APPENDIX

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 6, 2022
Lyle W. Cayce
Clerk

No. 22-40367

STATE OF TEXAS; STATE OF LOUISIANA,

Plaintiffs—Appellees,

versus

UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, IN HIS OFFICIAL CAPACITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, ACTING DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, IN HIS OFFICIAL CAPACITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DIRECTOR OF THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES, IN HER OFFICIAL CAPACITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 6:21-CV-16

Before JONES, CLEMENT, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Before the court is the Department of Homeland Security's ("DHS") request to stay the district court's vacatur of a new immigration rule that radically reduces the federal government's detention of those who are statutorily required to be removed post-haste. The district court determined that the rule conflicts with federal statutes, is arbitrary and capricious, and that its promulgation was procedurally invalid. We are inclined to agree. Because DHS fails to make a strong showing of likelihood of success on appeal, the motion for a stay pending appeal is DENIED. We distinguish this case from a recent decision by the Sixth Circuit, authorizing a stay pending appeal, based on differing precedent and the benefit of a complete trial record.

BACKGROUND

Federal immigration law provides that the Attorney General "shall take into custody," "shall detain," and "shall remove" aliens convicted of certain enumerated crimes and aliens who have become subject to final orders of removal. 8 U.S.C. §§ 1226(c)(1), 1231(a)(2), 1231(a)(1)(A). Under the current Presidential Administration, to "implement" these provisions, the Department of Homeland Security ("DHS") has outlined new immigration "guidance for the apprehension and removal of noncitizens" in a series of memoranda. The first memorandum was circulated in January 2021, when then-Acting Secretary of Homeland Security David Pekoske purported to "announce[] substantial changes to the enforcement of the Nation's immigration laws," including the establishment of certain enforcement priorities. The approved enforcement priorities entailed national security, public safety, and border security. What made this memorandum controversial was that each of these categories was narrowly defined to address certain threats but exclude others enumerated in the federal statutes. For example, DHS required Immigration and Customs Enforcement ("ICE") agents to prioritize the enforcement of aliens who

committed aggravated felonies, but not other deportable aliens with final orders of removal or who trafficked controlled substances, participated in the commercialized sex industry, trafficked humans, were convicted of certain firearm offenses, among others. Effective enforcement in this context would mean that ICE agents could apprehend aliens with certain criminal convictions or aliens who have final removal orders and detain them for speedy processing toward removal. But the first memorandum basically ignored the legal requirement of detention, and therefore the likelihood of removal, for those not "prioritized."

In February, Acting ICE Director Tae Johnson issued a second memorandum, reiterating the same three narrowly-focused categories. That memorandum added a requirement that enforcement agents obtain "preapproval" from their superior offices for any enforcement action against criminal aliens that did not fall within the three priorities. Both the January and February memoranda were labelled interim measures and were intended to guide immigration officials "until Secretary Mayorkas issues new enforcement guidelines."

On September 30, 2021, the Secretary of Homeland Security Alejandro Mayorkas issued a third and final memorandum ("Final Memo"). Notably, it is agreed that the Final Memo is an agency rule under the Administrative Procedure Act, 5 U.S.C. § 551(4). The Final Memo "serve[d] to rescind the January and February Memoranda." It re-articulated the same three enforcement priorities, but, unlike the prior memos, it did not "presumptively subject [the priorities] to enforcement action." Instead, before ICE officers may arrest and detain aliens as a threat to public safety, they are now required to conduct "an assessment of the individual and the totality of facts and circumstances," including various aggravating or mitigating factors. Immigration enforcement personnel are prohibited from "rely[ing] on the fact of conviction . . . alone," no matter

how serious. Similarly, enforcement personnel "should evaluate the totality of the facts and circumstances" before determining whether an alien who is otherwise a threat to border security ought to be subject to enforcement.

Not only did the Final Memo engrave these three priorities into immigration enforcement, but it also specified procedures to ensure agency-wide compliance. Specifically, the Final Memo required "[e]xtensive" and "continuous" training, and the implementation of a "rigorous review" process of all enforcement decisions. According to the memo, DHS would also "need to collect detailed, precise, and comprehensive data as to every aspect of the enforcement actions [] take[n] pursuant to th[e] guidance, both to ensure the quality and integrity of [the] work and to achieve accountability for it." Notably, the Final Memo establishes a "fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken." In other words, according to the Final Memo, those whom the law designates as aliens are granted an entirely new avenue of redress in the event they are removed or detained in a manner that conflicts with the guidance. The Final Memo was circulated along with a second memo titled "Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law" ("Considerations Memo"), which summarized the key aspects of the Final Memo. The Considerations Memo further purported to provide insight into DHS's reasoning for issuing the Final Memo.

The district court found that these regulatory actions, culminating in the Final Memo, have had measurable effects on immigration enforcement. This is particularly true in Texas, where, from 2017 to 2020 (*i.e.*, before any of the memoranda were issued) ICE agents rescinded no more than a dozen criminal detainers annually. Yet the district court found that from January 20, 2021 through February 15, 2022, detainers for 170 criminal aliens were

rescinded in Texas.[1] At least seventeen of those aliens failed to comply with their parole conditions, four have committed new crimes, and at least one remains at large in Texas with a warrant out for his arrest.[2] At least fifteen of the detainers were rescinded after the Final Memo became effective. One alien who was initially subject to a final order of removal was instead released to the public in Texas after his detainer was rescinded. The marked increase in rescinded detainers of criminal aliens has led the Texas Department of Criminal Justice ("TDCJ") to update its inmate-tracking system to record any rescinded detainers, a feature that was previously unnecessary due to the infrequency at which this occurred. According to data from 2019, DHS previously acknowledged that criminal aliens recidivated at an average rate of four criminal arrests/convictions per alien.

Texas and Louisiana filed suit, challenging the legality of the Final Memo on the basis that it is contrary to federal law, arbitrary and capricious, and procedurally invalid.[3] The States argued that DHS's issuance of the Final Memo conflicts with 8 U.S.C. §§ 1226(c) and 1231(a), both of which provide that the Attorney General "*shall*" detain or remove an alien who

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[1] Detainers were reissued for 29 of these criminal aliens.

[2] Similarly, one of the criminal aliens in Louisiana was convicted of indecent behavior with juveniles and sexual battery, yet his detainer was rescinded, and he was released subject to supervised release.

[3] The States initially filed suit against the January and February Memos, before the Final Memo was even issued. The district court issued a preliminary injunction, enjoining enforcement of both memos. *Texas v. United States*, 555 F. Supp. 3d 351 (S.D. Tex. 2021). A panel of this court initially stayed the injunction, *Texas v. United States*, 14 F.4th 332, 334 (5th Cir. 2021), but the *en banc* court voted to vacate that decision. *Texas v. United States*, 24 F.4th 407, 408 (5th Cir. 2021) (*en banc*). During these appellate proceedings, the Final Memo was issued, thus "rescind[ing] the January and February Memoranda." Accordingly, at DHS's request, this court dismissed the appeal. *Texas v. United States*, No. 21-40618, 2022 WL 517281, at *1 (5th Cir. Feb. 11, 2022). The States then amended their complaint to challenge the Final Memo.

committed certain crimes or who is subject to an order of removal, respectively. Because the Final Memo prohibits these statutorily mandated detentions and removals absent a thorough "review [of] the entire criminal and administrative record" in order to ascertain the "totality of the facts and circumstances of the conduct at issue," the States contended that the rule cannot stand, and they thus sought injunctive relief. The district court consolidated the preliminary injunction motion with a two-day bench trial. In an exhaustive opinion, the court agreed with the States' positions on all three issues and vacated the Final Memo. He stayed the effect of the vacatur briefly to allow DHS to seek appellate review. Defendants expeditiously moved this court to stay the vacatur order pending appeal.

STANDARD OF REVIEW

When asked to consider whether to grant a stay, this court determines "(1) whether the applicant has made a strong showing of likelihood to succeed on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether issuance of a stay will substantially injure other interested parties; and (4) where the public interest lies." *Thomas v. Bryant*, 919 F.3d 298, 303 (5th Cir. 2019). DHS's burden is a substantial one, as a stay is "an extraordinary remedy" and it is "an equitable one committed to this court's discretion." *Id.* The district court's findings of fact are reviewed for clear error and its legal conclusions *de novo*. *Coe v. Chesapeake Expl., L.L.C.*, 695 F.3d 311, 316 (5th Cir. 2012).

DISCUSSION

DHS defends its rule and challenges the district court's decision by invoking a plethora of theories. Based on the following discussion, it is likely that the district court's opinion evinces no reversible error of fact or law, nor any abuse of discretion. We begin with DHS's multiple justiciability challenges before proceeding to the merits.

I. Standing

DHS contends that the States lack standing to challenge the Final Memo because any purported injury is speculative, unsupported by the evidence, not fairly traceable to the Final Memo, and not redressable in federal court. We disagree.

The States must establish by a preponderance of the evidence "an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015) ("*Texas DAPA*") (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 1147 (2013)). It is only necessary that one state have standing, so we, like the district court, analyze Texas's standing. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 127 S. Ct. 1438, 1453 (2007). Notably, "[s]tates are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518, 127 S. Ct. at 1454. And here, Texas is entitled to "special solicitude,"[4] which means imminence and redressability are easier to establish here than usual.

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[4] To be entitled to "special solicitude," (1) the State must have a procedural right to challenge the action in question, and (2) the challenged action must affect one of the State's quasi-sovereign interests. *Massachusetts v. E.P.A.*, 549 U.S. 497, 517–19, 127 S. Ct. 1438, 1453–54 (2007). Texas satisfies the first requirement by asserting a procedural right under the APA to challenge the legality of agency action. *Texas DAPA*, 809 F.3d at 151. Regarding the second prong, Texas seeks to defend its quasi-sovereign "interest in the enforcement of immigration law."

DHS challenges the conclusion that such an interest entitles Texas to special solicitude, contending that the state's purported interests amount to no more than the vindication of "policy disagreements." This is not so. States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397, 132 S. Ct. 2492, 2500 (2012). And "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States." *Id.* at 397–98, 132 S. Ct. at 2500. "When a State enters the Union, it surrenders certain sovereign prerogatives," *Massachusetts*, 549 U.S. at 519, 127 S. Ct. at 1454, such as the right to control immigration policy and enforcement. "These sovereign prerogatives are now lodged in the Federal

A. *Injury*

Texas's injuries as a result of the Final Memo are difficult to deny, specifically its financial injury and harm as *parens patriae*. *First*, the uncontroverted evidence shows that the Final Memo shifted the cost of incarcerating or paroling certain criminal aliens from DHS to Texas. Specifically, the TDCJ incurs costs to keep aliens in custody or add them to parole or mandatory supervision programs when those aliens are not detained or removed by federal immigration authorities. The district court found that, for Fiscal Year 2020, the cost of these programs for inmates not detained or removed was $11,068,994. Additionally, the Tarrant County Sherriff estimated that the average cost of jailing inmates with immigration detainers amounted to $3,644,442 per year. DHS does not contest these findings.

Second, and perhaps most importantly, the state incurs substantial costs associated with criminal recidivism, the rate of which is significant among the illegal alien population according to evidence presented in the district court. The district court found that, as of January 2022, Tarrant County housed 145 inmates with immigration detainers and that, based on the criminal-history of these inmates, the recidivism rate was 90% for that population. In October 2021, the recidivism rate for the inmates with immigration detainers was 69%. Furthermore, DHS conceded that historical data demonstrated that criminal aliens recidivated at an average rate of *four criminal arrests/convictions per alien*. Again, DHS does not meaningfully

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Government," and such forfeited rights are precisely the quasi-sovereign rights that entitle a state to special solicitude. *Id.* at 519–20. *See also Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260, 3269 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.").

dispute these findings or the conclusion that recidivism is a serious problem among the criminal alien population.

Third, the district court further found Texas has actually absorbed, or at least will imminently absorb, the costs of providing public education and state-sponsored healthcare to aliens who would otherwise have been removed pursuant to federal statutory law. And "an increase in the number of aliens in Texas, many of whom" will create costs for the States, is sufficient to establish standing. *Texas v. Biden*, 10 F.4th 538, 547 (5th Cir. 2021). This court recognized that Texas suffers constitutional injury where an increase in the number of aliens would cause the state to incur significant costs in issuing additional driver's licenses. *Texas DAPA*, 809 F.3d at 155–56. Similar logic extends to Texas's obligation to subsidize these additional aliens' healthcare and education costs.

DHS raises a number of conclusory challenges to some of these fact findings, none of which come close to sustaining "clear error." It first asserts that the Final Memo does not compel a decrease in enforcement, but rather merely encourages prioritized enforcement against the most dangerous aliens. Underlying this claim is the assumption that the Final Memo only reconfigured the agency's priorities due to its scarce resources[5] without

[5] The district court found that DHS's reliance on the excuse of "insufficient resources and limited detention capacity" was not in good faith. While complaining that Congress has not provided sufficient resources to detain aliens as required by law, DHS simultaneously submitted "two budget requests [for 2023] in which it ask[ed] Congress to cut [its] resources and capacity by 26%." Additionally, since 2021, DHS has "persistently underutilized existing detention facilities." We further note the oddity that DHS emphasizes "limited resources" as its main defense of a rule that increases the complexity of its purportedly already-overwhelmed agents' jobs. For example, the Final Memo instructs that, before pursuing enforcement, personnel should, "to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue." But prior to the Final Memo, personnel could simply rely on an order

implicating enforcement levels. But the uncontroverted detainer data plainly contradict this assertion. DHS does not explain why the average daily number of criminal aliens in the United States' custody dropped following the January Memo, and continues decreasing into 2022 under the Final Memo, let alone successfully show that the district court's findings on this matter were clearly erroneous. [6]

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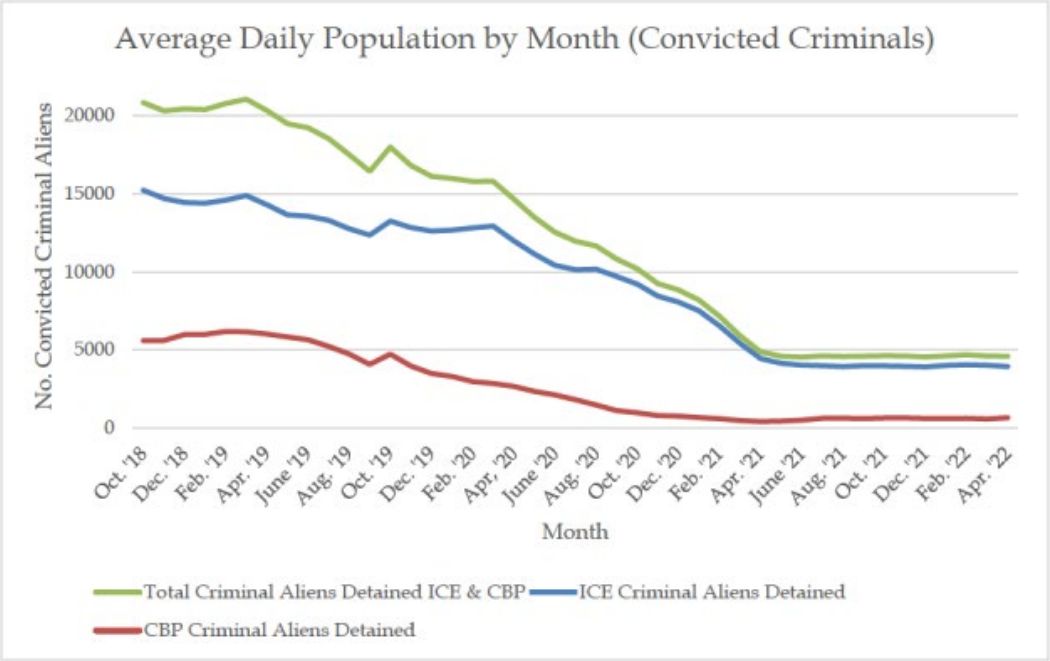
of removal or a qualifying criminal conviction. As the district court observed, DHS is "in effect . . . making it harder to comply with the statutory mandate it complains it doesn't have the resources to comply with."

[6] DHS complains that the district court "ignor[ed] data from ICE and U.S. Customs and Border Protection [] that confirms that the government has devoted significant enforcement resources to such border enforcement," referencing various statistics showing an increase in arrests and expulsions year-over-year. It also cites testimony from one of its employees claiming that, in the first 180 days of implementation of the Final Memo, the percentage of enforcement actions involving noncitizens increased as compared to the same time frame in fiscal year 2020. But any increase is less likely explained by the diligent enforcement efforts of this administration and more likely explained by the unprecedented surge of illegal aliens pouring over the border in record numbers. *See* Amicus Curiae Brief of Arizona, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and Wyoming at 2–3. Given that the number of encounters with illegal border-crossers is ten times what it was in April 2020, *see id.*, an increase in arrests and expulsions is far from impressive, especially if amici are correct that roughly three-fourths of the illegal aliens that cross the border go undetected by DHS entirely. *Id.* at 5. Nevertheless, for purposes of standing, the inquiry is whether the Final Memo caused Texas to have to incur additional financial, law enforcement, and welfare costs, not whether there were generally more enforcement actions year-over-year in the midst of a historic immigration crisis.



Rather, the data show that the Final Memo "increases the number of aliens with criminal convictions and aliens with final orders of removal released into the United States," and Texas has shown by a preponderance of the evidence that the cost of that reality has fallen on it and will continue to do so.[7]

B. *Traceability*

Nor does this case present a traceability problem. The district court found that, when ICE rescinds a detainer for a criminal inmate in TDCJ custody, those rescissions directly caused the Texas Board of Pardons and Paroles to revoke parole for certain aliens who were previously approved for

[7] DHS also baldly asserts that the district court's reliance on the "general statistics in the record" constituted "unwarranted speculation." It counters that the guidance merely focuses resources on the aliens who pose the greatest threat. But such conclusory assertions mean little in light of the evidence illustrating a concerning decline in overall enforcement, and DHS fails to counter or discredit any of those statistics other than by expressing its general disagreement.

parole and, accordingly, those criminal aliens remain in Texas's custody. For others, the district court found that the detainer rescissions caused an increase in the number of criminal aliens and aliens with final orders of removal to be released into Texas. Consequently, some immigrants who, according to the statutes, are required to be detained and deported will certainly seek healthcare services from the State as well as educational services. Thus, Texas is left with few alternatives regarding what to do with these "de-prioritized" aliens otherwise subject to mandatory detention—continue to incarcerate those with criminal convictions, or supervise them rigorously, or provide state-sponsored healthcare and educational services to the releasees. Texas has sufficiently established that these harms are presently or imminently traceable to the Final Memo.

C. *Redressability*

Similarly unavailing is DHS's contention that Texas's injuries are not redressable because "resource limitations preclude DHS from enforcing the INA against all noncitizens." The district court's vacatur does not need to operate on all aliens in Texas who are eligible for speedy removal. A court order need only alleviate some of the state's asserted harms. *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014) ("When establishing redressability, a plaintiff need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." (internal quotation marks omitted)). Texas's costs would be eased if DHS stopped rescinding detainers pursuant to the Final Memo, and thus vacating the Final Memo would naturally redress Texas's harm to a meaningful degree.

II. Reviewability

DHS next articulates several theories that purport to deprive the federal courts of the power to adjudicate the merits. *First*, it suggests, for the

first time on appeal, that 8 U.S.C. § 1252(f)(1) deprives the district court of jurisdiction to vacate the guidance. *Second*, it contends that the Final Memo does not constitute final agency action, thus rendering it unreviewable by the federal courts. *Third*, it asserts that the Final Memo represents decisions that are committed to DHS's discretion by law. *Finally*, it suggests that the States fall outside of the INA's "zone of interests." Each point is likely to fail.

A. *Section 1252(f)(1)*

Section 1252(f)(1) strips the federal courts (other than the Supreme Court) of jurisdiction to "enjoin or restrain the operation of" §§ 1221–1232 of the INA. The Supreme Court recently clarified that § 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Aleman Gonzalez*, No. 20-322, slip op. at 5 (U.S. June 13, 2022). There, the Court interpreted § 1252(f)(1) to prevent a class of aliens who were detained pursuant to 8 U.S.C. § 1231(a)(6) from obtaining class wide injunctive relief. *Id.* at 2, 4. The Court held that the ordinary meaning of the statute "bars the class-wide relief" sought. *Id.* at 4. DHS suggests that this holding applies "with equal force to vacatur," because such a vacatur "prohibits" DHS from implementing the Final Memo and *de facto* "enjoin[s] or restrain[s]" the agency's enforcement decisions.

