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 BRIEF FOR APPELLANTS

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

KENNETH L. PARKER
United States Attorney

DANIEL TENNY
MICHAEL SHIH
SEAN R. JANDA
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3388

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Federal Statutes:

State Statutes:

Other Authorities:

INTRODUCTION AND SUMMARY

The district court entered a preliminary injunction prohibiting the Department of Homeland Security (DHS) from fully implementing immigration-enforcement guidance that has enabled the agency to deploy its limited resources to meet the most pressing threats. The district court did so primarily because it accepted plaintiffs' assertions that two provisions of the Immigration and Nationality Act (INA)—8 U.S.C. §§ 1226(c) and 1231(a)—require the Executive to arrest, detain, and remove extremely broad categories of noncitizens. That was error, as demonstrated in our opening brief, and a panel of this Court agreed that the government was likely to succeed on the merits and stayed the injunction pending appeal.

Plaintiffs now retreat from the position erroneously adopted by the district court. They concede that "DHS has limited resources and is probably incapable" of arresting, detaining, and removing every noncitizen described by §§ 1226(c) and 1231(a). Br. 43. They "concede that, as a result, DHS officers must exercise discretion in deciding whom to arrest," and that DHS may permissibly "guid[e] that discretion with prioritization schemes." *Id.* And they appear to concede that DHS's decades-long history of issuing such prioritization guidance is lawful. Br. 10-12, 43-44. Therefore, it is hard to understand what is left of their claims.

Plaintiffs' brief largely boils down to a single mistaken premise: that the guidance here does not "simply announc[e] priorities to guide independent decisionmaking," Br. 44, but rather requires agency officers to refrain from enforcing

the law. Even a cursory review of the guidance reveals that announcing priorities to guide independent decisionmaking is exactly what it does. Thus, like all of the other similar guidance with which plaintiffs do not take issue, the guidance here comports with the INA.

Even beyond plaintiffs' fundamental misunderstanding of how the guidance works, their claims fail for a multitude of reasons. Their speculative assertions that they will spend some unspecified additional amounts under their own laws in response to the guidance are insufficient to satisfy Article III's standing requirement. The guidance is unreviewable under the Administrative Procedure Act (APA), and in any event conforms to each of the APA's requirements. And the preliminary injunction entered by the district court is unsupported by the equities, barred by the INA, and impermissibly overbroad. This Court should reverse.

ARGUMENT

I. Plaintiffs Lack Article III Standing

1. Plaintiffs contend that they have standing because the guidance will affect the mix of people who reside in their States and the States will alter their expenditures as a result. As noted in our opening brief (at 17), "[v]irtually any federal action . . . could be said to have some incidental impact on a State's fisc." But plaintiffs do not even attempt to cabin their legal theory, instead embracing an essentially boundless theory of standing for States whenever they can allege that they will spend additional funds in response to a federal action; indeed, plaintiffs contend that standing can be

premised on the contemplated expenditure of "any amount of money—even a dollar or two." Br. 24-25 (quotation omitted). As explained in our opening brief (at 16-21), the theory that a State has standing to seek judicial review of all manner of federal actions that may affect persons residing in the State based on the incidental effects on the expenditures the State may then in turn make is inconsistent with our constitutional structure of separate sovereigns.

Plaintiffs largely ignore these points. Instead, they note that in some circumstances economic harms can be cognizable. *See* Br. 33 (first citing *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019); and then citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979)). But the examples on which they rely merely highlight the decidedly indirect and attenuated nature of the injury they assert here. In the only cited Supreme Court case that involved a federal action, the plaintiffs claimed that the challenged policy would deter their citizens from responding to the census, which would directly cause the loss of "federal funds that are distributed on the basis of state population." *Department of Commerce*, 139 S. Ct. at 2565. A State's interest in a proper calculation of the federal funds to which it is entitled under federal law bears no resemblance to a State's concern that the federal government's actions might affect individuals in the State in such a way that the State would alter its own spending with respect to these same individuals. *Gladstone Realtors* involved a local government's suit under a specific federal fair housing act against a real-estate firm engaged in racially discriminatory steering of prospective home buyers that threatened the local

government's ability to bear the cost of government and to provide services. 441 U.S. at 93-95, 110-11. It was not a suit challenging *federal* action based merely on incidental effects on state or local government expenditures.

