



DAVE YOST
OHIO ATTORNEY GENERAL

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

June 30, 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: 28(j) notice in *State of Arizona, et al. v. Biden, et al.*, No. 22-3272

Dear Ms. Hunt:

The Supreme Court issued its opinion in *Biden v. Texas*, No. 21-954. The decision establishes at least two points relevant to this case.

First, it confirmed that 8 U.S.C. §1252(f)(1) does not “concern[] subject matter jurisdiction.” Slip op. 12. It simply limits the lower courts’ power to grant injunctive relief. *Id.* As a result, the Court explained, the statute does not deprive States of the right to bring Administrative Procedure Act suits regarding the legality of federal policies that contradict the Immigration and Nationality Act. *Id.* at 9.

In this case, the government forfeited its §1252(f)(1) argument. (*Biden* took no position on the question whether such arguments can be forfeited. Slip op. 12 n.4.) But in any event, §1252(f)(1) entitles the government *at most* to a reversal of the injunction and a remand for the District Court to consider the States’ request for a declaratory judgment. *See* Compl., R.1, PageID#21-22.

Second, the opinion confirms that agency memoranda forbidding its officials from taking legally permissible actions constitute final agency actions. Slip op. 20.

This confirms that the Anti-enforcement Policy is a final agency action that may be reviewed under the Administrative Procedure Act. *See also* States' Br.36–37.

One final note. The opinion implicated the meaning of 8 U.S.C. §1225(b)(2)(A), which says that certain aliens “shall be detained.” This use of “shall” mirrors the language in 8 U.S.C. §§1226(c) and 1231(a). But the Court assumed without deciding that this language imposes a mandatory duty. As a result, it did not resolve the question whether “shall” imposes a mandate.

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 30, 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