No. 22-3272

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF ARIZONA, et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, et al.,

Defendants-Appellants.

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

REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL AND FOR IMMEDIATE ADMINISTRATIVE STAY

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INTRODUCTION AND SUMMARY

The district court's erroneous preliminary injunction prohibits DHS from fully implementing immigration-enforcement guidance that has successfully focused scarce resources on the most pressing law-enforcement needs. Plaintiffs argue that Congress eliminated the Executive's enforcement discretion by using "shall" in two INA provisions. That argument is foreclosed by Supreme Court precedent and is inconsistent with structural, historical, and contextual features of the INA that plaintiffs' response does not discuss.

Even beyond that fundamental flaw, plaintiffs' arguments fail at every turn. Their allegations of injury are factually unsupported and legally unjustified. The guidance is unreviewable for multiple reasons. Plaintiffs' APA arguments fail on the merits. And plaintiffs have failed to demonstrate that the guidance will cause them sufficient harm to justify an injunction intruding on core Executive prerogatives and undermining proven policy.

ARGUMENT

I. The Injunction Rests On Serious Legal Error.

A. Plaintiffs' Claims Are Unreviewable.

1. Plaintiffs' attempt to demonstrate standing is unavailing.

First, plaintiffs wrongly contend (Opp.5) that the guidance has "neutered immigration enforcement," resulting in ICE's detaining and removing fewer noncitizens. Specifically, plaintiffs suggest that ICE detentions "resulting from

interior enforcement" and removals have dropped between 2019 and 2021, and they cite statistics (Opp.5) suggesting that ICE removed approximately 170,000 fewer noncitizens in January-July 2021 than in January-July 2019. But their statistics do not capture noncitizens detained at, or expelled from, the border. DHS's "detention population is increasingly occupied by recent border crossers," and the guidance has permitted DHS to deploy additional resources to the border to address the "pressing operational needs" there. Bible Decl. ¶¶ 7-8, 49, R.49-1, Page ID #1180-81, 1198-99. Indeed, comparing October 2021-March 2022 to October 2019-March 2020, ICE has increased initial book-ins in each month (with a much larger percentage of book-ins coming from CBP arrests, reflecting increased activity at the border), and DHS undertook more than 600,000 expulsions in January-July 2021 under CDC's public-health order, which was not in existence in 2019.[1] Moreover, the record confirms that DHS's policies have allowed it to increase arrests of those it prioritizes. *See* Considerations Memorandum 17, R.27-2, Page ID #459 (large increase in aggravated-felon arrests under previous guidance).

Next, plaintiffs contend (Opp.6) that the supposed presence of additional noncitizens will lead plaintiffs to spend some undefined sum on "recidivist crime" or

[1] For detention statistics, see spreadsheets at ICE, *Detention Management* (last visited Apr. 6, 2022), https://www.ice.gov/detain/detention-management. And for expulsion statistics, see CBP, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY2021* (last visited Apr. 6, 2022), https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2021.

"emergency healthcare and education." But the guidance focuses enforcement efforts on noncitizens who pose the greatest risk to safety and security. *See* Mot.7-8. Plaintiffs have not cited any evidence supporting their counterintuitive conclusion that this prioritization will increase crime or otherwise lead to more State expenditures.

Similarly, plaintiffs' attempt (Opp.6-7) to rely on their "quasi-sovereign interests" in place of an injury-in-fact fails. That argument again proceeds from the unsubstantiated premise that the guidance will lead to increased criminal activity. It also cannot be reconciled with the settled principle that a State cannot assert any such injury against the United States. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). And plaintiffs' reliance on *Kentucky v. Biden*, 23 F.4th 585, 599-601 (6th Cir. 2022), is unavailing. That case held that a federal vaccination policy impaired State plaintiffs' quasi-sovereign interests in a judicially cognizable manner because it allegedly "intruded upon" traditional police powers, preempted state law, and would severely damage the States' economies. *Id.* Here, by contrast, the States have no cognizable interest in the enforcement of the immigration laws against any particular noncitizen. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *cf. Kentucky*, 23 F.4th at 614 (Cole, J., concurring in part, dissenting in part) (explaining that it was common ground with the majority that "[t]o the extent that states seek to vindicate the interests of" their citizens, that would be "impermissible litigation on behalf of third parties" (citing *Mellon*, 262 U.S. at 485-86)). The Constitution vests exclusive authority over

immigration policy in the federal government. *See Arizona v. United States*, 567 U.S. 387, 394-97 (2012). And the States have failed to identify any severe financial injury.

Finally, even if plaintiffs could demonstrate that the guidance might indirectly result in their expending funds, that is insufficient to support standing. As explained (Mot.5-7), permitting such attenuated and derivative effects to support standing would allow States to assert generalized grievances, circumventing the principle that litigants "lack[] a judicially cognizable interest in the prosecution or nonprosecution of another," *Linda R.S*, 410 U.S. at 619 (1973), and upending the "separation-of-powers principles" that underlie Article III's case-or-controversy requirement. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Plaintiffs' sole response (Opp.9) is to quote *Marbury v. Madison*, 1 Cranch 137(1803). That is no response at all.