2. In stark contrast to the *Department of Commerce* case in which the federal government's actions allegedly deprived a State of federal funds to which it claimed to be entitled, plaintiffs here rely on a series of speculative assertions regarding the incidental effects of a policy concerning enforcement discretion and allocating the federal government's own resources.

A State has no legally protected or judicially cognizable interest in avoiding such effects of federal law enforcement and other policies. Such effects were entirely foreseeable at the Founding and are commonplace under a Constitution that by deliberate design vests the National Government with authority to act directly on the people of the several States, independent of the States' own authority to do so. It is fundamentally inconsistent with the constitutional structure, and the Framers could not have intended, for the Judicial Branch to resolve such a dispute between a State and the United States. Any such asserted "injuries" to the State, mediated through the diffuse effects of federal action on, and the actions of, individuals within the State, are not concrete, particularized, or imminent in the manner required for standing, and are not, under our constitutional structure, fairly traceable to the federal action.

Indeed here, plaintiffs' arguments are speculative even on their own terms. Plaintiffs "do not quarrel with the fact that DHS has limited resources" and thus

"must exercise discretion in deciding whom to arrest," and they "take no issue with DHS's guiding that discretion with prioritization schemes." Br. 43. But plaintiffs never attempt to square that necessary concession with their repeated suggestion that their asserted injuries are nonspeculative because the guidance "causes a drop in immigration enforcement." Br. 24. The guidance does not alter the amount of resources devoted to immigration enforcement but rather sets priorities for the use of those resources.

Plaintiffs cannot establish otherwise by pointing to statistics in the record showing a drop in interior immigration enforcement over the past two years. *See* Br. 15-17. As the government has already explained in its opening brief (at 22-23), those statistics are unhelpful because they do not account for noncitizens detained at, or expelled from, the border. And although plaintiffs suggest (at 16) that DHS performed fewer overall and fewer border arrests in Fiscal Year 2022 than Fiscal Year 2019, both overall book-ins and book-ins from U.S. Customs and Border Protection (CBP) arrests specifically are higher for each month in Fiscal Year 2022 than for the corresponding month in Fiscal Year 2020. *See* Opening Br. 22-23. It is thus unclear how plaintiffs could plausibly argue that any decrease in arrests since 2018-2019 is attributable to the guidance. In any event, statistics regarding the number of arrests are generally unhelpful because, during the pandemic, noncitizens at the border have often been expelled without first being arrested pursuant to the CDC's public health

order. *See* CBP, *Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions FY2021* (last visited May 31, 2022), https://go.usa.gov/xuUph.

As we further explained in our opening brief (at 23-24), in addition to prioritizing border enforcement, the guidance is intended to direct limited enforcement resources toward the very noncitizens who plaintiffs claim will most likely impose costs on them—those likely to commit criminal offenses. As the D.C. Circuit recognized, policies that are "designed to remove more criminals in lieu of" noncitizens "who commit no offenses or only minor violations" do not cause a cognizable injury to a nonfederal law-enforcement official. *Arpaio v. Obama*, 797 F.3d 11, 24 (D.C. Cir. 2015) (emphasis omitted).

Plaintiffs' attempt (at 34) to distinguish *Arpaio* on the grounds that their theory is "logically coherent" and "record-supported" is no more than *ipse dixit*. Plaintiffs have adduced no evidence establishing that the guidance has failed to work as intended, directing resources to support national security, public safety, and border security (and likely decreasing fiscal burdens on States in the process). In fact, the single news article that plaintiffs cite to support their assertion (at 26) that border security has diminished only undercuts their theory. That article, published months before the guidance was issued, describes an influx of border crossers, *see* Nick Miroff, *Border Officials Say More People Are Sneaking Past Them as Crossings Soar and Agents Are Overwhelmed*, Wash. Post (Apr. 2, 2021), https://perma.cc/Z9NX-K6LS, and the record here makes clear that the guidance has enabled DHS to redirect resources to

bolster border security in light of this influx, *see* Bible Decl. ¶ 49, R.49-1, Page ID #1198-99.

