The Detention of Immigration Policy: How States are Commandeering DHS Enforcement Guidelines

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The Detention of Immigration Policy: How States are Commandeering DHS Enforcement Guidelines

Brianna Riguera*

In 2021, the Department of Homeland Security issued immigration guidelines that de-emphasized detention and removal of non-citizens who, aside from being undocumented, are otherwise contributing members of communities across the United States. However, Arizona, Montana, Ohio, Texas, and Louisiana challenged these guidelines, launching a nuanced legal dispute that concerned states standing under Article III, prosecutorial discretion, and nationwide preliminary injunctions. In United States v. Texas, the Court ruled 8-1 that the states lacked standing and reversed the Fifth Circuit’s nationwide injunction, but the majority opinion failed to address the other legal issues that are pressing on a rife debate about the role of states in federal immigration enforcement.

This note contends that permitting states to meddle with federal immigration enforcement could lead to perilous outcomes and erode the integrity of the entire immigration system. Thousands of non-citizens, particularly those emigrating from Central and South America, are affected by the decision of the Supreme Court, and they require a more

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protective answer to the questions raised in United States v. Texas.

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I. INTRODUCTION

Throughout its entire history, the United States has served as a haven for immigrants seeking a better life. The influx of diverse people from all over the world established the United States as a melting pot, host to people of all races, creeds, and nationalities. Nevertheless, rhetoric that immigrants pose a threat to the American public has consistently accompanied this legacy. These viewpoints are weaponized most often toward Latin American and other non-white immigrants, indicative of the prejudiced backbone of the anti-immigrant ideology.

Under his authority as the Secretary of the Department of Homeland Security (hereinafter “the Secretary”), Alejandro Mayorkas issued a set of guidelines for immigration aimed to curtail prejudice toward non-white immigrants, but the States of Arizona, Montana, Ohio, Texas, and Louisiana filed suit in their respective district courts to prevent the guidelines from taking effect. Those states claim that the guidelines contradict federal law regarding immigration enforcement, are arbitrary and capricious, and are procedurally invalid because they were not made subject to notice-and-comment
rulemaking. On review in the Fifth Circuit and in the Sixth Circuit, the appellate courts came to conflicting conclusions as to whether the injunctions granted by both district courts should stand, and the Supreme Court granted certiorari to resolve the circuit split.

On June 23, 2023, Justice Kavanaugh delivered the majority opinion in United States v. Texas. In an 8-1 decision, the Supreme Court ruled that the States lacked standing to bring the action and reversed the nationwide injunction imposed by the Fifth Circuit. While nearly all of the Justices on the bench agreed that the Court could decide the issue on standing, Justice Gorsuch pointed out in his concurrence that the majority opinion squandered the opportunity to bring some clarity to other important issues raised by the circuit split.

This note will demonstrate that an injunction upon the Secretary’s guidelines is improper and merely an attempt to undermine the federal government’s control over immigration enforcement policy. Section II summarizes the history of modern immigration policy, where it has failed, and how the Secretary’s guidelines intended to address those failures. Section III analyzes the arguments made by each side in the underlying cases, as well as the diverging opinions issued by the Fifth and Sixth Circuit Courts, paying particular attention to the legal issues highlighted by Justice Gorsuch. This section will also discuss the Supreme Court’s ultimate decision announced in United States v. Texas. Section IV argues that the States lack the legal authority to invalidate the judgment of the federal government as it concerns immigration policy and indicates where the Supreme Court’s majority’s opinion could have offered broader protection of the separation of powers and federalism. Finally, Section V concludes that while the Supreme Court’s narrow resolution of the circuit split safeguarded the federal government’s ability to

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7 Id.


9 Id.

10 Id.
enforce immigration policies, as well as the fates of thousands of noncitizens, it left other areas of the immigration system and its jurisprudence vulnerable to the legal issues it did not resolve.

II. BACKGROUND

A. IMMIGRATION ENFORCEMENT UNDER THE DEPARTMENT OF HOMELAND SECURITY

Despite immigration to the United States predating even the founding of the nation itself, immigration enforcement as it is practiced today has only existed for about twenty years.11 In response to the terrorist attacks on September 11, 2001, Congress passed the Homeland Security Act, creating the Department of Homeland Security (hereinafter “DHS”).12 DHS was tasked with several objectives including “to prevent terrorism and enhance security; secure and manage U.S. borders; enforce and administer U.S. immigration laws; safeguard and secure cyberspace; and ensure resilience to disasters.”13 To carry out its functions related to immigration, three agencies were created: Bureau of Customs and Border Protection, Bureau of Citizenship and Immigration Services, and Bureau of Immigration and Customs Enforcement.14 The Bureau of Immigration and Customs Enforcement (hereinafter “ICE”) is a law enforcement agency responsible for enforcing federal immigration laws and for finding, detaining, and removing immigrants in violation of those laws.15

B. IMMIGRATION DETENTION CENTERS IN THE UNITED STATES

ICE utilizes detention centers to detain undocumented immigrants prior to their removal.16 Latin American immigrants make up
a disproportionate share of the individuals in detention centers and are often subject to the harshly inhumane conditions in those detention centers such as inadequate access to medical care and sexual abuse.\textsuperscript{17} Under the current immigration enforcement structure, the population of immigration detention centers has exploded.\textsuperscript{18} Further, under the Obama, Trump, and Biden Administrations, the number of family detention centers has grown.\textsuperscript{18} These detention centers are host to immigrants of various statuses including survivors of torture, people seeking asylum, visa holders, people who have been granted the permanent right to live in the U.S., people who have lived here for years and may have American citizen spouses and children, individuals with mental health and medical conditions and other vulnerable groups including pregnant women and families with children – even babies.\textsuperscript{19}

C. THE SECRETARY’S ATTEMPT AT REFORM

The unjust treatment and stigmatization of immigrants who otherwise benefit their local communities is among the chief criticisms against the practices of immigration enforcement and the surrounding rhetoric.\textsuperscript{20} The Secretary issued a memorandum, which set out guidelines designed to shift enforcement priorities away from such individuals and direct them instead toward noncitizens who pose a genuine threat to national security, public safety, or border security.\textsuperscript{21} The Secretary advised ICE agents to use their discretion and to not detain and remove noncitizens simply because they are “removable noncitizens,” noting that:

> the majority of undocumented noncitizens who could be subject to removal have been contributing members of our communities for years. They include individuals who work on the frontlines in the battle

\textsuperscript{17} See Jennifer Safstrom, \textit{Thirteenth Amendment Litigation in the Immigrant Detention Context}, 26 MIJRL 205, 209-10 (2020) (discussing the demographics and conditions of immigrant detention centers in the United States).


\textsuperscript{19} Id.


