No. 22-58

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS AND STATE OF LOUISIANA

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' RESPONSE IN OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE

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The Solicitor General, on behalf of the United States and the other petitioners, respectfully submits this response in opposition to the motion for leave to intervene as respondents filed by certain counties and county sheriffs in Texas and the Federal Police Foundation, ICE Officers Division. The motion should be denied.

STATEMENT

1. This case concerns the Secretary of Homeland Security's Guidelines for the Enforcement of Civil Immigration Law. The Guidelines establish priorities for apprehending and removing noncitizens. See J.A. 110-120. Respondents challenged the Guidelines in district court on several grounds. See J.A. 72-109. Following a trial, the district court vacated the Guidelines nationwide. See J.A. 293 n.11, 397. The district court's vacatur means that the Department of Homeland Security

"no longer ha[s] nationwide immigration enforcement guidance." J.A. 395.

This Court denied the government's request for a stay pending appeal. In light of the need for expedition, however, the Court granted certiorari before judgment on three questions: (1) whether respondents have Article III standing to challenge the Guidelines; (2) whether the Guidelines violate 8 U.S.C. 1226(c) or 1231(a), or otherwise violate the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*; and (3) whether 8 U.S.C. 1252(f)(1) prevents the entry of an order to "hold unlawful and set aside" the Guidelines under 5 U.S.C. 706(2). The Court set the case for argument during the "first week of the December 2022 argument session." J.A. 487.

2. Movants are plaintiffs in a separate case that also challenges the Guidelines, *Coe* v. *Biden*, No. 3:21-cv-168 (S.D. Tex. filed July 1, 2021). Movants assert that the Guidelines violate not only Sections 1226(c) and 1231(a), but also 8 U.S.C. 1225 and the Constitution's Take Care Clause, and they seek an injunction in addition to vacatur. Mot. 1; see Movants Amicus Br. 12-17, 20-28. The district court in *Coe* stayed their case in light of the appellate proceedings in this case. See Minute Entry, *Coe*, *supra* (No. 3:21-cv-168) (July 14, 2022). Movants consented to that stay and have not sought to lift it. App., *infra*, 9a. Movants now assert, however, that the stay justifies their intervention in this case so that they can secure an earlier ruling on their request for injunctive relief.

ARGUMENT

This Court should deny the motion to intervene. To begin, the motion is untimely. Movants have been on notice for months that injunctive relief is not directly at

issue in this proceeding, yet they waited until nearly a week after respondents' brief was filed to seek intervention. Intervention would also require briefing on a variety of new legal and factual issues, delaying this case and seriously prejudicing petitioners. And movants lack any interest in this litigation that could justify intervention. Instead, their real interest is in expediting the resolution of their own separate claims by circumventing the district court stay to which they agreed. But the proper forum for redressing any objection to that stay is the *Coe* district court—not an extraordinary motion for intervention in this Court.

1. As a threshold matter, movants have waited far too long to seek intervention. This Court granted certiorari before judgment on July 21, 2022. Yet movants sought intervention only on October 24, 2022—more than three months after the Court granted review, six weeks after petitioners filed their opening brief, nearly a week after respondents filed their response brief, and just over a month before oral argument.

Movants offer no good excuse for that months-long delay. They argue (Mot. 9 n.4) that they "acted diligently" to protect their rights after this Court's decision in *Biden* v. *Texas*, 142 S. Ct. 2528 (2022), which recognized that 8 U.S.C. 1252(f)(1) precludes district courts from granting injunctive relief in suits like this one and *Coe*. But the Court decided *Biden* on June 30, 2022—nearly four months before movants sought intervention.

Movants also claim (Mot. 9 n.4) that they "learn[ed] that respondents" do "not adequately represent [their] interests in seeking injunctive relief" only after the filing of respondents' merits brief. But respondents' opposition to the government's stay application, filed on July 13, 2022, made clear that respondents were seek-

ing vacatur, not injunctive relief. See Br. in Opp. to Stay Appl. 33 n.4 ("In the alternative, if the Court concludes that 1252(f)(1) prohibits vacatur, it retains [the] authority to vacate the Final Memorandum in the first instance."). And as movants acknowledge (Mot. 16), the questions on which this Court granted certiorari do not encompass injunctive relief. Movants suggest (Mot. 15) that, given the questions presented, "respondents are unable" to seek injunctive relief in this Court. By their own logic, then, movants should have sought to intervene promptly after the grant of certiorari on July 21, 2022.