Plaintiffs are also wrong to dismiss as irrelevant (at 25-26) the countervailing benefits that flow from directing enforcement resources to the greatest threats. These benefits are "of the same type and arise from the same transaction as the costs" that the guidance will allegedly inflict. *See Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015). Plaintiffs cannot manufacture standing by pretending that these benefits do not exist. Indeed, when combined with plaintiffs' separate assertion (at 24-25) that even a dollar of downstream expenditures is sufficient to support State standing, plaintiffs' argument on this point suggests that if any particular resident who would otherwise be detained or removed and on whom the State will expend state funds is not detained or removed, then the State has standing, even if the guidance causes a resident who is more dangerous (or more costly to the State) to be detained or removed instead. They cite no case that supports that extreme result.

3. Plaintiffs' attempt (at 27-28) to rely on asserted sovereign interests to justify standing also fails. To the extent that plaintiffs claim a sovereign interest in the "power to exclude" noncitizens from their territory, Br. 27 (quotation omitted), that asserted interest is incompatible with our federal structure. As the Supreme Court has explained, it is the National Government, not any State, that has the "power to determine immigration policy." *Arizona v. United States*, 567 U.S. 387, 395 (2012). Immigration is an important aspect of the National Government's exclusive power

over foreign affairs, and "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). And contrary to plaintiffs' suggestion, their belief that the Executive is not fulfilling its duty to take care that the immigration laws be faithfully executed does not establish any judicially cognizable injury to any distinct sovereign interest of one or some of the several States. It is, at bottom, a generalized, non-judicially cognizable grievance, just as such a belief by a resident of the State would be. Thus, in our system, the proper avenue of redress for such a grievance with the federal government is by the States' residents through the political process and by the leaders of the State to lend their support and voice their own concerns, *see* Opening Br. 18-19. *Cf. Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867).

For similar reasons, plaintiffs' attempted reliance (at 28) on *Massachusetts v. EPA*, 549 U.S. 497 (2007), is unavailing. In that case, the Supreme Court recognized that States retain an "independent interest" in their physical "sovereign territory," even if they have "surrender[ed] certain sovereign prerogatives" with respect to the ability to safeguard that interest (for example, "Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions"). *Id.* at 519. By contrast, and as *Arizona* makes clear, States in our federal system have surrendered any underlying

sovereign interest in the ability to exclude individuals, and so there accordingly is no sovereign interest that could support standing in this case.

Plaintiffs are likewise mistaken to suggest (at 27, 34-35) that their interest in their citizens' health and welfare supports standing. A State cannot "enforce [its citizens'] rights in respect of their relations with the federal government." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

4. Plaintiffs' claims of standing also fail because their asserted injuries are not redressable, for two reasons. *See* Opening Br. 25. First, no injunction could alter the reality that DHS does not have the resources to enforce the INA against all noncitizens potentially described in §§ 1226(c) and 1231(a)—a point that plaintiffs appear to concede (at 43). Second, the applicability of §§ 1226(c) and 1231(a) both hinge on antecedent exercises of prosecutorial discretion in the form of determining whether to initiate or pursue removal proceedings. *See Arizona v. Biden*, 31 F.4th 469, 475 (6th Cir. 2022). Section 1226(c) is not an independent source of detention authority but is instead "simply a limit on the authority conferred by" 8 U.S.C. § 1226(a), *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019)—authority that permits detention only "pending the outcome of removal proceedings," *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018). And § 1231(a) applies only once the Executive has obtained a final order of removal. The decisions to initiate and pursue removal proceedings are themselves committed to the agency's absolute discretion. *See Arizona*, 567 U.S. at 396 (recognizing the Executive's discretion to decide "whether it makes sense to

pursue removal at all"); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("[T]he Executive has discretion to abandon the endeavor" at "each stage" of the removal process.). Because plaintiffs do not (and could not) challenge these antecedent exercises of discretion, any injunction they obtain related to the downstream detention and removal decisions "would not necessarily result in the Department arresting more people, detaining more people, or removing more people." *Arizona*, 31 F.4th at 475.