But DHS reads too much into the *Aleman Gonzalez* opinion. There are meaningful differences between an injunction, which is a "drastic and extraordinary remedy," and vacatur, which is "a less drastic remedy." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165, 130 S. Ct. 2743, 2761 (2010). The Supreme Court has indicated that § 1252(f) is to be interpreted relatively narrowly. Indeed, the Court described § 1252(f) as "nothing more or less than a limit on injunctive relief." *Reno v. Am.-Arab Anti-*

Discrimination Comm., 525 U.S. 471, 481, 119 S. Ct 936, 942 (1999). And again, in a recent opinion, the Supreme Court reiterated this sentiment and additionally noted that the title of the provision—"Limit on injunctive relief"—clarified the "narrowness of its scope." *See Biden v. Texas*, No. 21-954, slip op. at *9, 12 (U.S. June 30, 2022) ("*Texas MPP*"). Extending *Aleman Gonzalez* to vacatur is particularly dubious in light of the Court's caveats.

Additionally, a vacatur does nothing but re-establish the status quo absent the unlawful agency action. Apart from the constitutional or statutory basis on which the court invalidated an agency action, vacatur neither compels nor restrains further agency decision-making. We decline to extend *Aleman Gonzalez* to such judicial orders, especially when doing so would be contrary to the "strong presumption favoring judicial review of administrative action."[8] *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021). DHS is unlikely to demonstrate that this provision strips federal court jurisdiction to vacate unlawful agency action.

B. *Final Agency Action*

Judicial review is available for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "The Supreme Court has long taken a pragmatic approach to finality, viewing the APA's finality requirement as flexible." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (internal quotation marks omitted). To be "final," (1) the action must "mark the consummation of the agency's decisionmaking process" and "it must not be of a merely tentative or interlocutory nature;" additionally, (2) it

[8] Not to mention the fact that the Supreme Court has previously affirmed the vacatur of DHS's recission of the Deferred Action for Childhood Arrivals program. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020).

must "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S. Ct. 1154, 1168–69 (1997) (internal quotation marks and citation omitted). DHS does not dispute that its Final Memo was the "consummation of the agency's decisionmaking process," only that the memo entailed no legal consequences and created no rights or obligations.

Agency action satisfies the second requirement of *Bennett* "if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *EEOC*, 933 F.3d at 441. Importantly here, the withdrawal of previously articulated discretion is an action that "alters the legal regime, binds the entity, and thus qualifies as final agency action." *Id.* (internal quotation marks omitted). Such a "withdrawal of discretion distinguishes a policy statement—which leaves the agency the discretion and the authority to change its position in any specific case and does not seek to impose or elaborate or interpret a legal norm—from a final agency action." *Id.* (internal quotation marks omitted).

DHS asserts that the guidance in no way binds enforcement agents and their superiors, but "simply ensures that discretion is exercised in an informed way." As the district court explained, the record plainly belies that assertion.

First, ICE officers previously possessed the discretion to arrest and detain aliens on the basis of a qualifying conviction or a final order of removal alone, subject to mandatory statutory dictates. But the Final Memo withdraws this discretion completely by *prohibiting* them to rely solely on a statutorily qualifying conviction or removal order. It asserts: "The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them;" and DHS "personnel should not rely on the fact of conviction or the result of a database search alone." This

withdrawal of discretion is reinforced by compulsory language used throughout the Final Memo (*i.e.*, "Again, our personnel *must* evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly;" "Whether a noncitizen poses a current threat to public safety *is not to be determined* according to bright lines or categories;" "Agency leaders as to whom this guidance is relevant to their operations *will* implement this guidance accordingly.").

Second, the Final Memo implements various mechanisms to *ensure* compliance, including "[e]xtensive training materials and a continuous training program" in order to "ensure the successful application of this guidance." Additionally, all enforcement decisions are subject to "rigorous review" during the first ninety days of implementation in order "to achieve quality and consistency in decision-making across the entire agency." After the ninety days, "[l]onger-term review processes should be put in place . . . drawing on lessons learned," and "[a]ssessment of implementation of this guidance *should be continuous*." Accordingly, not only will ICE agents be subject to "extensive" training on this guidance, but they will also have superiors looking over their shoulders to ensure their compliance. Moreover, the Final Memo now mandates the collection of "detailed, precise, and comprehensive data as to every aspect of the enforcement actions [] take[n] pursuant to th[e] guidance, both to ensure the quality and integrity of [the] work and to achieve accountability for it."

Third, other evidence confirms the Final Memo's binding effect on immigration enforcement. The Considerations Memo, circulated contemporaneously with the Final Memo, asserted that "the new guidelines will *require* the workforce to engage in an assessment of each individual case and make a case-by-case assessment as to whether the individual poses a public safety threat, guided by a consideration of aggravating and mitigating factors." When agents take an enforcement action, they must report it in a

database and select which of the three priorities characterizes their actions. The database makes clear that, besides the three priority categories, "'*Other*' Priority is no longer an option." Agents must also certify that they have faithfully considered "all relevant case specific information" as instructed by the Final Memo before submitting their information. Thus, an enforcement agent has no conscientious way to avoid the prioritization and special procedures required by the Final Memo.

DHS's insistence that agency-wide discretion remains intact as it was before the Final Memo is untenable. We have no difficulty determining that the Final Memo was a final agency action under § 704.

C. *Committed to Agency Discretion*

Agency action is not subject to judicial review if it "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court has "read th[is] exception in § 701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191, 113 S. Ct. 2024, 2030–31 (1993)). Seeking to squeeze the Final Memo within this narrow exception, DHS contends that these are agency enforcement decisions, which are "generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

In the first place, it is unlikely that *Heckler*'s approval of prosecutorial discretion applies to agency rules.[9] But even if it did, it would not insulate

[9] *See Texas v. Biden*, 20 F.4th 928, 978–85 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *rev'd on other grounds*, No. 21-954, slip op. at *9, 12 (U.S. June 30, 2022). Notably, DHS did not argue to the Supreme Court that *Heckler* barred judicial consideration of the rule

this rule. The Court in *Heckler* expressly distinguished its holding from cases involving the present circumstances. It emphasized:

> Nor do we have a situation where it could justifiably be found that the agency has consciously and expressly adopted *a general policy that is so extreme as to amount to an abdication of its statutory responsibilities*. Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

470 U.S. at 833 n.4, 105 S. Ct. at 1656 n.4 (emphasis added). The Final Memo does not represent a one-off enforcement decision, but rather a calculated, agency-wide rule limiting ICE officials' abilities to enforce statutory law. As will be indicated below, DHS's interpretation of the governing statutes seems obviously inconsistent with their meaning as a matter of linguistics, text, and context. This rule gives every indication of being "a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* Accordingly, *Heckler* does not save the Final Memo from judicial scrutiny.

But even in the unlikely event that *Heckler* bears on this rule, the Court emphasized in its opinion that any enforcement discretion was not absolute. Rather, "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 832–33, 105 S. Ct. at 1656. This makes sense. Congress defines the scope of the agency's discretion, and the Executive is

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revoking the previous Administration's Remain in Mexico policy. Yet it is hard to distinguish these two cases from that standpoint.

not able to use its discretion in order to thwart the boundaries of its authority. As further explained below, 8 U.S.C. §§ 1226(c) and 1231(a) are such substantive statutes that curb agency discretion as it pertains to this particular rule. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018) ("Section 1226(c) . . . carves out a statutory category of aliens who may *not* be released under § 1226(a)."). For both these reasons, DHS is unlikely to succeed on this point.

D. *Zone of Interests*

Congress has provided a cause of action under the APA for parties whose alleged injury was "arguably within the zone of interests to be protected or regulated by the statutes that the agencies were claimed to have violated." *Collins v. Mnuchin*, 938 F.3d 553, 574 (5th Cir. 2019), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021) (internal quotation marks omitted). But this requirement is not "especially demanding" and "the benefit of any doubt goes to the plaintiff." *Id.* (internal quotation marks omitted). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Texas DAPA*, 809 F.3d at 162 (internal quotation marks omitted).

DHS contends that the States do not fall within the zone of interests covered by §§ 1226(c) or 1231(a). But this final justiciability argument is also foreclosed by precedent. This court holds that "[t]he interests the states seek to protect fall within the zone of interests of the INA," and two criminal immigration statutes fall squarely within that interest. *Id.* at 163. The States will have no trouble clearing this low bar on appeal.

III. Legality of Agency Action

DHS's three defenses of the Final Memo on its merits are also likely to fail on final appellate consideration. We address each in turn.

A. *Contrary to Law*

A primary point of contention here is whether the Final Memo conflicts with 8 U.S.C. §§ 1226(c) and 1231(a) by rendering optional what the statutes make mandatory. Significantly, these provisions are distinguishable from 8 U.S.C. § 1225(b), construed in *Texas MPP*, which governs aliens apprehended at the U.S. border who claim asylum relief. The relevant provisions here do not utilize discretionary language, unlike the main provision in *Texas MPP*, § 1225(b)(2)(C). Additionally, unlike Section 1225(b), the instant provisions relate to the expedited removal of a small subset of aliens who have been in the United States and fall into two categories: (1) those who, having been convicted of certain enumerated criminal offenses, are removable; and (2) those who, at the conclusion of immigration proceedings, have become subject to final removal orders. Accordingly, we determine that the Court's statutory analysis in *Texas MPP* does not foreclose the question presented to this court with respect to §§ 1226(c) and 1231(a).

We begin with the plain language and structure of the statutes. Section 1226(c) provides: "The Attorney General *shall* take into custody any alien who" committed certain delineated crimes[10] "when the alien is

[10] These crimes include aliens convicted of crimes of moral turpitude, aliens convicted of drug offenses, aliens convicted of multiple offenses with an aggregate sentence of confinement of five years or more, aliens who are traffickers of controlled substances, aliens convicted of an aggravated felony, aliens who participate in the commercialized sex industry, aliens who engaged in terrorist activity, aliens who served in foreign governments and committed "particularly severe violations of religious freedom," aliens who participate in the human trafficking industry, aliens who engage in money laundering, and aliens

released" from state or local custody. § 1226(c)(1) (emphasis added). There is one, and only one, qualification to this mandatory provision, which authorizes discretionary release of such an alien "only if" three things are true—such release is "necessary to provide protection" for a witness or cooperator; *and* the alien proves he will pose no danger to persons or property and will appear for proceedings; *and* the release procedures must take into account the severity of the alien's offense.[11] To effectuate § 1226(c)'s arrest and detention mandate, Congress also provided that the Attorney General *shall* devise and implement a system to identify and track criminal aliens in local, state, and federal custody. § 1226(d) (emphasis added).

Consequently, as the Supreme Court explained, "Section 1226(c) mandates detention during removal proceedings for a limited class of deportable aliens—including those convicted of an aggravated felony." *Demore v. Kim*, 538 U.S. 510, 517–18, 123 S. Ct. 1708, 1714 (2003). In *Demore*, the Court thoroughly explained that § 1226(c) was enacted to redress

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convicted of certain firearms offenses. 8 U.S.C. §§ 1182(a)(2), (a)(3)(B), 1226(c), 1227(a)(2)(A)–(D).

[11] The provision states:

> The Attorney General may release an alien described in paragraph (1) *only if* the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

§ 1226(c)(2) (emphasis added).

multiple problems attendant to flight and recidivism because the previous law entitled criminal aliens to individualized bond or detention hearings, which led to a high rate of releases. *Id.* at 518–20, 123 S. Ct. at 1714–16. Congress was "concern[ed] that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." *Id.* at 520, 123 S. Ct. at 1716. But, evidencing the sharply different enforcement concerns between non-criminal aliens and criminal aliens, Congress provided more discretion as it pertains to non-criminal aliens. Section 1226(a), which applies to aliens "[e]xcept as provided in [§ 1226(c)]," states that the Attorney General "*may* continue to detain the arrested alien," or "*may* release the alien on" bond or conditional parole. § 1226(a)(1)–(2) (emphasis added).

Closely related to § 1226(c) is § 1231(a), which provides that "when an alien is ordered removed, the Attorney General *shall* remove the alien from the United States within a period of 90 days." § 1231(a)(1)(A) (emphasis added). Further, "[d]uring the removal period, the Attorney General *shall* detain the alien. *Under no circumstance* during the removal period *shall* the Attorney General release an alien who has" been convicted of enumerated crimes.[12] § 1231(a)(2) (emphasis added).

Under basic principles of statutory construction, different words are accorded their "ordinary" meaning and the text of a statute must be

[12] These include a crime of moral turpitude, a drug offense, drug trafficking, human trafficking, multiple offenses with an aggregate sentence of confinement of five years or more, prostitution, an aggravated felony, high speed flight from an immigration checkpoint, failure to register as a sex offender, certain firearm offenses, crimes of domestic violence, crimes against children, or who has engaged in terrorist activity. 8 U.S.C. §§ 1182(a)(2), (a)(3)(B), 1226(c), 1227(a)(2), (a)(4)(B), 1231(a)(2).

construed as a whole.[13] Nowhere do these principles make more sense than in the juxtapositions of "shall" with "may" in the two provisions at issue here. In fact, the Court has firmly warned that these terms should be afforded different meanings, especially where both are used in the same statute. *See, e.g.*, *Texas MPP*, slip op. at *13–15 (holding that the "unambiguous, express term 'may'" does not mean "shall" and it was error for the lower court to hold otherwise); *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S. Ct. 694, 703 (2005) (noting that it is error to read these two words synonymously when both are used in the same statute). Indeed, the Supreme Court has repeatedly interpreted both of these statutes to require mandatory detention.[14] *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280–81 & n.2 (2021) ("During the removal period, detention is mandatory" under § 1231(a)(2), and "[f]or certain criminal aliens and aliens who have connections to terrorism, detention is mandatory" under § 1226(c)); *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019) (referring to § 1226(c) as a "mandatory-detention requirement"); *Jennings*, 138 S. Ct. at 846 (noting that § 1226(c) "mandates detention"); *Zadvydas v. Davis*, 533 U.S. 678, 683, 121 S. Ct. 2491, 2495 (2001) ("After entry of a final removal order and during the 90–day removal period, however, aliens must be held in custody" under § 1231(a)(2)); *Demore*, 538 U.S. at 517–18, 123 S. Ct. at 1714 (2003) ("Section 1226(c) mandates detention during removal proceedings for a limited class of deportable aliens.").

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[13] ANTONIN SCALIA & BRYAN A GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 24, p. 167 (2012).

[14] DHS tries to distinguish these cases as involving individual aliens seeking relief. This makes no sense. A straightforward statutory dictate does not modulate from mandatory to permissive based on the particulars of the given case.

The parallel treatment of mandatory and precatory terms indicates conscious choices by Congress. DHS does not dispute that "shall" typically represents mandatory language and that "may" "*clearly* connotes" discretion. *Texas MPP*, slip op. at 13 (quoting *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1603 (2020)). *See also Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."). Nevertheless, citing *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796 (2005), DHS contends that there must be clear legislative intent, beyond the word "shall," that the legislature intended to overcome the agency's established discretion. Specifically, DHS argues that *Castle Rock*'s holding that "[t]he deep-rooted nature of law-enforcement discretion" may trump "seemingly mandatory legislative commands" overcomes the plain meaning of the term "shall" in the instant provisions. *Id.* at 761, 125 S. Ct. 2796.

But *Castle Rock* does not apply here for at least two reasons. *First*, *Castle Rock* is distinguishable on its facts. There, the Court determined that the plaintiff did not have a protected property interest in the enforcement of the terms of her restraining order by the state police for purposes of the Due Process Clause. 545 U.S. at 755, 125 S. Ct. at 2803. Colorado law did not make enforcement of restraining orders mandatory, irrespective of the use of the term "shall," and thus there was no general entitlement to enforcement of such restraining orders. *Id.* at 760-68, 125 S. Ct. at 2805–2809. It is a far stretch of this precedent to extend it from individualized decisions made by police officers to agency-wide decisions made by DHS. It is even more of a stretch when, as just explained, the statutory language seems incontrovertibly mandatory. Indeed, the Supreme Court has never applied *Castle Rock* to federal agency action, and Fifth Circuit precent has only

applied it to federal agency action where a statutory scheme expressly rendered the agency action discretionary.[15]

Second, the limitless principle of law that DHS would have us draw from *Castle Rock* is untenable and wholly unsupported. DHS effectively seeks a reading of *Castle Rock* that would insulate agency action that in any way relates to enforcement duties, despite the plain language of the INA. Nothing in *Castle Rock* compels that conclusion. The ruling there was based, not on a police department-wide policy of not enforcing restraining orders, but rather an individualized instance of nonenforcement. The Final Memo, however, is much more than a singular nonenforcement decision. It is an agency-wide mandate that strips from ICE agents their once-held discretion and subjects all enforcement decisions to strict oversight in express derogation of the governing statutes. *Castle Rock* does not compel us to ignore the plain text of the INA for such agency action. DHS is not likely to succeed on this crucial point.

We are additionally disturbed by certain aspects of the Considerations Memo, which purports to summarize and provide context to the Final Memo. In more ways than one, the Considerations Memo compels officials to comply with the Final Memo by utilizing prosecutorial discretion in a manner that violates statutory law. For example, it provides that the guidelines "are essential to advancing this Administration's stated commitment to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality." DHS's replacement of Congress's statutory mandates with concerns of equity and race is extralegal, considering

[15] *Ridgely v. FEMA*, 512 F.3d 727, 735–36 (5th Cir. 2008) (holding that the statutes and regulations governing Federal Emergency Management Agency did not create a property interest in enforcement where "mandatory language is wholly absent").

that such policy concerns are plainly outside the bounds of the power conferred by the INA. Similarly, the Considerations Memo explains that, in identifying those who are a threat to public safety, DHS "chose to place greater emphasis on the totality of the facts and circumstances" instead of identifying this group categorically. But DHS simply lacks the authority to make that choice when the statutes plainly *mandate* such categorical treatment. This is especially troubling in light of the fact that Congress attempted to prohibit such individualized consideration when it enacted § 1226(c) because the previous policy led to unacceptably high rates of criminal alien flight. *Demore*, 538 U.S. at 518–20, 123 S. Ct. at 1714–16. Thus, the Consideration Memo further confirms what the Final Memo says for itself—that it represents a disingenuous attempt on behalf of DHS to claim it acts within the bounds of federal law while practically disregarding that law.

B. *Arbitrary & Capricious*

Courts are compelled to "hold unlawful and set aside agency action[s]" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). While a reviewing court must not "substitute" its "own policy for that of the agency" and must apply this standard deferentially, the agency action must still "be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). This court "must set aside any action premised on reasoning that fails to account for relevant factors or evinces a clear error of judgment." *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 475 (5th Cir. 2021) (quotation omitted). Arbitrary and capricious review "is not toothless." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019). "In fact, after *Regents*, it has serious bite." *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021). "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself," not reasons

developed post hoc. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870 (1983).

DHS contends that the Considerations Memo expresses the basis for the Final Memo and is intended to supplement it. Upon examining the Considerations Memo, the district court found that DHS failed to adequately consider the high chances of recidivism and absconding within the relevant class of aliens as well as the costs or reliance interests of the States. On the other hand, DHS argues that the Considerations Memo sufficiently addresses these factors to satisfy the arbitrary/capricious standard.

The Considerations Memo states that the "public safety" factors "are to be weighed in each case to assess whether a noncitizen poses a current threat to public safety, *including through a meaningful risk of recidivism*." DHS contends that this illustrates that the agency considered recidivism, and it was not required to support its position with "empirical or statistical studies." *Prometheus*, 141 S. Ct. at 1160. But that is beside the point. The district court did not hold that the agency failed to consider recidivism *at all*. To the contrary, the court concluded that DHS failed to consider recidivism among the relevant population at issue in this case—"aliens who have been convicted of or are implicated in serious crime and aliens who have received a final order of removal." Those are the aliens covered by § 1226(c)[16] or § 1231(a)(2). While the Considerations Memo generally relies on studies about criminality among *all* aliens, those studies did not account for potentially higher rates of recidivism among those "who have already been convicted of a serious crime."

[16] In fact, Congress was especially concerned with the serious harms repeat criminal aliens may cause if not detained when it passed § 1226(c). *Demore v. Kim*, 538 U.S. 510, 518–20 (2003).

DHS does not assert that general alien criminality can substitute for data concerning the subset of convicted aliens. In fact, in 2019, DHS itself acknowledged that criminal aliens recidivate and abscond at higher rates:

> Of the 123,128 ERO administrative arrests in FY 2019 with criminal convictions or pending criminal charges, the criminal history for this group represented 489,063 total criminal convictions and pending charges as of the date of arrest, *which equates to an average of four criminal arrests/convictions per alie*n, highlighting the recidivist nature of the aliens that ICE arrests.

Yet this actual differential between the general population and the serious previous offender population receives no mention in the Considerations Memo. And it undoubtedly should have, because repeat illegal alien offenders inflict considerable damage on innocent American citizens. On this record, DHS is unlikely to succeed in demonstrating that it considered "the relevant data" and drew a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43, 103 S. Ct. at 2866 (internal quotation marks omitted).

We next address the costs of this rule to the States and their reliance interests. "When an agency changes course, as DHS did here, it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212, 136 S. Ct. 2117, 2120 (2016)). Failure to do so is fatal. DHS contends that a multi-page section in the Considerations Memo analyzing the "Impact on States" demonstrates that it adequately considered these interests before circulating the Final Memo. The district court found, however, that this analysis merely paid "lip service to the States' concerns."

