No. 22A17

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, ET AL., APPLICANTS

v.

STATE OF TEXAS AND STATE OF LOUISIANA

REPLY IN SUPPORT OF APPLICATION FOR A STAY

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 22A17

UNITED STATES OF AMERICA, ET AL., APPLICANTS

v.

STATE OF TEXAS AND STATE OF LOUISIANA

_____

REPLY IN SUPPORT OF APPLICATION FOR A STAY

_____

The district court's universal vacatur of the Secretary's enforcement priorities works an unprecedented intrusion on core executive prerogatives and effectively moots all other litigation challenging the Guidance nationwide. Respondents' opposition further confirms that a stay is warranted. Respondents acknowledge that the district court's decision directly conflicts with, and effectively nullifies, a carefully reasoned opinion by Chief Judge Sutton for the Sixth Circuit. See Arizona v. Biden, No. 22-2372, 2022 WL 2437870 (July 5, 2022). Respondents do not deny that the lower courts' holdings would invalidate decades of similar enforcement priorities adopted by the Department of Homeland Security (DHS) and its predecessor, which were never issued via notice and comment, included little or no discussion of their incidental effects on States, and did not purport to require the apprehension

and removal of all noncitizens covered by respondents' interpretation of 8 U.S.C. 1226(c) and 1231(a). And respondents effectively concede that their standing to bring this suit rests on a sweeping theory that would allow States to challenge virtually any federal policy by leveraging even a dollar's worth of incidental, indirect effects on state expenditures into a nationwide vacatur or injunction -- transforming every district court into a council of revision and injecting the Judiciary into countless policy disputes within our federal system.

For the multiple independent reasons given by the Sixth Circuit in Arizona, a stay is amply justified under "existing law." Opp. 2 (citation omitted). Respondents scarcely acknowledge the Sixth Circuit's reasoning. And they make no real effort to defend the dysfunction wrought by the district court's universal vacatur, which has granted the plaintiff States in Arizona the very relief they were denied in their own lawsuit.

Contrary to respondents' assertion (at 2-3), moreover, this Court need not definitively resolve the issues presented in this case to grant a stay. Instead, as it has often done, the Court can simply conclude that the district court's judgment should be stayed pending further appellate proceedings because there is a fair prospect the Court would reverse that judgment and the equities favor a stay. That course is particularly appropriate here, where the district court's vacatur rests on a series of unprecedented holdings; where it nullifies a decision by a court of ap-

peals; and where it grants a nationwide remedy that is vastly disproportionate to any indirect financial harm respondents may face. If, however, the Court wishes to decide the recurring and important questions presented in this case with the benefit of full briefing, it could also grant certiorari and set the case for argument in the fall.

I. THIS COURT WOULD LIKELY GRANT REVIEW IF THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S NATIONWIDE VACATUR

Respondents do not seriously dispute that this Court would likely grant review if the Fifth Circuit affirmed the district court's unprecedented nationwide vacatur. Respondents emphasize (at 18) the "preliminary-injunction posture" of the Sixth Circuit's decision in Arizona, but that is beside the point because this case involves a final judgment. Respondents also protest (at 19) that the Fifth Circuit has not yet resolved the underlying appeal. But this Court has repeatedly granted a stay pending appeal when an order blocks an important policy, even in the absence of a circuit conflict like the one present here. See, e.g., Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301 (2022) (No. 21A477); Biden v. Missouri, 142 S. Ct. 647, 650 (2022) (per curiam) (Nos. 21A240 and 21A241); Wolf v. Innovation Law Lab, 140 S. Ct. 1564 (2020) (No. 19A960); Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019) (No. 19A230); Trump v. Sierra Club, 140 S. Ct. 1 (2019) (No. 19A60). And respondents' demand (at 18) for more "percolat[ion]" is particularly misplaced coming from litigants

that sought and won nationwide relief, making further litigation pointless.

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

For multiple independent reasons, this Court would likely reverse or at least narrow the district court's judgment.