II. Plaintiffs' Claims Are Unreviewable

1. Even if this case presented a case or controversy under Article III, plaintiffs' claims would be unreviewable because the guidance is not final agency action that could qualify for judicial review under the APA. The guidance simply articulates a set of priorities to guide agency officials' exercise of discretion in individual cases; it does not alter any noncitizen's legal rights or obligations, compel agency officers to make any particular enforcement or nonenforcement decision, or otherwise engender any "direct and appreciable legal consequences," *Bennett v. Spear*, 520 U.S. 154, 178 (1997). *See* Opening Br. 25-28.

Plaintiffs' primary contention in response (at 36-37) is that the guidance is final because, in their view, it binds immigration officers by "prohibit[ing] officers from deciding to enforce immigration laws against an alien based exclusively on his inclusion within" §§ 1226(c) and 1231(a). Plaintiffs cite no authority for the proposition that directing officials to consider certain factors in the exercise of

discretion must be final agency action because it prohibits them from making decisions without regard to those factors. Such a conclusion would be especially anomalous because the finality inquiry focuses on whether the action in question has an "actual legal effect" on "regulated entities"—not on agency personnel. *See National Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

The guidance, moreover, preserves officials' "independent decisionmaking" authority and does not bind officials with regard to any future decision. *See Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 167-170 (6th Cir. 2017). The guidance expressly states that officers remain free to "evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." Guidance 3-4, R.1-1, Page ID #26-27. The guidance also states that officers should, "to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances," and "should not rely on the fact of conviction or the result of a database search alone" in making enforcement decisions. Guidance 4, R.1-1, Page ID #27. And the guidance provides "examples" of non-exhaustive "aggravating and mitigating factors" to help guide the case-by-case inquiry and suggests that any single factor or bright line category should not always be dispositive. *See* Guidance 3-4, R. 1-1, Page ID #26-27. There is no plausible argument that the guidance binds decisionmakers in individual cases.

The guidance also does not create any right to review of any action; instead, the guidance plainly establishes that it is "not intended to, does not, and may not be relied upon to create any right or benefit." Guidance 5-7, R.1-1, Page ID #28-30. Although plaintiffs urge (at 37) that the guidance provides a right to administrative review, U.S. Immigration & Customs Enforcement (ICE) has simply informed noncitizens that they may contact ICE officials to request a review of their case. *See* ICE, *Contact ICE About an Immigration/Detention Case*, https://www.ice.gov/ICEcasereview (last visited May 31, 2022). But nothing about that administrative second-look creates any enforceable legal rights; noncitizens may not, for example, challenge the result of the case review in court or otherwise rely on the guidance (or the separate case-review process) to claim any legal entitlement to nonenforcement.

2. Separately, plaintiffs' claims are unreviewable because the decision to issue enforcement prioritization guidance is committed to agency discretion by law. The Supreme Court has explained that such enforcement decisions are "generally committed to an agency's absolute discretion," *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), especially at the behest of third parties, who (unlike even the plaintiffs in *Heckler*) have no direct stake in the decision, *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). And every relevant feature of immigration and the INA confirms that Congress did not intend to displace that presumption of nonreviewability with respect to the claims at issue here. *See* Opening Br. 29-33.

Plaintiffs err in suggesting (at 38) that *Heckler* is inapplicable to this case "because the States are challenging a broad nonenforcement policy as opposed to a discrete nonenforcement decision." The guidance is not a "nonenforcement policy"; rather, as discussed above, the guidance sets priorities for allocating scarce resources, and does not preclude enforcement in any category of case. Moreover, *Heckler* itself involved a challenge to the FDA's general policy not to take enforcement action with respect to drugs that were intended for use by States in accordance with their lethal-injection laws, not a challenge to an individual nonenforcement decision in a particular case. *See Heckler*, 470 U.S. at 823-25. And the reasons given in *Heckler* for why nonenforcement decisions are generally committed to agency discretion apply just as forcefully, if not even more forcefully, to the issuance of prioritization guidance than to any individual nonenforcement determination. It is indisputable that developing such guidance "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," including which violations "agency resources are best spent on," in what circumstances "the agency is likely to succeed," and which enforcement actions "best fit[] the agency's overall policies." *Id.* at 831. Thus, as *Heckler* explained, it is the agency that is best positioned "to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 831-32; *see also Arizona*, 567 U.S. at 396-97.