We are troubled by DHS's dismissive analysis, which dots "i's" and crosses "t's" without actually saying anything. For example, DHS minimizes the influence of its policy on the States as maybe having some "downstream impacts." The Considerations Memo then states that it "cannot provide an exhaustive analysis of all of these potential impacts every time it adopts a change in immigration policy." Rather, it claims that any such "assessment" would be "uniquely difficult to conclude with certainty," so it simply does not bother. Yet, after explicitly declining to quantify or at least reasonably describe the costs of this policy to the States, the agency audaciously concludes that "any effects from implementation of priorities guidance are unlikely to be significant, and could have a net positive effect."

As to the States' reliance interests, the Considerations Memo flatly concludes that "no such reasonable reliance interests exist." In a single paragraph citing no evidence, DHS concluded that the States, including Texas as a 900-mile border state, has *no reliance interests* in the enforcement of federal criminal immigration law according to the governing statutes.[17] This omission is more inexcusable since the States have consistently asserted their reliance interests in the context of this litigation, which has been ongoing simultaneously with DHS's promulgation of the Final Memo and the Considerations Memo. "Stating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). Rather, courts "must make a searching and careful inquiry to determine if [the agency] actually *did* consider it." *Id.* (internal quotation marks omitted). At this point, DHS has not shown a likelihood that it adequately considered the relevant costs to the States or their reliance interests in the pre-existing enforcement policy.

[17] But see *supra* note 4.

C. *Procedural Invalidity*

Under the APA, rules must be subject to notice-and-comment rulemaking unless they fall within one of the APA's exceptions. 5 U.S.C. § 553(b)(A). Such exceptions "must be narrowly construed." *Texas DAPA*, 809 F.3d at 171 (internal quotation marks omitted). DHS contends that its rule does not need to be subject to notice-and-comment rulemaking because it qualifies as a general statement of policy, which merely "advise[s] the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln v. Vigil*, 508 U.S. 182, 197, 113 S. Ct. 2024, 2034 (1993) (internal quotation marks omitted). To determine whether a rule is merely a "policy statement," we evaluate two criteria: "whether the rule (1) imposes any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Texas DAPA*, 809 F.3d at 171 (internal quotation marks omitted). "While mindful but suspicious of the agency's own characterization, we focus primarily on whether the rule has binding effect on agency discretion or severely restricts it." *Id.* (internal quotation marks and alterations omitted).

As described above, the Final Memo overwhelmingly satisfies both criteria. Both the language found within and the mechanisms of implementing it establish that it is indeed binding, thus removing DHS personnel's discretion to stray from the guidance or take enforcement action against an alien on the basis of a conviction alone. For the same reasons articulated *supra* Section II.B, the Final Memo is much more substantive than a general statement of policy and, as such, it had to undergo notice and comment procedures. Because it did not, DHS is unlikely to be successful in establishing that the Final Memo need not have been subject to notice and comments before its promulgation.

IV. Remaining Stay Factors

DHS's case on the merits is sufficiently weak to justify denying a stay on that basis alone. But we briefly note our skepticism about DHS's allegations of "confusion" and the potential "waste" of "resources" that would result from our allowing the vacatur go into effect. Despite the administrative inconvenience caused by this litigation, DHS has no "interest in the perpetuation of unlawful agency action." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). "To the contrary, there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Id.* (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). Furthermore, "there is always a public interest in prompt execution of removal orders, and that interest may be heightened by circumstances such as a particularly dangerous alien." *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1753 (2009) (internal quotation marks, citation, and alterations omitted). Because the prevention of agency abuse overcomes other factors, none of those counsel in favor of granting DHS's stay.[18]

V. *Arizona v. Biden*

That this decision departs from the Sixth Circuit's recent opinion in *Arizona v. Biden* is readily explicable. In that case, the states of Arizona, Montana, and Ohio brought a nearly identical challenge to the Final Memo and DHS sought a stay of the district court's nationwide preliminary injunction. *Arizona v. Biden*, 31 F.4th 469, 472 (6th Cir. 2022). The Sixth

[18] We further reject DHS's contention that the nationwide vacatur is overbroad. In the context of immigration law, broad relief is appropriate to ensure uniformity and consistency in enforcement. Furthermore, "[t]here is a substantial likelihood that a geographically-limited injunction would be ineffective because [criminal aliens not subject to enforcement] would be free to move among states." *Texas DAPA*, 809 F.3d at 188.

Circuit ruled differently on several dispositive issues, but our differences result from two factors.

Unlike the Sixth Circuit, this court has developed precedent that predetermines many of our conclusions. *See Texas DAPA*, 809 F.3d at 134. As to issues raised by DHS that are not foreclosed by circuit precedent, we disagree with our sister circuit's legal conclusions for the reasons articulated above. Importantly, the Sixth Circuit found the factual record before it insufficient to support the states' standing. *Arizona*, 31 F.4th at 481–82 ("The States do not suggest that the agency had to calculate the costs of its Guidance on States, and the States themselves have not offered any concrete evidence of the Guidance's fiscal effects on each of them."). This court's appellate consideration, in contrast, has been significantly assisted by the district court's fulsome fact-findings based on a comprehensively tried case. Facts pertinent to standing and to the administrative issues raised by DHS are not wanting in the record before us.

Until there is a contrary ruling from the Supreme Court, we adhere to our precedent and the facts found by the district court.

CONCLUSION

For the foregoing reasons, the motion for a stay pending appeal is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

The STATE OF TEXAS and the STATE OF LOUISIANA,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 6:21-CV-00016**
	§	
The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES,	§	
	§	
Defendants.	§	

ORDER

Pending before the Court is the Government's Emergency Motion for Stay Pending Appeal and Continued Administrative Stay. (Dkt. No. 244). On June 10, 2022 the Court entered a seven day administrative stay to allow the Government to seek

further relief at the appellate level. (Dkt. No. 240 at 96); (Dkt. No. 241). The Government filed a Notice Appeal on June 13, 2022.

The Court has reviewed the Government's Motion, the States' Response, (Dkt. No. 245), and the Government's Reply, (Dkt. No. 246). The Court finds that the Government offers no new arguments related to this Court's entry of a stay, with one exception: the Supreme Court's decision yesterday in *Garland v. Aleman Gonzalez*, which discusses 8 U.S.C. § 1251(f)(1). For the reasons discussed below, the Court is of the opinion that *Garland v. Aleman Gonzalez* offers no basis for extending the stay or altering the Court's decision on the merits. Even so, the Court will **EXTEND** the administrative stay an additional seven days to June 24, 2022, so that the Fifth Circuit may have sufficient time to consider any emergency relief sought by the Government.

DISCUSSION

The Government argues that Section 1251(f)(1) constitutes a jurisdictional bar in this case, as it did in *Aleman Gonzalez*. *See* (Dkt. No. 244 at 3–4) (citing *Garland v. Aleman Gonzalez*, 596 U.S. ____, No. 20-322, slip op. at 5 (2022)). The Government further argues that *Aleman Gonzalez's* reasoning as to injunctions applies equally to vacatur of a rule under the Administrative Procedure Act, relying on Section 1252(f)(1)'s limit on lower courts' jurisdiction to "enjoin or restrain the operation of" the covered provisions of the INA. 8 U.S.C. § 1252(f)(1). The States respond that *Aleman Gonzalez* only applies to injunctive relief. (Dkt. No. 245 at 2–4).

Section 1252(f) is titled "Limit on injunctive relief."[1] 8 U.S.C. § 1252(f). In *Aleman Gonzalez*, the Supreme Court noted that 8 U.S.C. § 1252(f)(1) "strips lower courts of jurisdiction or authority to *enjoin* or *restrain* the operation of the relevant statutory provisions." *Aleman Gonzalez*, No. 20-322, slip op. at 4 (internal quotations omitted) (emphasis added). After analyzing the statute, the Supreme Court concluded that lower courts are prohibited "from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.* at 5. It is for this reason that the Supreme Court in *Aleman Gonzalez* held that Section 1252(f) deprived the district courts of jurisdiction to award class-wide injunctive relief. *Id.* at 1, 11.

The Court concludes *Aleman Gonzalez* is inapplicable for at least three main reasons. First, *Aleman Gonzalez* does not apply to this case because this Court did not enter an injunction. *See id*. at 7 n.2. Instead, the only relief granted was vacatur of the rule. (Dkt. No. 240 at 91 n.69, 94, 96). Indeed, the Supreme Court has noted the distinction between vacatur and injunctive relief, describing vacatur as "a less drastic remedy" than "the additional and extraordinary relief" of an injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66, 130 S.Ct. 2743, 2761, 177 L.Ed.2d 461 (2010). And *Aleman*

[1] Section 1252(f)(1) provides in full:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

Gonzalez did not disturb the Supreme Court's prior holding that Section 1252(f) "[b]y its plain terms, and even by its title, . . . is nothing more or less than a limit on *injunctive* relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481, 119 S.Ct. 936, 942, 142 L.Ed.2d 940 (1999) (emphasis added); *see also Jennings v. Rodriguez*, ____ U.S. ____, ____, 138 S.Ct. 830, 851, 200 L.Ed.2d 122 (2018) ("Section 1252(f)(1) thus prohibits federal courts from granting classwide *injunctive* relief[.]" (cleaned up) (emphasis added)).

Second, vacatur of the Final Memorandum in this case is not implicated by the Supreme Court's holding or reasoning in *Aleman Gonzalez* because vacatur under the Administrative Procedure Act does not "enjoin or restrain the operation of" Sections 1226 or 1231. *See* 8 U.S.C. § 1252(f)(1). In fact, the Court preemptively explained this distinction in its Memorandum Opinion and Order. (Dkt. No. 240 at 94 n.71) (citing *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 60 (D.D.C. 2020)).

Finally, reading *Aleman Gonzalez* as the Government does is not only an incorrect interpretation of that case, but it would likely insulate virtually every rule related to the INA from judicial review. Such a result is inconsistent with the Fifth Circuit's explicit rejection of the Government's claimed authority to have "unreviewable and unilateral discretion to ignore statutory limits imposed by Congress and to remake entire titles of the United States Code to suit the preferences of the executive branch." *Texas v. Biden*, 20 F.4th 928, 1004 (5th Cir. 2021), *cert. granted*, 142 S.Ct. 1098, 212 L.Ed.2d 1 (2022).

CONCLUSION

Notwithstanding the foregoing, the Court hereby **EXTENDS** the administrative stay of the Final Judgment, (Dkt. No. 241), an additional seven days to June 24, 2022, for

the sole purpose of providing the Fifth Circuit sufficient time to decide whether an additional stay should be entered. The Court **DENIES** all other requested relief.

It is SO ORDERED.

Signed on June 14, 2022.

DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

The STATE OF TEXAS and the STATE OF LOUISIANA,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 6:21-CV-00016**
	§	
The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

This case is the culmination of a series of challenges to immigration-related memoranda issued within the Department of Homeland Security. The legal issues are varied and complicated. But the core of the dispute is whether the Executive Branch may

require its officials to act in a manner that conflicts with a statutory mandate imposed by Congress. It may not.

This past September, the Secretary of the Department of Homeland Security issued a rule—self-styled as a memorandum—governing civil immigration enforcement. The States of Texas and Louisiana say this memorandum conflicts with detention mandates under federal law. The Federal Government, in response, tries to reconcile the apparent contradiction between its memorandum and federal law. The Federal Government's explanations fall short.

Lawmaking is vested by the People in Congress. Congress has long used its legislative power to craft immigration law which will ultimately be enforced by the Executive Branch. The Executive Branch's *statutorily* authorized discretion on civil immigration enforcement has historically ebbed and flowed. In the 1990s, Congress reigned in the Executive Branch's discretion by mandating detention of criminal aliens[1] or aliens with final orders of removal. The wisdom of the statute passed by Congress and signed into law by the President has no bearing here. The passions of the present sometimes conflict with the views of the past. But the law remains unless it is repealed or replaced. And the two statutes at issue in this case are still the law of the land.

[1] "Criminal alien" is the term used by Congress in the statute. 8 U.S.C. § 1226(c); *see also Johnson v. Guzman Chavez*, ____ U.S. ____, ____ n.2, 141 S.Ct. 2271, 2280 n.2, 210 L.Ed.2d 656 (2021) (discussing detention of "certain criminal aliens" under Section 1226(c)). When used in this opinion, the Court refers to criminal aliens as those who have committed the offenses articulated in the statute.

That brings us to the relevant immigration statutes. This case is not about aliens in general, or even aliens who are in the United States illegally. Sections 1226(c) and 1231(a)(2) of Title 8 of the United States Code state that the Executive Branch "shall" detain aliens convicted of specific types of crimes or who have final orders of removal. The Federal Government acknowledges that *some* immigration statutes mandate detention. But it disputes that Sections 1226(c) and 1231(a)(2) are among those statutes. In support, the Federal Government offers an implausible construction of federal law that flies in the face of the limitations imposed by Congress. It also invokes discretion and prioritization in an effort to evade meaningful judicial review.

True, the Executive Branch has case-by-case discretion to abandon immigration enforcement as to a particular individual. This case, however, does not involve individualized decisionmaking. Instead, this case is about a rule that binds Department of Homeland Security officials in a generalized, prospective manner—all in contravention of Congress's detention mandate.

It is also true that the Executive Branch may prioritize its resources. But it must do so within the bounds set by Congress. Whatever the outer limits of its authority, the Executive Branch does not have the authority to change the law.

Using the words "discretion" and "prioritization," the Executive Branch claims the authority to suspend statutory mandates. The law does not sanction this approach. Accepting the Executive Branch's position would have profound consequences for the separation of powers.

It is worth repeating that the Federal Government agrees that certain immigration statutes contain mandatory detention provisions. The question, then, is whether the statutes here are mandatory. The answer is yes: Sections 1226(c) and 1231(a)(2) mandate detention. All of this matters because the Administrative Procedure Act compels federal courts to set aside agency rules that are contrary to law, are arbitrary and capricious, or failed to observe the requisite procedure. After a trial on the merits, the States have shown that the Secretary's memorandum is all three. For the reasons that follow, the Court vacates the memorandum.[2]

[2] The Court understands that some may find the terms "alien" and "illegal alien" offensive, and the Court's intent is certainly not to offend. These terms are used in this opinion because they are contained in the statutes as well as official government documents quoted by the Supreme Court in a seminal immigration case. *See Arizona v. United States*, 567 U.S. 387, 397, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012). Moreover, "alien" and "immigrant" are different and defined statutory terms. *Compare* 8 U.S.C. § 1101(a)(3) *with Id.* § 1101(a)(15). Furthermore, the Fifth Circuit explained why "illegal alien" is a preferable (and not pejorative) term in a case like this:

> The usual and preferable term in [American English] is *illegal alien*. The other forms have arisen as needless euphemisms, and should be avoided as near-gobbledygook. The problem with *undocumented* is that it is intended to mean, by those who use it in this phrase, "not having the requisite documents to enter or stay in the country legally." But the word strongly suggests "unaccounted for" to those unfamiliar with this quasi-legal jargon, and it may therefore obscure the meaning.
>
> More than one writer has argued in favor of *undocumented alien* . . . [to] avoid[ ] the implication that one's unauthorized presence in the United States is a crime . . . . Moreover, it is wrong to equate illegality with criminality, since many illegal acts are not criminal. *Illegal alien* is not an opprobrious epithet: it describes one present in a country in violation of the immigration laws (hence "illegal").

Texas v. United States, 809 F.3d 134, 148 n.14 (5th Cir. 2015) (quoting Bryan A. Garner, Garner's Dictionary of Legal Usage 912 (Oxford 3d ed. 2011)); *see also* Matthew R. Salzwedel, *The Lawyer's Struggle to Write*, 16 Scribes Journal of Legal Writing 69, 76 (2015) ("[I]llegal alien has going for it both history and well-documented, generally accepted use.").

I. FINDINGS OF FACT

The Court finds that the following facts have been established by a preponderance of the evidence.[3]

A. THE PARTIES

1. The States of Texas and Louisiana are the plaintiffs in this case.

2. Defendant Alejandro Mayorkas is the Secretary of the United States Department of Homeland Security ("DHS"). He issued and currently administers the memorandum titled *Guidelines for the Enforcement of Civil Immigration Law* (the "Final Memorandum"). (Dkt. No. 109-5 at 2–8).

3. Defendant DHS implemented the Final Memorandum, which became effective on November 29, 2021. (*Id.* at 7).

4. DHS oversees Defendants United States Citizenship and Immigration Services ("USCIS"), United States Customs and Border Protection ("CBP"), and United States Immigration and Customs Enforcement ("ICE").

5. Defendant Troy Miller is the Deputy Commissioner of CBP.

6. Defendant Tae Johnson is the Acting Director of ICE.

7. Defendant Tracy Renaud is currently employed by USCIS and has worked in various capacities, including as the Acting Director of USCIS.

B. THE RELEVANT STATUTES

8. Certain statutes are at issue in this case. The first is 8 U.S.C. § 1226(c). Paragraph 1 of that subsection states:

> (1) Custody
>
> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

[3] The Court consolidated the hearing on the States' Motion to Postpone the Effective Date of Agency Action or, in the Alternative, for Preliminary Injunction with the trial on the merits in this case. *See* Fed. R. Civ. P. 65(a)(2).

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1).

9. Paragraph 2 of that subsection states:

> (2) Release
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. § 1226(c)(2).

10. This case also implicates 8 U.S.C. § 1231. The relevant portions of that statute state:

> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

8 U.S.C. § 1231(a)(1)(A).

> During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

Id. § 1231(a)(2).

C. CIVIL IMMIGRATION ENFORCEMENT PRINCIPLES

11. Enforcement of U.S. immigration law by United States executive branch agencies such as USCIS, CBP, ICE, and DHS ("Immigration Enforcement Authorities") is also at issue in this case.

12. In light of resource constraints, Immigration Enforcement Authorities must decide how to focus their immigration enforcement actions. This is done regardless of whether there is express agency-wide guidance or not.[4] (Dkt. No. 146-2 at 1); (Dkt. No. 146-3 at 4); (Dkt. No. 146-7 at 2).

13. Since it began operations in 2003, DHS has never apprehended and removed all removable aliens.

14. As of August 2021, the Enforcement and Removal Operations ("ERO") division of ICE had approximately 34,000 detention beds nationwide. (Dkt. No. 153-21 at 15).

15. At these resource levels, it would be impossible to detain all aliens covered in Section 1226(c) or Section 1231(a)(2) at one time. (Dkt. No. 153-21 at 14–16).

[4] Throughout this opinion, all docket-entry cites are to the ECF-imposed "Page ID."

16. Despite this, DHS has requested a dramatic reduction in detention bed capacity.[5] Most recently, DHS's 2023 budget request asks for a reduction to 25,000 detention beds. This amounts to a requested reduction of 26% over the course of the two years of the current administration. DHS's 2023 budget request also seeks to eliminate funding for family detention beds.

17. ICE has also persistently underutilized its existing resources since 2021. For example, an April 2022 Office of Inspector General Report regarding one of ICE's outside contractors found that "none of the [contractor's] facilities used more than half of the number of beds ICE paid for under its contract. For example, usage ranged from an average of 21 percent at one hotel in El Paso to an average of 45 percent at one hotel in Phoenix. As a result, ICE spent $16.98 million[] for unused beds at the hotels between April and June 2021."[6]

18. DHS's detention capacity is elastic. That is, DHS can reallocate resources based on existing needs. (Dkt. No. 153-10 at 6); (Dkt. No. 210 at 89, 92–93).

19. For example, from Fiscal Year 2019–present, ICE had an average daily population by month that peaked at 55,238 in August 2019 and reached a low of 14,084 in February 2021. The April 2022 average daily population was 19,176.[7]

20. Shifting resources is not without cost. For example, reallocating resources to the border may come at the expense of interior enforcement, and vice-versa. (Dkt. No. 153-10 at 6); (Dkt. No. 210 at 176, 178).

21. There is also velocity to DHS's detention capacity. (Dkt. No. 210 at 200–01). That is, DHS's detention capacity is not just a function of the number of "beds" DHS possesses, but also how quickly it removes aliens. For example, from fiscal year 2019–present, the ICE average length of stay by month peaked at 91.5 days in September 2020

[5] *U.S. Immigration and Customs Enforcement Budget Overview*, Department of Homeland Security at p. 19, 29, https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf (last visited June 9, 2022); *U.S. Immigration and Customs Enforcement Budget Overview*, Department of Homeland Security at p. 17, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf (last visited June 9, 2022).

[6] *ICE Spent Funds on Unused Beds, Missed COVID-19 Protocols and Detention Standards while Housing Migrant Families in Hotels*, Office of Inspector General at p. 6, https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-Apr22.pdf (last visited June 9, 2022).