A. The States Lack Article III Standing

Respondents rely (at 22-25) on the district court's factual analysis to argue that the Guidance will impose peripheral costs on Texas. The government has already shown (Appl. 18-20) why that analysis rests on basic factual errors, which respondents do not defend. More importantly, even if that analysis were correct, it would not establish standing. Under longstanding federalism and separation-of-powers principles, a State does not acquire standing to challenge the federal government's enforcement policies simply because those policies have incidental, indirect effects on the State. See Appl. 15-18.

Respondents assert (at 21) that this argument "contradicts decades of this Court's standing precedent," but it is in fact respondents' standing theory that does so. This Court's cases "consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973). Thus, a plaintiff has "no judicially cognizable interest in procuring enforcement of the immigration laws" against others. Sure-Tan, Inc. v. NLRB, 467

U.S. 883, 897 (1984). Respondents cannot evade that established principle by reframing their interest (at 26) as "avoiding harms caused by the [Guidance]." The plaintiff in Linda R. S. also sought to avoid financial harm, but lacked Article III standing because that harm was attributable to a nonenforcement decision. 410 U.S. at 619.

Respondents' theory of standing contradicts precedent in other ways as well. Respondents claim (at 24-25) standing based on the Guidance's incidental, downstream effects on their treasuries, but this Court held long ago that a State may not challenge a federal policy simply because the policy has (as almost every federal policy does) an "indirect" effect on the state fisc. Florida v. Mellon, 273 U.S. 12, 18 (1927). And respondents assert (at 22) parens patriae standing, but States may not bring parens patriae suits against the United States. Mellon, 273 U.S. at 18.

More fundamentally, respondents do not deny that suits like this one are foreign to our Nation's history and would have been unrecognizable to the Framers. Appl. 4-5. And despite invoking (at 21) "decades" of precedent, respondents ultimately cite (at 28) just two decisions that supposedly support standing here: Department of Commerce v. New York, 139 S. Ct. 2551 (2019), and Massachusetts v. EPA, 549 U.S. 497 (2007). But as the Sixth Circuit explained, neither decision assists them. In New York, this Court did not rely on the various interests respondents assert; instead, it held only that States had standing to challenge

the conduct of the Census because they faced a loss of "federal funds" distributed directly to the States. 139 S. Ct. at 2565. "By contrast, this Guidance does not impose any direct costs on the States or threaten any loss of federal funding." Arizona, 2022 WL 2437870, at *6. And in Massachusetts, the Court held only that a State had standing to challenge a federal policy that threatened to diminish its "sovereign territory." 549 U.S. at 519. That analysis does not support the "boundless theory" that States may challenge any federal policy that imposes "peripheral costs" on them. Arizona, 2022 WL 2437870, at *6.

Respondents dismiss (at 27) concerns about the scope of their theory as "rhetoric," but they conspicuously fail to offer any limiting principle. Taken to its logical conclusion, their theory would give States standing to challenge virtually any federal policy -- a powerful indication that respondents' theory is wrong.

B. The Guidance Is Lawful

1. Notice and comment. Respondents contend (at 42-45) that the Guidance is subject to the Administrative Procedure Act's (APA) notice-and-comment requirements because it binds DHS personnel and establishes a process that ensures those personnel apply the Guidance correctly. But a rule is subject to notice-and-comment procedures only if it "purports to impose legally binding obligations or prohibitions on regulated parties." National Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (emphasis added). Even assuming respondents are right that the Guidance requires DHS

personnel to take or refrain from taking particular enforcement actions (but see Appl. 22), it plainly does not bind private parties. Respondents do not dispute that their theory would require a sea change by invalidating countless enforcement policies that DHS and other agencies have long issued without notice and comment. Appl. 21.