3. Plaintiffs' claims are also unreviewable because they are precluded by the INA and because any incidental effects on a State's own expenditures do not fall

within the zone of interests of §§ 1226(c) or 1231(a). *See* Opening Br. 33-34. Plaintiffs are mistaken in asserting (at 39-40) that they fall within the zone of interests because §§ 1226(c) and 1231(a) were enacted to protect States from the costs of immigration underenforcement. The relevant inquiry for both preclusion and zone-of-interests purposes focuses on whether Congress intended that the "particular plaintiff should be heard to complain of a particular agency decision," *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987); *see also Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984) ("[T]he preclusion issue does not only turn on whether the interests of a particular class . . . are implicated. Rather, the preclusion issue turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law."). And as explained, the INA throughout reflects the principle that the balancing of the various underlying interests implicated by immigration enforcement is exclusively the province of the National Government; no feature of the statute suggests that Congress intended that States be permitted to rely on attenuated financial interests to challenge the Executive's balancing of those interests.

Plaintiffs also misunderstand the relevance of 8 U.S.C. § 1252(b)(9), which provides for challenges to the application of the INA only by noncitizens against whom that law is enforced. Contrary to plaintiffs' assertion (at 40) that § 1252(b)(9) does not matter here because it only applies to "issues bearing on *particular* removal decisions," where Congress decides to "provide[] a detailed mechanism for judicial

consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded," *Block*, 467 U.S. at 349. Congress's evident desire to allow challenges to the implementation of the INA to generally proceed only through individual actions through statutorily specified channels by directly regulated noncitizens seeking individual relief, *cf.* 8 U.S.C. § 1252(f)(1), precludes systemwide challenges brought by third parties like the States here. And for similar reasons, plaintiffs' reliance on *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1907 (2020), is unavailing. In that case, which included directly affected noncitizens as plaintiffs, the Court only considered whether § 1252(b)(9) by its terms bars review of certain policy-based challenges; it did not consider the extent to which § 1252(b)(9), along with the other relevant structural and contextual features of the INA, shows that Congress did not intend to allow claims like those at issue here to proceed through the APA.

III. Plaintiffs Cannot Prevail On The Merits Of Their Claims

1. On the merits, plaintiffs' claim that the guidance is contrary to asserted mandates contained in §§ 1226(c) and 1231(a) to arrest, detain, and remove certain noncitizens is incorrect. *See* Opening Br. 34-40.

a. As an initial matter, §§ 1226(c) and 1231(a) do not impose any mandatory, judicially enforceable duty to arrest or remove any noncitizen. Plaintiffs do not dispute the applicability of the bedrock interpretive principle that enforcement

discretion persists "even in the presence of seemingly mandatory legislative commands" and that some "stronger indication" of congressional intent is required before a court should conclude that Congress meant to limit the Executive's inherent discretion. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005). Instead, plaintiffs argue (at 41-42, 45-46, 48-49) that §§ 1226(c) and 1231(a) provide a sufficient indication, primarily because both provisions use the word "shall"; the INA elsewhere employs "may" language; and legislative history suggests Congress believed these provisions to be "mandates."

But none of those features of the statutory scheme, alone or in combination, can overcome the Executive's "deep-rooted" enforcement discretion. Indeed, all three were present in *Castle Rock* itself. *See* 545 U.S. at 759-61, 759 n.6, 764 n.11. *Castle Rock* concerned a statute stating that Colorado officers "shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest" of a person with notice of a domestic-violence restraining order if there was probable cause to believe that the person had violated the order. *Id.* at 759 (emphasis omitted) (quoting Colo. Rev. Stat. 18-6-803.5(3)(b) (Lexis 1999)). The statute was enacted against the backdrop of other statutes that provided that officers "may arrest" persons in particular circumstances. *See id.* at 764 n.11 (quoting Colo. Rev. Stat. 16-3-102(1) (Lexis 1999)). And the legislative history indicated that the legislature thought that officers would be required to make arrests. *Id.* at 759 n.6.