[7] *Detention Management*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detain/detention-management (last visited June 9, 2022) (download Detention FY 2022 YTD (Detention FY22 tab, line 76); FY 2021 Detention Statistics (Detention FY 2021 YTD tab, line 76); FY 2020 Detention Statistics (Detention EOFY2020 tab, line 59); and FY 2019 Detention Statistics (Detention FY19 tab, line 59)).

and reached a low of 21.1 days in September 2021. The April 2022 average length of stay was 23.8 days.[8]

22. As referenced in paragraphs 19 and 21 above, 55,238 total beds coupled with an average length of stay of 21.1 days equates to a total annual detention capacity of approximately 955,539 individuals. In contrast, 14,084 total beds coupled with an average length of stay of 91.5 days equates to a total annual detention capacity of approximately 56,182 individuals. This demonstrates that DHS's discretionary decisions have significant aggregate consequences.

23. Also relevant is the process by which DHS takes custody of aliens with criminal convictions, which often happens through the use of a "detainer."

24. A detainer is an administrative notice from DHS to a Federal, state, or local law enforcement agency. A detainer informs the law enforcement agency that DHS intends to take custody of a removable alien detained by the jurisdiction upon their release. A detainer asks the law enforcement agency to (1) notify DHS of the alien's release date and (2) hold the alien for up to 48 hours, so that DHS can take custody. 8 C.F.R. § 287.7.

25. In Texas, the Texas Department of Criminal Justice ("TDCJ") administratively interviews every inmate at intake. If an inmate indicates that either his citizenship or place of birth is not the United States, TDCJ enters that information into its database and sends a packet on the inmate to ICE. The packet includes the inmate's fingerprints, biography, and family history. TDCJ regularly sends and updates the packets. ICE relies on these packets to determine whether a detainer should be issued. (Dkt. No. 210 at 54–55).

D. DHS Officials Issued Immigration Enforcement Memoranda

1. The January Memorandum

26. On January 20, 2021, then-Acting Secretary of Homeland Security David Pekoske issued a memorandum titled *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (the "January Memorandum"). By its own terms, it took effect on February 1, 2021. (Dkt. No. 146-8).

[8] *Detention Management*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detain/detention-management (last visited June 9, 2022) (download Detention FY 2022 YTD (Detention FY22 tab, line 93); FY 2021 Detention Statistics (Detention FY 2021 YTD tab, line 93); FY 2020 Detention Statistics (Detention EOFY2020 tab, line 76); and FY 2019 Detention Statistics (Detention FY19 tab, line 75)).

27. The January Memorandum announced substantial changes to the enforcement of the Nation's immigration laws. (*Id.*).

28. The January Memorandum identified three enforcement priorities: national security, border security, and public safety. (*Id.* at 2).

29. The January Memorandum defined the national security priority as pertaining to those "[i]ndividuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States." (*Id.* at 2).

30. The January Memorandum defined the border security priority as pertaining to those "[i]ndividuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020." (*Id.* at 2).

31. Finally, the January Memorandum defined the public safety priority as pertaining to those "[i]ndividuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an 'aggravated felony,' as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety." (*Id.* at 2).

32. The January Memorandum did not instruct officers to prioritize aliens convicted of crimes of moral turpitude,[9] aliens convicted of drug offenses,[10] aliens convicted of multiple offenses with an aggregate sentence of confinement of five years or more,[11] aliens who are traffickers of controlled substances,[12] aliens who participate in the commercialized sex industry,[13] aliens who served in foreign governments and committed "particularly severe violations of religious freedom,"[14] aliens who participate in the human trafficking industry,[15] aliens who engage in money laundering,[16] aliens convicted of certain firearms offenses,[17] and aliens with final orders of removal.[18]

9 *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)–(ii).

10 *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II).

11 *See* 8 U.S.C. § 1182(a)(2)(B).

12 *See* 8 U.S.C. § 1182(a)(2)(C).

13 *See* 8 U.S.C. § 1182(a)(2)(D).

14 *See* 8 U.S.C. § 1182(a)(2)(G).

15 *See* 8 U.S.C. § 1182(a)(2)(H).

16 *See* 8 U.S.C. § 1182(a)(2)(I).

17 *See* 8 U.S.C. § 1227(a)(2)(C).

18 *See* 8 U.S.C. § 1231(a)(1)(A).

33. The January Memorandum further stated that its "guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (Dkt. No. 146-8 at 4).

34. The January Memorandum called on the Acting Director of ICE to "issue operational guidance on the implementation of" the priority framework. (*Id.* at 3).

35. The January Memorandum stated that it did not "prohibit[] the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities" in the memorandum. (*Id.*).

36. The January Memorandum was not issued following notice-and-comment procedures. (Dkt. No. 211 at 69).

2. The February Memorandum

37. As required by the January Memorandum, on February 18, 2021, Acting ICE Director Tae Johnson issued a memorandum titled *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (the "February Memorandum"). (Dkt. No. 146-9).

38. The February Memorandum noted that it provided only "interim guidance" and would "remain in effect until Secretary Mayorkas issue[d] new enforcement guidelines." (*Id.* at 1).

39. The February Memorandum acknowledged that the January 20 Memorandum "established interim civil immigration enforcement priorities," and it restated those priority categories: national security, border security, and public safety. (*Id.* at 2, 4–5).

40. The February Memorandum defined the national security priority as pertaining to those aliens who have engaged in, or are suspected of engaging, in terrorism or espionage. (*Id.* at 4).

41. The February Memorandum defined the border security priority as pertaining to those aliens "apprehended at the border or a port of entry while attempting to unlawfully enter the United States on or after November 1, 2020" or who were "not physically present in the United States before November 1, 2020." (*Id.* at 4).

42. Finally, the February Memorandum defined the public safety priority as pertaining to those aliens who "pose[] a threat to public safety" and have been "convicted of an 'aggravated felony'" or are involved with criminal gangs. (*Id.* at 4–5).

43. The February Memorandum did not instruct officers to prioritize aliens convicted of crimes of moral turpitude,[19] aliens convicted of drug offenses,[20] aliens convicted of multiple offenses with an aggregate sentence of confinement of five years or more,[21] aliens who are traffickers of controlled substances,[22] aliens who participate in the commercialized sex industry,[23] aliens who served in foreign governments and committed "particularly severe violations of religious freedom,"[24] aliens who participate in the human trafficking industry,[25] aliens who engage in money laundering,[26] aliens convicted of certain firearms offenses,[27] and aliens with final orders of removal.[28]

44. The February Memorandum stated that it would generally not require "[o]fficers and agents . . . [to] obtain preapproval for enforcement or removal actions" against those who fall within the three "presumed priority" categories. But it generally required "preapproval" for enforcement actions, which includes detention, against other criminal aliens. The February Memorandum noted, "[i]f preapproval is impractical, an officer or agent should conduct the enforcement action" and then seek approval within 24 hours. (Dkt. No. 146-9 at 5–6).

45. The approval rate for "other priority" enforcement actions varied by ICE field office. Several offices approved more than 99% of all requests. The lowest approval rates were in the New York (82%) and Denver (89%) field offices. The median approval rate was 98%. (Dkt. No. 146-15 at 1, 3).

46. However, under the February Memorandum, many ICE offices had a practice of pre-vetting cases so that officers obtained informal approval from their supervisors before they formally submitted an approval request. This made the approval rate for non-priority cases appear deceptively high. (*Id.* at 3).

47. This practice artificially inflated the approval rate for "other priority" enforcement actions. It is unlikely that officers would seek preapproval for an

19 *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)–(ii).

20 *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II).

21 *See* 8 U.S.C. § 1182(a)(2)(B).

22 *See* 8 U.S.C. § 1182(a)(2)(C).

23 *See* 8 U.S.C. § 1182(a)(2)(D).

24 *See* 8 U.S.C. § 1182(a)(2)(G).

25 *See* 8 U.S.C. § 1182(a)(2)(H).

26 *See* 8 U.S.C. § 1182(a)(2)(I).

27 *See* 8 U.S.C. § 1227(a)(2)(C).

28 *See* 8 U.S.C. § 1231(a)(1)(A).

enforcement action, let alone take an enforcement action, that did not survive this informal pre-vetting process. (*Id.*); (Dkt. No. 210 at 79–80).

48. To "ensure compliance" and "consistency" across the country and to allow for an assessment of the effectiveness of the priority framework, the February Memorandum required field offices to "collect data on the nature and type of enforcement and removal actions they perform." (Dkt. No. 146-9 at 5).

49. The February Memorandum stated that it did "not require or prohibit the arrest, detention, or removal of any noncitizen" and that "officers and agents are expected to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission." (*Id.* at 3).

50. The February Memorandum further stated that its "guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (*Id.* at 7).

51. The February Memorandum was not issued following notice-and-comment procedures. (Dkt. No. 211 at 69).

3. The Final Memorandum

52. On September 30, 2021, Secretary Mayorkas issued the Final Memorandum from DHS. (Dkt. No. 109-5).

53. Secretary Mayorkas provided that the Final Memorandum would become effective on November 29, 2021, and that, upon its effective date, the Final Memorandum would "serve to rescind" the January and February Memoranda. (*Id.* at 7).

54. In developing the Final Memorandum, Secretary Mayorkas and DHS received input from certain individuals and groups. (Dkt. No. 145-1).

55. Secretary Mayorkas and DHS considered issues raised in litigation and the views of members of Congress and state and local officials. *See*, *e.g.*, (Dkt. No. 148-9); (Dkt. No. 148-8); (Dkt. No. 148-15); (Dkt. No. 150-1).

56. The Final Memorandum by its terms sets out "guidance for the apprehension and removal of noncitizens." (Dkt. No. 109-5 at 2). The Final Memorandum expressly applies to detainers. (*Id.* at 3).

57. The Final Memorandum identifies the same three priority enforcement categories as the previous two memoranda: national security, border security, and public safety. *Compare* (*Id.* at 4–5) *with* (Dkt. No. 146-8 at 2) *and* (Dkt. No. 146-9 at 4–5).

58. Unlike the February Memorandum, the Final Memorandum's priorities are not presumptively subject to enforcement action. *Compare* (Dkt. No. 109-5 at 4–5) *with* (Dkt. No. 146-9 at 4–5).

59. For example, under the "border security" priority, the Final Memorandum admonishes "there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. [DHS] personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly." (Dkt. No. 109-5 at 5).

60. Unlike the February Memorandum, the Final Memorandum's "public safety" priority no longer presumptively subjects aliens convicted of aggravated felonies to enforcement action, including detention. *Compare* (Dkt. No. 109-5 at 4–5) *with* (Dkt. No. 146-9 at 4–5).

61. DHS's explanation for removing the "aggravated felony" category is that it was "both over- and under-inclusive," is "an imperfect proxy for severity of offense," and because the "aggravated felony definition can be challenging to administer in many instances[.]" (Dkt. No. 146-1 at 12).

62. The statute, however, specifically provides that the Defendants ("the Government") "shall take into custody any alien" that has committed an aggravated felony. 8 U.S.C. §§ 1226(c)(1)(B), 1227(a)(2)(A)(iii).

63. Under the "public safety" priority, the Final Memorandum instructs DHS personnel that enforcement, including detention, "is not to be determined according to bright lines or categories." (Dkt. No. 109-5 at 4–5).

64. The Final Memorandum "requires an assessment of the individual and the totality of the facts and circumstances." It states, DHS "personnel should not rely on the fact of conviction or the result of a database search alone," when deciding to enforce the law. Rather, they "should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the [alien's] conduct at issue." (*Id.*).

65. As with the January and February Memoranda, the Final Memorandum does not instruct officers to prioritize aliens convicted of crimes of moral turpitude,[29] aliens convicted of drug offenses,[30] aliens convicted of multiple offenses with an aggregate sentence of confinement of five years or more,[31] aliens who are traffickers of

[29] *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i)–(ii).

[30] *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[31] *See* 8 U.S.C. § 1182(a)(2)(B).

controlled substances,[32] aliens who participate in the commercialized sex industry,[33] aliens who served in foreign governments and committed "particularly severe violations of religious freedom,"[34] aliens who participate in the human trafficking industry,[35] aliens who engage in money laundering,[36] aliens convicted of certain firearms offenses,[37] and aliens with final orders of removal.[38]

66. The Final Memorandum states that a "review process should be put in place to ensure the rigorous review of our personnel's enforcement decisions" and "should seek to achieve quality and consistency in decision-making across the entire agency and the Department." (Dkt. No. 109-5 at 7).

67. The Final Memorandum also states that DHS "will work to establish a fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken." (*Id.*). That case review process has been implemented. This "ICE Case Review (ICR)" process allows aliens to challenge enforcement actions taken against them if they believe they do not meet the Final Memorandum's priorities.[39] The ICR process allows aliens to request further review of their initial determination by "a Senior Reviewing Official, who, where appropriate, will communicate the ultimate resolution" with the requesting alien.[40] The ICR process states that cases "involving individuals detained in ICE custody or pending imminent removal will be prioritized" and permits legal counsel to undertake the ICR process on behalf of aliens.[41]

68. The Final Memorandum further states that it "does not compel an action to be taken or not taken" and "is not intended to, does not, and may not be relied upon to

[32] *See* 8 U.S.C. § 1182(a)(2)(C).

[33] *See* 8 U.S.C. § 1182(a)(2)(D).

[34] *See* 8 U.S.C. § 1182(a)(2)(G).

[35] *See* 8 U.S.C. § 1182(a)(2)(H).

[36] *See* 8 U.S.C. § 1182(a)(2)(I).

[37] *See* 8 U.S.C. § 1227(a)(2)(C).

[38] *See* 8 U.S.C. § 1231(a)(1)(A).

[39] *ICE Case Review*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/ICEcasereview (last visited June 9, 2022).

[40] *ICE Announces Case Review Process*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/news/releases/ice-announces-case-review-process (last visited June 9, 2022).

[41] *ICE Case Review*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/ICEcasereview (last visited June 9, 2022).

create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (Dkt. No. 109-5 at 6, 8).

69. The Final Memorandum was issued contemporaneously with another document titled *Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law* (the "Considerations Memo"), in which DHS summarized the key aspects informing the Final Memorandum. (Dkt. No. 146-1).

70. In the Considerations Memo, DHS included a section on potential alternative approaches to the Final Memorandum. (*Id.* at 19–21).

71. DHS has coupled the Final Memorandum "with [an] extensive and continuous training program on the new guidelines, the creation of short- and long-term processes to review enforcement decisions to achieve quality and consistency, and comprehensive data collection and analysis." (*Id.* at 20).

72. DHS's Activity Analysis and Reporting Tool ("AART") is used to collect data on whether enforcement actions adhere to the Final Memorandum. (Dkt. No. 217-18 at 4). The AART requires agents to report which of the three priority categories from the Final Memorandum applies to an enforcement action. (*Id.* at 8). Agents may only choose from the three categories when logging an enforcement action.

73. Agents must also certify that they "considered all relevant case specific information" available at the time of the enforcement action. The submissions are reviewed by the agent's supervisors to verify that "all necessary information has been provided." (*Id.* at 12–13).

74. The Final Memorandum was not issued following notice-and-comment procedures. (Dkt. No. 211 at 69).

E. THE FINAL MEMORANDUM INCREASES THE NUMBER OF CRIMINAL ALIENS AND ALIENS WITH FINAL ORDERS OF REMOVAL RELEASED INTO TEXAS, LOUISIANA AND THE UNITED STATES

75. In Texas, from fiscal year 2017 to fiscal year 2020, detainers were rescinded for various reasons such as discovering that the individual was a U.S. citizen, medical complications, or an inability to be repatriated. (Dkt. No. 203 at 68–69); (Dkt. No. 210 at 37).

76. However, no more than a dozen detainers were dropped per year during that time period. (Dkt. No. 203 at 68–69).

77. Before February 2021, TDCJ did not track daily the number of detainers that ICE dropped because there was no need. Before February 2021, ICE dropped so few detainers that the number could be tracked on a periodic basis. (Dkt. No. 210 at 42).

78. Because of the increase in dropped detainers, TDCJ is currently updating its inmate-tracking system to indicate whether criminal alien inmates have had detainers dropped—or never issued in the first place—due to the Final Memorandum. (*Id.* at 46–47).

79. From January 20, 2021 through February 15, 2022, ICE rescinded detainers on 170 criminal aliens in TDCJ facilities. It later reissued the detainer or took custody of 29 of those inmates. (Dkt. No. 203 at 69); (Dkt. No. 217 at 19–23).

80. ICE took custody of some aliens with rescinded detainers because TDCJ raised questions about the cancelation of their detainers. (Dkt. No. 210 at 8, 51).

81. Of the 141 criminal aliens whose detainers remained rescinded, 55 were serving a sentence for a drug offense. These were serious drug offenses; none were for a single offense involving possession of 30 grams or less of marijuana for one's own use. (Dkt. No. 217 at 19–23).

82. Of the 141 criminal aliens whose detainers remained rescinded, 95 were released on parole supervision. (Dkt. No. 203 at 83). At the time this case was tried, 17 of those 95 had failed to comply with their parole supervision and four had committed new criminal offenses. At least one remains at large in Texas with a warrant for his arrest. (*Id.*).

83. In the months since the Final Memorandum became effective, ICE has continued to rescind detainers placed on criminal aliens in TDCJ custody because of the Final Memorandum. (Dkt. No. 217 at 23); (Dkt. No. 210 at 45); (Dkt. No. 203 at 85); *see also* (Dkt. No. 217-23).

84. From November 29, 2021 to February 15, 2022, ICE rescinded detainers for at least 15 aliens detained within Texas facilities. (Dkt. No. 217 at 23). At least one of those aliens was subject to a final order of removal from the United States, but because of the dropped detainer, he was released into the public rather than ICE's custody. (Dkt. No. 203 at 80–81); (Dkt. No. 217 at 23).

85. Between approximately March to April 2021, the Louisiana Department of Public Safety and Corrections had at least four criminal aliens who were either (1) subject to detainers that were canceled; or (2) released to ICE custody only to later be returned to Louisiana. (Dkt. No. 217-1 at 13–15). These four individuals were thereafter placed on "supervised release" or "supervision by probation and parole." (*Id.*).

86. One of those was convicted of indecent behavior with juveniles and sexual battery. His detainer was rescinded, and he was released subject to supervised release. (*Id.* at 13–14).

87. Two others, one convicted of possessing Fentanyl and the other of aggravated second-degree battery, were released to ICE but almost immediately returned for supervised release rather than removed. (*Id.* at 14).

88. A fourth, convicted of aggravated assault with a firearm, was released to ICE but later returned to Louisiana's custody for supervised release. (*Id.* at 15).

89. The number of convicted criminal aliens in ICE custody per day has dropped dramatically in the months since the January Memorandum was issued and has continued through today under the subsequent Memoranda. There has been little variation in custody numbers since the January Memorandum was issued.[42]

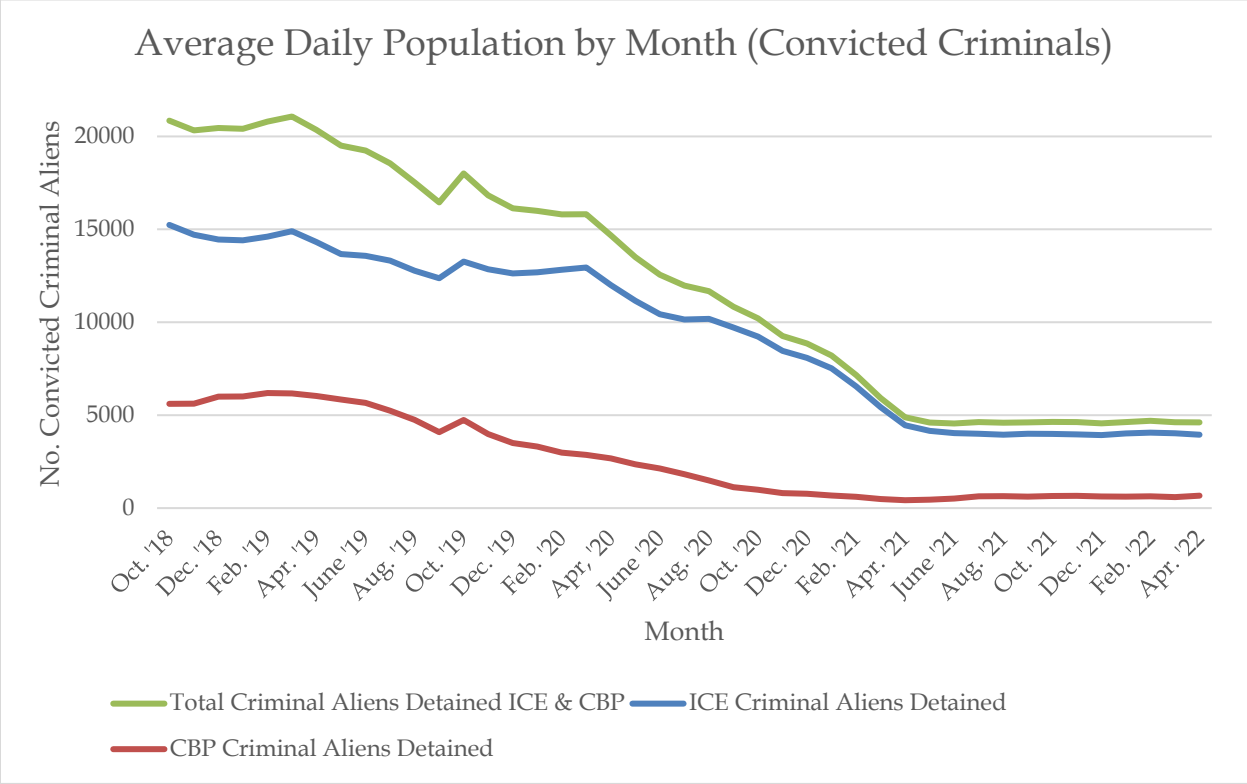
90. There has been little practical difference between ICE's detention of aliens with criminal convictions under the February Memorandum and under the Final Memorandum. (Dkt. No. 203 at 85); (Dkt. No. 210 at 40).