Permitting intervention at this late stage would prejudice petitioners. Although the parties have already filed their merits briefs, movants seek to inject several new issues into this case: whether movants have standing; whether the Guidelines comport with 8 U.S.C. 1225; whether the Guidelines comply with the Take Care Clause of Article II; and whether it would be appropriate for this Court to enter an injunction that goes beyond vacating the Guidelines. See Mot. 1; Movants Amicus Br. 12-17, 20-28. The government moved to dismiss for lack of standing in the district court, but the *Coe* court has not yet issued any substantive rulings on that question or others. Granting intervention would presumably require additional briefing from the parties—which, in turn, could require postponing the oral argument that is now scheduled to be held on November 29, 2022. The resulting delay in the resolution of this case would prolong the significant and irreparable harm that the district court's vacatur of the Guidelines is already causing the federal government.

2. The motion also fails to meet the substantive standard for intervention. "No statute or rule provides

a general standard to apply in deciding whether intervention on appeal should be allowed," and this Court has accordingly "considered the 'policies underlying intervention' in the district courts." *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2022) (quoting *International Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Scofield*, 382 U.S. 205, 217 n.10 (1965)). The Court has viewed Federal Rule of Civil Procedure 24 as a helpful guide, *International Union*, 382 U.S. at 217 n.10, but has applied a particularly demanding standard for intervention in this Court, reserving that step for "rare," "unusual" cases "containing * * * extraordinary factors." Stephen M. Shapiro et al., *Supreme Court Practice* Ch. 6.16(c), at 6-62 (11th ed. 2019).

Here, movants allege (Mot. 11) that "[o]nly injunctive relief can" fully redress their supposed injuries. They further assert (Mot. 9) that, as a result of the district court's stay in the *Coe* litigation, "intervention here is the only way for Movants to obtain injunctive relief in a timely manner." Those allegations do not justify intervention in this Court.

As movants acknowledge (Mot. 15), the propriety of an injunction is not at issue here, so it is hard to see how the disposition of this case would impair any interest they might claim in that remedy. And although movants assert (*ibid.*) that respondents do not "adequately represent" their interest in obtaining an injunction, Fed. R. Civ. P. 24(a)(2), movants make no similar claim of inadequacy as to any of the issues actually presented in this case.

To be sure, the Court's resolution of the questions presented may affect the *Coe* litigation by establishing relevant precedent. But because the Court considers

recurring and important questions of federal law, see Sup. Ct. R. 10, virtually all of its decisions establish precedents that affect many other cases involving many other litigants. The possibility of such effects has never been thought to justify intervention. Instead, nonparties with an interest in the Court's resolution of a pending case present their views by participating as amici curiae, as movants have already done. See Movants Amicus Br.; see also *Supreme Court Practice* Ch. 6.16(c), at 6-63 ("The obvious alternative for one who desires to intervene in a pending Supreme Court proceeding is to seek to file an amicus curiae brief.").

Movants also fail to show that intervention is otherwise warranted in "the discretion of the [C]ourt." *Cameron*, 142 S. Ct. at 1011. Movants' complaint (Mot. 13-14) that their own litigation is proceeding too slowly rests on the *Coe* district court's decision to stay proceedings. Setting aside the fact that movants *consented* to that stay and have not sought to lift it, see App., *infra*, 9a-10a, intervention is not a tool for a party to expedite its own lawsuit by piggybacking on a different case. The authorities on which movants rely do not support using intervention in a pending case in this Court to circumvent the procedural rulings of a district court in a separate litigation. See, *e.g.*, *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952) (allowing joinder of two parties in this Court to ensure standing in light of a late-raised challenge). If movants have changed their view about the propriety of the *Coe* district court's stay, they should seek relief in that court.

CONCLUSION

The motion for leave to intervene should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2022

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

3:21-CV-00168

SHERIFF BRAD COE, ET AL.

v.

JOSEPH R. BIDEN, ET AL.

10:31 a.m. to 10:45 a.m.
July 14, 2022

TELEPHONIC HEARING ON STATUS CONFERENCE BEFORE THE HONORABLE JEFFREY V. BROWN VOLUME 1 OF 1 VOLUME

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[3]

TELEPHONIC PROCEEDINGS

THE COURT: Good morning. This is Jeff Brown at the federal courthouse in Galveston. This is a telephonic status conference in Cause Number 3:21-CV-168, Brad Coe and others v. Joseph R. Biden, Jr., and others.

Would the attorneys make their appearances, please.

MR. KOBACH: Yes, Your Honor. For plaintiffs this is Kris Kobach and with me on this call are Chris Hajec and Matt Crapo.

THE COURT: Great. Glad to have y'all.

And for the defense?

MR. ROSEN-SHAUD: This is Brian Rosen-Shaud for defendants. With me are my colleagues Adam Kirschner and Daniel Hu from the U.S. Attorney's Office.

THE COURT: Okay. Great. I appreciate all of you all getting on the call this morning. Here is—there are two big things I want to talk about. And the first is I know that I denied the plaintiffs' request for an injunction, for a preliminary injunction; and I have a motion from them to reconsider that ruling.