2. Arbitrary and capricious. Respondents argue (at 40, 42) that the Guidance is arbitrary and capricious because, in their view, the Secretary did not "actually consider" the risk of "recidivism" and the States' "reliance interests." That charge is unfounded. The Considerations Memo explained why a totality-of-the-circumstances approach would enable DHS to tackle the "risk of recidivism" better than bright lines and categories, citing "experience," "academic literature," and "empirical data." Appl. App. 154a-155a. The Considerations Memo also explained that the Guidance's effects on States "are unlikely to be significant"; observed that no State "has materially changed its position to its detriment" based on previous enforcement policies; and ultimately concluded that "none of the asserted negative effects on States * * * outweighs the benefits of the scheme." Id. at 156a-158a. The States may disagree with those conclusions or believe that DHS gave their interests too little weight, but the APA does not empower a court to question an agency's "value-laden * * * weighing of risks and benefits." Department of Commerce, 139 S. Ct. at 2571. And again, respondents do not deny that their theory would

invalidate enforcement priorities previously issued by DHS and its predecessor, which did not include anything like the explanation that respondents now demand. Appl. 23.

3. Contrary to law. Finally, respondents argue (at 33-40) that the Guidance violates 8 U.S.C. 1226(c) and 1231(a)(2). But respondents do not dispute that only a fraction of the Guidance's applications implicate those provisions, and they do not explain how any purported conflict with those statutes would justify the wholesale vacatur of instructions the Secretary has issued to guide all of DHS's vast enforcement efforts. In any event, respondents' arguments are unpersuasive on their own terms.

Respondents describe Sections 1226(c) and 1231(a)(2) as "mandatory detention provisions" (Opp. 6), contending that they "command that certain aliens 'shall' be detained" (Opp. 33) and quoting cases stating that "detention is mandatory" under them (Opp. 37 (quoting Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2281 (2021))). But those arguments are largely irrelevant. The Guidance expressly applies only to "apprehension and removal." Appl. App. 138a. It "does not provide guidance pertaining to detention and release determinations." Id. at 169a. And it is "consistent with" and "do[es] not purport to override" the prohibitions in Section 1226(c)(2) and the second sentence of Section 1231(a)(2) against release of criminal noncitizens who already are in custody pending removal proceedings or during the removal period. Id. at 161a.

Respondents argue (at 35) that, because Sections 1226(c) and 1231(a)(2) require DHS to detain certain noncitizens, those provisions also create a judicially enforceable mandate for apprehension. But the decisions and government briefs on which respondents rely do not address that question. In those cases, "detainees subject to enforcement action were seeking their release." Arizona, 2022 WL 2437870, at *11 (citation omitted). "In explaining that detainees are not entitled to bond hearings or release," this Court "had no occasion to consider whether the statutes subject [DHS] to a judicially enforceable mandate to arrest and remove all noncitizens covered by these provisions in the first place." Ibid.

The text and context of Sections 1226(c) and 1231(a)(2) do not establish such a mandate. Section 1226(c) states that DHS "shall take into custody" certain noncitizens pending removal proceedings, 8 U.S.C. 1226(c)(1), but it does not purport to displace DHS's "absolute discretion" to decline to pursue removal. Heckler v. Chaney, 470 U.S. 821, 831 (1985); see Appl. 26-27. And Section 1231(a)(2) does not refer to apprehension or arrest at all; it simply provides that DHS "shall detain" noncitizens with final orders of removal. 8 U.S.C. 1231(a)(2).

Moreover, respondents concede (at 37) that this Court's decision in Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005), "requires a clear statement to displace ordinary presumptions of [law-enforcement] discretion." That concession is fatal to re-

spondents' argument. DHS agrees that Section 1226(c)(2) and the second sentence of Section 1231(a)(2) contain clear statements requiring DHS to continue to detain certain criminal noncitizens already in its custody pending removal proceedings or during the removal period -- and DHS complies with those detention requirements programmatically. But neither provision contains a clear statement requiring DHS to apprehend noncitizens not yet in its custody.

It would be particularly inappropriate to interpret Sections 1226(c) and 1231(a)(2) as creating such a judicially enforceable mandate because, as respondents effectively concede (at 39), DHS lacks the ability to apprehend, detain, and remove all of the noncitizens covered by such a broad reading of those provisions. See Appl. App. 183a. Respondents' insistence that the Secretary cannot adopt priorities acknowledging that reality thus would not lead to greater compliance with the purported statutory mandates; instead, it would simply result in ad hoc, inconsistent prioritization decisions by individual officers, notwithstanding the Secretary's statutory responsibility to set "national immigration enforcement policies and priorities," 6 U.S.C. 202(5).