91. The average daily number of aliens with pending criminal charges in ICE custody has also dropped in the months since the Final Memorandum was issued.[43]

[42] *Detention Management*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detain/detention-management (last visited June 7, 2022) (download Detention FY 2022 YTD (Detention FY22 tab, line 73); FY 2021 Detention Statistics (Detention FY 2021 YTD tab, line 73); FY 2020 Detention Statistics (Detention EOFY2020 tab, line 56); and FY 2019 Detention Statistics (Detention FY19 tab, line 57)).

[43] *Detention Management*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detain/detention-management (last visited June 7, 2022) (download Detention FY 2022 YTD (Detention FY22 tab, line 74); FY 2021 Detention Statistics (Detention FY 2021 YTD tab, line 74)).

92. A similar pattern exists with respect to convicted criminal aliens in CBP custody.[44]

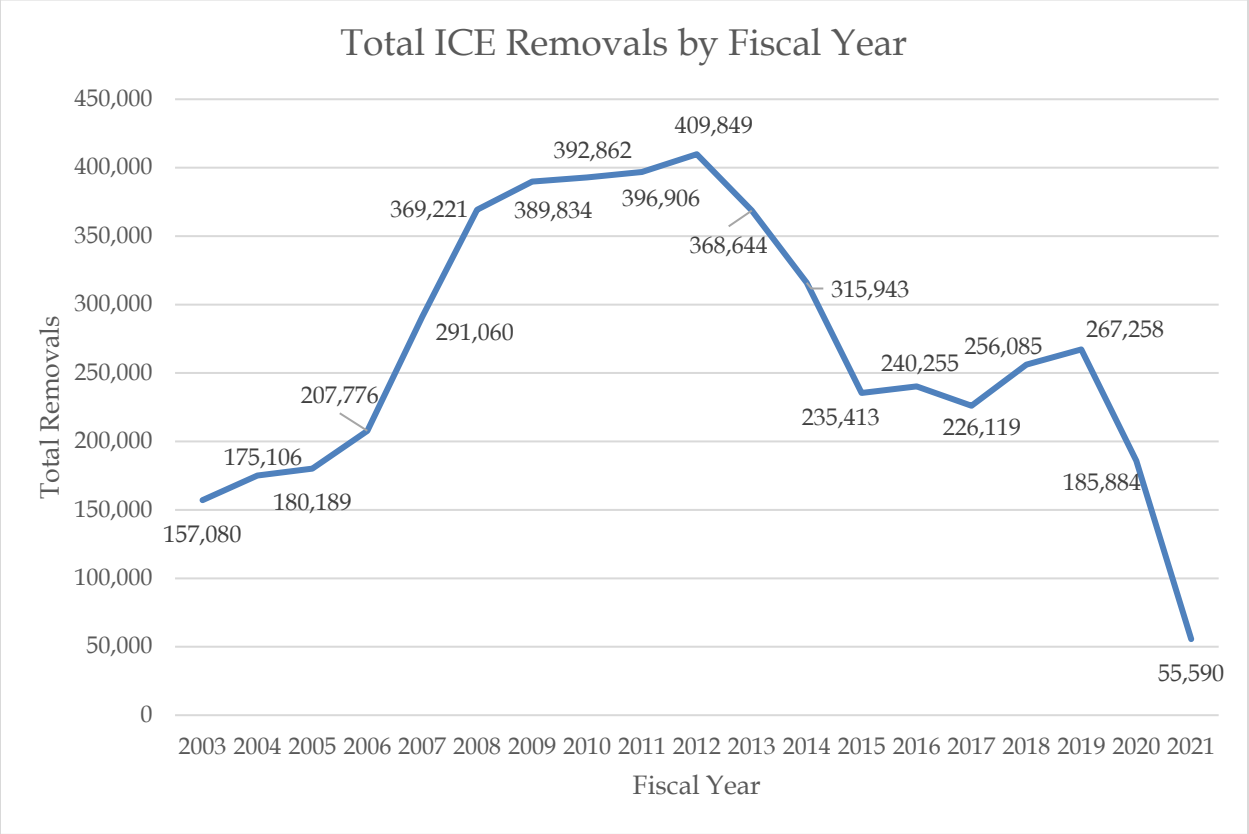


93. Even as COVID-19 conditions have improved, detentions of aliens with criminal convictions have remained considerably lower than prior years.

94. As the detention data indicate, officers do not have discretion to go outside the enforcement priorities. The data are not consistent with officers having the ability to disregard the admonitions in the Memoranda. Instead, they demonstrate that officers are expected to only take an enforcement action within much narrower circumstances.

[44] *Detention Management*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detain/detention-management (last visited June 7, 2022) (download Detention FY 2022 YTD (Detention FY22 tab, line 69); FY 2021 Detention Statistics (Detention FY 2021 YTD tab, line 69)).

95. The same decline is also evident in removals carried out by ICE, since DHS was created:[45]



96. These removal numbers—over three-fold below the removals carried out at the height of the pandemic—make clear that the Final Memorandum is dramatically impacting civil immigration enforcement and are a further indication that agents consider the Memoranda to contain mandatory directives that limit the discretion that was available to them in years' past.

97. The Final Memorandum subjects every enforcement action to review for compliance with its priorities and terms. (Dkt. No. 109-5 at 7–8); (Dkt. No. 217-18 at 12–13). DHS personnel are required to consider the priorities and other factors outlined in the Final Memorandum and are precluded from relying on a conviction, no matter how

[45] *Detention Management*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detain/detention-management (last visited June 7, 2022) (download FY 2021 Detention Statistics (Detention FY 21 YTD tab, line 29) (for fiscal year 2021); FY 2020 Detention Statistics (Detention EOFY2020 tab, line 29) (for fiscal year 2020)); (Dkt. No. 153-10 at 22) (for fiscal years 2017–2019); *FY 2016 ICE Immigration Removals*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/remove/removal-statistics/2016 (last visited June 7, 2022) (for fiscal years 2008–2016); *FY2003 – 2016 Removal by AOR Stats*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/doclib/foia/immigration_statistics/Removals-AOR-FY2003-2016.xlsx (last visited June 7, 2022) (for fiscal years 2003–2007).

serious, or the result of a database search alone before taking an enforcement action. (Dkt. No. 109-5 at 5, 7–8); (Dkt. No. 217-18 at 8, 12); (Dkt. No. 217-26 at 8–15, 18).

98. Based on the dramatic decrease in detentions of aliens with criminal convictions, the Final Memorandum and its priorities—particularly when viewed in light of the previous Memoranda and how they were implemented and enforced by DHS supervisors—are perceived by many ICE officers and agents as substantially limiting if not eliminating their discretion to make detention decisions. (Dkt. No. 109-5 at 7–8); (Dkt. No. 210 at 46, 163); *see supra* (F.F. No. 89); (F.F. Nos. 91–93); (F.F. No. 95).

99. The result is that an ostensibly permissive Final Memorandum is effectively mandatory at the most important level: the agents and officers who are tasked with enforcing the law.

100. The Memoranda have resulted in ICE officers rescinding detainers and declining to take aliens into custody who are covered by the statutes. (Dkt. No. 203 at 68–69, 73–74); (Dkt. No. 210 at 37–39, 80, 84–85, 87, 161); (Dkt. No. 217 at 19–23).

101. The Final Memorandum has led to the rescission of detainers, which has at least in part contributed to fewer criminal aliens being detained by ICE. (Dkt. No. 217 at 23); (Dkt. No. 210 at 45); (Dkt. No. 203 at 85); *see supra* (F.F. No. 89); (F.F. Nos. 91–93); (F.F. No. 95). It has also led to the release of aliens with final orders of removal. (Dkt. No. 203 at 80–81); (Dkt. No. 217 at 23).

102. The Final Memorandum increases the number of aliens with criminal convictions and aliens with final orders of removal released into the United States.

F. Increased Numbers of Criminal Aliens Lead to Increased State Costs

1. Costs of Incarcerating Criminal Aliens

103. The average cost to TDCJ for incarcerating an inmate who qualifies for reimbursement under the federal government's State Criminal Alien Assistance Program ("SCAAP") was $62.34 per day for the period of July 1, 2017 through June 30, 2018. (Dkt. No. 115-6 at 3). During that period, TDCJ incarcerated 8,951 eligible inmates for a total of 2,439,110 days. (*Id.*). The total estimated cost of incarcerating these inmates for that period was $152,054,117. (*Id.* at 3-4). Of that amount, the SCAAP program reimbursed only $14,657,739. (*Id.*). Thus, the estimated net cost to the State of Texas was approximately $56.33 per person per day.

104. For the most recently completed period, July 1, 2018 through June 30, 2019, TDCJ incarcerated 8,893 eligible inmates for a total of 2,385,559 days at an estimated total cost of $165,247,672. The average per-inmate, per-day cost of incarceration for those

inmates was $69.27. As of January 2022, SCAAP had not reimbursed any of that amount. (Dkt. No. 217 at 112 ¶¶ 6–7).

105. When ICE rescinds a detainer for an inmate in TDCJ custody, the Board of Pardons and Paroles considers that new information and has revoked parole for aliens who were previously approved for parole, leading to continued custody in TDCJ. (Dkt. No. 203 at 85–89); (Dkt. No. 217 at 19–23).

106. As the number of aliens in TDCJ custody increases, the net cost to the State of Texas of detaining those aliens increases. (Dkt. No. 217 at 112 ¶ 8).

107. TDCJ also incurs costs to keep aliens in custody or add them to parole or mandatory supervision programs when those aliens are not detained or removed by federal immigration authorities. For Fiscal Year 2020, the average per-day cost of these programs for each inmate not detained or removed is $4.64, which would total $11,068,994. (*Id.* at 113 ¶ 9).

108. Louisiana incurs costs to supervise aliens not detained by ICE while they are on supervised release. (Dkt. No. 217-1 at 15).

2. Recidivism of Criminal Aliens

109. A 2018 study from the United States Department of Justice's Bureau of Justice Statistics shows that state offenders generally recidivate at a 44% level within the first year following release, 68% within the first three, 79% within the first six, and 83% within the first nine. The same study shows that during the nine-year period following release, there were on average five arrests per released prisoner. (Dkt. No. 217-10 at 2).

110. Tarrant County, Texas averages 246 inmates with immigration detainers at any given time. The Tarrant County Sheriff estimates the average cost of jailing those inmates to be $3,644,442 per year. (Dkt. No. 217 at 107).

111. As of January 7, 2022, Tarrant County had 145 of these inmates out of a total population in custody of 3,855. (*Id.* at 107–08).

112. The 145 immigration-detainer inmates had 246 pending charges among them. They included, among other crimes, seven charges for murder, twenty-six charges for aggravated assault with a deadly weapon, and eight charges for aggravated sexual assault of a child. (*Id.*).

113. The Tarrant County Sheriff's Office examined the recidivism rates for inmates with immigration detainers by examining the criminal-history files of every such inmate jailed as of that date. In January 2022, it found a recidivism rate (indicated by prior jail time) of roughly 90% for that population, compared to 69% in October 2021. (*Id.* at 108).

114. DHS itself found that "[o]f the 123,128 ERO administrative arrests in FY 2019 with criminal convictions or pending criminal charges, the criminal history for this group represented 489,063 total criminal convictions and pending charges as of the date of arrest," which equates to "an average of *four* criminal arrests/convictions *per alien*, highlighting the recidivist nature of the aliens that ICE arrests." (Dkt. No. 153-10 at 15) (emphases added).

3. Education Provided to Criminal Aliens

115. The estimated average per-student, per-year funding entitlement for a student in Texas public schools in Fiscal Year 2022 will be $9,211. For a student who qualifies for English as a second language weighted funding, that amount is $11,500. (Dkt. No. 217 at 140).

116. While Texas does not have information on the total number of school-aged aliens attending public schools in the State, there is data for a subset of those children. (*Id.*).

117. Data from the U.S. Health and Human Services Office of Refugee Resettlement shows how many unaccompanied children were released to sponsors in Texas during annual October–September periods. Most unaccompanied children detained by the Government and released to sponsors in Texas qualify for English as a second language weighted funding. (*Id.*).

118. For each of those children educated in the Texas public school system the fiscal year following release to a sponsor and who qualified for English as a second language weighted funding, the State and local governments would incur millions of dollars in costs. Since fiscal year 2015, those costs have been as high as $176.42 million per year and as low as $26.95 million per year. (*Id.* at 140–41).

119. The total costs to Texas of providing public education to alien children will rise as the number of such children increases. (Dkt. No. 217 at 141).

120. The Texas Juvenile Justice Department ("TJJD") has custody of juvenile offenders who have committed felony-level offenses. When those juveniles are released, they attend public schools. (*Id.* at 155).

121. ICE previously sent detainers to TJJD for juvenile aliens. However, as of April 26, 2021, at least one alien juvenile in TJJD custody for committing aggravated robbery was not issued a detainer. That juvenile will attend a Texas public school upon release. (*Id.* at 155–56).

122. Some aliens with criminal convictions who are not detained by ICE because of the Final Memorandum will cause the Texas public school system to incur additional costs.

4. Healthcare Provided to Criminal Aliens

123. The Texas Health and Human Services Commission ("HHSC") provides three principal categories of services and benefits to aliens in Texas: (i) Texas Emergency Medicaid; (ii) the Texas Family Violence Program; and (iii) Texas Children's Health Insurance Program ("CHIP") Perinatal Coverage. Aliens also receive uncompensated medical care from public hospitals in the State. (*Id.* at 118).

124. The Emergency Medicaid program is a federally required program jointly funded by the federal government and the states. It provides Medicaid coverage to aliens living in the United States. (*Id.*).

125. Because HHSC Medicaid claims data do not conclusively identify an individual's residency status, HHSC must estimate the portion of Emergency Medicaid payments attributable to aliens. (*Id.*).

126. The Family Violence Program contracts with non-profit agencies across Texas to provide essential services to family violence victims, including aliens, in three categories: shelter centers, non-residential centers, and Special Nonresidential Projects. The Family Violence Program does not ask individuals about their residency status, so HHSC estimates the portion of Family Violence Program expenditures attributable to aliens. (*Id.* at 119).

127. Texas CHIP Perinatal Coverage provides perinatal care to certain low-income women who do not otherwise qualify for Medicaid. HHSC cannot definitively report the number of aliens served by CHIP Perinatal Coverage because the program does not require citizenship documentation. (*Id.*).

128. The following chart shows HHSC's estimates of the total cost to Texas to furnish coverage under each program to undocumented aliens.

State Fiscal Year	Emergency Medicaid	Family Violence	CHIP Perinatal
2009	$62 million	$1.3 million	$33 million
2011	$71 million	$1.3 million	$35 million
2013	$90 million	$1.4 million	$38 million
2015	$73 million	$1.0 million	$30 million
2017	$85 million	$1.2 million	$30 million
2019	$80 million	$1.0 million	$6 million

(*Id.* at 118–20).

129. HHSC has in the past estimated the amount of uncompensated medical care provided by state public hospital districts to aliens. HHSC estimated that those districts

incurred approximately $596.8 million in uncompensated care for aliens in State Fiscal Year 2006 and $716.8 million in State Fiscal Year 2008. (*Id.* at 120).

130. Some criminal aliens who are not detained by ICE because of the Final Memorandum will require these services, causing Texas to incur costs.

G. THE AGREEMENTS BETWEEN THE STATES AND DHS

131. On January 8, 2021, an official in DHS, Ken Cuccinelli, signed agreements with the States of Texas and Louisiana. (Dkt. No. 153-8 at 43–52, 53–56); (Dkt. No. 153-9 at 1–6).

132. These agreements sought to provide individual states with 180-days' written notice before DHS took "any action or [made] any decision that could reduce immigration enforcement, increase the number of removable or inadmissible aliens in the United States, or increase immigration benefits or eligibility for benefits for removable or inadmissible aliens." (Dkt. No. 153-8 at 46); *see also* (*id.* at 56).

133. In letters dated February 2, 2021, signed by Acting DHS Secretary Pekoske and addressed to Texas and Louisiana, DHS stated that the agreements were unenforceable and non-binding. (Dkt. No. 153-14 at 19–20, 22–23). In addition, in each of those letters, Acting Secretary Pekoske stated that, "[n]otwithstanding that the Document is void, not binding, and unenforceable—and preserving all rights, authorities, remedies, and defenses under the law—this letter also provides notice . . . that DHS, CBP, ICE and USCIS rescinds, withdraws, and terminates the Document, effective immediately." (*Id.*).

134. Each of those agreements had a clause stating that termination of those agreements would take effect "180 days after the written termination request was submitted or upon a date agreed upon by all parties, whichever is earlier." (Dkt. No. 153-8 at 50); (Dkt. No. 153-9 at 4).

135. Texas's purported agreement with DHS was terminated as of August 1, 2021. (Dkt. No. 109 at 20).

II. STANDING

The Court now turns to the legal analysis. To bring a lawsuit in federal court, a plaintiff must have standing. The Supreme Court has distilled the standing doctrine into an "irreducible constitutional minimum" whereby a plaintiff must demonstrate (1) that it suffered an "injury in fact" that is "concrete and particularized" and "actual or

imminent," (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–39, 136 S.Ct. 1540, 1547–48, 194 L.Ed.2d 635 (2016). Both Texas and Louisiana maintain that they have standing, but only one state need have standing to proceed to the merits. *Texas v. Biden*, 20 F.4th 928, 969 (5th Cir. 2021) (hereinafter *Texas MPP*), *cert. granted*, 142 S.Ct. 1098, 212 L.Ed.2d 1 (2022). Since there was a final trial on the merits, the States must prove standing by a preponderance of the evidence. *Id.* The wealth of evidence at trial was as to Texas's claims, so the Court considers Texas's case for standing.[46]

[46] Relevant to this controversy, the Court is mindful that the States are not typical litigants, especially for the purpose of invoking federal jurisdiction in this context. *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 1454, 167 L.Ed.2d 248 (2007). The Court holds that the States are entitled to "special solicitude" in their quest to establish standing. *Id.* at 520, 127 S.Ct. at 1454–55. This is not an alternative, state-specific track for them to prove standing, but rather lowers the burden for them to establish constitutional standing when the conditions for special solicitude are met. *Texas MPP*, 20 F.4th at 970.

Special solicitude has two requirements. First, the State must have a procedural right to challenge the action in question. *Id.* at 969. Second, the challenged action must affect one of the State's quasi-sovereign interests—that is, one of the "formerly sovereign prerogatives that are now lodged in the Federal Government." *Id.* (cleaned up). The first element is satisfied because the APA affords Texas a procedural right to challenge DHS's rules. *See Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015) (citing 5 U.S.C. § 702) (hereinafter *Texas DAPA*); *see also Texas MPP*, 20 F.4th at 970. The second element is satisfied because at least two of Texas's quasi-sovereign interests are implicated here: Texas's interest in being free from "substantial pressure" from the federal government to change its laws, and Texas's interest in the enforcement of immigration law—the power to regulate immigration being a sovereign prerogative that Texas wholly ceded to the Government when it joined the Union. *Texas DAPA*, 809 F.3d at 152–54; *see also Texas MPP*, 20 F.4th at 970; *see generally Arizona*, 567 U.S. at 394–98, 132 S.Ct. at 2497–500. Indeed, special solicitude is especially apt in this case because of the States' inability to legislate on their own behalf in this area. *Texas DAPA*, 809 F.3d at 152–53; *see Arizona*, 567 U.S. at 394–98, 132 S.Ct. at 2497–500.

Since the States are entitled to special solicitude, at a minimum, this makes it easier for them to establish the imminence and redressability components of standing. *Texas MPP*, 20 F.4th at 970. The Court holds that the States have established standing without the need for special solicitude. But lest any doubt remain, special solicitude certainly pushes them over the line.

A. INJURY IN FACT

Texas's first task is to establish an injury in fact. The Final Memorandum harms Texas in two ways: financially and as *parens patriae*. As to its finances, Texas has suffered a concrete and particularized, actual injury. (F.F. Nos. 103–30). Texas has also suffered concrete and particularized, actual injuries to its interests as *parens patriae*.[47] Texas possesses a quasi-sovereign interest in protecting its citizens from the criminal activity of aliens subject to mandatory detention under federal law. *Texas v. United States*, 555 F. Supp. 3d 351, 378–79 (S.D. Tex. 2021) (collecting cases) (hereinafter *Texas II*). And, at trial, Texas showed that aliens who are subject to mandatory detention, but that ICE declined to detain, have already committed, and are committing, more crimes in Texas. (F.F. No. 82); (F.F. Nos. 109–14).

