted interim immigration-enforcement priorities that have successfully focused scarce resources on the most pressing threats. The interim priorities remained in effect until August, when the district court entered a nationwide preliminary injunction prohibiting DHS and ICE from implementing them. But the motions panel unanimously adopted a partial stay pending appeal, limiting enforcement of the injunction. The panel held that the injunction was, in large part, legally unjustified, practically untenable, and wholly unprecedented. Since then, and while this appeal has been pending, DHS adopted revised enforcement priorities that will supersede the interim priorities in less than a month—likely rendering this dispute moot.

Further review of the panel's decision would be unwarranted even if plaintiffs' petition could satisfy the stringent standard for rehearing en banc—and even if this matter were not likely to become moot in mere weeks—because plaintiffs failed to present many of their arguments to the panel. In any event, the panel's decision was correct and broke no new legal ground. The panel simply applied settled law to the facts of this case. Plaintiffs' contrary argument—that two provisions of the Immigration and Nationality Act (INA) withdrew the Executive Branch's longstanding enforcement and prosecutorial discretion—lacks any basis in law, as the panel correctly concluded. Indeed, until the district court entered the injunction at

issue, no court had ever endorsed plaintiffs' view—which if accepted would mean that every administration would have been violating those provisions since their enactment in 1996.

STATEMENT

A. Statutory Background

The INA, 8 U.S.C. § 1101 *et seq.*, sets forth procedures for removal of noncitizens. The process generally begins when DHS initiates a removal proceeding, *id.* § 1229(a), a discretionary decision that requires DHS to consider the enforcement priorities that Congress has charged DHS with establishing, 6 U.S.C. § 202(5). In the removal proceeding, an immigration judge determines whether the noncitizen is removable and whether to enter a removal order. 8 U.S.C. § 1229a(c)(1)(A); *see* 8 C.F.R. § 1240.12. In most circumstances, the noncitizen can obtain administrative and judicial review of such an order.

The INA also sets forth the framework for arresting and detaining a noncitizen present in the United States "pending a decision on whether [he] is to be removed." 8 U.S.C. § 1226(a). That provision "distinguishes between two different categories of aliens." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) applies to all removable noncitizens and allows the government "to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 846. Section 1226(c) provides that DHS "shall take into custody any alien," 8 U.S.C. § 1226(c)(1), who "falls into one of several enumerated categories involving criminal offenses and terrorist

activities," *Jennings*, 138 S. Ct. at 837, and "may release [such] an alien . . . only if" one of several specified conditions is satisfied, 8 U.S.C. § 1226(c)(2).

Once an order of removal becomes administratively final and other conditions are satisfied, the noncitizen can be removed. Section 1231 sets a "removal period" of 90 days, and provides generally that the noncitizen is subject to detention and removal during that period. 8 U.S.C. § 1231(a).

The Executive Branch has broad authority to administer and enforce the Nation's immigration laws. *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 483-84 (1999); *see* 6 U.S.C. § 202(5); 8 U.S.C. § 1103. For decades, the Executive has exercised its enforcement discretion to prioritize which noncitizens to arrest, detain, or remove. No administration has ever arrested, detained, and pursued removal of every noncitizen who could be covered by §§ 1226(c) and 1231(a)(2). Nor has Congress ever appropriated funds sufficient to allow the Executive to do so.

B. Factual Background

This appeal concerns two memoranda that establish interim priorities to guide DHS's and ICE's enforcement decisions. Both memoranda will be superseded on November 29, 2021, when revised priorities take effect.

The first memorandum was issued by DHS on January 20, 2021. ROA.48. It called for a "Department-wide review of policies and practices concerning immigration enforcement," and adopted interim enforcement priorities pending that review. ROA.49. Specifically, the memorandum urged components to focus

enforcement on noncitizens who fell within certain categories. ROA.49. It did not prohibit the "apprehension or detention of" noncitizens "not identified as priorities." ROA.50.

The interim priorities were intended to "remain in effect until superseded by revised priorities[.]" ROA.50. DHS issued those revised priorities on September 30, 2021. DHS, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), https://perma.cc/G5K4-Y7EM (DHS Revised Priorities). Their effective date is November 29, 2021. *Id.* at 6. Once the revised priorities take effect, the January DHS memorandum will be superseded.