\textsuperscript{21} See Mayorkas, \textit{supra} note 5.
against COVID, lead our congregations of faith, teach our children, do back-breaking farm work to help deliver food to our table, and contribute in many other meaningful ways.22

The Secretary instead asked that ICE agents prioritize the “apprehension and removal [of] noncitizens who are a threat to our national security, public safety, and border security.”23 He defines an individual who threatens border security as “[a] noncitizen who is engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities, or who otherwise poses a danger to national security.”24 The Secretary recommends that an individual who can be considered a threat to public safety—usually someone who engages in some criminal conduct—be evaluated according to the totality of several aggravating or mitigating factors rather than according to unforgiving bright lines.25 Finally, the Secretary states that an individual can be considered a threat to border security if “they are apprehended at the border or port of entry while attempting to unlawfully enter the United States” or if “they are apprehended in the United States after unlawfully entering after November 1, 2020,” and again subject to assessment of various aggravating and mitigating factors.26

The Secretary also prescribes certain measures to be taken by ICE agents prior to the guidelines taking effect including training, a review process for effective implementation, data collection, and a case review process.27 These measures are designed “[t]o ensure the quality and integrity of [the DHS’s] civil enforcement actions, and to achieve consistency in the application of [its] judgements.”28

22 Id. at 2.
23 Id. at 3.
24 Id.
25 Id. at 3-4 (listing gravity of the criminal offense, harm caused, sophistication of the crime, use of a firearm, or prior record as aggravating factors and advanced or tender age, long-term presence in the United States, mental conditions, status as a victim, impact of removal on family, eligibility for humanitarian protection, military service, evidence of rehabilitation, or expunged conviction as mitigating factors).
26 Id. at 4.
27 Mayorkas, supra note 5 at 5-6.
28 Id. at 6.
The guidelines from the Secretary address some of the harms of immigration enforcement in the United States and appear to provide at least a modest remedy for the resulting injustices. However, the Fifth Circuit and Sixth Circuit have had to grapple with whether the Secretary has overstepped his authority by implementing these guidelines.29

III. THE CIRCUIT SPLIT

The Fifth Circuit and Sixth Circuit reviewed decisions by their respective lower courts regarding claims brought by several States to enjoin the enforcement of the Secretary’s guidelines (hereinafter referred to as “the Guidance”).30 In Arizona v. Biden, the States of Arizona, Montana, and Ohio sued President Biden, DHS, the United States, and several other related defendants.31 The United States District Court for the Southern District of Ohio issued a nationwide preliminary injunction in favor of the States.32 In Texas v. United States,33 the states of Texas and Louisiana sued many of the same defendants from Arizona v. Biden in the United States District Court for the Southern District of Texas, which ultimately vacated the Guidance.34 The Sixth Circuit reviewed Arizona v. Biden and reversed the preliminary injunction.35 Just one day after the Sixth Circuit’s opinion was filed, the Fifth Circuit filed its opinion, which upheld the district court’s vacatur in Texas v. United States and denied the defendants’ motion for a stay pending appeal.36 The arguments made by the parties in each case were nearly identical, so for the purposes of this note, the plaintiffs in both cases will be referred

29 See generally Arizona v. Biden, 40 F.4th 375 (6th Cir. 2022); see also Texas v. United States, 40 F.4th 205 (5th Cir. 2022).
30 Heelan, supra note 6.
32 Id. at 380.
33 Note that this case ultimately reached the Supreme Court as United States v. Texas. The discussion of this decision at the Fifth Circuit level will be referred to as Texas v. United States, whereas discussion of the case at the Supreme Court level will be referred to as United States v. Texas.
34 Texas v. United States, 40 F.4th at 215.
36 Texas v. United States, 40 F.4th at 215.
to collectively as “the States” and the defendants in both cases will be referred to collectively as “the Department.”

A. THE STATES’ ARGUMENTS FOR ENJOINING THE GUIDANCE

i. The Guidance is Contrary to Federal Immigration Law

The States identify two federal immigration statutes which they claim conflict with the Guidance: 8 U.S.C. §§ 1226(c)(1) and 1231(a)(1)(A). They zero in on the mandatory language used in the statutes to argue that the sort of discretion called for by the Guidance is impermissible.

“Section 1226(c)(1) says that ICE ‘shall take into custody,’ specified aliens—including aliens convicted of crimes of moral turpitude, drug crimes, aggravated felonies, firearm offenses, espionage, and human trafficking—upon their release from criminal custody.” The States interpret this as meaning that the Department must detain all eligible noncitizens and find provisions of the Guidance which prohibit reliance on bright lines or categories to be at odds with the mandate in § 1226(c)(1).

Section 1231(a)(1)(A) provides that “ICE ‘shall remove’ an alien with a final order of removal within 90 days.” The States frame the section as a remedy to situations where DHS fails to remove noncitizens already in receipt of removal orders. Because the Guidance would require agents to comprehensively review the circumstances surrounding a noncitizen’s proposed detention and removal, the States argue that § 1231(a)(1)(A) is violated where an eligible noncitizen is neither detained nor removed.

37 Subsections A and B of Part III summarize the analogous arguments made in both Arizona v. Biden and Texas v. United States by the States and by the Department. Subsection C compares the diverging opinions reached by the Fifth and Sixth Circuits respectively.
38 Brief of the States of Arizona, Montana, and Ohio at 40, Arizona v. Biden, 40 F.4th 375 (6th Cir. 2022) (No. 22-3272) [hereinafter Brief for the States].
39 Id. at 40-41.
40 Id. at 41 (quoting 8 U.S.C. §1226(c)(1)).
41 Id. at 41-42.
42 Id. at 48.
43 Id.
The Department points to “the Executive’s ‘deep-rooted’ enforcement discretion [which has] ‘long coexisted with apparently mandatory arrest statutes’ and persists ‘even in the presence of seemingly mandatory legislative commands’” to argue that the statutes referenced by the States do not preclude DHS from advising officials on how to carry out that mandate.44

ii. The Guidance is Arbitrary and Capricious

“The APA prohibits agency actions that are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’” and requires that agencies make decisions rationally.45 The States identify several factors which they claim the Department ignored when promulgating the Guidance, which would render it arbitrary and capricious.46 First, the States allege that the risks associated with recidivism are a practical result of the Guidance, and that the Department failed to give ample consideration to these risks.47 Second, the States identify issues that will likely arise from non-detention of noncitizens and which will impact later removal efforts.48 Specifically, the States claim that “‘frivolous appeals’ designed ‘to delay . . . deportation’” and increased “‘absconder rate[s]’” are significant concerns which the Department neglected to consider.49 Finally, the States contend that the substantial costs that the Guidance would impose on the States needed to have been evaluated as part of the Department’s decision-making.50

The States argue that, despite the Department’s claims to have considered such concerns, those efforts were wholly insufficient.51

An agency’s “statement that it considered this or that factor” is not “enough to avoid any arbitrary-and-capricious problems.” Put differently, “[s]tating that a factor was considered . . . is not a