Finally, respondents' interpretation of Sections 1226(c) and 1231(a)(2) would represent an extraordinary intrusion into the authority of the Executive and undermine "bedrock separation of powers" principles. Arizona, 2022 WL 2437870, at *11. Decisions about whom to arrest and charge in the first place -- or about

whether, when, or how to execute a removal order -- lie at the core of the Executive's law-enforcement discretion. And "[i]t takes little imagination to envision the difficulty the Judicial Branch would face in trying to ensure that immigration officers enforce federal laws like these just the way some States would like them to." Ibid.

C. The District Court Lacked Jurisdiction To Vacate The Guidance

Section 1252(f)(1) deprived the district court of jurisdiction to vacate the Guidance. 8 U.S.C. 1252(f)(1). By its plain terms, that provision precludes the lower courts from entering coercive relief -- such as an injunction or vacatur -- "requir[ing] officials to take actions that (in the Government's view) are not required by [the relevant provisions] and to refrain from actions that (again in the Government's view) are allowed by [the relevant provisions]." Garland v. Aleman Gonzalez, 142 S. Ct. 2057, 2065 (2022). Respondents' contrary arguments fail.

At the outset, respondents assert (at 30) that "applicants forfeited this argument in the district court." That objection is misplaced. The district court specifically addressed Section 1252(f)(1), relying on Fifth Circuit precedent to hold that the provision did not bar relief. Appl. App. 131a n.71 (citing Texas v. Biden, 20 F.4th 928, 1003-1004 (5th Cir. 2021), rev'd, 142 S. Ct. 2528 (2022)). When this Court rejected the Fifth Circuit's reasoning in Aleman Gonzalez, the government brought that opinion

to the district court's attention, and the court again found Section 1252(f)(1) inapplicable. Id. at 34a. The Fifth Circuit likewise squarely considered Section 1252(f)(1). Id. at 13a-14a. Section 1252(f)(1)'s applicability thus is properly presented here. See Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 379 (1995). In any event, Section 1252(f)(1) explicitly limits the "jurisdiction or authority" of the lower courts. 8 U.S.C. 1252(f)(1). Because jurisdictional limitations speak to "a court's power," they "can never be forfeited or waived." United States v. Cotton, 535 U.S. 625, 630 (2002).

As to substance, respondents contend that vacatur falls outside the scope of Section 1252(f)(1) because it is "less drastic" than an injunction. Opp. 31-32 (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-166 (2010)). But vacatur effectively enjoins implementation of the Guidance: As a result of the judgment below, DHS cannot rely on the Guidance. The district court endorsed that view, asserting that vacatur would "restore[] the status quo before the invalid rule took effect." Appl. App. 125a (citation omitted); see id. at 127a (noting that vacatur means "DHS will no longer have nationwide immigration enforcement guidance"). Respondents do not contend otherwise. Because the court's vacatur prohibits DHS from giving effect to the Secretary's decision, it plainly "enjoin[s]" and "restrain[s]" DHS's "operation" of the covered provisions. 8 U.S.C. 1252(f)(1).

Respondents point (at 32) to the provision's title -- "Limit on injunctive relief," 8 U.S.C. 1252(f) (emphasis omitted) -- in support of their interpretation. But they ignore this Court's decisions treating orders "set[ting] aside" an agency's action as "injunction[s]" under 28 U.S.C. 1253. Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289, 307-308 & n.11 (1975) (citation omitted); see Appl. 30. Limiting the scope of Section 1252(f)(1) to orders styled as "injunctions" would also squarely conflict with the text's reference to "enjoin[ing] or restrain[ing]" the operation of the covered provisions, 8 U.S.C. 1252(f)(1), and "[a] title or heading should never be allowed to override the plain words of a text," Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879 (2021) (citation omitted).