If anything, the absence of any mandatory, judicially enforceable duty is clearer here than in *Castle Rock*. Unlike the plaintiff in *Castle Rock*, who was the victim of the abuse that led to the restraining order yet could still not challenge its nonenforcement, the plaintiff States here are not even remotely affected in such a direct and concrete way. Moreover, here, Congress imposed many restrictions on judicial review of decisions under §§ 1226 and 1231; application of both provisions is contingent on antecedent exercises of unreviewable discretion; Congress has never appropriated anywhere near sufficient resources to permit the Executive to arrest, detain, and remove all noncitizens potentially covered by those provisions; and Congress expressly vested in the Secretary responsibility to determine how best to allocate the agency's limited resources across all aspects of the INA's enforcement scheme, *see* 6 U.S.C. § 202(5).

Finally, the structure of § 1231(a)(2) illustrates the error in plaintiffs' effort to treat the word "shall" as imposing a mandatory, judicially enforceable duty in the context of the INA. Congress provided that DHS "shall detain" a noncitizen during the removal period, 8 U.S.C. § 1231(a)(2), language that plaintiffs contend creates a mandatory, enforceable duty to arrest and detain all noncitizens during the removal period. But in the very next sentence, Congress provided that "[u]nder no circumstance during the removal period shall" DHS release a specified and limited subset of noncitizens. *Id.* Plaintiffs suggest that "[u]nder no circumstance" merely means the same thing as "shall," which would render the "[u]nder no circumstance"

sentence wholly superfluous if plaintiffs' interpretation of the "shall" sentence were correct.

Plaintiffs' reliance on statements from the Supreme Court and this Court—and by the government in the course of litigating those cases—regarding the "mandatory" nature of § 1226(c) ignores the context in which those statements were made. *See* Br. 41 (citing *Preap*, 139 S. Ct. at 959, 966), 48-49 (first citing *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 (2021); and then citing *Martinez v. Larose*, 968 F.3d 555, 561 (6th Cir. 2020)). Prior litigation surrounding §§ 1226(c) and 1231(a) has centered on whether noncitizens who have been detained by DHS and who are covered by those provisions are entitled to a bond hearing. As the government argued in those cases, and the courts agreed, those provisions mandate detention in the sense that noncitizens are not entitled to a bond hearing and potential release on bond. For the noncitizens, that is the distinction between those provisions and the discretionary detention described in § 1226(a). But even plaintiffs concede that detention is not mandatory for DHS in the sense that it must arrest and detain every noncitizen subject to §§ 1226(c) or 1231(a); among other things, "resource constraints" would render such universal detention impossible. Br. 43.

b. Plaintiffs also misunderstand the guidance insofar as they assert that it precludes arrest or removal in any individual case by permitting arrest or removal "*only if* the extra-statutory factors in the [guidance] are satisfied." Br. 42. The guidance "leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel"

in each case. Guidance 5, R.1-1, Page ID #28. And there are certainly no "extra-statutory factors" that must be "satisfied"; instead, the guidance eschews "bright lines" and "categories," providing only a non-exhaustive list of aggravating and mitigating factors for officers to consider in making individualized enforcement decisions. *See* Guidance 3-4, R.1-1, Page ID #26-27. In any given case, an officer may determine that a noncitizen warrants enforcement action—regardless of whether all, some, or none of the aggravating or mitigating factors are applicable.

Plaintiffs underscore their error by suggesting that an officer might be precluded from arresting an "armed burglar" if the guidance's "factors do not support arresting the" burglar. Br. 42-43. That situation would arise only if the officer were to consider the totality of the circumstances and decide, in her independent judgment, that it would not be a valuable use of the agency's limited resources to arrest, detain, and remove the burglar. Given that plaintiffs concede that officers have no statutory obligation to arrest every noncitizen subject to §§ 1226(c) and 1231(a)—a necessary concession in light of resource constraints, among other factors—the guidance, properly understood, does not violate even plaintiffs' own understanding of those provisions.

2. Plaintiffs' arbitrary-and-capricious claim is similarly unavailing. *See* Opening Br. 40-43. In the main, plaintiffs contend (at 53-54) that DHS failed to adequately consider the issues of recidivism of noncitizens subject to § 1226(c) and the costs of the guidance on the States. But DHS did address those issues, in depth. *See*