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44 Brief for Appellants at 35-38, Arizona v. Biden, 40 F.4th 375 (6th Cir. 2022) (No. 22-3272) [hereinafter Brief for Appellants].
45 Plaintiffs’ Motion for Preliminary Injunction at 19, Texas v. United States, 40 F.4th 205 (5th Cir. 2022) (No. 6:21-cv-00016) (quoting 5 U.S.C. § 706(2)(A)) [hereinafter Plaintiffs’ Motion for Preliminary Injunction].
46 Id. at 21.
47 Id. at 20.
48 Id. at 20.
49 Id. at 20-21 (quoting Demore v. Kim, 538 U.S. 510, 530 (2003)).
50 Id. at 21.
51 Brief for the States, supra note 38, at 52-56.
substitute for considering it.” While agencies need not make formal findings, they “must provide the court an explanation sufficient to allow [it] to properly carry out [its] review.” “Cryptic assertions” do not suffice. And neither “conclusory recitation[s],” nor unreasoned or unsupported assertions pass muster either.52

The Department retorts that it in fact considered each of these concerns extensively and concluded that the benefits of the Guidance and the resource constraints which necessitate it outweighed the States’ alleged concerns.53

iii. The Guidance is Procedurally Invalid

The States further argue that the Guidance does not comply with the Administrative Procedures Act (hereinafter “the APA”) because it was promulgated without being subjected to notice-and-comment rulemaking.54 Substantive or legislative rules must undergo notice-and-comment rulemaking, otherwise they should be “held unlawful and set aside” as issued “without observance of procedure required by law.”55 Although there are exceptions, the States claim that these exceptions must be narrowly construed and that the Guidance does not meet any exception.56 The States disregard the “self-serving label” given to the Guidance and look instead at the Guidance’s contents, which they find strip DHS officials’ ability to make individualized determinations in enforcing immigration laws.57 The States also contend that the Guidance does not fit any exception for notice-and-comment rulemaking because it creates legal rights and obligations for noncitizens whose detention and removal would not be prioritized and because the presence of said noncitizens would have a significant impact on the States where they reside.58

The Department responds that the Guidance is exempt from notice-and-comment rulemaking precisely because it gives discretion to DHS officials, it does not create any legal rights or obligations

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52 Id. at 52-53 (citations omitted).
53 Brief for the Appellants, supra note 44, at 40-43.
54 Brief for the States, supra note 38, at 56.
55 Plaintiffs’ Motion for Preliminary Injunction, supra note 41, at 22-23 (quoting 5 U.S.C. § 706(2)(D)).
56 Id. at 23-25.
57 Id.
58 Id. at 24-25.
upon which noncitizens can rely, and its impact on the States is speculative and attenuated. 59

B. THE DEPARTMENT’S ARGUMENTS FOR DISMISSING THE STATES’ CLAIMS

i. The States Lack Standing to Bring a Claim

The Department argues that the States do not have standing to bring a claim because they have not shown “that they have suffered an ‘injury in fact’ ‘caused’ by the Guidance that a favorable decision would ‘redress.’” 60 While it may be true that the States are entitled to special solicitude, they are still required to prove these foundational elements to have standing. 61

The States allege that they have suffered financial injury because of the Guidance. 62 They claim that the increased number of noncitizens who are eligible for detention and removal but who have not been detained or removed under the Guidance have created excess costs for the States. 63 The Department responds that even if the States could prove these speculative costs, the financial impacts incidental to federal actions like the Guidance do not constitute an injury that affords Article III standing, especially because the federal action is not binding on the States. 64 From the Department’s perspective, the priorities for enforcement outlined in the Guidance would not necessarily result in less eligible noncitizens being detained and removed. 65 Essentially, the Department argues that it can detain and remove as many eligible noncitizens as it had prior to the Guidance because nothing in the Guidance requires a reduction in the volume of noncitizens being apprehended, meaning the States’

59 Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction at 33-36, Texas v. United States, 40 F.4th 205 (5th Cir. 2022) (No. 6:21-cv-00016) [hereinafter Defendants’ Opposition].
61 Arizona v. Biden, 40 F.4th at 385-86.
62 Plaintiffs’ Motion for Preliminary Injunction, supra note 45, at 28; Brief for the States, supra note 38, at 24.
63 Brief for the States, supra note 38, at 24.
64 See Brief for the Appellants, supra note 44, at 11.
65 Brief for Appellants, supra note 44, at 21-23.
injury is only speculative.\textsuperscript{66} Additionally, the Department contends that even if there were costs to the States associated with the Guidance, the States would still lack standing because the Guidance in no way abridges the powers of the States and any incidental effects on the States flowing from federal actions are not considered injuries in fact; any grievances which the States may have with such federal actions should be addressed politically, not judicially.\textsuperscript{67}

Regardless of whether there has been an injury in fact, the States would still need to show that the Guidance caused that injury, and the Department maintains that they cannot.\textsuperscript{68} The Department points to the data offered by the States, which shows a trend of lowered rates of detention and removal, but it notes that the downward trend predates the Guidance and is likely the result of various other factors such as the public-health orders issued during the COVID-19 Pandemic.\textsuperscript{69} To further support its attack on the States’ purported causal chain, the Department observes that “the chain of causation ‘hinge[s] on the response’ of multiple other actors.”\textsuperscript{70} These other actors would include the individual DHS agents who still retain control of how many noncitizens they will detain and remove under the Guidance and the removable noncitizens whose activities may or may not be costly to the States.\textsuperscript{71}

The Department concludes by stating that the States failed to show that an injunction would redress the alleged injuries because DHS and its agents would still retain discretion as to how to enforce the federal immigration statutes regardless of whether the Guidelines remain in effect.\textsuperscript{72} Essentially, it argues that an injunction would not affect the volume of noncitizens removed or detained.\textsuperscript{73}

\textsuperscript{66} Id.
\textsuperscript{67} Id. at 16-19.
\textsuperscript{68} Id. at 16.
\textsuperscript{69} Id. at 21-23.
\textsuperscript{70} Id. at 23-24 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992)).
\textsuperscript{71} Brief for Appellants, supra note 44, at 24.
\textsuperscript{72} Id. at 25.
\textsuperscript{73} Id.
ii. The Guidance is not Subject to Review

The Department also argues that the Guidance is not reviewable because it does not constitute a final agency action, it is committed to discretion, and it falls outside of the States’ zone of interest.74

The APA imposes certain limitations on which agency actions are subject to review, and three of those limitations prevent review of the Guidance: (1) only “final agency actions” which create legal rights, obligations, or consequences are subject to review,75 (2) matters committed to agency discretion by law are not appropriate for review,76 and (3) where Congress expresses a specific scheme for review of conduct of a particular agency, any form of review which runs against the scheme is precluded.77