The second memorandum was issued by ICE on February 18, 2021. ROA.54. It offered further guidance with respect to the removal priorities identified by the January DHS memorandum. The ICE memorandum recognized that "ICE operates in an environment of limited resources," and that, as a result, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." ROA.55. The memorandum further explained that ICE's mission had been rendered "particularly complex" due to "ongoing litigation," the "COVID-19 pandemic," foreign-relations concerns, and ICE's other responsibilities under the INA. ROA.55. "[T]o most effectively achieve" its mission to protect "national security, border security, and public safety" under these constraints, ROA.56, the memorandum instructed officers to focus enforcement efforts on noncitizens within

the priority categories, ROA.57-58. It did not "prohibit the arrest, detention, or removal of any noncitizen." ROA.56.

The ICE memorandum was also intended to "remain in effect until [DHS] issues new enforcement guidelines." ROA.54. As noted, DHS issued those guidelines on September 30. Once the revised priorities take effect on November 29, the ICE memorandum—like the DHS memorandum—will be superseded as well.

C. Prior Proceedings

Texas and Louisiana sued DHS and ICE, challenging the memoranda's priorities framework. On August 19, 2021, the district court entered a nationwide preliminary injunction prohibiting the agencies from implementing the priorities and imposing other onerous requirements. ROA.1285. The court declined to stay the injunction pending appeal, although it entered a brief administrative stay.

The government appealed the preliminary injunction, ROA.1446, and renewed its stay motion in this Court. After oral argument, the panel issued a unanimous opinion on September 15 that largely granted the government's motion. Pet. App. 1-15. The panel held that the government was likely to prevail on the merits because §§ 1226(c) and 1231(a)(2) "do not eliminate immigration officials' 'broad discretion' to decide who should face enforcement action in the first place." Pet. App. 7. With respect to the remaining stay factors, the panel held that affirming the injunction would irreparably injure the government and "undermine[] the separation of powers" by "impair[ing]" the government's ability to exercise enforcement discretion—a "core

power of the Executive Branch." Pet. App. 13. The panel further held that the balance of equities is heavily tilted in the federal government's favor. Of particular note, the panel emphasized that maintaining the injunction was especially inappropriate because "the release of new guidance [wa]s imminent." Pet. App. 14. Allowing the injunction to take effect—only for DHS to override the interim priorities with revised priorities—could disrupt agency operations by "subject[ing] immigration agents to three separate directives in the span of a few weeks." *Id.*

ARGUMENT

THE STAY DECISION IS CORRECT AND DOES NOT WARRANT REHEARING EN BANC.

A. Rehearing Is Inappropriate For This Stay Of A Preliminary Injunction That Will Soon Be Moot.

As explained in greater detail below, *infra* pp. 9-16, the panel correctly analyzed the legal issues and applied the equitable standards governing the issuance of a stay pending appeal, and the petition does not satisfy the stringent standard for rehearing en banc. But even if plaintiffs could identify some question that would otherwise be appropriate for en banc consideration (which they cannot), the panel's stay decision here would be a poor vehicle to address any of the legal issues in the petition.

1. First, as the panel recognized, the balance of equities supported a stay of the injunction in significant part because, by their terms, the interim priorities would soon be superseded by revised priorities. Pet. App. 14. The petition does not dispute that conclusion, which has even more force now: DHS issued that guidance on

September 30, 2021. *See generally* DHS Revised Priorities. Once the revised priorities "become effective" on November 29, 2021, they "will serve to rescind" the two memoranda at the core of this dispute. *Id.* at 6. At that point, the government's appeal—from a district court order of a preliminary injunction applicable only to the interim priorities—will likely become moot.

For these reasons, even if this Court were to grant plaintiffs' petition and rehear the stay application en banc, plaintiffs could only obtain the relief that they have requested if the Court were to reach a decision on an extremely expedited basis. And that relief—vacatur of the stay pending appeal—would extend no further than reinstating the district court's injunction until this Court reaches a decision on the merits of the case. The district court's injunction, however, will cease to have any practical effect on November 29. Accordingly, a decision in plaintiffs' favor would throw the Nation's immigration-enforcement apparatus into disarray by "subject[ing] immigration agents to three separate directives in the span of a few weeks." Pet. App. 14. It would also require the full Court to expend significant resources on a dispute that will soon cease to present a live controversy.

