**No. 22-40367**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

STATE OF TEXAS AND STATE OF LOUISIANA
*Plaintiffs-Appellees*,

v.

UNITED STATES OF AMERICA, *et al.*,
*Defendants-Appellants.*

# REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A STAY PENDING APPEAL

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## INTRODUCTION AND SUMMARY

Plaintiffs acknowledge that the district court's nationwide vacatur squarely conflicts with a published opinion of the Sixth Circuit. They also cannot dispute that the vacatur contradicts the practice of every Administration since the relevant provisions of the INA were adopted: Enforcement priorities have never been issued via notice and comment, and they have never required the arrest and removal of every noncitizen covered by 8 U.S.C. §§ 1226(c) and 1231(a). Finally, plaintiffs have no persuasive answer to the Supreme Court's intervening decision in *Garland v. Aleman Gonzalez*, No. 20-322 (June 13, 2022), which makes clear that the district court lacked jurisdiction to prohibit DHS from implementing the guidance.

This Court should stay the vacatur in full. In the alternative, it should stay the vacatur outside the plaintiff States. Nationwide vacatur is not necessary to remedy plaintiffs' asserted injuries and would effectively nullify the Sixth Circuit's stay. At a minimum, the Court should extend the administrative stay to allow full consideration of *Aleman Gonzalez* and the Supreme Court's forthcoming decision in *Biden v. Texas*, No. 21-954, which is expected within days. The Supreme Court is reviewing this Court's decision in *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), which was one of the principal authorities on which the district court relied—and which is cited more than a dozen times in plaintiffs' opposition. Particularly because the guidance has been in effect for seven months, there is no good reason to upset the status quo by allowing

the vacatur to take effect before the parties and this Court can consider the Supreme Court's forthcoming decision.

## ARGUMENT

**1.** The district court prohibited the federal government from relying on the guidance even though 8 U.S.C. § 1252(f)(1) provides that no court other than the Supreme Court "shall have jurisdiction or authority to enjoin or restrain the operation of" §§ 1221-1232 of the INA other than with respect to an individual noncitizen in removal proceedings. Plaintiffs do not dispute that the district court's order would be impermissible if it were styled an "injunction." But they contend (at 10) that § 1252(f)(1) has nothing to say about a substantively equivalent order so long as it is styled a "vacatur." That argument is incompatible with the text of the provision and with *Garland v. Aleman Gonzalez*, No. 20-322 (U.S. June 13, 2022).

Because vacatur prohibits the agency from giving effect to the vacated action, the district court "enjoin[ed] or restrain[ed] the operation of" the covered INA provisions when it vacated the guidance implementing them. 8 U.S.C. § 1252(f)(1). The phrase "enjoin *or* restrain," *id.* (emphasis added), is impossible to square with plaintiffs' contention that § 1252(f)(1) is limited only to injunctive relief. The Supreme Court's statement (cited at Opp.10) that § 1252(f)(1) is "nothing more or less than a limit on injunctive relief" came in the context of rejecting an argument that it is a "jurisdictional grant"; it had nothing to do with the distinction that plaintiffs now seek

to draw to avoid § 1252(f)(1)'s plain jurisdictional bar. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999).

In addition, the Supreme Court made clear that Congress intended to preclude the lower courts from entering orders that "require officials to take actions that (in the Government's view) are not required by" the covered INA provisions or that require officials "to refrain from actions that (again in the Government's view) are allowed by" the covered provisions. *Aleman Gonzalez*, slip op. at 7. That is exactly what the district court's vacatur does: it requires DHS officials to refrain from relying on the guidance when deciding whether to pursue enforcement action against any particular noncitizen—even though, in the government's view, such reliance is permitted by the INA.

That understanding of § 1252(f)(1) is also consistent with how the Supreme Court has interpreted similar language in other statutes. For example, the Court interpreted a statute conferring jurisdiction over appeals from an "injunction in any civil action" required to be heard by a three-judge district court, 28 U.S.C. § 1253, to apply to orders with a "coercive" effect, *Aberdeen & Rockfish R.R. v. Students Challenging Regul. Agency Procs. (S.C.R.A.P.)*, 422 U.S. 289, 307 (1975). The Court emphasized that it had "repeatedly exercised jurisdiction under [the provision] over appeals from orders . . . not cast in injunctive language but which by their terms simply 'set aside' or declined to 'set aside' orders of the [agency]." *Id.* at 308 n.11.