Regarding the first limitation, an agency action can only be considered final if it is the consummation of the agency’s decision-making process and it creates legal rights, obligations, or consequences.78 The Department concedes that the Guidance satisfies the first component—that it is the consummation of the agency’s decision—but disagrees that the second component is satisfied—that legal rights, obligations, or consequences are determined by the action.79 The Department identifies several indicators that the Guidance lacks legal effect, beginning with the language of the Guidance itself which plainly says that it does not “create any right or benefit, substantive or procedural, enforceable at law.”80 Noncitizens are not able to use the Guidance as a means of protecting themselves against enforcement of federal immigration law, so it logically follows that the Guidance does not afford them any legal rights.81 The Guidance does not impose any legal obligations on DHS officers either; rather, it spells out which noncitizens’ removal should be prioritized while still “permit[ting] officers to pursue enforcement action against any removable noncitizen in the exercise of officials’ individualized

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74 Id. at 25-34; Defendants’ Opposition, supra note 59, at 12.
75 Defendants’ Opposition, supra note 59, at 12.
76 Id.
77 Brief for Appellants, supra note 44, at 33.
78 Defendants’ Opposition, supra note 59, at 12.
80 Defendants’ Opposition, supra note 59, at 13.
81 Id.
discretion,” so long as they utilize the proper channels.82 Finally, the Department argues that any consequences which may flow from the Guidance, such as decisions as to which eligible noncitizens to initiate enforcement actions against, are not legal in nature.83 It cites to several cases that characterized “the decision to initiate an enforcement action” as “the quintessential example of non-final agency action.”84

As for the second limitation, the Department argues that administrative decisions considered “committed to agency discretion” are exempt from review under the APA.85 The Department maintains, despite the States’ protests, that decisions regarding which eligible noncitizens should be prioritized for detention and removal is within the discretion of the DHS.86 From the Department’s perspective, the enforcement priorities detailed in the Guidance are precisely the sort of administrative decisions that are traditionally treated as committed to agency discretion and therefore not reviewable.87

Concerning the third limitation on review of the Guidance, the Immigration and Nationality Act (hereinafter “INA”), does not authorize the States to bring a claim against immigration enforcement policies because they have an attenuated financial impact, which is consistent with the general rule that “third parties have no cognizable legal interest in compelling the enforcement of immigration laws against others.”88 The Department reiterates that the INA only permits noncitizens against whom immigration laws are being enforced to challenge policies regarding and enforcement of immigration law.89 It further argues that the States’ interests fall far outside the zone-of-interest covered by the INA because immigration enforcement has long been understood to be within the interest of the Federal Government alone, and therefore the States are not afforded a right of review.90

82 Brief for Appellants, supra note 44, at 27-28.
83 Defendants’ Opposition, supra note 59, at 13.
84 Id. (citing Zadvydas v. Davis, 533 U.S. 678, 699-700 (2001)).
85 Defendants’ Opposition, supra note 59, at 14.
86 Id. at 14-16.
87 Id. at 14.
88 Brief for Appellants, supra note 44, at 33.
89 Id.
90 Defendants’ Opposition, supra note 59, at 33-34.
C. DIVERGING OPINIONS OF THE FIFTH AND SIXTH CIRCUITS

Generally, the Sixth Circuit’s opinion in Arizona v. Biden supports the arguments made by the Department while the Fifth Circuit’s opinion in Texas v. United States agrees with those made by the States.91 The Fifth Circuit attempts to distinguish its opinion from that of the Sixth Circuit on the basis that there was a complete trial record available in Arizona v. Biden, but several of the legal arguments made by the Fifth Circuit directly oppose those of the Sixth, clearly creating a circuit split.92 The clashing legal analyses are examined below.

i. Whether Downstream Financial Impacts Constitute an Injury for Which There is a Cause of Action

On the issue of standing, the Fifth Circuit held that the States sufficiently proved that they had suffered “an injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”93 The court found that the statistics provided by the States tended to show that the Guidance had caused significant financial costs which adversely impacted the States.94 It identified costs associated with incarcerating and paroling “criminal aliens,” costs associated with criminal recidivism, and costs of health and education services provided to otherwise removable noncitizens.95 Having concluded that the Guidance was a “fairly traceable” cause of these costs, the Fifth Circuit also found that vacating the Guidance would alleviate the harm caused to the States.96

The Sixth Circuit’s analysis yielded the exact opposite result. It held that the States failed to show that the Guidance in fact caused the speculative monetary harms alleged,97 and that in any case,
“indirect fiscal burdens” resulting from agency action do not create a “cognizable Article III injury.” The Sixth Circuit asserts that there would only be a theory of injury available to the States if the Guidance had regulated the States themselves, preempted local law-making, or threatened incursion on their property or territory, none of which has been alleged by the States in either case.

ii. Whether the Guidance is a Reviewable Final Agency Action

As for the second justiciability hurdle relevant to these cases, the Fifth Circuit finds that the Guidance constituted a final agency action and is therefore reviewable. It bases this finding on its determination that the Guidance has legal consequences and creates legal rights and obligations because the Guidance removes ICE officers’ discretion by “prohibiting them to rely solely on a statutorily qualifying conviction or removal order.” Additionally, the Fifth Circuit holds that the Guidance is not committed to agency discretion such that it is exempted from review and that the States are provided a cause of action under the APA because they fall within the zone of interests covered by §§ 1226(c) and 1231(a).

The Sixth Circuit is not so convinced. It finds no legal right, obligation, or consequence which flows from the Guidance, which itself explicitly denies having such an effect, so the Sixth Circuits holds that the Guidance does not constitute a final agency action reviewable under the APA. It also identifies an additional ground to support its finding that the Guidance is not reviewable: the Department has congressionally approved discretion over how to effectuate enforcement of federal immigration law and therefore the Guidance is committed to agency discretion by law.

98 Id. at 386.
99 Id.
100 Texas v. United States, 40 F.4th at 219.
101 Id. at 220 (emphasis removed).
102 Id. at 221-23.
104 Id. at 389.
iii. Whether the Guidance Violates the APA

The Fifth Circuit accepts the States’ argument that the mandatory language of 8 U.S.C. §§ 1226(c) and 1231(a) prohibits the Department from promulgating prioritizations for enforcement that bar officers from enforcing those sections to their full extent. 105 It also holds that because the Department fails to sufficiently consider various factors affecting the States, the Guidance is arbitrary and capricious. 106 Finally, it does not find that the Guidance meets any of the exceptions that might have exempted it from notice-and-comment rulemaking under the APA and is therefore procedurally invalid. 107

Again, the Sixth Circuit’s analysis contrasts that of the Fifth’s on each point. It holds that the mandatory language in the statute is not enough to “displace the Department’s longstanding discretion in enforcing the many moving parts of the nation’s immigration laws.” 108 Moreover, the Sixth Circuit finds that the Department “offered a satisfactory explanation for the priorities,” and amply considered the factors affecting the States. 109 As a result, it holds that the Guidance is neither arbitrary nor capricious. 110 Finally, it holds that the content of the Guidance tends to show that it is a “general statement[] of policy” exempted from the notice and comment requirement, further establishing the Guidance’s procedural validity. 111