2. En banc review is also unwarranted because "a party may not raise an argument for the first time in a petition for rehearing." *United States v. Sanjar*, 876 F.3d 725, 749 (5th Cir. 2017) (quotation omitted). In the stay proceedings before this Court, plaintiffs never made many of the arguments on which they now rely. For example, the petition attempts (Pet. 7-8) to distinguish *Town of Castle Rock v. Gonzales*,

545 U.S. 748 (2005), the decision at the crux of the stay motion, Stay Mot. 11-13, and the panel's decision, Pet. App. 10-11. But plaintiffs failed to present those arguments to the panel; indeed, they never cited *Castle Rock* at all. Similarly, the petition argues (Pet. 12-13) that, even if immigration-enforcement decisions are committed to agency discretion by law, procedural claims under the Administrative Procedure Act remain cognizable. But plaintiffs never presented that dubious argument to the panel either. And plaintiffs have failed to identify any reason to excuse their forfeiture.

3. Finally, the question presented by the petition—whether 8 U.S.C. §§ 1226(c) and 1231(a)(2) impose judicially enforceable limits on the Executive's enforcement discretion—is not squarely before the Court. As our stay motion explained, the district court wrongly concluded that plaintiffs had demonstrated a cognizable injury sufficient to support standing (much less justify preliminary injunctive relief), Stay Mot. 8-10; that plaintiffs fell within the zone-of-interests requirements of §§ 1226(c) and 1231(a)(2), Stay Mot. 13-14; and that the interim priorities constituted final agency action reviewable under the APA, Stay Mot. 14-15. The panel agreed with the government that the interim priorities were unreviewable because immigration-enforcement decisions are committed to the Executive's discretion by law, so it did not need to reach any of those other threshold arguments. But the stay could not be vacated without first resolving all of these issues in plaintiffs' favor. Thus, even accepting plaintiffs' incorrect contention that the question presented by their petition warrants en banc review, and even assuming that

the panel should have resolved that question in plaintiffs' favor, plaintiffs would still not prevail.

B. The Panel's Unanimous Decision Is Correct And Does Not Conflict With Any Applicable Precedent.

The petition should be denied for the additional reason that plaintiffs have failed to satisfy the exacting standard set forth in Federal Rule of Appellate Procedure 35 for rehearing en banc. The panel's decision is consistent with Supreme Court precedent and with prior decisions of this Court. *See* Fed. R. App. P. 35(b)(1)(A). As the panel explained, no authority supports plaintiffs' radical interpretation of §§ 1226(c) and 1231(a)(2), and ample authority rejects it. Pet. App. 9-11. And the petition does not identify any question of exceptional importance, *see* Fed. R. App. P. 35(b)(1)(B), particularly because this dispute will soon become moot. In any event, the panel's decision was entirely correct.

1. The panel correctly held that the government was likely to succeed on its argument that immigration-enforcement decisions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As a general rule, decisions about how to allocate limited resources in this context are "committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Such decisions require the "complicated balancing of a number of factors" within the agency's expertise, including "whether agency resources are best spent on this violation or another" and

"whether the particular enforcement action requested best fits the agency's overall policies." *Id.*

As the panel explained, these considerations "are greatly magnified in the deportation context." Pet. App. 6 (quoting *AADC*, 525 U.S. at 490); *accord Crane v. Johnson*, 783 F.3d 244, 247 n.6 (5th Cir. 2015) (same). Congress has charged the Executive with deciding "whether it makes sense to pursue removal at all," *Arizona v. United States*, 567 U.S. 387, 396 (2012); *see* 6 U.S.C. § 202(5), and the Executive has discretion "to abandon the endeavor" at "each stage" of the removal process, *AADC*, 525 U.S. at 483. That is because, in addition to the usual factors governing the exercise of discretion, immigration policy can "affect trade, investment, tourism, and diplomatic relations for the entire Nation." *Arizona*, 567 U.S. at 395. In short, enforcement discretion is the linchpin of the federal immigration system. *See* Pet. App. 5.

