No. 21-40618

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

The district court's preliminary injunction, which asserts sweeping authority to micromanage the Executive's immigration-enforcement efforts, is in every respect extraordinary. Its premise is that, by using "shall" in two statutory provisions, Congress eliminated the Executive's prosecutorial and enforcement discretion. That conclusion is foreclosed by Supreme Court precedent. The court compounded its error by holding that plaintiffs could prove standing, by overlooking other threshold obstacles, and by substituting plaintiffs' policy preferences for the judgment of the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE). If the injunction is not stayed, it will immediately destabilize the government's immigration-enforcement efforts with potentially severe results. Accordingly, the Court should stay the order pending appeal or until DHS issues final enforcement priorities by the end of September, whichever is earlier.

Plaintiffs' contrary arguments fail at every turn. Their allegations of injury all depend on the assumption that the interim priorities will increase crime. That speculative assertion is undercut by the record, which indicates that the priorities have allowed the government to detain a greater number of noncitizens convicted of aggravated felonies and to deploy hundreds of additional officers to the border. Plaintiffs' other arguments misstate federal law and mischaracterize the priorities. As our motion explained, 8 U.S.C. §§ 1226(c) and 1231(a)(2) do not impose judicially enforceable constraints on the Executive's discretion. Nor do the priorities create any

rights, forbid the detention of any noncitizen covered by those statutes, or prohibit line-level officers from enforcing immigration laws against other-priority targets.

With respect to the remaining stay factors, plaintiffs attempt to downplay the impact of the injunction. But although the order does not itself require the Executive to detain any particular noncitizen, the district court's reasoning would prevent DHS and ICE from implementing any priorities unless those priorities required the detention of every noncitizen potentially within §§ 1226(c) and 1231(a)(2). DHS and ICE cannot comply with that directive given the limited resources that Congress has appropriated. And attempting to do so would jeopardize the agencies' ability to focus scarce resources on the most pressing threats. Regardless, the immediate effect of the injunction is to prevent DHS from implementing lawful priorities that have successfully promoted public safety. Conversely, plaintiffs have failed to demonstrate any concrete harm from temporarily staying the order.

ARGUMENT

I. The Injunction Rests On Serious Legal Error And Should Be Stayed.

A. Plaintiffs' Claims Are Unreviewable.

1. Plaintiffs' lawsuit is a transparent attempt to compel the Executive to enforce federal law against particular noncitizens. But plaintiffs "lack[] a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). That plaintiffs' lawsuit pertains to entire classes of noncitizens, not a specific individual, only underscores the impropriety of their suit.

Plaintiffs have failed to identify any cognizable injury that would support standing. They rely (Opp.8-9) on the district court's finding that the priorities are likely to increase crime within plaintiffs' borders. But the court cited no evidence sufficient to support that speculative conclusion, which makes no logical sense. *See* Mot.9-10. Plaintiffs' reading of §§ 1226(c) and 1231(a)(2) would require ICE to arrest and detain every noncitizen potentially covered by those provisions. That expansive group includes every individual in the removal period under § 1231(a)(2), even those without a criminal history. It also includes many individuals still litigating their removability who have minimal or nonviolent criminal history, such as a decades-old conviction for shoplifting or simple possession. Forcing ICE to expend its limited resources on those individuals could prevent ICE from prioritizing for detention more serious public-safety threats who are not covered by § 1226(c)—such as noncitizens who are charged with, but not yet convicted of, violent sexual assaults or other similar crimes. Indeed, given the vagaries of the categorical approach, even noncitizens with serious convictions, potentially up to and including murder, may not be covered by that provision. Nowhere have plaintiffs or the district court cited any evidence to justify the counterintuitive conclusion that focusing limited resources on individuals covered by §§ 1226(c) and 1231(a)(2) instead of individuals presumed to be a threat to public safety, national security, and border safety would decrease crime.

Indeed, the record demonstrates that the priorities have resulted in an increase of arrests of aggravated felons by approximately two-thirds. Add.181. Rather than

contend with that evidence, plaintiffs claim (Opp.9-10) that this Court cannot consider it. But the priorities' benefits are "of the same type and arise from the same transaction as the costs" that the priorities 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.

Plaintiffs also rely (Opp.8) on the district court's finding that the priorities would increase plaintiffs' detention costs. That finding likewise relies on the speculative conclusion that the priorities will cause more crime than they prevent. And it is contradicted by the court's recognition that plaintiffs' law-enforcement budget is set "months or years in advance." Add.45.

Finally, plaintiffs assert (Opp.8-9) that the priorities will harm their citizens by increasing crime. Once again, these allegations are speculative. Additionally, a *parens patriae* theory of injury cannot support plaintiffs' standing here without a concrete injury to the States' proprietary interests. *See Massachusetts v. EPA*, 549 U.S. 497, 520-22 (2007) (holding that Massachusetts had standing to challenge climate policies because inaction would "swallow Massachusetts' coastal land"). The "special solicitude" accorded to States in that context does not liberate them from Article III's injury-in-fact requirement.