Finally, plaintiffs err in asserting (at 9-10) that the government forfeited any reliance on § 1252(f)(1). The district court did not hold that reliance on § 1252(f) was waived, but instead concluded that the provision was inapplicable. *See* Add.94 n.71. Appellate courts will address "an issue not pressed [below] so long as it has been passed upon." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quotation omitted). In any event, § 1252(f)(1) explicitly limits the district court's "jurisdiction or authority," 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" to whichever statutory requirements it chooses, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), and Congress unambiguously did so in § 1252(f)(1). *See Miranda v. Garland*, 34 F.4th 338, 354-56 (4th Cir. 2022) (holding § 1252(f)(1) is a jurisdictional provision).

**2.** Plaintiffs' responses to the remaining threshold arguments and the merits are largely premised on their erroneous view that the guidance constrains immigration officers, who would otherwise pursue enforcement action against every noncitizen covered by 8 U.S.C. §§ 1226(c) and 1231(a). This argument is mistaken at every turn.

**a.** First, nothing in the guidance binds ICE officers to take or not take particular enforcement actions. The guidance emphasizes that it creates no rights or obligations and that officers remain free to "exercise their judgment" in deciding

whether enforcement action is warranted in each case. Add.102-06. Thus, it "has the telltale signs of a non-binding policy statement." *Arizona v. Biden*, 31 F.4th 469, 477 (6th Cir. 2022). Although plaintiffs claim that the district court made contrary factual findings, construction of the guidance is not a factual question. In any event, plaintiffs fail to point to any reasonable foundation for those findings, which contradict the guidance's plain language.

Even under plaintiffs' telling (at 12), the guidance only "binds" agency officials in the sense that it requires officials to "evaluate the individual and the totality of the facts and circumstances" in exercising discretion. An instruction to officers to exercise discretion in an informed way does not create any actual "legal consequences" because it does not compel a particular outcome in any case, create "safe harbors protecting private parties from adverse action," or "retract [the officers'] discretion." *Texas v. EEOC*, 933 F.3d 433, 441-42 (5th Cir. 2019). And although plaintiffs focus on ICE's separate implementation of a process permitting noncitizens to request a review of their case (Opp.5), nothing about that process compels any specific enforcement decision in any case or creates any enforceable rights.

**b.** Second, plaintiffs erroneously contend that the guidance violates 8 U.S.C. §§ 1226(c) and 1231(a). They do not contest that no Administration has ever interpreted those provisions to require the Executive to arrest every noncitizen described therein. *See* Add.112. Other than briefly acknowledging that "DHS may have limited resources," Opp.16, plaintiffs make no effort to account for this reality.

The guidance's statement that it "eschews 'bright lines or categories,'" Opp.1, merely refers to the fact that the guidance no longer sets categorical rules for prioritization that appeared in prior guidance memoranda. *See* Add.116 (explaining that prior memoranda had defined "threat to public safety" in terms of enumerated offenses). The quoted language does not repudiate an alleged prior interpretation of §§ 1226(c) and 1231(a) that was consistent with plaintiffs' view—not least because no Administration has ever adopted that view.

**c.** Finally, the way every Administration has construed §§ 1226(c) and 1231(a) is correct. Section 1226 addresses detention during removal proceedings. Thus, to trigger §1226(c), there must first be a decision to institute or maintain removal proceedings. *See Arizona*, 31 F.4th at 480. Nothing in § 1226(c) affects that antecedent exercise of prosecutorial discretion. Similarly, § 1231(a)(2) addresses the continued detention of noncitizens who have received final removal orders; it does not address the arrest of such noncitizens who are not already in detention, and it categorically bars the release only of the subset of detained noncitizens who are described in its second sentence.

Moreover, bedrock interpretive principles establish 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). In contending (at 14-16) that

§§ 1226(c) and 1231(a) provide a sufficient indication, plaintiffs primarily rely on both provisions' using the word "shall," the INA's elsewhere employing "may" language, and legislative history.

But none of those features, 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. If anything, the absence of any mandatory, judicially enforceable duty is clearer here than in *Castle Rock*. Here, Congress imposed many restrictions on judicial review of decisions under §§ 1226 and 1231; Congress has never appropriated anywhere near sufficient resources to permit the Executive to arrest, detain, and remove all noncitizens described in 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).

Plaintiffs' passing suggestion that *Castle Rock*'s reasoning does not apply to agency rules lacks merit. That case turned on fundamental and generally applicable principles of statutory construction. And plaintiffs do not explain how §§ 1226(c) and 1231(a) could mean different things depending on whether the interpretive question arises in a lawsuit challenging "an individual nonenforcement decision" or one challenging a "rule." Opp.15.

