



DAVE YOST
OHIO ATTORNEY GENERAL

Office of the Solicitor General
Office 614-466-8980
Fax 614-466-5087

June 15, 2022

Office of the Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: Response to 28(j) notice in *State of Arizona, et al. v. Biden, et al.*, No. 22-3272

Dear Ms. Hunt:

DHS says the interpretation of 8 U.S.C. §1252(f)(1) adopted by *Garland v. Gonzalez*, No. 20-322 (U.S., June 13, 2022), “makes clear that the district court lack[ed] authority to enjoin DHS’s immigration-enforcement guidance.” Letter at 1. We write with three responses.

First, to the extent *Gonzalez* bears on this case, it entitles DHS only to a remand for further proceedings. That is because §1252(f)(1) is “nothing more or less than a limit on *injunctive relief*.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) (emphasis added). The States’ complaint seeks vacatur under the APA, which is a “less drastic remedy” distinct from injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). Perhaps for that reason, “the Court” in *Gonzalez* did “not purport to hold that §1252(f)(1) affects courts’ ability to ‘hold unlawful and set aside agency action ...’ under the Administrative Procedure Act.” *Gonzalez*, slip op.17 (Op. of Sotomayor, J.). The States also sought declaratory relief. As the United States just told the Supreme Court, §1252(f)(1) does not bar declaratory relief. See Supp. Reply Br. for Petitioners at 2–3, *Biden v. Texas*, No. 21-954 (U.S., May 13, 2022).

Second, *Gonzalez* does not resolve this appeal. True, it held that §1252(f)(1) prohibits enjoining the federal government’s implementation of INA provisions (including §1226 and §1231), regardless of whether the implementation is “unlawful” or “improper.” Slip op.7 (majority). But the District Court did not enjoin or restrain the implementation of those provisions. It instead enjoined an administrative rule—the Anti-enforcement Policy. *Gonzalez* does not speak to that situation.

Finally, *Gonzalez* does not address whether the government forfeits arguments predicated on §1252(f)(1) by failing to raise them. (*Biden v. Texas* might. See Supplemental Brief for Respondents at 5–11, *Biden v. Texas*, No. 21-954 (U.S., May 13, 2022).) Here, DHS forfeited its argument by failing to raise it below. That is inexcusable. The United States often argues that arguments are forfeited—even in criminal cases where forfeiture may ensure the deprivation of a defendant’s liberty. It should be held to the same standard.

DAVE YOST
Ohio Attorney General
/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
SYLVIA MAY MAILMAN
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
bflowers@ohioattorneygeneral.gov
Counsel for State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

/s/ Benjamin M. Flowers

Benjamin M. Flowers
Solicitor General