D. THE SUPREME COURT’S ULTIMATE DECISION

Justice Kavanaugh, writing the majority opinion of the Court in United States v. Texas, framed the issue as beginning and ending with whether the States have Article III standing to maintain their suit against the Department, and wastes little time concluding that they do not. 112 The Court treats the case Linda R. S. v. Richard D as determinative of the issue, interesting despite neither the Fifth or Sixth Circuit paying it much attention in their respective

106 See id. at 226-28.
107 Id. at 228-29.
109 Id. at 392-93.
110 Id.
111 Id. at 393.
decisions.\textsuperscript{113} Invoking that prior decision, the Court states that “in ‘American jurisprudence at least,’ a party ‘lacks a judicially cognizable interest in the prosecution . . . of another’” and that “‘a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.’”\textsuperscript{114}

The Court identifies a number of “good reasons” that support the holding in Linda as well as that of \textit{United States v. Texas}.\textsuperscript{115} First, that the decision by the Department to not prosecute in certain circumstances is not an exercise of coercive power, “and thus does not infringe upon interests that courts often are called upon to protect.”\textsuperscript{116} Second, the Court cannot mandate the Executive branch to make more arrests or prosecutions without offending the separation of powers prescribed by the Constitution.\textsuperscript{117} Article II gives the Executive exclusive discretion over how to enforce the law, and that authority extends to the immigration context.\textsuperscript{118} Finally, not only does the Court lack the authority to command such enforcement decisions, but it is also not in any position to do so.\textsuperscript{119} The Executive branch’s resources for arrest and prosecution are not unlimited, and the Court notes that for the 27 years that the statutes at issue here have been enforced, “all five Presidential administrations have determined that resource constraints necessitated prioritization in making immigration arrests.”\textsuperscript{120} These practical considerations are the backbone of the majority’s decision in \textit{United States v. Texas}.

Although the majority holds that the States lack standing under the present facts, the Court does not close the door on a similar suit being raised in the future.\textsuperscript{121} The Court contemplates several factors that might affect whether there is a cognizable injury for Article III standing in the immigration context.\textsuperscript{122} For instance, the Court concedes that the Equal Protection Clause might be invoked by a party

\textsuperscript{113} \textit{See id.} at 677-78.
\textsuperscript{114} \textit{Id.} at 677. (quoting Linda R.S v. Richard D., 410 U.S. 614, 619 (1973)).
\textsuperscript{115} \textit{See id.} at 678-80.
\textsuperscript{116} \textit{Id.} at 678.
\textsuperscript{117} \textit{Id.} at 678-79.
\textsuperscript{118} \textit{United States v. Texas}, 599 U.S. at 678-79.
\textsuperscript{119} \textit{Id.} at 679-80.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 681.
\textsuperscript{122} \textit{See id.} at 681-84.
injured by selective prosecution where the party is “seek[ing] to prevent his or her own prosecution, not to mandate additional prosecutions against other possible defendants.”123 The Court also considers how Congress could authorize such lawsuits by statute and provides the following example: “Congress might (i) specifically authorize suits against the Executive Branch by a defined set of plaintiffs who have suffered concrete harms from executive under-enforcement and (ii) specifically authorize the Judiciary to enter appropriate orders requiring additional arrests or prosecutions by the Executive Branch.”124 The Court also raises a hypothetical situation where instead of providing a prioritization scheme, the Guidelines encourage the Department to cease arrests and prosecutions altogether, which potentially could constitute an injury in fact.125 Finally, the Court distinguishes the Guidelines here as a policy solely involving arrest and prosecution priorities, so it leaves open the question of whether an injury would exist if the policy involved “the provision of legal benefits or legal status” or “the continued detention of noncitizens who have already been arrested.”126 The Court does not elaborate on why or how the Article III calculus would be affected by such policies but, nevertheless, narrows its present holding accordingly.127

Despite being discussed extensively by the lower courts, the majority opinion does not even address whether the States ought to be treated any differently than a citizen in the standing calculus, and by default treats whatever distinction that might exist as being insignificant here. This is one of the primary qualms that Justice Gorsuch raises in his concurrence.128 In his view, Massachusetts v. EPA cannot be reconciled with the majority’s opinion, but rather than asking that the Court apply the special solicitude doctrine here as well, he appears to advocate that the Court finally put it to rest.129

Before Massachusetts v. EPA, the notion that States enjoy relaxed standing rules “had[ed] no basis in our jurisprudence.” Nor has “special solicitude” played a meaningful role in this Court’s

123 Id. at 681.
124 United States v. Texas, 599 U.S. at 681-82.
125 Id. at 682-83.
126 Id. at 683.
127 See id.
128 See id. at 688-89 (Gorsuch, J., concurring).
129 Id.
decisions in the years since. Even so, it’s hard not to wonder why the Court says nothing about “special solicitude” in this case. And it’s hard not to think, too, that lower courts should just leave that idea on the shelf in future ones.130

Gorsuch’s concurrence concluded that the States lacked standing, not because there had been no injury, but because that injury could not be redressed by the Court.131 He does nothing to discredit the district court’s finding that the States had incurred increased costs as a result of the priorities laid out in the Guidelines, but instead determines that the Court cannot provide the State a remedy for that injury.132 Turning to 8 U.S.C. §1252(f)(1) and Garland v. Aleman Gonzalez, he notes that injunction is unavailable in this case.133 Further, he observes that even if the Guidelines could be vacated under the APA, the Department could still exercise its prosecutorial discretion according to the same prioritization scheme.134 Gorsuch is similarly unimpressed by the notion that the Supreme Court’s power to fashion an injunction itself is sufficient to support redressability, which needed to have been established at the outset of the case, before it could be anticipated that it would reach the Supreme Court.135

However, most concerning to Gorsuch was the remedy afforded by the district court: a “wholesale vacatur of the Guidelines, rendering them inoperable with respect to any person anywhere.”136 He recognizes this as part of a larger trend by the district courts and immediately strikes a tone of disapproval, characterizing the practice as lower courts “assert[ing] the authority to issue decrees that purport to define the rights and duties of sometimes millions of people who are not parties before them.”137 Unconvinced that the APA affords such a remedy, Gorsuch says the following of the States’

130 United States v. Texas, 599 U.S. at 688-89 (Gorsuch, J., concurring).
131 Id. 689-90. (Gorsuch, J., concurring).
132 Id.
133 Id. (citing Garland v. Aleman Gonzalez, 596 U.S. 543, 550 (2022)) (“[W]e held that § 1252(f)(1) ‘prohibits lower courts from ... order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions.’”).
134 Id. at 690-91.
135 Id. at 692.
136 United States v. Texas, 599 U.S. at 695 (Gorsuch, J., concurring).
137 Id. at 694.
contention that the words “set aside” of §706(2) allow a district court to void the Guidelines with respect to anyone anywhere:

Color me skeptical. If the Congress that unanimously passed the APA in 1946 meant to overthrow the “bedrock practice of case-by-case judgments with respect to the parties in each case” and vest courts with a “new and far-reaching” remedial power, it surely chose an obscure way to do it. 138

However, after considering the serious questions posed by nationwide injunctions, Gorsuch leaves their answers for another day, acknowledging the implications it might have on the breadth of APA litigation before the Court. 139

IV. ARGUMENT

Various legal issues are raised by the split decisions of the Fifth and Sixth Circuit Courts, but they all speak to a single concern—whether the States have the authority to undermine the federal government’s exclusive control of immigration policy. This section examines how Article III standing, prosecutorial discretion, and nationwide preliminary injunctions levied by the district courts are all implicated in this attempt by the States to usurp this power from the federal government. Additionally, it examines whether the Supreme Court’s decision went far enough to prevent the serious consequences of the same.