These harms are to legally protected interests under both the traditional and *parens patriae* inquiries. *See Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015) (hereinafter *Texas DAPA*); *see also Texas MPP*, 20 F.4th at 969–72. And they are substantial. (F.F. Nos. 103–04); (F.F. No. 107); (F.F. No. 118); (F.F. Nos. 128–29).

B. TRACEABILITY

Texas also established a "fairly traceable link" between its injuries and the Government's action. For instance, when ICE rescinds a detainer for an inmate in TDCJ

[47] As discussed at length in this Court's memorandum opinion and order granting a preliminary injunction, *Texas v. United States*, 555 F. Supp. 3d 351, 376–80 (S.D. Tex. 2021), *parens patriae* standing results from the existence of an injury to a "quasi-sovereign" interest. There are "two general categories" in which a quasi-sovereign interest may fall. *Id.* at 377. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents. *Id.* Second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system. *Id.*

custody, the Texas Board of Pardons and Paroles considers that new information and has revoked parole for aliens who were previously approved for parole. (F.F. No. 105). This has led to aliens remaining in TDCJ custody longer than they otherwise would, which imposes additional costs on the State of Texas. (F.F. No. 107). It has also caused, and continues to cause, increases in the number of criminal aliens and aliens with final orders of removal released into Texas. (F.F. No. 79); (F.F. Nos. 83–85); (F.F. No. 89); (F.F. Nos. 91–92); (F.F. No. 95); (F.F. Nos. 100–02). It has caused, and continues to cause, increases in Texas's expenditures on public services such as healthcare and education. (F.F. No. 118); (F.F. No. 128). When the Government declines to detain aliens subject to mandatory detention, either the States must pay to continue to detain them or they are released into the States. (F.F. No. 105); (F.F. No. 107). Upon release, some have consumed, and will continue to consume, social services that the States are required to provide. (F.F. No. 122); (F.F. No. 130). In addition, some have recidivated, and others will recidivate. (F.F. No. 82); (F.F. Nos. 109–14). *Cf. Texas DAPA*, 809 F.3d at 160; *see Texas MPP*, 20 F.4th at 972. "The causal chain is easy to see." *Texas MPP*, 20 F.4th at 972.

Here, there is no need to rely on appeals to human nature—that third parties "will likely react in predictable ways"—in response to the action of the Government, thereby causing a traceable harm to Texas. *See Dep't of Com. v. New York*, ____ U.S. ____, ____, 139 S.Ct. 2551, 2566, 204 L.Ed.2d 978 (2019). At trial, the States proved by a preponderance of the evidence that aliens with criminal convictions *have* reacted in specific ways that harm Texas.

C. REDRESSABILITY

Last, the Court can redress the States' injuries. The APA empowers the Court to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The Court finds that the Final Memorandum has led to more criminal aliens and aliens with final orders of removal being released into Texas and Louisiana. (F.F. Nos. 79–80); (F.F. Nos. 82–85); (F.F. No. 90–92); (F.F. No. 95); (F.F. No. 102). So vacatur of the Final Memorandum would directly contribute to the decrease in the number of criminal aliens in the States' prisons and the number of aliens who are subject to a final order of removal being released into the States. This would decrease the financial injury and *parens patriae* injury that the States are suffering. Indeed, detention of aliens with criminal convictions was substantially higher before DHS issued the series of memoranda in 2021. (F.F. No. 92).

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The Court holds that the States have standing.[48]

[48] With the exception of the Sixth Circuit's stay opinion, *Arizona v. Biden*, 31 F.4th 469, 474–77 (6th Cir. 2022), every court to have considered challenges to the Final Memorandum and its predecessor memoranda has found standing. *Arizona v. Biden*, ____ F. Supp. 3d ____, ____, 2022 WL 839672, at *14 (S.D. Ohio Mar. 22, 2022); *Texas II*, 555 F. Supp. 3d at 373–85; *Arizona v. DHS*, 2021 WL 2787930, at *8 (D. Ariz. June 30, 2021); *Florida v. United States*, 540 F. Supp. 3d 1144, 1156 (M.D. Fla. 2021), *vacated as moot*, No. 21-11715, 2021 WL 5910702 (11th Cir. Dec. 14, 2021) (per curiam).

Importantly, the Sixth Circuit noted that it did not have evidence that there was a connection between the decrease in enforcement actions and the Final Memorandum. *Arizona*, 31 F.4th at 475. The Sixth Circuit held that there was no evidence that removing the Final Memorandum would result in DHS "arresting more people, detaining more people, or removing more people." *Arizona*, 31 F.4th at 475. In this case, the States' theory of injury is based on the Final Memorandum causing increased numbers of *criminal* aliens within their borders, and as shown above, the Final Memorandum has caused ICE to detain fewer criminal aliens. (F.F. No. 79); (F.F. Nos. 82–85); (F.F. No. 90); (F.F. No. 92); (F.F. No. 95); (F.F. No. 102).

III. JUDICIAL REVIEW

The Court must determine whether the States' claims are judicially reviewable before turning to the merits. There are four inquiries: final agency action, statutory bars to judicial review, committed to agency discretion, and zone of interests. The Court addresses each in turn.

A. FINAL AGENCY ACTION

To be subject to judicial review under the APA, the Final Memorandum must be "final agency action for which there is no other adequate remedy in a court[.]" *See* 5 U.S.C. § 704. The Fifth Circuit considers this determination "a jurisdictional prerequisite of judicial review." *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016). "The Supreme Court has long taken a pragmatic approach to finality, viewing the APA's finality requirement as flexible." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (cleaned up). To constitute final agency action, two conditions must be satisfied. *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 1168–69, 137 L.Ed.2d 281 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* (citations and quotations omitted). Second, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (quotations omitted). The Parties do not dispute that the Final Memorandum marks the consummation of the agency's decisionmaking process, (Dkt. No. 122 at 36 n.10), and the Court agrees. *See Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168.

It is the second condition that is in dispute. The Fifth Circuit has held that an agency guidance document produces legal consequences or determines rights and obligations when the document binds the agency and its staff to a legal position. *EEOC*, 933 F.3d at 441–42; *Texas MPP*, 20 F.4th at 948–49. A guidance document binds the agency and its staff when the document "either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *EEOC*, 933 F.3d at 441 (cleaned up); *Texas MPP*, 20 F.4th at 948. "[M]andatory language" in an agency's guidance document alone can be sufficient to render it binding. *EEOC*, 933 F.3d at 441–42. Likewise, "where agency action withdraws an entity's previously-held discretion," that action is binding. *Id.* at 442 (citation omitted); *see Texas MPP*, 20 F.4th at 948.

The Final Memorandum is final agency action. First, the Final Memorandum is facially binding on DHS personnel. Second, the Considerations Memorandum and other related evidence of DHS's internal practices demonstrate that the Final Memorandum is being applied in a way that makes it binding. Third, detention data also demonstrate that the Final Memorandum is being applied in a way that makes it binding. Finally, the Final Memorandum creates legal rights for aliens subject to enforcement action.

1. Facially Binding

The Final Memorandum facially binds DHS personnel using mandatory language. The Final Memorandum states that DHS "personnel *must* evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly" and that "[w]hether a noncitizen poses a current threat to public safety *is not to be determined* according to bright lines or categories, [but by] an assessment of the individual and the

totality of the facts and circumstances." (Dkt. No. 109-5 at 4–5) (emphases added). It also states that "[t]he fact an individual is a removable noncitizen [] *should not* alone be the basis of an enforcement action against them" and that DHS "personnel *should not* rely on the fact of conviction or the result of a database search alone."[49] (*Id.* at 3, 5) (emphases added). Additionally, it states that a "review process should be put in place to ensure the rigorous review of our personnel's enforcement decisions" and it "should seek to achieve quality and consistency in decision-making across the entire agency and the Department." (*Id.* at 7). Last, the Final Memorandum "is Department-wide" and states that "[a]gency leaders as to whom this guidance is relevant to their operations will implement this guidance accordingly." (*Id.* at 8). This mandatory language makes the Final Memorandum facially binding. *Cf. EEOC*, 933 F.3d at 443 (approving the holding in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("a guidance

[49] The Government argues that directing agents not to rely on the fact of conviction alone does not actually change anything because agents must still "engage in a categorical or modified categorical analysis" to determine whether a state-court conviction is covered by Section 1226(c), even absent any agency guidance. (Dkt. No. 223 at 12–13). But to detain someone under these statutes, agents only need "reason to believe" that the state-court conviction falls within the statutory categories—certainty is not required. *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 230 (3d Cir. 2011) (quoting Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review, 63 Fed. Reg. 27,441, 27,444 (May 19, 1998)), *abrogated on other grounds by Jennings v. Rodriguez*, ____ U.S. ____, 138 S.Ct. 830, 200 L.Ed.2d 122 (2018); *Jennings*, ____ U.S. at ____, 138 S.Ct. at 836 ("Detention during [immigration] proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made."). In addition, if that officer is mistaken, an alien can request a hearing to challenge the detention. *See Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). There are also constitutional limits on detention. *Zadvydas v. Davis*, 533 U.S. 678, 699, 121 S.Ct. 2491, 2503, 150 L.Ed.2d 653 (2001).

document requiring agency staff to use a multi-factor analysis in deciding whether a regulated entity's activity complied with governing law was a final agency action")).

This mandatory language is not diluted by other lines from the Final Memorandum, which state that it "does not compel an action to be taken or not taken" and leaves the exercise of discretion "to the judgment of our personnel."[50] (Dkt. No. 109-5 at 6). The Final Memorandum's inclusion of these select statements does not subvert the mandatory language throughout the document requiring agents to consider and apply certain priorities and factors and precluding them from relying on the fact of conviction alone. *Cf. Texas v. United States*, 549 F. Supp. 3d 572, 600 (S.D. Tex. 2021) ("The DACA Memorandum itself also includes mandatory language that contradicts its purported conferral of discretion."). The Final Memorandum facially binds DHS staff by using mandatory language to impose requirements on agency personnel. This satisfies the second *Bennett* prong. 520 U.S. at 177–78, 117 S.Ct. at 1168; *Texas MPP*, 20 F.4th at 949; *EEOC*, 933 F.3d at 442–43.

Further, because the Final Memorandum requires consideration and application of additional priorities and factors and precludes reliance on a conviction alone—requirements that would not exist in the Final Memorandum's absence—it binds the agency by "withdraw[ing] [agents'] previously-held discretion[.]" *See EEOC*, 933 F.3d at

[50] The end of the Final Memorandum also states that this "guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter." (Dkt. No. 109-5 at 8). But this kind of boilerplate language is given little weight in the final agency action analysis. *See Appalachian Power Co.*, 208 F.3d at 1023.

442. As explained in greater detail below, Sections 1226(c) and 1231(a)(2) mandate detention for certain categories of aliens. *See infra* III.C.1. Prior to the Final Memorandum, agents could detain an alien with a criminal conviction listed in Section 1226(c) based on the simple fact of that conviction alone. Or they could detain an alien based on the simple fact of a final order of removal. Now they must consider the personal history of each covered alien and their family members for aggravating and mitigating circumstances before taking any enforcement action, including detention. (Dkt. No. 217-26 at 12, 18). If an officer determines that the *only* factor supporting detention is that the alien is covered by the mandatory provisions of Section 1226(c) or Section 1231(a)(2), the officer may not detain the alien. This imposes additional requirements on DHS personnel that would not otherwise exist and is a separate reason that the Final Memorandum satisfies the second *Bennett* prong.[51] *Texas MPP*, 20 F.4th at 951 ("The Termination Decision . . . created legal consequences by stripping preexisting discretion from DHS's own staff."); *see Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168; *EEOC*, 933 F.3d at 442–43.

[51] The Government also disputes that the Final Memorandum requires agents to consider its priorities and factors before taking an enforcement action. The Government relies on a statistic that, under the February Memorandum, over 90% of requests to take an enforcement action outside of the three priorities were approved. (Dkt. No. 122 at 19); (Dkt. No. 223 at 14–15). This demonstrates, in the Government's view, that the priorities were not binding on DHS personnel. But the same document reporting the 90% statistic also notes that many ICE offices have a practice of pre-vetting cases before they are submitted for approval, which deceptively inflates the percentage. (F.F. Nos. 46–47). Additionally, under the Final Memorandum, the option to report an enforcement action outside the Final Memorandum's priority categories no longer exists. (Dkt. No. 217-18 at 8).

2. Binding Based on Related Evidence

Other evidence further supports the conclusion that the Final Memorandum is being applied in a way that binds DHS personnel. *See EEOC*, 933 F.3d at 441; *see also Texas MPP*, 20 F.4th at 948. The Considerations Memorandum states that "the new guidelines will *require* the workforce to engage in an assessment of each individual case and make a case-by-case assessment as to whether the individual poses a public safety threat, guided by a consideration of aggravating and mitigating factors." (Dkt. No. 146-1 at 19) (emphasis added).

Additional insight comes from the Quick Reference Guide to ICE's Activity Analysis and Reporting Tool—the database in which it tracks enforcement actions. (Dkt. No. 217-18). When an agent takes an enforcement action (including issuing a detainer), the agent must report which of the three Final Memorandum priority categories applies. (Dkt. No. 217-18 at 8). The Guide requires agents to categorize an enforcement action as falling under one of the priorities in the Final Memorandum—it only includes radio buttons for the three priority categories and contains the disclaimer "**'*Other*' Priority is no longer an option**." (*Id.*) (emphasis in original). When the "Public Safety" category is selected, agents must then select from a list each aggravating factor that applies.[52] (*Id.* at 9). Before submitting the information, the agent must certify that he or she has read and

[52] The agent must consider whether the individual was convicted of an aggravated felony; charged with an aggravated felony; convicted of a felony; charged with a felony; convicted of multiple misdemeanors; charged with multiple misdemeanors; is a known or suspected gang member; or if the police report indicates "particularly heinous or dangerous behavior not reflected in charges or convictions"; or "other." (Dkt. No. 217-18 at 9). If "other" is selected, a narrative description is required. (*Id.*).

complied with the directive to "consider[] all relevant case specific information" available at the time of the enforcement action "which may include but is not limited to the nature and degree of harm to any victim(s), the significance and the sophistication of the offense, the length of the resulting sentence, and the duration of time that has elapsed since the offense and or release." (*Id.* at 12). Submissions are reviewed by the agent's supervisors "for review and confirmation" that "all necessary information has been provided." (*Id.* at 4, 13).

Furthermore, the mandatory "ICE Academy" training webinar on the Final Memorandum for DHS personnel reiterates that agents should apply the Final Memorandum's priorities and factors in decision-tree fashion. (Dkt. No. 217-26 at 18). The training webinar details the inquiries officers are expected to make. (Dkt. No. 217-16). For instance, before an ICE officer takes an enforcement action under the "Threats to Public Safety" priority category, the officer should examine the following aggravating factors:

> Gravity of the offense of conviction and the sentence imposed; Nature and degree of harm caused by the criminal offense: [] both societal harm caused by a violent offense and other harms (e.g., victim impact, exploitation of vulnerable individuals); Sophistication of the criminal offense; Use, or threatened use, of a firearm or dangerous weapon; [and] a serious prior criminal record.

(*Id.* at 55). The ICE officer should also examine the following mitigating factors:

> Advanced or tender age; Lengthy presence in the United States; A mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment; Status as a victim of crime or victim, witness, or party in legal proceedings; Impact of removal on

> family in the United States, such as loss of provider or caregiver; Whether the noncitizen may be eligible for humanitarian protection or other immigration relief; Military or other public service of the noncitizen or their immediate family; Time since an offense and evidence of rehabilitation; [and whether the] [c]onviction was vacated or expunged.

(*Id.* at 57). The officer is then instructed that consideration of the totality of the facts and circumstances includes:

- Reviewing "the noncitizen's record and any specific aggravating factors." (*Id.* at 61).
- Completing and understanding "the profile of the individual by identifying mitigating factors as well." (*Id.*).
- Reviewing "the noncitizen's entire known criminal and administrative record, and other investigative information, before making a decision" and directing questions to "their colleagues [as to] how they might handle the case." (*Id.*).
- Conducting "an investigation to identify the aggravating and mitigating factors that might be present and inform the assessment of the individual." (*Id.*).
- Potentially going "beyond the contents of the record" and pursuing "interviews of individuals with relevant information," especially where "the noncitizen is not represented by counsel." (*Id.*).
- Noting that the "record could include a range of official and unofficial documents with relevant information." (*Id.*).

The Considerations Memorandum, the Quick Reference Guide to ICE's Activity Analysis and Reporting Tool, and the "ICE Academy" training webinar all demonstrate that the Final Memorandum is being applied in a way that is binding on DHS personnel. *See EEOC*, 933 F.3d at 441–42; *see also Texas MPP*, 20 F.4th at 948–49. The result is that an ostensibly permissive Final Memorandum is effectively mandatory at the most important level: the agents and officers who are tasked with enforcing the law. (F.F. No. 99).

3. Binding Based on Detention Data

Data on ICE's detention practices for aliens with criminal convictions further demonstrate that the Final Memorandum is being applied by the agency in a way that makes it binding. *See EEOC*, 933 F.3d at 441; *see also Texas MPP*, 20 F.4th at 948. DHS has detained significantly fewer aliens with criminal convictions or pending criminal charges since the January Memorandum was issued. (F.F. No. 92). This same pattern continued unabated through the issuance of the Final Memorandum and has continued since. (*Id.*). Further, the States' witnesses testified that since the Final Memorandum was implemented, DHS has continued to rescind detainers, and DHS officials attribute those rescissions to the Final Memorandum. (F.F. No. 83); (F.F. No. 100).

4. Creates Rights or Obligations

In addition to being binding on DHS and its employees, the Final Memorandum also confers rights on aliens subject to enforcement and is therefore an agency action "by which rights or obligations have been determined, or from which legal consequences will flow." *See Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168. The Final Memorandum states that DHS will "work to establish a fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken." (Dkt. No. 109-5 at 7). That case review process has been implemented, and it allows aliens to challenge an enforcement action if they believe it does not comply with the Final Memorandum. (F.F. No. 67).

Not only does this process demonstrate that the Government's characterization of the Final Memorandum as mere "guidance" is categorically false, it also shows that the

Final Memorandum provides a new basis on which aliens may avoid being subject to the enforcement of immigration law. This creates new "rights or obligations," and it provides an additional basis on which the Court finds that the Final Memorandum is final agency action. *See Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1168.

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In sum, the Final Memorandum is final agency action. It is facially binding on DHS and its staff because it uses mandatory language that requires DHS personnel to consider and apply certain priorities and factors before taking enforcement action, and it expressly disallows reliance on the fact of conviction alone, which removes agents' previously held discretion. *See EEOC*, 933 F.3d at 441–42, 445; *see also Texas MPP*, 20 F.4th at 948. It is also being applied in a way that makes it binding on DHS and its staff. *See EEOC*, 933 F.3d at 441; *see also Texas MPP*, 20 F.4th at 948. And it creates rights or obligations by providing a basis on which aliens can challenge enforcement actions that they believe are inconsistent with the Final Memorandum's priorities. *See Bennett*, 520 U.S. at 177–78, 117 S.Ct. at 1169. Accordingly, it is an action "by which rights or obligations have been determined, or from which legal consequences will flow," and it satisfies the second *Bennett* prong. *Id*. Because the Final Memorandum satisfies both *Bennett* prongs, the Court holds that it is final agency action under the APA.[53]

[53] Additionally, the Court holds that the Final Memorandum is a legislative rule. *See infra* IV.C. Because legislative rules are necessarily final agency action, this holding is an alternative basis for the Court's conclusion that the Final Memorandum is final agency action. *See Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 634–35 (D.C. Cir. 2019); *EEOC*, 933 F.3d at 441.

B. STATUTORY BARS TO JUDICIAL REVIEW

Under the APA, an action may not proceed when another statute precludes judicial review. 5 U.S.C. § 701(a)(1). The Government contends that 8 U.S.C. §§ 1252, 1226(e), and 1231(h) bar review. (Dkt. No. 122 at 37–41). None do.

As an initial matter, the Fifth Circuit has already concluded that "the entirety of the text and structure of § 1252 indicates that it operates only on denials of relief for individual aliens." *Texas MPP*, 20 F.4th at 977; *see id.* at n.11; *see also J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031–32 (9th Cir. 2016). A closer review of subsections (a)(5) and (b)(9), which the Government cites, confirms that neither provision bars review.