But in light—what I want to know is in light of the injunction that Judge Tipton entered in Victoria, is there any relief left that the plaintiffs need from an—injunctive relief that the plaintiffs need that they didn't get from the injunction in Victoria?

[4]

MR. KOBACH: Your Honor, if I could just answer that question. This is Kris Kobach. There is some relief left in the sense that the injunctive relief granted by Judge Tipton in Victoria extended to detention decisions; whereas, we are also asking for removal injunctive relief. So there is some relief left.

However, as the Court may be aware, and as the defendants recently notified the Court a couple of days ago, there is a new issue presented by the Supreme

Court's ruling in just a few cases at the end of June concerning injunctive relief by a lower federal court that, setting that aside for the moment, yes, there is—to answer your question directly, yes, there is some injunctive relief that we have requested that is outside of—goes beyond, I should say, the scope of what Judge Tipton ordered.

Another—another element of why it goes beyond is Judge Tipton ruled on Sections 1226 and 1231 of Title 8 of the U.S. Code and we—our case concerns those two provisions, but it also concerns Section 1225. So there is some injunctive relief that goes beyond what he ordered.

THE COURT: Okay. And what is the government's position on that?

MR. ROSEN-SHAUD: This is Brian Rosen-Shaud. A few points. One is that Judge Tipton vacated the [5] memorandum. I understand that plaintiff's second-amended complaint also specifically challenges that memoranda; and so it's not clear to me what relief, beyond erasing the effect of that memo, plaintiffs could obtain. So that's an additional claim.

The second point is that the cases that my colleagues on the other side reference, *Aleman Gonzalez* and *Biden v. Texas*, the MPP case, make it very clear that district courts cannot enter injunctions that tell the federal government how to operate the covered provisions here: 1225, 1226 and 1231. And so that's a very clear jurisdictional bar and is an independent reason why further injunctive relief would not be proper.

And then sort of within that, on the question of 1225, admittedly Judge Tipton's order did not address that

statute; but the question of whether a mere "shall" creates an enforceable mandate is equally presented by the "shall" in 1226 and the "shall" in 1231 and that specific question is presented to the Fifth Circuit in our appeal of Judge Tipton's order. So that question is already up in the court of appeals.

THE COURT: Okay. So as far as the motion to reconsider the Court's denial of the preliminary injunction, it sounds like the plaintiffs want to press that motion, there is still some relief that they need. [6] The government thinks that I should just deny it, that the plaintiffs have gotten all the relief that they—the relief they have gotten out of Victoria is all the relief that they need. Is that accurate?

MR. KOBACH: For plaintiffs, yes. Yes, Your Honor, that is accurate.

MR. ROSEN-SHAUD: That is accurate for defendants with a slight caveat that the Court wouldn't have jurisdiction to enter any further relief, even if, you know, the Court, you know, thought maybe there was some unaddressed relief. So with that slight caveat, yes, we agree.

THE COURT: Okay. All right. And the new—the new issue that Mr. Kobach brought up, someone brief me on that briefly.

MR. KOBACH: Your Honor, this is Kris Kobach. I think I'll let the defendants—well, perhaps I could just end it there. Mr. Rosen-Shaud just mentioned it. So the Supreme Court in a pair of cases that were just handed down about two weeks ago said, essentially, that the 1252 language, which is the language restricting the forms of relief that a Court can grant, said

that injunctive—that an injunction in a matter like this that either compels the agency to act or restricts an agency from acting is something that the Supreme Court can grant but [7] the lower federal courts cannot grant.

I think Mr. Rosen-Shaud might have accidentally said all federal courts are denied this power. So the—that will be an issue.

And then the Fifth Circuit, it's been moving very quickly. Judge Tipton, of course, issued his ruling; and in his ruling he vacated the memoranda at issue in this case. And the Fifth Circuit eight days ago, on July 6th, just denied the Department of Justice's request for a stay and issued about a 50-page opinion going through all of those issues, including the issue of the Supreme Court's recent cases on 1252 and the power of the lower court to enjoin. And the Fifth Circuit said regardless of the restriction on the power to enjoin, certainly federal district courts and, by extension, federal courts of appeal, have the power to vacate.

So that's a quick summary of what has happened. And to that point, Your Honor, we were about to file a, you know, written notice of new authority for your review about that Fifth Circuit decision. It's Texas v. Louisiana—sorry, *Texas and Louisiana v. The United States*. It's case 22-40367. It was issued by the Fifth Circuit on July 6th, 2022.

And it addresses virtually every issue, not quite [8] every issue but virtually all of the issues in the pending motion to dismiss that is in your court in plaintiffs' favor. There are a couple of issues that are not addressed in it.

And it also addresses the merits of the 1226 and 1231 claims in plaintiffs' favor.

If the Court would still like a written notification of that new authority in addition to the oral notification I have just given, we would be happy to do so.