2. Plaintiffs' claims are also unreviewable as a statutory matter.

a. Even if plaintiffs had standing, their claims are unreviewable because enforcement-prioritization decisions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Plaintiffs' primary response is that the presumption of nonreviewability is "rebutted" by §§ 1226(c) and 1231(a)'s use of "shall." Opp.11 (quotation omitted). As explained (Mot.9-10), however, the Supreme Court has repeatedly rejected the argument that such language displaces the Executive's "deep-rooted" enforcement discretion. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005); *see City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999).

Plaintiffs do not cite, much less attempt to distinguish, these cases. Nor do they grapple with the many additional statutory indications that Congress did not intend these provisions to foreclose the Executive's exercise of judgment: Congress charged the Secretary with establishing immigration-enforcement priorities, constructed an immigration system that relies on officials' discretion, and has never appropriated anywhere near sufficient funds to permit the detention and removal of every noncitizen potentially covered by §§ 1226(c) and 1231(a). *See* Mot.10; *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 386(a), 110 Stat. 3009-653 (provided funding only to support "at least 9,000 beds" during fiscal year 1997).

The INA is a highly reticulated scheme, and DHS must enforce many provisions in the statute affecting different groups of noncitizens. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(A)(i) (certain inadmissible noncitizens "who [are] arriving in the United States" "shall" be ordered expeditiously removed). Congress has neither provided sufficient resources to fully enforce every aspect of the scheme nor instructed DHS to prioritize some aspects over others. And although plaintiffs do not appear to dispute that not all "shalls" in the INA impose categorical mandates, their proposed solution—forbidding the Secretary from issuing guidance and instead allowing individual officers to exercise discretion on an ad hoc basis, while still potentially considering factors such as those articulated in the guidance, Opp.15—turns the INA

upside down. Congress vested the Secretary—and not individual officers—with authority to "establish national immigration policies and priorities." 6 U.S.C. § 202(5).

Plaintiffs also assert (Opp.10-11) that "the committed-to-agency-discretion doctrine does not foreclose" challenges to "polic[ies]" but only challenges to "any particular decision." But the presumption of nonreviewability articulated in *Heckler*, which itself addressed a policy-based challenge, is based on the recognition that enforcement decisions require the "complicated balancing of a number of factors" within the agency's expertise, including which violations "agency resources are best spent on." 470 U.S. at 831. Broader enforcement guidance implicates those factors at least as much as any individualized decision.

Finally, plaintiffs' passing reference (Opp.10) to *Barrios Garcia v. DHS*, 25 F.4th 430 (6th Cir. 2022), is unavailing. That case held that claims brought by noncitizens related to the agency's adjudicating immigration-benefit applications were reviewable under the APA. The Court's reasoning depended on the fact that the agency had "created a program for conferring affirmative immigration relief." *Id.* at 449 (quotation omitted); *cf. id.* (contrasting a "passive non-enforcement policy" (quotation omitted)). By contrast, the guidance does not confer any affirmative legal rights. And the decision whether to arrest or remove a noncitizen is entitled to a presumption of nonreviewability under *Heckler*.

b. Plaintiffs' asserted financial injuries also fall outside the zone of interests of §§ 1226(c) and 1231(a) because plaintiffs have no judicially cognizable interest in

the enforcement of immigration laws against noncitizens, *Linda R.S.*, 410 U.S. at 619, and Congress provided in the INA for judicial review only at the behest of noncitizens directly affected, *see* 8 U.S.C. § 1252(a)(5), (b)(9). Regardless of whether Congress hoped that States would derive some benefit from §§ 1226(c) and 1231(a) (Opp.11-12), the statute that Congress enacted does not extend to States any right to obtain judicial review of decisions made under those provisions.

c. Lastly, plaintiffs' claims are barred because the guidance is not final agency action. Mot.11-13. Plaintiffs' primary response is that the guidance has legal consequences because it "requires" agency officers to "enforce the law in a different way" than plaintiffs believe §§ 1226(c) and 1231(a) require. Opp.12-13 (quotation omitted). But the guidance is consistent with §§ 1226(c) and 1231(a). *See supra* pp.4-6, *infra* pp.8-9. Regardless, the guidance does not "require" agency officers to make any particular decision in any case. To the contrary, the guidance "leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel" in each case. Guidance 5-7, R.1-1, Page ID #28-30. And in any event, that subordinate agency personnel are expected to apply the guidance is irrelevant to the finality inquiry, which focuses on "the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

Lastly, plaintiffs contend (Opp.13) that the guidance is final because if some noncitizen is not detained or removed as a result of the guidance, the States might "owe legal obligations" to that noncitizen. But plaintiffs' reliance on incidental and

derivative effects from the independent operation of other statutes cannot be reconciled with this Court's admonition that the "[p]ractical consequences" of an agency's actions "are not legal harms" for purposes of finality. *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 169 (6th Cir. 2017) (quotation omitted).