Respondents answer (at 32) that the term "restrain," 8 U.S.C. 1252(f)(1), encompasses only temporary restraining orders. That interpretation fails to solve respondents' textual dilemma. It does not eliminate the superfluity, since temporary restraining orders are merely a species of injunctive relief. See, e.g., Sampson v. Murray, 415 U.S. 61, 87 (1974); 11A Charles Alan Wright et al., Federal Practice and Procedure § 2941 (2013) (describing "three types of injunctions," including a "temporary-restraining order"). And it creates interpretive problems for subsection (f)(2), which states that "no court shall enjoin the removal of any alien pursuant to a final order." 8 U.S.C. 1252(f)(2). Re-

spondents offer no explanation for why Congress would have drafted Section 1252(f)(2) to permit temporary restraining orders against removal but not preliminary or permanent injunctions.

Lastly, respondents invoke (at 32) the presumption in favor of judicial review. But Section 1252(f)(1) "does not deprive the lower courts of all subject matter jurisdiction" over claims involving the covered provisions. Biden v. Texas, 142 S. Ct. 2528, 2539 (2022). It simply limits the scope of relief in order to protect against the very sort of programmatic intrusion into executive implementation of the INA that respondents seek here. In any event, as this Court recently explained in addressing another provision of Section 1252, "the text and context of [the provision] -- which is, after all, a jurisdiction-stripping statute -- clearly indicate" that the lower courts may not award vacatur in this context. Patel v. Garland, 142 S. Ct. 1614, 1627 (2022).

D. The District Court Erred In Granting Universal Relief

Even assuming the district court had jurisdiction to vacate the Guidance, it erred in granting "universal[]" relief rather than limiting its remedy to the parties before the court. Appl. App. 129a. This case epitomizes the irrationality and overreach inherent in universal relief that extends beyond remedying the plaintiffs' harm. The district court's vacatur effectively countermands the Sixth Circuit's decision in Arizona. And it does so even within the plaintiff States in that case. Tellingly, the losing States from the Arizona litigation have sought to file an

amicus brief in this Court defending the district court's decision here to grant them relief to which they are not entitled in a case to which they are not parties. Respondents have nothing to say about the conflict between the district court's vacatur and the Sixth Circuit's contrary decision.

Respondents also do not dispute that Article III and principles of equity permit a court to award relief only to the extent necessary to remedy the injury of the plaintiff before the court. See, e.g., Trump v. Hawaii, 138 S. Ct. 2392, 2427-2428 (2018) (Thomas, J., concurring). Instead, they contend (at 46) that Section 706 of the APA authorizes the novel and otherwise impermissible remedy of universal vacatur through its instruction that reviewing courts "hold unlawful and set aside agency action, findings, and conclusions found to be" arbitrary and capricious or contrary to law, 5 U.S.C. 706(2). But respondents ignore all of the reasons why that understanding is wrong. See Appl. 36-38. Section 706 does not pertain to remedies at all; that is the office of 5 U.S.C. 703. And even if Section 706 did speak to remedies, the APA was enacted against a background of party-specific relief. Nothing in the text of the APA suggests that Congress intended to displace that tradition. Appl. 36-38.

In support of their interpretation, respondents quote (at 45-46) inapposite dicta. In FEC v. Akins, 524 U.S. 11, 25 (1998), the Court stated that "[i]f a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's

action and remand the case." But Akins, unlike this case, involved a "special statutory review proceeding" allowing the district court to directly review an agency order. 5 U.S.C. 703; see Akins, 524 U.S. at 18 (citing 2 U.S.C. 437g(a)(8) (1994)). And in any event, Akins simply used the phrase "set aside"; it neither held that "set aside" means "vacate," nor suggested that a court should "set aside" the agency action on a universal basis rather than with respect to the parties. Respondents also quote Lujan v. National Wildlife Federation, 497 U.S. 871 (1990), for the proposition that an "entire program" can be "affected" when a discrete agency action is "challenged under the APA." Opp. 45 (quoting Lujan, 497 U.S. at 890 n.2) (ellipsis and internal quotation marks omitted). But saying that a program can be "affected" when a challenger sues under the APA is a far cry from saying that a court may vacate an entire agency program universally. Respondents additionally rely (at 46) on dissents in Lujan and Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020), but dissents are not the law.