A. ARTICLE III STANDING

i. The doctrine of special solicitude does not give the States standing to bring their APA claim against the Department

The Fifth and Sixth Circuit’s diverging conclusions regarding whether or not the States have standing to bring their respective suits against the Department ultimately hinge on each Circuit’s interpretation of Massachusetts v. EPA. 140 In Massachusetts v. EPA, the Supreme Court decided that the several states were rightfully entitled to sue the Environmental Protection Agency for failing to establish

138 Id. at 695.
139 Id. at 701-02.
rulemaking aimed at controlling greenhouse gas emissions.\textsuperscript{141} The lasting impact of this case is that it established “special standing”, also known as the doctrine of special solicitude.\textsuperscript{142} The doctrine of special solicitude has been unclear since its genesis in 2007, and without any further clarification by the Supreme Court has only become more muddled.\textsuperscript{143} The Supreme Court’s ultimate ruling on the Fifth-Sixth Circuit split should elucidate the actual function of the doctrine, and a return to well-established Article III standing jurisprudence would be the best way forward.

In Massachusetts v. EPA, a slim majority decided that because the plaintiff states were suing the federal government on the basis of quasi-sovereign interests, they were entitled to special solicitude and therefore had met the bar for Article III standing.\textsuperscript{144} Lujan v. Defenders of Wildlife is the landmark Article III standing case which neatly summarizes “the irreducible constitutional minimum of standing” established in the common law:

First, the plaintiff must have suffered an “injury in fact”—a invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”\textsuperscript{145}

The plaintiff states in Massachusetts v. EPA asserted they were injured by unregulated greenhouse gas emissions which

\textsuperscript{142} See id. at 1030; see also Article III—Standing—Special Solicitude Doctrine—Affordable Care Act—California v. Texas, 135 Harv. L. Rev. 343 (2021).
\textsuperscript{143} Article III—Standing—Special Solicitude Doctrine—Affordable Care Act—California v. Texas, supra note 139, at 348-50.
compromised the health and wellness of their residents and “swallow[ed] Massachusetts’ coastal land.”146 Strictly relying on the longstanding \textit{Lujan} rule, the plaintiff states would have fallen short of Article III standing without a concrete injury in fact.147 However, because the majority found that they were covered by special solicitude, the implication of their quasi-sovereign interests was sufficient to bring suit.148

Quasi-sovereign interests are yet another uncertain legal concept, but accepted definitions include “a set of interests that the State has in the well-being of its populace”149 and the State’s interest in “assuring that the benefits of the federal system are not denied to its general population.”150 Interestingly, the Fifth Circuit in \textit{Texas v. United States} defines quasi-sovereign interests as those sovereign interests which states forfeit to the federal government without any clear source for support.151 Special solicitude is only available to states which bring suit under the theory that their quasi-sovereign interests have been affected.152 The Sixth Circuit in \textit{Arizona v. Biden}, reasons that strictly financial damages fall squarely outside the scope of quasi-sovereign interests, quoting \textit{Massachusetts v. EPA} itself, which stated that quasi-sovereign interests are distinct from those “capable of estimate in money.”153 The Sixth Circuit goes on to note that even if the States here were entitled to special solicitude, that would only mean they had an alternate theory of injury available to them, not that they would be blindly absolved of their burden of proving the remaining factors for standing under the \textit{Lujan} rule.154 The Fifth Circuit does not agree with this interpretation of special solicitude, and instead feels that a grant of special

147 \textit{See id.} at 516-18.
148 \textit{Id.} at 520.
150 \textit{Id.} at 1037 (quoting Snapp, 458 U.S. at 602).
152 \textit{See Massachusetts v. EPA}, 549 U.S. at 518-20.
154 \textit{Id.} at 386.
solicitude “means imminence and redressability are easier to establish [] than usual,” again without any indicated support.155

Massachusetts v. EPA, if interpreted in a manner consistent with its common law precedent, cannot be understood to mean that special solicitude entirely substitutes the requirements for standing under the Lujan rule. At most, special solicitude lowers the burden of proving injury in fact by providing an alternative sort of injury available only to states, while still requiring a substantial showing of causation and redressability. Due to the highly speculative nature of the downstream costs imposed upon the States by the Guidance, neither traceability nor redressability can be sufficiently established, regardless of whether the States are entitled to special solicitude.

ii. The Fifth Circuit willfully misinterprets Massachusetts v. EPA to lower the bar for standing

At several junctures of Texas v. United States, the Fifth Circuit twists the words of the Supreme Court and contorts controlling case law to reach its desired outcome.156 In some instances, it provides little to no precedent for its reasoning whatsoever.157 Below is an analysis of these inconsistencies, which further expose the weakness of the Fifth Circuit’s ultimate holdings.

On the issue of whether the States had standing to bring suit, the Fifth Circuit clumsily applied the doctrine of special solicitude to hold that they did.158 To begin, the court relegates its explanation of the doctrine upon which it bases its holding on standing rests to a footnote.159 Within that lengthy footnote, the Court hides its misguided interpretation of Massachusetts v. EPA, particularly regarding what constitutes a quasi-sovereign interest.160 It writes: “When a State enters the Union, it surrenders certain sovereign prerogatives,” such as the right to control immigration policy and enforcement. “These sovereign prerogatives are now lodged in the Federal

155 Texas v. United States, 40 F.4th at 216.
156 See id. at 215.
157 See id.
158 See id. at 215-16.
159 Id. at 215 n.4.
160 See id.
Government,’ and such forfeited rights are precisely the quasi-sovereign rights that entitle a state to special solicitude.”

These carefully selected quotations disguise the fact that nothing in Massachusetts v. EPA suggests that immigration policy is a quasi-sovereign interest of the States, and if any case did exist to support that contention, surely the Fifth Circuit would have referred to it. The Court in Massachusetts v. EPA wrote that the quasi-sovereign interests which entitle Massachusetts to special solicitude include “all the earth and air within its domain” and “the health and welfare of its citizens.” That definition, although rather vague, certainly does not insinuate that every sovereign power forfeited by the States to the Union is one that the States retain as a quasi-sovereign interest.