Plaintiffs resist (Pet. 4-5) this conclusion—which is grounded in common sense, historical practice, and longstanding precedent—by arguing that Congress eliminated the Executive's discretion by using the word "shall" in §§ 1226(c) and 1231(a)(2). But as the panel correctly held, "longstanding precedent hold[s] that the use of 'shall' in arrest laws does not limit prosecutorial discretion." Pet. App. 10-11 (citing *Gonzales*, 545 U.S. at 759; *City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999); *Cairo & F.R. Co. v. Hecht*, 95 U.S. 168, 170 (1877)). A "stronger indication" of

congressional intent is required before a court will conclude that enforcement discretion has been displaced. *Gonzales*, 545 U.S. at 761.

Far from evincing any such intent, the traditional tools of statutory interpretation confirm that, when Congress enacted the INA, it left the Executive's discretion intact. Congress expressly foreclosed judicial review of all discretionary enforcement decisions arising from those provisions. *See* 8 U.S.C. §§ 1226(e), 1231(h). Other provisions likewise confirm Congress's desire to "protect[] the Executive's discretion from the courts," and in particular from "attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485-86, 485 n.9 (discussing 8 U.S.C. § 1252(g)). And Congress has never appropriated enough funds to allow the Executive to enforce the INA to its maximum theoretical reach. As the record indicates, an estimated 1.2 million noncitizens in the United States are subject to a final order of removal, and many more noncitizens are subject to detention under various INA provisions. Stay Mot. Add. 185. Yet Congress has given ICE only enough money to fund approximately 34,000 detention beds nationwide. *Id.* at 179. Indeed, if plaintiffs' interpretation of §§ 1226(c) and 1231(a)(2) were correct, every President would have been violating those provisions since their enactment in 1996.

As the panel explained, plaintiffs' interpretation is especially anomalous because the interim priorities cover a much "broader" range of enforcement decisions that implicate "immigration officials' ability to prioritize who is subject to investigative and enforcement action in the first place": "whether to issue a detainer, whether to issue,

reissue, serve, file, or cancel a Notice to Appear, and whether to stop, question, or arrest a noncitizen." Pet. App. 8 (quotation omitted). By their terms, §§ 1226(c) and 1231(a)(2) do not limit the Executive's discretion with respect to any of those decisions. To the contrary, the detention authority conferred by those provisions is contingent on a predicate discretionary decision: § 1226(c) authorizes detention of the described noncitizens only "pending the outcome of removal proceedings," *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018), while § 1231(a)(2) authorizes detention only during the removal period following a final order of removal. *See* Pet. App. 8 n.4; Pet. App. 9 n.5. Thus, "when it comes to decisions that occur before detention, such as who should be subject to arrest, detainers, and removal proceedings," the panel properly held that the provisions at issue do not constrain the Executive's longstanding discretion. Pet. App. 12.[1] And because those predicate immigration-enforcement decisions are committed to the Executive's discretion by law, the government is likely to prevail on its argument that plaintiffs' claims are not subject to judicial review.

2. Plaintiffs' rejoinders—many of which are forfeited because plaintiffs failed to present them to the panel—are unpersuasive.

[1] The panel recognized that §§ 1226(c) and 1231(a)(2) may prevent the Executive from "releas[ing] those [noncitizens] who are facing enforcement actions and fall within" the categories described in those provisions. Pet. App. 7-8. That comports with DHS's longstanding interpretation and its detention practices concerning detained noncitizens whom DHS determines are subject to any mandatory portion of those provisions.

Plaintiffs contend (Pet. 5-6) that §§ 1226(c) and 1231(a)(2) eliminate the Executive's discretion because the provisions use the word "shall." To reiterate, the panel properly held that plaintiffs' argument was foreclosed by cases such as *Castle Rock*, Pet. App. 9, which plaintiffs failed to address or even cite in their stay briefing despite the fact that those cases were central to the government's stay application, Stay Mot. 11-12. And until the district court entered the injunction at issue, "no court at any level previously has held that [those provisions] eliminate immigration officials' discretion to decide who to arrest or remove." *Id.*

Rather than engage with the panel's reasoning, plaintiffs note (Pet. 6-7) that the Supreme Court has previously described those provisions as "mandatory." But the panel properly declined to rely on cherry-picked statements divorced from their context. As the panel observed, every case cited by plaintiffs involved "detainees subject to enforcement action [who] were seeking their release." Pet. App. 9. The Court therefore had no occasion to "consider whether [§§ 1226(c) and 1231(a)(2)] eliminate the government's traditional prerogative to decide who to charge in enforcement proceedings (and thus who ends up being detained)." *Id.*