THE COURT: No. I don't think I need that. And I knew about that opinion and have seen it. So I appreciate that. But you brought up the motion to dismiss, which is the other thing that I wanted to cover.

Do the plaintiffs—is there any need for the plaintiffs to—well, it sounds like maybe I shouldn't even be bothering with that until we hear from the Fifth Circuit on—we have already heard from them in the opinion that was issued on July 6th, but their final word on it.

Do the parties have a position on that? Should I be waiting on them to rule on the motion to dismiss?

MR. ROSEN-SHAUD: So from the defendants' perspective, Your Honor, we actually think the appropriate course here would be to stay all district court proceedings because, as Mr. Kobach recognized, most—not all but most of the key legal questions in this case are [9] squarely in the Fifth Circuit.

As he said, this is just a stay now until they issue an opinion. You know, we are planning on a full appeal of Judge Tipton's order. And so we will get a conclusive —well, we expect to receive a conclusive determination from the appellate court on a lot of these questions. And so defendants think more broadly, not just on the motion to dismiss but that all district court proceedings should be stayed.

To answer you more specifically, though, if the Court didn't go that route, there are still some questions presented in our motion to dismiss that the Court would have to address if it was inclined to deny our motion. And those are questions of standing for the specific allegations or independent view or lack thereof for the counties and sheriffs but also the associational questions, standing questions, which also raises the TSRA issue and I understand there is a TSRA issue before the Fifth Circuit right now.

THE COURT: Yes. I'm aware of that one.

MR. ROSEN-SHAUD: Even given—even given the Fifth Circuit statement in that opinion, the Court would still have to engage with defendants other threshold arguments if they just wanted to decide the motion to dismiss.

[10]

THE COURT: How do the plaintiffs feel about staying everything in this case while we wait for the Fifth Circuit?

MR. KOBACH: Your Honor, our view would be slightly different. We would say that you should stay all proceedings until the Supreme Court reviews because, as you are probably aware, on the shadow docket of the Supreme Court right now is a—after the Fifth Circuit ruled, the defendants moved for a—the Fifth Circuit to provide—to grant the stay—I'm sorry—for the Supreme Court to grant the stay pending appeal and that is, you know, rapidly being briefed.

We think that if the Supreme Court rules in favor of the Fifth Circuit that, you know, essentially all of the issues are being fully briefed right now, then at that

point you will be free to proceed to rule on the motion to dismiss. So we wouldn't advise waiting until the Fifth Circuit has ruled again on the issue. We think that the issues will be clear enough for the Court to go ahead and rule on a motion to dismiss after the Fifth Circuit rules but we—I'm sorry—after the Supreme Court rules. But we do agree that staying all proceedings until either the point we advise or the point defendants advise would be proper.

We also just note for the Court's information that we [11] do have a discovery schedule that it probably would need to be pushed back because right now I think we're coming up on a September deadline for discovery and, obviously, that would need to be pushed back.

THE COURT: Okay. All right. Well, we have kind of been in a de facto stay in this case, even if it wasn't a de jure stay, just because I have been watching what has been going on in Victoria and at the Supreme Court.

So let's go ahead and—the Court will go ahead and enter an order staying all district court proceedings, staying all discovery deadlines, and we'll just leave it open on the other end. The case is stayed until I say it's not stayed, and I will wait to hear from one of y'all; or if I decide that something has happened and I have not heard from y'all, I will sua sponte raise the issue of lifting the stay with y'all.

So the Court will enter an order staying everything, and we'll all just watch and see what happens. And y'all can come back to me when you think we need to get things underway again.

Does that sound all right?

MR. KOBACH: For plaintiffs, yes, Your Honor.

MR. ROSEN-SHAUD: That sounds good, as with the defendants, Your Honor. Thank you.

THE COURT: Okay. Great. So anything else we [12] need to cover in this one this morning from the plaintiffs?

MR. KOBACH: Your Honor, just one note, just for your information. Trying to predict different outcomes of what might happen in the Supreme Court in the next few weeks. The issue of vacatur if, for example, injunctive relief is not available, if the Supreme Court does concur with the Fifth Circuit that vacatur is available, we would just simply note that the second-amended complaint does specifically ask for vacatur and declaratory relief. But other than that, no, Your Honor.

THE COURT: All right. And from the defense?

MR. ROSEN-SHAUD: Nothing further, Your Honor.

THE COURT: Okay. Great. Well, again, I just kind of wanted to see if there were any loose ends that needed to be tied up. And I appreciate y'all getting on the call this morning so we could determine that. And the Court will go ahead and enter the order staying the case. And until we reconsider that, the Court stands in recess. Y'all have a good day.

MR. KOBACH: Thank you, Your Honor. You, too.

MR. ROSEN-SHAUD: Thank you.

THE COURT: Okay.

(Proceedings concluded at 10:45 a.m.)

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