Additionally, the Fifth Circuit suggests that a grant of special solicitude lowers the bar for proving the elements of traceability, or “imminence” and redressability. No support for this statement is provided in the body of the opinion or the footnote mentioned above. As the Sixth Circuit correctly notes in Arizona v. Biden, Massachusetts v. EPA “does not remove Article III’s imperative of a cognizable case or controversy or the requirements of injury, causation, and redressability” by providing an additional theory of injury to States. While it appears the Fifth Circuit is intent on lowering the bar for standing, there is no legal precedent to support its use of the doctrine of special solicitude as a means of doing so.

iii. An Examination of the Special Solicitude Doctrine is Noticeably Absent from the Majority Opinion.

As Justice Gorsuch notes in his concurrence, the majority makes no mention of the special solicitude doctrine. One can infer from its silence that the majority does not find that the doctrine applies here. However, the procedural history of this case, and that of the Sixth Circuit case, Arizona v. Biden, both devote significant

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161 Texas v. United States, 40 F.4th at 215 n.4 (quoting Massachusetts v. EPA, 549 U.S. 497, 519-520 (2007)).
162 See Massachusetts v. EPA, 549 U.S. at 518-520.
163 Id. at 518-19.
164 See id. at 519-20.
165 Texas v. United States, 40 F.4th at 216.
166 Id. at 216 n.4.
attention to unpacking the special solicitude doctrine and its sparse jurisprudence, so it is exceedingly odd that the majority would avoid it all together, especially where injury was the deciding issue. The majority does nothing to clear up the fogginess of the doctrine, and perhaps purposefully so. By ignoring the special solicitude doctrine in *United States v. Texas*, the Court leaves open the opportunity to manipulate it in any way it may be interested in doing so later.

The Court had the perfect opportunity to either resuscitate the special solicitude doctrine and announce a clear rule of its scope or to finally cast it out of Article III standing jurisprudence. By doing neither, the lower courts remain in limbo, unsure of how to apply it or whether they should. Justice Gorsuch would do away with the special solicitude doctrine and perhaps that would have been the ti-diest resolution. As he mentions, the relaxed standard for standing for the States had no jurisprudential support prior to *Massachusetts v. EPA*, and since then has been scarcely invoked.\(^{169}\) If the majority believes it so obvious that the States in this case are subject to the ordinary standard for Article III standing, so much so that it does not even warrant mentioning, there is no reason why the Court should not officially break with the special solicitude doctrine once and for all. Leaving it undisturbed in the jurisprudence only means that lower courts are bound to confuse what its proper scope would be in future cases, intentionally or otherwise.

iv. How diminishing the requirements for Article III standing would harm federalism

The standing requirements under Article III are a critical barrier preventing State governments from weaponizing the courts to meet their own ends where the only perceived injury is political in nature. The Fifth Circuit’s endorsement of this tactic in *Texas v. United States* is a prime example of this danger. Displeased with the approach taken by the Department and the Secretary, the states of Texas, Louisiana, Arizona, Montana, and Ohio challenged a simple set of guidelines for immigration enforcement.\(^{170}\) Unable to actually satisfy the criteria for standing, the States used the shaky doctrine of

\(^{169}\) *Id.* at 688-89.

\(^{170}\) See Plaintiffs’ Motion for Preliminary Injunction, *supra* note 41; see also Brief for the States, *supra* note 34.
special solicitude as a crutch. If the Supreme Court were to accept the States’ argument that their supposed quasi-sovereign interest in immigration enforcement—an area of law entrusted exclusively to the federal government—lowers the bar for Article III standing, there would no doubt be a flood of litigation from disgruntled state governments alleging injuries were there are none. The current political climate is increasingly polarized and weakening fundamental tenets of our democratic process will only strengthen the dysfunction caused by the nation’s division.

By attempting to afford special solicitude to the States under the theory that the States have a quasi-sovereign interest in enforcing immigration law, the Fifth Circuit implies that the States have a greater interest in immigration enforcement than the Department and the federal government itself. Immigration policy is the concern of the federal government and the federal government alone. "The Court without exception has sustained Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’" Any suggestion that the States have an equal or superior interest in the enforcement of immigration law contradicts foundational elements of federalism.

States are afforded two Senators each, and several House Representatives to vouch for their respective interests in federal matters in Congress. That is how the Constitution intended for States to be represented in matters entrusted to the federal government. States governments are not invited to override the decisions of Congress, or that of agencies such as the Department, simply because those decisions do not align with their respective agendas. Moreover, the courts, especially the Supreme Court, must be careful to

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171 See Plaintiffs’ Motion for Preliminary Injunction, supra note 41, at 28-30; see also Brief for the States, supra note 34, at 23-34.
173 Id.
174 Id.
175 Id. (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).
176 U.S. Const. art. I, § 3, cl. 1; id. § 2, cl. 3.
177 THE FEDERALIST No. 45 (James Madison).
avoid elevating the authority of the States in matters such as these merely because they are of the same opinion. “No matter how important the underlying policy issues at stake, [the Supreme] Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.”

B. PROSECUTORIAL DISCRETION

The States’ interpretation of the APA ignores a rich history of prosecutorial discretion and the factors which necessitate it. Prosecutorial discretion in the immigration context “generally refers to the agency’s determination of whether or not the immigration laws should be enforced against a particular individual or group of persons.” The DHS is able to exercise prosecutorial discretion at any point in the immigration enforcement process, “including, but not limited to, interrogation, arrest, charging, detention, removal proceedings, appeals, or after a removal order has become final.” Immigration enforcement benefits from prosecutorial discretion in both a humanitarian sense and an economic sense. Noncitizens whose presence in the United States is not significantly harmful, or which may indeed be valuable, might be spared from enforcement actions such as detention or removal. Prosecutorial discretion also recognizes the immense cost, and even impossibility, associated with taking enforcement action against every last removable noncitizen living in the United States.

Courts have traditionally avoided interfering with prosecutorial discretion, in criminal law matters and immigration law matters alike. The judiciary is not properly equipped to consider factors such as “the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s

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180 Id. at 42.
181 Id.
182 Id. at 42-43.
183 Id. at 42.
relationship to the Government’s overall enforcement plan.”

When there are challenges to prosecutorial discretion, they usually target decisions to enforce which discriminate “based upon an unjustifiable standard such as race, religion, or other arbitrary classification,” and such challenges are not easily proven. In the context of deportation, the Supreme Court recognized that discrimination rarely reaches a level so “outrageous” that it overcomes the presumption that prosecutorial discretion was exercised responsibly.

The Guidance issued by the Secretary is nothing more than a plan for how the Department should exercise its prosecutorial discretion to make effective use of limited resources, so judicial intervention is not appropriate. The INA specifically provides that among other responsibilities, the Secretary shall “establish[] national immigration enforcement policies and priorities.” Additionally, discrimination on the basis of race, religion, ethnicity, or other arbitrary classification is not a concern raised by the Guidance. To the contrary, the Guidance specifically states that among its prerogatives is to prevent and protect against such forms of discrimination. The States, as well as the Fifth Circuit, fail to put forth a convincing argument as to why the Department should be suddenly robbed of its ability to exercise prosecutorial discretion.