**3.** Plaintiffs' misreading of the guidance and the INA infects each of their arguments. Plaintiffs premise their claim of standing and irreparable harm on the

theory that the guidance will occasion less enforcement against threats to public safety, deeming it "beside the point" that the guidance "does not mandate a reduction in immigration enforcement." Opp.8 (quotation omitted). That the guidance focuses scarce resources on the very threats to public safety that plaintiffs fear is not beside the point; it is the point. *See Arizona*, 31 F.4th at 474-75. In addition, plaintiffs are also wrong to dismiss as irrelevant (at 8) 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.

In any event, plaintiffs' efforts to establish a reduction in enforcement still do not account for noncitizens expelled (rather than removed) at the border under public health authorities or for recent border crossers arrested by CBP. Nor do plaintiffs contest that, taking that border enforcement into account, there have been hundreds of thousands of recent expulsions and increases in overall arrests. *See* Mot.8-9. More fundamentally, the States still have failed to support their counterintuitive speculation about the effect of the guidance with any evidence demonstrating an actual increase in criminal activity or state expenditures linked to the guidance.

As to final agency action, plaintiffs do not even attempt to demonstrate that the guidance in fact has some legal effect "on regulated entities"—namely, the noncitizens who are the only persons subject to the INA and objects of enforcement. *See National*

*Mining Ass'n v. McCarthy*, 758 F.3d 243, 250-53 (D.C. Cir. 2014). As to the availability of a cause of action, plaintiffs fail to account for the fact that the INA's comprehensive remedial scheme with remedies provided only for those noncitizens and its failure to create any rights in favor of third parties, including States, who may be indirectly affected by immigration enforcement decisions and policies. *See* Mot.14-15. And although plaintiffs briefly suggest (at 13) that, notwithstanding that the INA does not displace traditional enforcement discretion, the guidance cannot be committed to agency discretion by law because it is a "rule," *see Texas v. Biden*, 20 F.4th 928, 978-84 (5th Cir. 2021), plaintiffs have no response to the fact that the guidance is no more binding on a class of cases than was the policy in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

**4.** As explained, vacatur would impose irreparable harm on the government and the public by forbidding DHS from implementing a policy with proven results, sowing confusion among immigration officers, and significantly undermining public safety. Plaintiffs do not seriously dispute any of these points. Instead, they contend (at 19-20) that these harms do not count because the government is wrong on the merits. The balance of harms is not just another proxy for likelihood of success on the merits, but in any event, the government is, as explained, likely to succeed on the merits.

At a minimum, a stay is warranted insofar as the vacatur extends beyond the plaintiff States. *See Arizona*, 31 F.4th at 484 (Sutton, C.J., concurring). Plaintiffs' only response (at 20) is to state, in a single paragraph, that limited relief may not redress

plaintiffs' asserted injuries to the maximum possible extent because out-of-state noncitizens "who are not detained due to the [guidance]" might move into plaintiff States. But equitable relief must consider countervailing equities, including those of DHS and the public in implementing the enforcement priorities and of other States that believe 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.

This case starkly illustrates the fundamental equitable and practical problems with nationwide relief. A number of other plaintiffs have similarly sought to enjoin or vacate the guidance but have failed. For example, the State of Arizona has repeatedly tried, and failed, to enjoin DHS's enforcement priorities. First, Arizona unsuccessfully sought an injunction against DHS's interim priorities both in district court and (twice) in the Ninth Circuit. *See Arizona v. DHS*, No. 21-16118 (9th Cir.). Then, Arizona brought similar claims against the guidance in district court in Ohio; although the State initially obtained a preliminary injunction, that injunction was then stayed pending appeal by the Sixth Circuit. *See Arizona*, 31 F.4th 469. And Arizona now appears in this Court as amicus in support of a district-court decision that effectively nullifies the Sixth Circuit's stay. No equitable principle requires the federal government to prevail in every case but requires the plaintiffs to prevail only once.

## CONCLUSION

For these reasons, and those in the stay motion, this Court should stay the vacatur order pending appeal. In the alternative, the Court should extend the administrative stay pending a determination by the Solicitor General whether to seek relief from the Supreme Court, and, if such relief is sought, pending the Supreme Court's resolution of the government's stay application. At the very least, the Court should extend the administrative stay to allow the parties and the Court to address the Supreme Court's impending decision in *Biden v. Texas*.

Respectfully submitted,

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## I CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,599 words according to the count of Microsoft Word.

*/s/ Sean R. Janda*
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## CERTIFICATE OF SERVICE

I hereby certify that, on June 23, 2022, I electronically filed the foregoing reply with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

*/s/ Sean R. Janda*
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