Respondents note (at 46-47) that this Court has affirmed decisions granting universal relief under the APA. But this Court has never directly addressed the issue, and "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon," do not "constitute precedents." Webster v. Fall, 266 U.S. 507, 511 (1925). And respondents altogether ignore the hundreds of years of precedent requiring party-specific re-

lief. See Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 424-445 (2017) (detailing historical practice).

Apart from their reliance on the APA, respondents briefly contend (at 47) that universal relief is justified on the facts of this case, because noncitizens in other States not subject to enforcement action may migrate to Texas and Louisiana. But none of the record materials cited by the district court, see Appl. App. 130a-131a, identify any unlawfully present or otherwise removable noncitizens who relocated to Texas or Louisiana from another State. And respondents have no explanation for why vacating the Guidance within Texas and Louisiana would be insufficient to enable DHS to deal with such noncitizens upon their arrival in those States (or deter them from arriving in the first place). In short, respondents have not shown that universal vacatur is necessary to "grant the full relief needed to remedy [their] injury." Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 394 (4th Cir. 2001) (citation omitted), overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544 (4th Cir. 2012), cert. denied, 568 U.S. 1114 (2013).

In any event, even if the operation of the Guidance in other States might conceivably inflict some indirect harm on Texas and Louisiana, universal vacatur would still be unwarranted. Because vacatur is an equitable remedy, it must be "tailored" to the scope of the harm and the burden on the opposing party. Winter v. NRDC,

Inc., 555 U.S. 7, 33 (2008); see Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (noting that an injunction is not appropriate "to restrain an act the injurious consequences of which are merely trifling") (citation omitted). Here, the grossly disproportionate remedy of universal vacatur is not remotely justified by the speculative possibility that (1) the Guidance will cause DHS to fail to take enforcement action against some noncitizens in other States; (2) those particular noncitizens will migrate to Texas and Louisiana; (3) they will continue to avoid enforcement action after their arrival; and (4) they will then have an impact on respondents' fisc.

III. THE EQUITIES OVERWHELMINGLY FAVOR A STAY

The district court's judgment imposes ongoing and irreparable harm on the Executive Branch, which has express constitutional and statutory authority to prioritize resources in prosecuting violations of the law. See TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021); 6 U.S.C. 202(5). By purporting to dictate how and when the Executive Branch should enforce immigration law in all fifty States, the district court upended the separation of powers and intruded on a core executive prerogative.

Respondents contend (at 48) that the government has no legitimate interest in violating the law. But that argument improperly collapses the likelihood of success on the merits with the equitable stay factors. Cf. Winter, 555 U.S. at 32. It also wrongly assumes that respondents are correct on the merits. At

the very least, respondents' highly contestable merits arguments, see Arizona, 2022 WL 2437870, at *3-*12, considered in light of the broader equities, do not support denying the federal government the temporary remedy of a stay pending appeal while the issue percolates in the lower courts.

Respondents also suggest (at 48) that vacatur of the Secretary's priorities will result in increased enforcement, but they ignore the significant resource constraints that DHS faces. See, e.g., Appl. App. 148a, 185a. Those constraints make it imperative that DHS have the freedom to target noncitizens who pose the greatest threat to national security, public safety, and border security. The district court's order leaves individual officers rudderless in determining when to take enforcement action, id. at 188a, thereby making effective enforcement more difficult, not less, id. at 185a.

Finally, respondents protest (at 48) that their alleged harms are irreparable because sovereign immunity would bar a damages suit against the federal government. Respondents do not even attempt to show that their alleged harms are significant. The district court identified only 15 dropped detainers due to the Guidance, Appl. App. 54a, which does not come close to justifying a nationwide, judicially imposed overhaul of the Executive Branch's enforcement priorities.

CONCLUSION

The application for a stay of the district court's judgment vacating the Guidance should be granted. At a minimum, the Court should stay the district court's judgment outside Texas and Louisiana. In addition, the Court may wish to construe this application as a petition for a writ of certiorari before judgment, grant the petition, and set this case for argument in the fall.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JULY 2022