Prosecutorial discretion is an indispensable feature of law enforcement that has enabled the executive branch to more faithfully satisfy its duty to “take care that the laws be faithfully executed” since the early days of the Republic. It is a practice that recognizes the realities of law enforcement and considers the effect each action has on the bigger picture. “Even just laws, if enforced fully, will give rise to unjust results, and thus, law enforcement must have

185 Wayte, 470 U.S. at 607.
187 See Wayte, 470 U.S. at 608-10.
188 Reno, 525 U.S. at 491-92.
190 Mayorkas, supra note 5, at 5.
191 Id.
discretion in deciding how, when, and whether to enforce the laws in any particular case or category of cases.”\(^\text{194}\) In the immigration context, prosecutorial discretion has an increasingly important role as a result of the sheer number of noncitizens present in the United States and Congress’ passage of harsh immigration laws which makes a significant percentage of those noncitizens deportable under the law.\(^\text{195}\) The critical function of prosecutorial discretion in both criminal and immigration law cannot be minimized, and consequently, it must be protected at all costs.

In Texas v. United States, the Fifth Circuit likens the Department’s Guidance to “a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.”\(^\text{196}\) If a policy that directs enforcement be taken against specific categories of noncitizen—without prohibiting enforcement agents from taking action against a noncitizen who may not meet the prioritized criteria—is “so extreme” that it exceeds the bounds of prosecutorial discretion, it is difficult to imagine what would remain within the bounds. In Heckler v. Chaney, a landmark case analyzing the prosecutorial discretion of agencies, the Supreme Court acknowledged that an agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and indeed, whether the agency has enough resources to undertake the action at all.\(^\text{197}\)

Agencies must be given considerable latitude to exercise their prosecutorial discretion if they are to make these important determinations.\(^\text{198}\)

While the majority opinion does not provide much discussion of the merits of the case or the APA because it decided that no standing existed, it does suggest that if the States had advanced a Heckler-style argument, there might have been standing to bring the claim.\(^\text{199}\)

\(^{194}\) Hallett, supra note 192, at 1771.

\(^{195}\) See id. at 1774-76.

\(^{196}\) Texas v. United States, 40 F.4th 205, 222 (5th Cir. 2022) (quoting Heckler v. Chaney, 470 U.S. 821, 833 (1985)).

\(^{197}\) Heckler, 470 U.S. at 831.

\(^{198}\) See id.

This acknowledgment serves as an outer limit for prosecutorial discretion. The Department has discretion over who it decides to prosecute, and who it does not, so long as it is prosecuting someone. Also, that the States could not support this argument is only further proof that the Guidelines do not encourage fewer arrests, only those arrests be carried out only in particular circumstances. That is the very essence of prosecutorial discretion, and although it fell short in other respects, the Court did emphasize the importance of that discretion remaining in the hands of the Executive branch.

C. NATIONWIDE INJUNCTIONS IN THE IMMIGRATION CONTEXT

Although not addressed in the majority opinion in Arizona v. Biden, Judge Sutton argues in a separate concurrence that the district court’s preliminary injunction is not appropriate for two reasons: (1) “It lacked the authority to [issue the injunction] under 8 U.S.C. § 1252(f)(1)” and (2) “[t]he scope of the district court’s remedy—universally enjoining the National Government from enforcing the Guidance in any State in the country—also likely exceeded its authority apart from the statutory restriction.”

Sutton warns that nationwide injunctions effectively balloon the judicial power of the district courts by applying a judgment on third parties without having to follow the proper procedures for doing so. Sutton is not alone in his criticisms. “[T]he lack of textual authority for issuing nationwide injunctions[,] the opportunity that nationwide injunctions give for forum shopping[,] the issues that may arise from differing injunctions in different circuits[,] and the chilling effect that nationwide injunctions have on letting policies and regulation percolate among judges and actually play out” are all valid arguments against the controversial remedy. Nationwide injunctions have cropped up again and again in the immigration context, affecting immigration policies under the Obama, Trump, and now Biden administrations.

201 See id. at 396.
202 Madison J. Scaggs, Nationwide Injunctions Have Thwarted Recent Immigration Policy, 105 IOWA L. REV. 1447, 1467 (2020).
203 See id. at 1447.
One might have expected the Supreme Court to address whether the practice of district courts issuing nationwide injunctions should continue, as foreshadowed by Justice Thomas’ disapproval of nationwide injunctions in his concurrence to *Trump v. Hawaii* in 2018, but the majority fell silent on this issue as well. Yet again, Justice Gorsuch fills that silence with his concurring opinion, where he takes the opportunity to discuss the legality of these judicial actions and the dangers they pose. Given that Gorsuch decided the case on redressability, he appropriately contemplated whether this remedy was available. In his analysis of the “wholesale vacatur” at issue in the present case, which he does not consider distinct from “universal injunctions,” Gorsuch indicates that a wholesale vacatur would not be permissible in the present circumstance but declines to decide either way on the issue. If the district courts are permitted to continue abusing this remedy, opponents to any piece of legislation, administrative rule, or executive order can be nearly guaranteed to have it blocked so long as they select a venue that aligns with their agenda. Yet again, the Court fails to confront a critical issue before it and allows confusion to persist.

V. CONCLUSION

The Supreme Court’s final decision on the circuit split ensures that—at least for the time being—the federal government retains control over immigration policy. The Court held that the States did not have standing to undermine the Secretary’s Guidelines but left open questions regarding the special soliciitude doctrine and nationwide injunctions. The majority reinforced the jurisprudence surrounding Article III standing requirements and prosecutorial discretion, but by ignoring those issues, fell short of fully protecting the checks and balances on the Judiciary created by the Constitution. Allowing states to interfere with federal governance in this way would have dangerous consequences and undermine the integrity of the entire immigration system.

204 *See id.* at 1467.
206 *Id.* at 700-02.
The Secretary’s Guidance was issued to acknowledge that many of the removable noncitizens living in the United States do more to contribute to the Nation than to harm it and to quiet rhetoric which insists all immigrants, specifically those who come from Central and South America, are threatening. The legal issues raised by the circuit split do not exist in a vacuum but are contextualized by the thousands of noncitizens whose lives hang in the balance of the Supreme Court’s final decision on this matter.

The United States ought to strive for a more fair and just immigration system prioritizing the well-being of all individuals. The federal government is uniquely and singularly equipped to make the sort of policy decisions that facilitate such a system. If each state is able to advance its own agendas, the federal government’s power is destabilized and the immigration system and the people it affects suffer. While the Supreme Court’s decision in *United States v. Texas* was not as protective as it could have been, it did uphold long-standing principles of federalism to guarantee fairness in at least one aspect of the immigration process.