Considerations Memorandum 5-8, 11-13, 14-20 R.27-2, Page ID #447-50, 453-55, 456-62. Plaintiffs merely disagree with DHS's conclusions and the weight it placed on various relevant considerations. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (review under the arbitrary-and-capricious "standard is deferential, and a court may not substitute its own policy judgment for that of the agency"). And while plaintiffs urge that DHS should have further studied recidivism rates among noncitizens subject to § 1226(c)—a category whose detention would in any event greatly exceed DHS's available resources—they identify no error in the list of factors that DHS identified as relevant to the determination of whether a noncitizen is a danger to public safety. They do not explain, in particular, why it was arbitrary and capricious to distinguish between a noncitizen who committed murder last year and a noncitizen who issued a bad check twenty years ago, even though each could be covered by § 1226(c). *See Dolic v. Barr*, 916 F.3d 680 (8th Cir. 2019) (holding that passing a bad check in violation of Missouri Revised Statute § 570.120.1(1) is a crime involving moral turpitude).

3. Finally, plaintiffs have failed to demonstrate that DHS was required to promulgate the guidance through notice-and-comment procedures. *See* Opening Br. 43-45. Plaintiffs' primary contention on this score (at 56) is that the guidance is a substantive rule, not policy guidance, because it limits agents' discretion by "prohibit[ing] agents from enforcing immigration laws if doing so would contradict the" guidance. As has been repeatedly explained, however, *see* Opening Br. 26-28, 43-

45; *supra* pp. 11, 18-19, the guidance does not "narrowly circumscribe[] administrative discretion" or "finally and conclusively determine[] the issues to which it relates," *Dyer v. Secretary of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989) (per curiam), because it allows individual ICE officers to determine whether, in their own judgment, enforcement action is appropriate in any given case. The fact that the guidance provides some non-exhaustive factors for those officers to consider in making individualized, discretionary decisions—and that officers generally should not initiate an enforcement action if they determine, in their individual judgment, that the totality of the circumstances does not render that action a valuable use of limited agency resources—does not alter the conclusion that the guidance is a nonbinding policy statement.

IV. The Preliminary Injunction Is Improper In Any Event

1. Even if plaintiffs were likely to succeed on the merits, the district court erred in entering a preliminary injunction because the balance of the equities and the public interest weigh heavily against such relief. *See* Opening Br. 45-47. The only harm plaintiffs have asserted is the prediction that they will spend some additional unspecified sum of money in response to the guidance. On the other side of the ledger, plaintiffs provide no response to the explanation in our opening brief that enjoining the guidance would work grave harm on the Executive and the public interest by invading the Executive's constitutional prerogatives and by disrupting

DHS's ability to appropriately allocate its scarce resources by enforcing the INA against the most pressing threats.

Instead, plaintiffs' only argument regarding the balance of the equities and the public interest (at 57-58) is that, to the extent that plaintiffs are likely to succeed on the merits, the harms to the Executive and the public interest from enjoining the guidance do not count as legitimate because the guidance is unlawful. That argument disregards the preliminary injunction framework. To obtain a preliminary injunction, a plaintiff must demonstrate not only that "he is likely to succeed on the merits," but *also* "that the balance of equities tips in his favor" and "that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). If plaintiffs' argument were correct, those three factors would collapse into one: any plaintiff who could establish a likelihood of success on the merits would also establish that the balance of equities and the public interest tipped in his favor. That is not the law. *See id.* at 31-32 (declining to "address the underlying merits" but holding plaintiffs had failed to meet the equitable factors). And the oddity of plaintiffs' position is only underscored by the tentative nature of the merits inquiry at the preliminary-injunction stage.

2. In addition, the district court's preliminary injunction is precluded by 8 U.S.C. § 1252(f)(1), which states that any court other than the Supreme Court lacks jurisdiction to "enjoin or restrain the operation of" certain provisions of the INA—

including §§ 1226(c) and 1231(a)—except as to "the application of such provisions to an individual alien." *See* Opening Br. 48.

Plaintiffs argue (at 58-59) that the preliminary injunction does not enjoin "the operation of" §§ 1226(c) or 1231(a) but instead only enjoins guidance that "thwarts the operation" of those provisions. But plaintiffs' position does not grapple with the fact that "enjoin" can mean not merely to prohibit but also "[t]o require; command; [or] positively direct." *Enjoin*, Black's Law Dictionary 529 (6th ed. 1990). By depriving courts of the authority to "enjoin" the relevant statutory provisions, § 1252(f)(1) bars not only injunctions that block operation of the covered INA provisions on constitutional grounds but also injunctions that direct the Executive to adhere to the court's reading of those provisions. Thus, § 1252(f)(1) bars injunctive relief on claims that, like plaintiffs', assert that "the Executive's action does not comply with the statutory grant of authority." *Preap*, 139 S. Ct. at 975 (Thomas, J., concurring in part and in concurring in the judgment).