2. a. Even if plaintiffs had standing, their claims are unreviewable because immigration-enforcement decisions are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that

enforcement decisions are "generally committed to an agency's absolute discretion"). Plaintiffs respond (Opp.11-12) that 8 U.S.C. §§ 1226(c) and 1231(a)(2) impose "non-discretionary" duties because the provisions contain the word "shall." As explained (Mot.10-13), however, the Supreme Court has repeatedly rejected the argument that a bare statutory "shall" is enough to overcome the Executive's "deep-rooted" enforcement discretion. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005); *see City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999). Plaintiffs do not cite, much less attempt to distinguish, these cases.

Plaintiffs claim (Opp.12) that the Administrative Procedure Act (APA) establishes a presumption in favor of judicial review that can be overcome only if there is no meaningful law to apply. But that is an entirely different doctrine. *See Lincoln v. Vigil*, 508 U.S. 182, 190-92 (1993). With respect to enforcement decisions, the presumption runs in the opposite direction. *Id.* (recognizing that such decisions are "presumptively unreviewable"). The presumption is particularly strong in the immigration context, given the many indications that Congress intended the "broad discretion exercised by immigration officials" to be a "principal feature" of the immigration system. *Arizona v. United States*, 567 U.S. 387, 395-96 (2012); *see* Mot.12-13. Indeed, Congress has never appropriated enough funds to allow the Executive to enforce the Immigration and Nationality Act (INA) to its maximum theoretical reach. Yet beyond the word "shall," plaintiffs have failed to identify any indication that Congress intended §§ 1226(c) and 1231(a)(2) to eliminate the Executive's discretion.

Plaintiffs contend (Opp.12-13) that the INA's limitations on judicial review do not bar their lawsuit. But whether or not those provisions preclude plaintiffs' claims, they undermine plaintiffs' arguments by confirming Congress's desire to avoid constraining Executive discretion. In any event, plaintiffs' interpretation of those provisions is erroneous. Plaintiffs argue (Opp.12-13) that § 1231(h) only bars "individual challenges" by noncitizens in enforcement proceedings. But § 1231(h) broadly forecloses attempts to enforce § 1231 "by any party." 8 U.S.C. § 1231(h); *see Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-19 (2008) ("'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind" (quotation omitted)). Plaintiffs' lawsuit is an attempt to enforce § 1231 against the United States, and they are obviously a party to their own suit. Plaintiffs also note (Opp.13) that § 1226(e) only bars challenges to "discretionary" enforcement decisions. But that argument presupposes the mistaken conclusion that § 1226(c) imposes a mandatory duty.

b. Plaintiffs' asserted financial injuries also fall outside the zone of interests of §§ 1226(c) and 1231(a)(2) both because plaintiffs have no cognizable interest in the enforcement of immigration laws against noncitizens, *Linda R.S.*, 410 U.S. at 619, and because Congress did not intend either provision to be judicially enforceable, *supra* pp.5-6; *see* Mot.12-13. This Court's decision in *Texas*, *supra*, does not support plaintiffs. The zone-of-interests inquiry focuses on the "particular provision[s] of law"—here, §§ 1226(c) and 1231(a)(2)—that plaintiffs seek to enforce. *Bennett v. Spear*, 520 U.S. 154, 175-76 (1987). That case concerned different INA provisions

authorizing States to exclude unlawfully present noncitizens from public-benefit programs. *Texas*, 809 F.3d at 163. Those provisions are not at issue here.

c. Lastly, plaintiffs' claims are barred because the memoranda are not final agency action. Mot.14-15. Plaintiffs respond (Opp.10-11) that the priorities alter legal obligations because they require DHS agents to violate the alleged requirements of §§ 1226(c) and 1231(a)(2). Those provisions, again, do not eliminate the Executive's enforcement discretion. And even if they did, the priorities would not violate them. *See infra* p.8.

Plaintiffs also contend (Opp.10) that the priorities are final because they bind line-level officers. That argument proves too much; subordinates are always required to follow agency directives. This Court's decision in *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019), underscores the point. That decision explains that agency action is final only when it meaningfully eliminates agency discretion. *Id.* at 442. Plaintiffs' rhetoric notwithstanding, the priorities do not prohibit line-level officers from initiating enforcement action against any noncitizen. Indeed, plaintiffs have no answer to the fact that officers have continued to pursue enforcement actions against other-priority targets. Add.177. Moreover, DHS and ICE remain free to alter or revoke the priorities—and in fact DHS intends to issue final priorities within the month.

Plaintiffs contend (Opp.11) that the interim priorities are final because, as a practical matter, they might trigger benefits under other statutes. But such

downstream consequences are not attributable to the priorities themselves. The priorities expressly do not create any rights or obligations, and downstream effects are not "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 178.

B. Plaintiffs' Statutory And Procedural Arguments Lack Merit.

A stay is independently warranted because plaintiffs' merits arguments are incorrect.