First, Section 1252(a)(5) provides that federal courts of appeal have exclusive jurisdiction for any petition for review "filed . . . in accordance with" Section 1252 itself. 8 U.S.C. § 1252(a)(5). In plain language: an individual who has an order of removal affirmed by the Board of Immigration Appeals may appeal that decision directly to a federal circuit court. *See Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012); *see also* 8 U.S.C. § 1252(d). The States are not challenging an order of removal or petitioning for judicial review of one. Section 1252(a)(5) is therefore inapplicable. *Texas v. United States*, 524 F. Supp. 3d 598, 640 (S.D. Tex. 2021) (hereinafter *Texas I*).

The same is true of 8 U.S.C. § 1252(b)(9). Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9). This means that an individual subject to an order of removal must consolidate judicial review of his or her immigration proceedings into one action. *I.N.S. v. St. Cyr*, 533 U.S. 289, 313–14, 121 S.Ct. 2271, 2286–87, 150 L.Ed.2d 347 (2001); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 499, 119 S.Ct. 936, 951, 142 L.Ed.2d 940 (1999) (Stevens, J., concurring). Again, the States are not challenging a final order of removal, nor are they challenging any aspect of a removal proceeding that an individual has undergone. So, Section 1252(b)(9) is likewise inapplicable. *Texas I*, 524 F. Supp. 3d at 640–41; *see also Dep't of Homeland Sec. v. Regents of the Univ. of California*, ____ U.S. ____, ____, 140 S.Ct. 1891, 1907, 207 L.Ed.2d 353 (2020) ("§ 1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." (cleaned up)).

Next, the Government contends that Section 1226(e) bars the States' claims as they relate to Section 1226(c). Section 1226(e) provides:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). The Supreme Court has found that Subsection (e)'s limitation "applies only to discretionary decisions about the application of § 1226 *to particular cases*." *Nielsen v. Preap*, ____ U.S. ____, ____, 139 S.Ct. 954, 962, 203 L.Ed.2d 333 (2019) (internal quotations omitted) (emphasis added). Section 1226(e), therefore, "does not block

lawsuits over the extent of the Government's detention authority under the statutory framework as a whole." *Id.* (internal quotations omitted); *see Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999); *see also Demore v. Kim*, 538 U.S. 510, 517, 123 S.Ct. 1708, 1714, 155 L.Ed.2d 724 (2003); *Jennings v. Rodriguez*, ____ U.S. ____, ____, 138 S.Ct. 830, 839–41, 200 L.Ed.2d 122 (2018). Further, Subsection (e) does not prevent plaintiffs from questioning the meaning of Section 1226(c). *Preap*, ____ U.S. at ____, 139 S.Ct. at 961–62.

Here, the States' claims against the Government "dispute the extent of the statutory authority that the Government claims." *See id.* at ____, 139 S.Ct. at 962. In effect, "the general extent of the Government's authority under § 1226(c) is precisely the issue here." *See id.*; *see also Jennings*, ____ U.S. at ____, 138 S.Ct. at 841. Section 1226(e) does not bar review. *Texas II*, 555 F. Supp. 3d at 387–88.

Finally, the Government argues that Section 1231(h) bars any claim pertaining to Section 1231(a)(2). Section 1231(h) provides in full:

> Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

8 U.S.C. § 1231(h). This Court, after conducting an extensive analysis, previously held that Section 1231(h) does not bar the States from challenging a rule under the APA that is purportedly contrary to Section 1231. *Texas I*, 524 F. Supp. 3d at 633–39; *see also Texas II*, 555 F. Supp. 3d at 386–87. The Government merely re-urges its previously rejected arguments. The Court is not persuaded.

As a last resort, the Government argues that review is barred because there is a detailed scheme for claims pertaining to the INA. Yet each of the limiting provisions that the Government cites is within a statutory section that deals with judicial review of an individualized decision in a suit brought by an alien him or herself. *See* 8 U.S.C. §§ 1226, 1231, 1252. None of these provisions bar review. *Texas I*, 524 F. Supp. 3d at 641–42.

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The Court holds that there are no statutory bars to review.

C. COMMITTED TO AGENCY DISCRETION

The APA embodies a "basic presumption of judicial review." *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 2030, 124 L.Ed.2d 101 (1993) (citation omitted). An agency action, however, is not reviewable if it "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception to judicial review is narrow and confined "to those *rare* administrative decisions traditionally left to agency discretion." *Regents*, ____ U.S. at, ____, 140 S.Ct. at 1905 (emphasis added) (cleaned up). The exception is also limited to "those *rare* circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, ____ U.S. ____, ____, 139 S.Ct. 361, 370, 202 L.Ed.2d 269 (2018) (citation omitted) (emphasis added). Here, the agency action is not committed to discretion by law. To understand why, the Court begins with the applicable statutes.

1. Mandatory Duties under Sections 1226(c) and 1231(a)(2)

The two relevant statutes are 8 U.S.C. §§ 1226(c) and 1231(a)(2). Under Section 1226(c), "[t]he Attorney General shall take into custody" certain aliens when "released" from state or local custody. 8 U.S.C. § 1226(c). Likewise, Section 1231(a)(2) provides: "During the removal period, the Attorney General shall detain the alien." 8 U.S.C. § 1231(a)(2). Statutory interpretation, precedent, and more demonstrate that Sections 1226(c) and 1231(a)(2) impose mandatory duties to detain.

a. Statutory Interpretation

Words matter, so the Court begins by examining the text of the statute. *Artis v. Dist. of Columbia*, ____ U.S. ____, ____, 138 S.Ct. 594, 603, 199 L.Ed.2d 473 (2018). A court gives those words their ordinary meaning when they are not defined. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566, 132 S.Ct. 1997, 2002, 182 L.Ed.2d 903 (2012). The words have "meaning only in context." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415, 125 S.Ct. 2444, 2449, 162 L.Ed.2d 390 (2005). And "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 2417, 168 L.Ed.2d 112 (2007). Finally, "policy concerns cannot trump the best interpretation of the statutory text." *Patel v. Garland*, ____ U.S. ____, ____, 142 S.Ct. 1614, 1627, ____ L.Ed.2d ____ (2022).

To begin, Section 1226 governs the apprehension and detention of aliens.[54] Section 1226(a) provides as follows: "On a warrant issued by the Attorney General, an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a) (emphasis added). The statute continues on:

> *Except as provided in subsection (c)* and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole; but
>
> (3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

Id. (emphasis added). Put simply, Section 1226(a) provides the default rule: the Executive Branch has general discretion to detain aliens. But there are limits to that discretion, as evidenced by the language "except as provided in subsection (c)." Section 1226(c) thus cabins the general grant of discretion under Section 1226(a). *Preap*, ____ U.S. ____, 139 S.Ct. at 966.

Section 1226(c), titled "Detention of criminal aliens," lists those limitations to the general discretion to detain:

[54] "Section 1226 applies before an alien proceeds through the removal proceedings and obtains a decision; § 1231 applies after." *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2290; *see also Texas I*, 524 F. Supp. 3d at 611–17 (detailing the immigration removal process).

> The Attorney General *shall* take into custody any alien who—
>
> > (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
> >
> > (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> >
> > (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
> >
> > (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1) (emphases added). Section 1226(c)(2) continues on to list circumstances in which aliens described under Section 1226(c)(1) may be released: the Attorney General "may" release aliens described in Subsection (c)(1) "only if" certain circumstances are present. *Id.* § 1226(c)(2).

The contrast between "may" under Section 1226(a) and "shall" under Section 1226(c) is important. "The word 'shall' usually connotes a requirement." *Maine Cmty. Health Options v. United States*, ____ U.S. ____, ____, 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020) (citation omitted). The word "may," by contrast, "customarily connotes discretion," particularly where "may" is juxtaposed with "shall." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346, 125 S.Ct. 694, 703, 160 L.Ed.2d 708 (2005). Also note that Section 1226(c)(1) includes a temporal requirement: "when the alien is released." The temporal requirement provides a trigger for when discretion must yield to a mandate.

For Section 1226(c)(2) to have any meaning, Section 1226(c)(1) must be a mandate: the Attorney General must detain aliens when released from state or local custody, and these aliens may then be released from detention *only if* certain situations call for it. If Subsection (c)(1) is not interpreted in this way, then Subsection (c)(2) loses its significance. It would be superfluous for Congress to state the only circumstances in which certain aliens may be released—per Subsection (c)(2)—if the Government was meant to initially have the discretion to decide which criminal aliens to detain in the first place. The Government could free itself from a requirement to detain merely by *choosing* not to detain in the first place. *Cf. Preap*, ____ U.S. at ____, 139 S.Ct. at 970. Reading a mandatory detention statute as actually meaning that the Government "has to detain" only when it "decides to detain" makes the statute inoperative. A mandate that the Government can ignore at its own discretion is no mandate at all.

Now Section 1231. Section 1231(a)(2) also contains the word "shall":

> During the removal period, the Attorney General *shall* detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2) (emphasis added). Like Section 1226, Section 1231 contains a temporal requirement: during the removal period. The "removal period" is defined as a period of 90 days when an alien is ordered removed. *Id.* § 1231(a)(1)–(2). The statute further provides that the removal period "shall" be extended beyond 90 days if certain circumstances arise, and the alien "may" remain in detention during that extended

period. *Id.* § 1231(a)(1)(C). It would be odd to read "shall detain" during the removal period as providing discretion when the statute also specifies discretion to detain—"may remain in detention"— *after* the initial 90-day removal period. *See id.* There would be no need to confer discretion to detain after the 90-day removal period expires if discretion was already built into this language—"During the removal period, the Attorney General shall detain the alien."

All of this makes even more sense considering that a court should interpret a "statute as a symmetrical and coherent regulatory scheme[.]" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 1301, 146 L.Ed.2d 121 (2000) (quotations and citations omitted). Section 1225, a companion statute to Section 1226, includes the same "may" versus "shall" juxtaposition and imposes a mandatory duty. *Texas MPP*, 20 F.4th at 993–96. "Shall" under Sections 1226(c) and 1231(a)(2), then, also mandates detention.

The Government offers a different reading. In the Government's view, "shall" in both statutes means "may."[55] This makes little sense. Section 1226(a) provides discretion to detain aliens. Section 1226(c), by contrast, lists certain criminal aliens that "shall" be

[55] At no point has the Government invoked *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Therefore, the Court does not pass "*Chevron* Step Zero." *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006). The Government could have argued that "shall" is ambiguous and that the Court should defer to the Government's interpretation. The Government may have declined to pursue this route because it has interpreted Section 1226(c) as mandatory for decades. *See* Brief for Petitioners, *Albence v. Guzman Chavez*, 2020 WL 4938065, at *5; Reply Brief for Petitioners, *Albence v. Guzman Chavez*, 2020 WL 3124376, at *7; Oral Argument, *Nielsen v. Preap*, 2018 WL 4922082, at *9; Brief for Petitioners, *Reno v. Ma*, 2000 WL 1784982, at *26–28; *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 678 (BIA 1997). It has also argued that other INA provisions impose mandates. Brief for Petitioners, *Jennings v. Rodriguez*, 2016 WL 5404637, at *16–17 (8 U.S.C. § 1225(b)).

detained. A similar structure exists in Section 1231(a)(2). Section 1231(a)(2) mandates detention during the removal period. It also *prohibits* the release of certain individuals if DHS *actually* detains those individuals. None of these limitations in the statute would make sense if they were discretionary. The Government's reading would invite the Court to erase the limitations under the INA, all in violation of "the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, ____ U.S. ____, ____, 139 S.Ct. 1881, 1890, 204 L.Ed.2d 165 (2019) (internal quotations omitted). The Government's interpretation would mean that it "can take the powers given to it by Congress" but "ignor[e] the limits Congress placed on those powers"—a dangerous result. *Texas MPP*, 20 F.4th at 997. Congress could have drafted a statute that gives general authority to detain. But it was more specific. And deliberately so.

The Government does not dispute that Congress *can* mandate detention. In fact, the Government concedes that Congress *has* limited discretion by using the phrase "only if" under Section 1226(c) and "under no circumstance" under Section 1231(a)(2). This language, so the Government reasons, is sufficiently clear to demonstrate a congressional mandate. (Dkt. No. 211 at 103–04); (Dkt. No. 223 at 23).

But what about "shall"? Section 1226, for example, does not include the same language "under no circumstance." Section 1226, instead, contrasts "may" with "shall." If "may" provides discretion and "shall" also provides discretion, the entire statutory scheme becomes redundant at best or nonsensical at worst. Moreover, Section 1226(c)(1) would be superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 2125, 150

L.Ed.2d 251 (2001). Congress would not have enacted Section 1226(c) to be discretionary because Section 1226(a) already is. Indeed, the Supreme Court has noted that "it would be very strange for Congress to forbid the release of aliens who need not be arrested in the first place." *Preap*, ____ U.S. at ____, 139 S.Ct. at 970.

The Government's contention that the "only if" clause in Section 1226(c) and the "under no circumstance" clause in Section 1231(a)(2) are mandatory, but the "shall" clauses are not, is untenable. Of course, "only if" and "under no circumstance" are different words than "shall," just as "shall" and "may" are different words. But the may-versus-shall distinction is not important just because they are different words; it is important because they are commonly used as antonyms. Thus, their juxtaposition in the statutes accentuates their different meanings. Unlike "shall" and "may," "shall" and "only if" or "under no circumstance" are commonly used as synonyms—even complements. And they are used as complements here. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540, 133 S.Ct. 1351, 1364, 185 L.Ed.2d 392 (2013) ("We are not aware . . . of any canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing."). Indeed, federal courts remain mindful that "respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Murphy v. Smith*, ____ U.S. ____, ____, 138 S.Ct. 784, 788, 200 L.Ed.2d 75 (2018); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328, 134 S.Ct. 2427, 2446, 189 L.Ed.2d 372 (2014) ("Agencies are not free to adopt unreasonable interpretations of statutory

provisions and then edit other statutory provisions to mitigate the unreasonableness." (cleaned up)).

b. Precedent

Lest any doubt remain, the Supreme Court has interpreted both Sections 1226(c) and 1231(a)(2) as mandatory. In *Johnson v. Guzman Chavez*, the Supreme Court noted "detention is mandatory" during an alien's removal period, as prescribed by Section 1231(a)(2). ____ U.S. ____, ____, 141 S.Ct. 2271, 2281, 210 L.Ed.2d 656 (2021). And under Section 1226(c), "detention is mandatory and release is permitted in very limited circumstances" for "certain criminal aliens and aliens who have connections to terrorism." *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2. Other Supreme Court cases read the statutes similarly. *Preap*, ____ U.S. at ____, 139 S.Ct. at 959 (Section 1226(c)); *Jennings*, ____ U.S. at ____, 138 S.Ct. at 846 (Section 1226(c)); *Zadvydas v. Davis*, 533 U.S. 678, 683, 121 S.Ct. 2491, 2495, 150 L.Ed.2d 653 (2001) (Section 1231(a)(2)); *Demore*, 538 U.S. at 521, 123 S.Ct. at 1716 (Section 1226(c)).

The Government nevertheless argues that this precedent does not control because those cases did not address whether DHS, through a "rule" under the APA, has discretion to detain under those statutes. This distinction in unpersuasive.

Guzman Chavez, for example, considered whether certain aliens could be released on bond while petitioning for relief from removal. There, the Supreme Court analyzed Sections 1226(c) and 1231(a)(2). It held that Section 1231 applied to these aliens because they had effectively been ordered removed through the reinstatement of their previous orders of removal. *Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2287–91.

In reaching this conclusion, the Supreme Court compared Section 1226, which applies to the arrest and detention of an alien "pending a decision on whether the alien is to be removed from the United States," with Section 1231, which applies to an alien ordered removed. *Id.* at ____, 141 S.Ct. at 2280–81. The Supreme Court noted that "DHS," under Section 1226(a), "may arrest and detain the alien" pending that alien's removal decision. *Id.* Such an alien "may generally apply for release on bond or conditional parole." *Id.* Nevertheless, the Supreme Court stated "there is one exception" to this general rule: for certain criminal aliens, "detention is mandatory" under Section 1226(c). *Id.* at ____ n.2, 141 S.Ct. at 2280 n.2. Like Section 1226(c), the Supreme Court stated detention under Section 1231 is "mandatory" precisely because of Section 1231(a)(2). *Id.* at ____, 141 S.Ct. at 2281. As this analysis of the statutes makes clear, interpreting Sections 1226(c) and 1231(a)(2) was essential to the holding in *Guzman Chavez*. Because the reasoning was essential to the holding, it is binding. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S.Ct. 1114, 1129, 134 L.Ed.2d 252 (1996). This is unsurprising. Other circuits have agreed that the INA mandates detention. *See*, *e.g.*, *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150, 152, 154–55 (3d Cir. 2013).

c. Castle Rock

The Government reads the statutes differently in light of *Town of Castle Rock v. Gonzales*. There, the Supreme Court explained "the presence of seemingly mandatory legislative commands" like "shall" do not automatically impose a mandate against law enforcement. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–61, 125 S.Ct. 2796, 2805–06, 162 L.Ed.2d 658 (2005). Instead, a mandate is found when there is "some stronger

indication" from the legislature. *Id.* at 761, 125 S.Ct. at 2806. *Castle Rock*, however, is distinguishable. In *Castle Rock*, the question presented was "whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated." *Id.* at 750–51, 125 S.Ct. at 2800. This case, by contrast, involves a "contrary to law" claim under the APA against a federal agency that promulgated a rule. *See Texas MPP*, 20 F.4th at 982–83. In addition, "*Castle Rock* is relevant only where an official makes a nonenforcement decision." *Id.* at 997. That is, *Castle Rock* applies to individual decisions. *Castle Rock* is irrelevant when DHS engages in "misenforcement" or suspension of the INA by issuing a rule under the APA, as it has done here.

And even if *Castle Rock* does apply, the Court finds that there *is* "some stronger indication" that Sections 1226(c) and 1231(a)(2) impose a mandate. First, Congress included a grace period in the INA to provide time for the agency to make the change from a discretionary to a mandatory detention regime. Second, the context surrounding the enactment of Sections 1226(c) and 1231(a)(2) shows that they are mandatory.

i. Transition Period Custody Rules

In 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *Matter of Garvin-Noble*, 21 I. & N. Dec. 672, 674 (BIA 1997). Included in the IIRIRA are the Transition Period Custody Rules. *Id.* at 675. Enacted alongside the 1996 amendments to federal immigration law, the Transition Period

Custody Rules demonstrate that Sections 1226(c) and 1231(a)(2) mandate detention. *Compare* Act of Sept. 30, 1996, Pub. L. No. 104–208 § 303(a) *with id.* § 303(b)(3).

The Transition Rules were "designed to give the Attorney General a 1-year grace period, which [could] be extended for an additional year, during which mandatory detention of criminal aliens [under Section 1226(c)] would not be the general rule." *Matter of Garvin-Noble*, 21 I. & N. Dec. at 675. Congress included the Transition Rules because it knew that it could be difficult for the Attorney General (who oversaw the enforcement of immigration law before the creation of DHS) to immediately comply with its detention mandate. *See Preap*, ____ U.S. at ____, 139 S.Ct. at 969; *Matter of Garvin-Noble*, 21 I & N Dec. at 681 ("While practical constraints temporarily necessitated some flexibility, Congress, in keeping with prior concerns, enacted the transition rules with some restrictions on the release of criminal aliens pending removal, such as keeping those aliens dangerous to the community in detention.").

The Transition Rules themselves are found in Section 303(b)(3) of Public Law No. 104–208. Section 303(b)(2) contains the provision that allows the Attorney General to opt-in to the Transition Rules:

> If the Attorney General, not later than 10 days after the date of the enactment of this Act [i.e., September 30, 1996], notifies in writing [Congress] that there is *insufficient detention space* and [] *personnel* available to carry out section 236(c) of the Immigration and Nationality Act [codified at 8 U.S.C. § 1226(c)], [] the [Transition Period Custody Rules] shall be in effect for a 1-year period beginning on the date of such notification, instead of [8 U.S.C. § 1226(c)].

Pub. Law. No. 104–208 § 303(b)(2) (emphases added). The Attorney General took advantage of the Transition Rules within the opt-in period. *Matter of Garvin-Noble*, 21 I & N Dec. at 674. But the Transition Rules had a maximum two-year lifespan. *Id.* at 675; Pub. Law. No. 104–208 § 303(b)(2). After invoking the Transition Rules for the full two-year period, INS asked Congress to extend the grace period further, but Congress refused. *INS Issues Detention Guidelines After Expiration of TPCR*, 75 No. 42 Interpreter Releases 1508, 1508 (Westlaw Nov. 2, 1998). Thus, as the INS recognized, the mandate under 8 U.S.C. § 1226 became the law of the land in October 1998. *See id.*; *see also Saysana v. Gillen*, 590 F.3d 7, 10 n.2 (1st Cir. 2009); *Galvez v. Lewis*, 56 F. Supp. 2d 637, 641 (E.D. Va. 1999).