Plaintiffs next argue (Pet. 8-10) that §§ 1226(c) and 1231(a)(2) require the Executive to arrest and detain all noncitizens described in those provisions, whether or not the Executive intends to remove them. But that argument is just another permutation of the discredited argument that the word "shall" imposes a mandatory and judicially enforceable obligation on the Executive. With respect to § 1226(c) in

particular, that provision authorizes detention only "pending a decision on whether the alien is to be removed." 8 U.S.C. § 1226(a); *cf. Jennings*, 138 S. Ct. at 838. Moreover, plaintiffs' argument that these provisions should be read to require "indefinite detention for someone not facing removal" cannot be reconciled with Supreme Court precedent. Pet. App. 9 n.5; *see Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001)).

Finally, plaintiffs contend (Pet. 10-11) that the APA embodies a presumption of judicial review that can be overcome only where there is no "clear law to apply." But that is an entirely different doctrine. *See Lincoln v. Vigil*, 508 U.S. 182, 190-92 (1993). As noted, the presumption runs in the opposite direction when enforcement decisions are at issue, and both the Supreme Court and this Court have recognized that the presumption against review of enforcement decisions is especially strong in the immigration context. *See* Pet. App. 5-6 (listing cases); *Crane*, 783 F.3d at 247 n.6.

3. Plaintiffs separately argue (Pet. 11-13) that en banc review should be granted because the panel failed to address two additional claims—that the interim priorities were arbitrary and capricious, and that the priorities had to be promulgated using notice-and-comment procedures. At the outset, these claims do not relate to the only argument identified by plaintiffs as warranting en banc review. *See* Pet. 1. And since both claims are foreclosed by the panel's conclusion that the interim priorities are unreviewable because immigration-enforcement decisions are committed

to agency discretion by law, the panel did not need to reach them. *See* Pet. App. 12; 5 U.S.C. § 701(a)(2).

Plaintiffs do not dispute that their arbitrary-and-capricious claim is barred by § 701(a)(2). They contend (Pet. 13) only that their notice-and-comment claim should have been permitted to proceed. Plaintiffs failed to raise this argument to the panel, so they cannot now complain that the panel failed to consider it. In any event, Congress made clear that the entirety of Chapter 7 of Title 5—which includes the APA's judicial-review and cause-of-action provisions, 5 U.S.C. §§ 704, 706—does not apply to actions "committed to agency discretion by law." *Id.* § 701(a)(2); *see Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 634-35 (D.C. Cir. 2020) ("Where Congress leaves the notice-and-comment process no work to do and expressly authorizes the Executive Branch to exercise its unreviewable discretion 'at any time,' the APA does not require an agency to undertake the process for its own sake.").

Plaintiffs' procedural claims lack merit even on their own terms. With respect to their arbitrary-and-capricious claim, the interim priorities are both reasonable and reasonably explained. The memoranda noted that DHS and ICE have "limited resources," Stay Mot. Add. 163, which have been further strained by the pandemic and by foreign-relations considerations, *id.* at 169. The agencies therefore directed limited resources to enforcement actions that would maximize the agencies' ability to "protect[] national security, border security, and public safety." *Id.* at 163. That straightforward explanation is all the APA requires. Plaintiffs complain (Pet. 11-12)

that the agency did not consider various other factors and policy alternatives. But the agency justified the priorities in terms of the most relevant factors—the overarching duty to advance safety and security. And the APA does not "require an agency to consider all policy alternatives in reaching [a] decision." *Motor Vehicle Mfrs. Ass'n of the U.S., Ind. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983).

With respect to their notice-and-comment claim, the interim priorities are "general statements of policy" exempt from notice-and-comment requirements, 5 U.S.C. § 553(b)(3)(A), because they do not "impose any rights and obligations" and leave "the agency and its decisionmakers free to exercise discretion" in individual cases. *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (quotation omitted). The priorities do not create any rights or obligations, and do not compel or prohibit any action by any noncitizen or State. They also preserve the Executive's discretion—which DHS has already exercised—to revoke or amend the priorities. And individual officers remain free under the priorities to "exercise their discretion thoughtfully" and to consider "all relevant facts and circumstances" when deciding whether to pursue enforcement in any given case. ROA.56.

CONCLUSION

For these reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

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November 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, 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.

s/ Sean Janda
Sean Janda

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2), (e) because it contains 3870 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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