Plaintiffs' principal argument (Opp.14-15) is that the priorities are unlawful because they violate §§ 1226(c) and 1231(a)(2). But plaintiffs cannot prevail even assuming that those provisions impose mandatory requirements (which they do not). Section 1226(c) applies only "pending the outcome of removal proceedings." *Jennings v. Rodriguez*, 138 S. Ct. 830, 838 (2018). It does not require the initiation of removal proceedings against any particular noncitizen, and the priorities do not compel the release of any noncitizen in removal proceedings. More generally, the priorities do not forbid detaining any noncitizen subject to either provision—and DHS has regularly detained individuals who fall outside the presumed priorities. Add.177-78. Plaintiffs have failed to address these issues.

Plaintiffs' procedural arguments fare no better. They contend (Opp.15-16) that there is no rational connection between the priorities and the agencies' reasoning. But the memoranda make the connection clear: given severe resource constraints, DHS and ICE elected to refocus enforcement efforts on the most significant threats to

public safety, national security, and border security. Add.163-64, 169-70. Plaintiffs respond (Opp.16-17) that the agencies should have given more weight to plaintiffs' speculative concerns about increased crime. But the agencies explained why the priorities were necessary to advance the agencies' goals of protecting the public and securing the border. Add.163-64, 169-70. And the priorities themselves contain special provisions applicable to "exigent circumstances and the demands of public safety." Add.173. Those public-safety rationales demonstrate ample consideration of plaintiffs' concerns. Although plaintiffs would have preferred different priorities, a court may not substitute plaintiffs' policy preferences for the agencies' expert judgment. *See Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 380 (5th Cir. 2008).

Plaintiffs also contend (Opp.17-18) that the agencies were required to issue the priorities using notice-and-comment procedures. But their recycled arguments do not demonstrate that the priorities constitute a substantive rule. The memoranda do not bind the agency with respect to any particular noncitizen. *See supra* pp.7-8. Any consequences of enforcement decisions are the result of other laws, not of the priorities themselves. *Id.* And plaintiffs' suggestion (Opp.18) that individual agents' discretion "is so constrained as to be illusory" cannot be reconciled with undisputed evidence showing that DHS and ICE are routinely pursuing enforcement against noncitizens who fall outside the presumed priorities. Add.177.

II. The Remaining Factors Overwhelmingly Favor A Stay.

After adopting the interim priorities, DHS and ICE were able to detain many more noncitizens convicted of aggravated felonies than before. Add.180-81. And the priorities allowed the agencies to deploy hundreds of officers to the Nation's southern border. Add.182. Forcing the agencies to redirect scarce resources toward all noncitizens covered by §§ 1226(c) and 1231(a)(2) would preclude the agencies from prioritizing their most critical missions, thus harming the government and the public interest.

Plaintiffs characterize (Opp.19) these injuries as "self-inflicted harms." But the availability of detention facilities is not wholly within DHS's control. Congress has never appropriated funds sufficient to detain everyone who would be covered by §§ 1226(c) and 1231(a)(2)—and every Administration has employed a priority scheme to guide immigration-enforcement decisions. Some detention facilities terminated their contracts with DHS. Add.199. DHS's ability to secure detention space has been further complicated by "state laws prohibiting ICE detention" and by the difficulty of hiring adequate medical personnel during the COVID-19 pandemic. *Id.* Thus, even if DHS could reprogram funds appropriated for other programs to maximize detention capacity, DHS could not "readily add sufficient bedspace to accommodate the orders of magnitude of additional noncitizens that would need to be detained" under plaintiffs' mistaken view of the INA. *Id.* Moreover, any such reprogramming would divert scarce resources away from other agency priorities.

Plaintiffs attempt (Opp.19-20) to downplay the significance of the injunction, emphasizing that it does not technically mandate the detention of any particular noncitizen. But that argument ignores the impossibility of devising new priorities consistent with the court's erroneous interpretation of §§ 1226(c) and 1231(a)(2). *See* Mot.19-20. And it overlooks that the injunction indisputably prohibits DHS from implementing what has already proven to be a valuable tool to safeguard public safety and border security. *See* Add.180-82.

Plaintiffs' defense (Opp.20) of the order's onerous recordkeeping and reporting requirements is equally disingenuous. Plaintiffs do not dispute that requiring compliance with those provisions would constitute irreparable injury, and do not explain how the court had authority to impose such requirements except as part of the injunction. Plaintiffs argue (Opp.20) only that the court has "ameliorate[d] the harm." But to date the court has merely clarified when the government's first reports are due. Dkt. 92, at 2-3.

Finally, plaintiffs have failed to specify how a temporary stay would injure them. And even if the balance of the equities favored them, they would not be entitled to the sweeping relief that the court granted. As we have explained (Mot.20-21), the nationwide injunction contravenes core principles of Article III and equity, and is especially inappropriate given the availability of remand without vacatur and the fact that DHS expects to complete its final priorities soon. Plaintiffs' opposition does not discuss these defects in the order.

CONCLUSION

The Court should stay the injunction pending appeal or until final enforcement priorities are issued, whichever is earlier.

Respectfully submitted,

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SEPTEMBER 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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 motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,596 words according to the count of Microsoft Word.

/s/ Sean Janda
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CERTIFICATE OF SERVICE

I hereby certify that, on September 1, 2021, I electronically filed the foregoing motion 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 Janda
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