B. Plaintiffs' Additional Arguments Lack Merit.

1. Plaintiffs contend (Opp.14-15) that the guidance violates §§ 1226(c) and 1231(a). As explained, that misunderstands the statutory scheme. *See supra* pp.4-6.

Rather than engage with the government's statutory analysis or relevant precedent, plaintiffs (Opp.15) quote the oral argument in *Nielsen v. Preap* to suggest that the government shares the district court's interpretation of § 1226(c). But the government did not maintain, as plaintiffs now assert, that § 1226(c) imposes an unyielding arrest mandate enforceable by the courts. As the Supreme Court itself explained, Congress enacted § 1226(c) in part to "exhort[] the Secretary to act quickly" and to detain noncitizens pending removal proceedings. *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019). And the mere use of the word "shall" does not eliminate the Secretary's authority to set priorities, particularly given the undisputed reality that limited resources prevent DHS from arresting everybody described in § 1226(c), much less to create a judicially enforceable constraint on the Secretary's exercise of judgment about competing enforcement responsibilities. *Cf. id.* at 969 n.6 (rejecting the argument in the context of § 1226(c) that evidence "that Congress expects the

Executive to meet a deadline" necessarily means that "Congress wanted the deadline enforced by courts" (emphases omitted)).

The guidance does not violate even plaintiffs' mistaken interpretations of §§ 1226(c) and 1231(a) because it does not require any officer to forbear from enforcing those statutes in any case. *See* Mot.13. Plaintiffs' only response to this alternative argument (Opp.15-16) is to mischaracterize the guidance as allowing officers to detain or remove noncitizens "*only if* they first determine that extra-statutory factors are satisfied." But as explained, the guidance itself emphasizes that it leaves each ultimate enforcement decision to officers' individualized discretion.

2. Plaintiffs' arbitrary-and-capricious claim fares no better. Plaintiffs argue (Opp.16-19) that DHS failed to adequately consider the potential for recidivism or the impact of the guidance on States and failed to provide a reasoned explanation for the guidance. But the administrative record speaks for itself: DHS considered all of those issues. *See* Considerations Memorandum 5-8, 11-13, 14-20 R.27-2, Page ID #447-50, 453-55, 456-62; Mot.13-16. And plaintiffs' attempt to nitpick perceived flaws in that consideration does not provide any basis for relief under the APA. Instead, the review under the arbitrary-and-capricious "standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The agency "reasonably considered the relevant issues and reasonably explained the decision." *Id.* That is all the APA requires.

3. Finally, plaintiffs have failed to show that DHS was required to issue the guidance using notice-and-comment procedures. *See* Mot.16-17. Plaintiffs' sole counterargument (Opp.19-20) is that the guidance "has binding force" because subordinate agency officials are expected to refer to the guidance when deciding whether to pursue any particular enforcement action. But that expectation does not alter the legal rights of any noncitizen, much less of any State. *See* Mot.16-17. Moreover, an agency action has "binding force" only "if it narrowly circumscribes administrative discretion in all future cases" or "finally and conclusively determines the issues to which it relates." *Dyer v. Secretary of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989) (per curiam). The guidance, which leaves the exercise of discretion in each case up to agency personnel, falls well short of that standard.

II. The Remaining Factors Overwhelmingly Favor A Stay.

As explained, *see* Mot.17-20, the equities overwhelmingly favor a stay pending appeal because the preliminary injunction usurps the Executive's longstanding constitutional and statutory authority to exercise enforcement discretion; creates considerable operational confusion for immigration officers; and interferes with the government's ability to implement a policy that has enabled DHS to deploy limited resources to meet the most urgent needs, including by supporting border-security operations and increasing enforcement actions against the most pressing public-safety threats.

By contrast, the only concrete harm claimed by the States is their assertion (Opp.22) that the guidance "means *tens of thousands* more criminal aliens will remain in the States," causing them to spend additional funds. But the States fail to cite any evidence to support that statement. Indeed, the States have failed to identify even a single noncitizen—much less "tens of thousands"—spared enforcement under the guidance whose presence has caused the States to expend additional funds. Their speculative injuries are thus outweighed by the irreparable harms that the preliminary injunction inflicts on the Executive and the public—many of the specifics of which plaintiffs declined to dispute because there was "insufficient space" in their opposition. Opp.22.

III. Any Injunction Should Be Limited To The Plaintiff States.

Finally, as explained (Mot.20-21), the district court's nationwide injunction contravenes constitutional and equitable principles concerning injunctive relief. Plaintiffs' only response (Opp.23) is to state, in a single paragraph, that "people travel" and so a limited injunction may not redress plaintiffs' asserted injuries to the maximum possible extent because out-of-state noncitizens "who are neither arrested nor removed would be free to enter Ohio." But injunctive relief must consider countervailing equities, including those of DHS in implementing its enforcement priorities and of other States that might conclude the priorities are sound. Plaintiffs have failed to identify even one noncitizen who was released outside their borders, moved to plaintiff States, and caused them to incur some cost.

CONCLUSION

The government respectfully requests that this Court enter an immediate administrative stay and stay the preliminary injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,598 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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