Indeed, this Court has already rejected a similar argument in *Hamama v. Adducci*, 912 F.3d 869, 879-80 (6th Cir. 2018) (cited at Opening Br. 48), a case that plaintiffs fail to acknowledge. There, the district court interpreted §§ 1226(c) and 1231 to require bond hearings for certain detained noncitizens and entered a classwide preliminary injunction requiring the government to provide those hearings; on appeal, the noncitizens defended that injunction on the basis that "the district court was not enjoining or restraining the statutes, but rather interpreting them to ensure they are

correctly enforced." *Id.* at 879 (quotation omitted). This Court rejected that argument as "implausible on its face," concluding that the injunction's "limitations on what the government can and cannot do under the removal and detention provisions are" plainly "restraints" forbidden by § 1252(f)(1). *Id.* at 879-80; *accord Hamama v. Adduci*, 946 F.3d 875, 878 (6th Cir. 2020). Similarly here, the district court's preliminary injunction "enjoins" or "restrains" the government's implementation of §§ 1226(c) and 1231(a) by requiring the government to arrest, detain, and remove certain noncitizens under those provisions.

Plaintiffs are likewise mistaken to contend (at 59) that § 1252(f)(1) is not a true jurisdictional statute—apparently because it does not address the court's power to "adjudicate any case or set of cases"—and that the government's argument that it barred the entry of the preliminary injunction has been forfeited. Section 1252(f)(1) explicitly limits the "jurisdiction or authority" of the lower courts, 8 U.S.C. § 1252(f)(1), and jurisdictional limitations speak to "a court's power" and so "can never be forfeited or waived," *United States v. Cotton*, 535 U.S. 625, 630 (2002). Congress "is free to attach the conditions that go with the jurisdictional label"—including exemption from forfeiture—to whichever statutory requirements it chooses, *Henderson ex rel. Henderson v. Shineski*, 562 U.S. 428, 435 (2011), and Congress unambiguously did so in § 1252(f)(1). Here, the limitation on relief in § 1252(f)(1) "is jurisdictional . . . because explicit statutory language makes it so." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318 (2017).

3. Finally, the district court's nationwide injunction contravenes fundamental constitutional and equitable principles concerning injunctive relief. *See* Opening Br. 49-51. Plaintiffs concede that "[c]ourts must 'grant relief in a party-specific and injury-focused manner,'" which "generally counsels against nationwide injunctions." Br. 58 (quoting *Arizona*, 31 F.4th at 483 (Sutton, C.J., concurring)). Their only attempted defense of nationwide relief here is that an injunction limited to the plaintiff States would permit DHS to transport noncitizens arrested in those States and subject to §§ 1226(c)(2) and 1231(a)(2) across state lines and then release them.

That speculative and wholly unwarranted assertion fails to support the extraordinary remedy of nationwide relief. As DHS has explained, it has long "recognize[d]" that § 1226(c)(2) and the second sentence of § 1231(a)(2) impose "constraints on its authority" to release the described noncitizens once they are detained in the first instance, and nothing in the guidance—which applies by its terms only to arrest and removal decisions and not to release decisions—"override[s]" those obligations. Considerations Memorandum 18-19, R.27-2, Page ID #460-61; *see also* Opening Br. 39. There is thus no basis to believe that DHS would respond to a geographically limited injunction in the manner plaintiffs posit.

CONCLUSION

For the foregoing reasons and those given in our opening brief, the judgment of the district court should be reversed and the preliminary injunction should be vacated.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

KENNETH L. PARKER
United States Attorney

DANIEL TENNY
MICHAEL SHIH

s/ Sean R. Janda
SEAN R. JANDA
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3388
sean.r.janda@usdoj.gov

May 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,346 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 R. Janda
Sean R. Janda

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 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. Service will be accomplished by the appellate CM/ECF system.

s/ Sean R. Janda
Sean R. Janda