Two salient points about the Transition Rules. First, Congress contemplated the precise situation the Government complains of in this case: a lack of resources and personnel. Accordingly, Congress gave the Executive Branch a grace period as it transitioned to mandatory detention. But a grace period is not a license to permanently disregard the law. Congress expected that after two years, the Executive Branch would comply. *Matter of Garvin-Noble*, 21 I & N Dec. at 681; *see also Matter of Valdez-Valdez*, 21 I. & N. Dec. 703, 719 (BIA 1997). Indeed, the INS requested an extension of the grace period in the Transition Rules and Congress rejected that request. The Transition Rules demonstrate, and the Constitution demands, that when it is difficult for the Executive Branch to comply with Congress's instructions, the proper course is to ask for more support or for the law to be changed. *Cf. Alabama Dep't of Revenue v. CSX Transp., Inc.*,

575 U.S. 21, 31, 135 S.Ct. 1136, 1144, 191 L.Ed.2d 113 (2015) ("If the task . . . is 'Sisyphean,' . . . it is a Sisyphean task that the statute imposes.").

And on this point about insufficient resources and limited detention capacity, the Court finds that the Government has not acted in good faith. Throughout this case, the Government has trumpeted the fact that it does not have enough resources to detain those aliens it is required by law to detain. The Government blames Congress for this deficiency. At the same time, however, the Government has submitted two budget requests in which it asks Congress *to cut* those very resources and capacity by 26%. (F.F. No. 16). Additionally, the Government has persistently underutilized existing detention facilities. (F.F. No. 17). To say that this is incongruous is to say the least.

Second, the Government's position "flouts the interpretive canon against surplusage—the idea that every word and every provision is to be given effect and that none should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *See Preap*, ____ U.S. at ____, 139 S.Ct. at 969 (cleaned up). As we have seen, the Government's reading violates this canon because it renders the word "shall" meaningless. *See supra* III.C.1.a. Now we see that the Government's reading doubly violates the canon, because it also makes the Transition Rules surplusage. The Transition Rules were an intricate and thoughtful statutory regime that governed the detention of aliens in this country for the two years that they were in effect. Pub. Law. No. 104–208 § 303(b). The Government's reading is incorrect.

ii. IIRIRA was passed, in part, to take away the Government's general discretion in this context

The context of the IIRIRA amendments to the INA is a separate reason that *Castle Rock*'s call for "some stronger indication" is met here. To the extent that *Castle Rock* applies, the Supreme Court recognized that when the word "shall" is used in a statute and applied to law enforcement, there must be "some stronger indication" from the legislature that it is a mandate. *Castle Rock,* 545 U.S. at 761, 125 S.Ct. at 2806. The word "shall" alone might not be sufficient. In this case, however, one of the specific reasons that the statutes in question were amended was to take away the Government's discretion in this context. It is difficult to envision a stronger indication.

Section 1226(c) was enacted "against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens." *Demore*, 538 U.S. at 518, 123 S.Ct. at 1714. The failure "to remove deportable criminal aliens" resulted in overpopulated prisons, monetary costs, and increased crime. *Id.* at 518–20, 123 S.Ct. at 1714–15. Crucially, "Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens *was the agency's failure to detain those aliens* during their deportation proceedings." *Id.* at 519, 123 S.Ct. at 1715 (emphasis added). Before Section 1226(c) was enacted, the Attorney General had broad discretion on whether to detain aliens in this context. *Id.* Later, *and in response to these concerns*, Congress amended the law *to require* the Attorney General to detain a subset of deportable criminal aliens who committed the most serious crimes, pending a

determination of their removability. *Id.* at 521, 123 S.Ct. at 1716. In the Court's view, this is direct evidence of the stronger indication envisioned by *Castle Rock*.

Like Section 1226(c), Section 1231(a)(2) was enacted against the same backdrop. As the Supreme Court noted, "protecting the community from dangerous aliens" is a "statutory purpose" of that section. *Zadvydas*, 533 U.S. at 697, 121 S.Ct. at 2502. What is more, Section 1231 "is part of a statute that has as its basic purpose effectuating an alien's removal." *Id.* Section 1231(a)(2)'s mandatory nature is made more evident because it applies *after* an alien has proceeded through the removal proceedings and obtained a decision. *See Guzman Chavez*, ____ U.S. at ____, 141 S.Ct. at 2290.

The Court holds that "shall" under Sections 1226(c) and 1231(a)(2) unambiguously means "must."

2. Whether Congress Can Mandate Detention

Sections 1226(c) and 1231(a)(2) mandate detention. But *can* Congress require the Executive to detain? Yes, it can. "It is undisputed that Congress may mandate that the Executive Branch detain certain noncitizens during removal proceedings or before removal."[56] *Preap*, ____ U.S. at ____, 139 S.Ct. at 973 (Kavanaugh, J., concurring).

That Congress can mandate detention makes sense when considering the broader scheme of immigration law. The Constitution provides that "Congress shall have Power . . . To establish an uniform Rule of Naturalization[.]" U.S. Const. art. I, § 8, cl. 4. The

[56] Indeed, even the Government concedes that Congress *can* mandate detention but argues that Congress did not in Sections 1226(c) and 1231(a)(2). (Dkt. No. 211 at 103–04); (Dkt. No. 223 at 23).

Supreme Court has long recognized that the power of naturalization is exclusively vested in Congress. *Chirac v. Lessee of Chirac*, 2 Wheat. 259, 269, 4 L.Ed. 234 (1817). Congress's exclusive power extends "to the entry of aliens and their right to remain here[.]" *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 743, 98 L.Ed. 911 (1954). "[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established." *Kleindienst v. Mandel*, 408 U.S. 753, 769–70, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972). Congress, exercising its authority vested by the Constitution, long ago enacted federal statutes governing immigration. In 1996, Congress charted a new course by amending federal immigration law. *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16. Before, Congress provided the Executive Branch with broad general directives regarding the detention of aliens. But in 1996, to address perceived harms, Congress withdrew that discretion.

Congress had the authority to reign in this discretion. An administrative agency like DHS is a creature of statute. As such, it possesses "only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, ____ U.S. ____, ____, 142 S.Ct. 661, 665, 211 L.Ed.2d 448 (2022) (per curiam). In the APA context, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *See Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374, 106 S.Ct. 1890, 1901, 90 L.Ed.2d 369 (1986). Indeed, Congress may limit agency discretion by putting restrictions in the operative statutes. *Lincoln*, 508 U.S. at 193, 113 S.Ct. at 2032. As such, DHS "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 125, 120 S.Ct. at 1297

(internal quotations omitted). Congress may give, and Congress may take away. *See Aviation & Gen. Ins. Co. v. United States*, 882 F.3d 1088, 1098 (Fed. Cir. 2018). In 1996, Congress did just that. *Demore*, 538 U.S. at 518–21, 123 S.Ct. at 1714–16. Sections 1226(c) and 1231(a)(2) do not leave any room for agency discretion when the duty to detain is triggered.

For similar reasons, certain portions of the Final Memorandum do not fall under the Secretary of Homeland Security's general grant of authority to establish "national immigration enforcement policies and priorities." *See* 6 U.S.C. § 202(5). However broad the Secretary's authority in setting enforcement policies and priorities may be, it must be read in conjunction with statutory limits. *Regents*, ____ U.S. at ____, 140 S.Ct. at 1925 (Thomas, J., concurring in part and dissenting in part). The Government reads those limits out of the law and instead renders "shall" as a suggestion simply because Congress also delegated authority to enforce the law. DHS, however, does not have "unreviewable and unilateral discretion to ignore statutory limits imposed by Congress and to remake entire titles of the United States Code to suit the preferences of the executive branch." *Texas MPP*, 20 F.4th at 1004.

3. *Heckler v. Chaney*

The Government also argues that the Final Memorandum is committed to agency discretion under *Heckler v. Chaney*. Federal courts generally presume that "an agency's decision not to take enforcement action" is committed to agency discretion by law. *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985). This presumption does not apply "to agency actions that qualify as rules under 5 U.S.C.

§ 551(4)." *Texas MPP*, 20 F.4th at 985. All parties in this case have agreed, as does the Court, that the Final Memorandum is undisputedly a rule under 5 U.S.C. § 551(4). (Dkt. No. 211 at 114). The Court therefore holds that the Final Memorandum is not committed to agency discretion under *Heckler*.[57]

4. The Government's Reliance on "Prosecutorial Discretion"

An overarching theme of the Government's argument in this case is that it has "prosecutorial discretion" to make these decisions, and this precludes judicial review. Some courts have observed that prosecutorial discretion stems from Article II of the Constitution. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1153 (D.C. Cir. 2006); *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) (Kavanaugh, J., writing for himself). The precise scope of prosecutorial discretion is unclear.[58] *See*, *e.g.*, Kimberly L. Wehle, *"Law and" the OLC's Article II Immunity Memos*, 32 Stan. L. & Pol'y Rev. 1, 32–36 (2021). Whatever its contours, prosecutorial discretion "does not encompass the discretion not to follow a law imposing a mandate or prohibition on the Executive Branch." *In re Aiken County*, 725 F.3d at 266 (Kavanaugh, J., writing for himself). In one scholar's words: "It is well settled, after all, that in interbranch constitutional relations, the executive power—whatever its inherent bounds—comes to an end in a clear Congressional command."

[57] In *Texas MPP*, the Fifth Circuit concluded: "Even if *Heckler* could apply in theory, the statute's text would rebut it in actuality." 20 F.4th at 988. So too here. The substantive statutes have provided parameters within which DHS must enforce the law. *Heckler*, 470 U.S. at 832–33, 105 S.Ct. at 1656.

[58] Courts have recognized that prosecutorial discretion includes whom to prosecute, when to charge, what charges to bring, whether to dismiss charges, and plea bargaining. *McCleskey v. Kemp*, 481 U.S. 279, 312, 107 S.Ct. 1756, 1778, 95 L.Ed.2d 262 (1987); *United States v. Batchelder*, 442 U.S. 114, 124, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 Mich. L. Rev. 455, 502 (2020); *see also id.* at 500–03. The Government agrees that Congress can mandate detention of certain aliens under the INA, (Dkt. No. 211 at 103–04); (Dkt. No. 223 at 23), a point it would never have conceded if it believed this encroached upon the Executive's Article II authority. *Cf. Preap*, ____ U.S. at ____, 139 S.Ct. at 973 (Kavanaugh, J., concurring). Otherwise, the Government would argue that any detention mandate is an unconstitutional infringement on executive power. *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S.Ct. 1421, 1428, 182 L.Ed.2d 423 (2012). The Government does not so argue.[59]

This discussion about prosecutorial discretion in the abstract falls by the wayside after recognizing the Final Memorandum is a "rule" that is subject to judicial review under the APA; it is not an exercise of prosecutorial discretion on a case-by-case basis. Individualized decisions to abandon law enforcement are outside the reach of judicial review: a litigant cannot demand that DHS enforce the law against a particular person. *Texas MPP*, 20 F.4th at 982. In contrast, a "rule" that is contrary to law is subject to judicial review. *See* 5 U.S.C. § 706(2)(A). The States here are challenging a generalized and

[59] It is worth noting that "Congress can explicitly or implicitly cabin executive enforcement discretion, reducing it to the constitutional minimum (*Youngstown* Category 3)." Louis W. Fisher, *Executive Enforcement Discretion and the Separation of Powers: a Case Study on the Constitutionality of DACA and DAPA*, 120 W. Va. L. Rev. 131, 138 (2017). *Youngstown* Category 3 is as follows: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38, 72 S.Ct. 863, 871, 96 L.Ed. 1153 (1952) (Jackson, J., concurring).

prospective policy in the form of a "rule" under the APA. Generally invoking prosecutorial discretion does not shield this rule from judicial review.

To hold otherwise would elevate form over substance. Under *Heckler v. Chaney*, rules under 5 U.S.C. § 551(4) are not "committed to agency discretion." *Texas MPP*, 20 F.4th at 985. This is because "the English Bill of Rights, followed by the Constitution, explicitly forbade the executive from nullifying whole statutes by refusing to enforce them on a *generalized* and *prospective* basis." *Id.* at 983 (emphasis in original). This is also because "the Supreme Court and Fifth Circuit have consistently read *Heckler* as sheltering one-off nonenforcement decisions rather than decisions to suspend entire statutes." *Id.* As such, "*Heckler*'s progeny never has allowed the executive to affirmatively enact prospective, class-wide rules without judicial review."[60] *Id.* It would be odd to hold that the Final Memorandum is committed to agency discretion simply because it incants prosecutorial discretion when, in fact, the Final Memorandum is a prospective, class-wide rule under 5 U.S.C. § 551(4). The Government seeks the benefit of generally invoking prosecutorial discretion without adequately explaining how the concept squarely applies to rules under 5 U.S.C. § 551(4). The Court remains unpersuaded.

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In sum, the statutory scheme provides bright-line rules as to the timing and identity of certain aliens who must be detained. The States are challenging the

[60] "If judicial involvement is based on a statutory violation by the executive, review promotes rather than undermines the separation of powers, for it helps to prevent the executive branch from ignoring congressional directives." Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 670 (1985).

Government's compliance with that statutory scheme via a rule under the APA. The Court holds that the agency action is not committed to agency discretion.

D. ZONE OF INTERESTS

Congress, through the APA, has provided a cause of action for those seeking redress against the federal government for violations of other federal laws. *See* 5 U.S.C. §§ 702, 706. But Congress has limited the availability of an APA cause of action to those who allege an injury that is "arguably" within the "zone of interests" for which the statutes exist to protect. *Collins v. Mnuchin*, 938 F.3d 553, 573–74 (5th Cir. 2019), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, ____ U.S. ____, 141 S.Ct. 1761, 210 L.Ed.2d 432 (2021).

The zone of interests test is not "especially demanding." *Id.* at 574. Indeed, "the benefit of any doubt goes to the plaintiff[.]" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130, 134 S.Ct. 1377, 1389, 188 L.Ed.2d 392 (2014). The zone of interests test "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Collins*, 938 F.3d at 574 (internal quotations omitted). Importantly, the relevant statute in whose zone of interests the plaintiff's injury must reside "is to be determined not by reference to the overall purpose of the Act in question," but, rather, "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175–77, 117 S.Ct. at 1167. In other words, a court must review those "substantive provisions" of law that the plaintiff relies on for "the gravamen" of its complaint. *Id.* at 175, 117 S.Ct. at 1167.

The Government solely argues that the States do not fall within the zone of interests because no entity can enforce Section 1231 in light of subsection (h). (Dkt. No. 122 at 40–42). As an initial matter, the States' injuries are within the zone of interests of Sections 1226(c) and 1231(a)(2) based on the Court's discussion of *Demore* and other Supreme Court precedent regarding the development and purpose of those statutes. The statutes were enacted to protect and benefit the states, citizens, and legal immigrants. Indeed, the INA was enacted for this exact purpose. *See Texas DAPA*, 809 F.3d at 163 & n.80. As such, the injuries the States suffer due to the Final Memorandum fall within the relevant statutes' zone of interests. *See id.* at 163. Moreover, as the Court explained, the Government is mistaken that Section 1231(h) bars relief. *See supra* III.B. Thus, the sole argument that the Government offers fails.

The Court holds that the States' injuries fall within the zone of interests of Sections 1226(c) and 1231(a)(2).

IV. CLAIMS

A. CONTRARY TO LAW (COUNTS I AND II)

Because shall means must, the Government generally must detain aliens subject to Sections 1226(c) and 1231(a)(2) at specific points in time: when released from custody under Section 1226(c) and during the removal period under Section 1231(a)(2). The Court now considers whether the Final Memorandum is contrary to law.

By its terms, the Final Memorandum provides "Guidelines for the Enforcement of Civil Immigration Law." (Dkt. No. 109-5 at 2). It begins by discussing prosecutorial discretion. (*Id.* at 3). The Final Memorandum then acknowledges that DHS does "not

have the resources to apprehend and seek the removal of every" removable noncitizen. (*Id.*). Thus, DHS must "determine whom to prioritize for immigration enforcement action." (*Id.*). These priorities do not discuss mandatory detention obligations. Instead, they focus on three categories that have distinct definitions under the Final Memorandum: national security, public safety, and border security. (*Id.* at 3–5). The Final Memorandum states, "[t]he fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them." (*Id.* at 3). It continues: "We will prioritize for apprehension and removal noncitizens who are a threat to our national security, public safety, and border security." (*Id.* at 4).

The Final Memorandum defines "public safety" as follows: "A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal." (*Id.*). But it clarifies that "a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances." (*Id.*). The Final Memorandum continues on by listing "aggravating factors that militate in favor of enforcement action" and "mitigating factors that militate in favor of declining enforcement action." (*Id.*). Later, it instructs personnel that they "must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly." (*Id.* at 5). Whatever that discretion looks like, however, "personnel should not rely on the fact of conviction or the result of a database search alone." (*Id.*). "Rather, [DHS] personnel should, to the fullest extent possible, obtain and review the entire

criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue." (*Id.*).

The Final Memorandum flatly contradicts the detention mandates under Sections 1226(c) and 1231(a)(2). It replaces those statutes by conferring discretion to independently decide who will be detained and when—if ever. And it clearly provides that a conviction alone cannot be the basis for placing an alien in removal proceedings. This plainly contradicts the language of the statutes and removes the discretion of agents and officers. The result? Agents and officers do not have the discretion they once had because of the Final Memorandum. The Final Memorandum supplants Congress's clear commands with an extra-statutory balancing scheme of aggravating and mitigating factors that agency personnel must apply. At times, agents and officers on the ground are forced to make quick decisions as they encounter individuals, and this scheme ties their hands and changes the standard under which they make decisions on whom to detain and when. Recall that the statutes prescribe the timing of detention: "when the alien is released," per Section 1226(c), or "during the removal period," per Section 1231(a)(2). The release language clarifies when the duty to detain is triggered and who is covered. *See Preap*, ____ U.S. at ____, 139 S.Ct. at 969. The Final Memorandum displaces that statutory language in favor of current policy considerations.

Consider that, under the Final Memorandum, an officer who has reason to believe that an alien was convicted of one of the serious crimes implicated by Section 1226(c) can no longer detain him upon release on that basis alone. Rather, that officer must first undertake extensive research and analysis of a variety of factors before detention. So too

for aliens with final orders of removal under Section 1231(a)(2). Perhaps most problematic is that an officer cannot "rely on the fact of conviction or the result of a database search alone." *See* (Dkt. No. 109-5 at 5). Yet that is precisely what Section 1226(c) demands: the mandatory detention of certain criminal aliens who are convicted of certain crimes. The Final Memorandum says otherwise; staff can no longer follow the statute's categorical command. This flips the presumption of detention on its head by starting from the premise than an official should *not* enforce the law. In doing so, the Government has assumed a discretionary power that Congress has explicitly foreclosed. All of this matters because the statutes contain mandates and are not generally applicable laws. *Cf. Morton v. Ruiz*, 415 U.S. 199, 230–31, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). Simply put, the Final Memorandum is contrary to Sections 1226(c) and 1231(a)(2).

The practical implications of finding the Final Memorandum contrary to law do not alter the Court's decisionmaking. "It would be dangero[u]s in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation." *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L.Ed. 529 (1819) (opinion for the Court by Marshall, C.J.). Courts must not avoid their obligation to say what the law is simply because the results of that decision may pose practical difficulties. *See*, *e.g.*, *McGirt v. Oklahoma*, ____ U.S. ____, ____, 140 S.Ct. 2452, 2482, 207 L.Ed.2d 985 (2020). Moreover, Congress—not the judiciary or the executive—amends the Nation's laws under such circumstances. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S.Ct. 941, 956, 151 L.Ed.2d 908 (2002).

To be sure, DHS has limited resources.[61] Thus, it "may adopt policies to prioritize its expenditures *within the bounds established by Congress*." *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446 (emphasis in original). But DHS may not "modify unambiguous requirements imposed by a federal statute." *Id.* The Final Memorandum does not simply prioritize DHS's expenditures within the bounds of the statutes. Instead, and stated plainly, DHS has substituted its own categories for those mandated by Sections 1226(c) and 1231(a)(2). For instance, Section 1226(c)(1)(B) mandates that the Attorney General take into custody any alien who has committed an aggravated felony. 8 U.S.C. §§ 1226(c)(1)(B), 1227(a)(2)(A)(iii). But in its Considerations Memorandum, DHS explained that it removed the category of "aggravated felonies" from the Final Memorandum because it found the category "both over- and under-inclusive." (Dkt. No. 146-1 at 12). But that is not its decision to make. The language included in the statutes was passed by both the House of Representatives and the Senate and signed into law by the President after extensive investigation, hearings, review, and negotiations—DHS is not free to cavalierly toss that aside. DHS further found that the "aggravated felony definition can be challenging to administer in many instances; its various elements are subject to evolving definition by the Board of Immigration Appeals and the federal

[61] DHS chiefly relies on enforcement discretion, not resource constraints, to justify the Final Memorandum. In fact, as noted above, DHS requested that Congress appropriate funding for 26% *fewer* beds as compared to August 2021—not more. (F.F. No. 16). In effect, the Government is making it harder to comply with the statutory mandate it complains it doesn't have the resources to comply with. It then asks this Court to re-fashion the law to accommodate that behavior.

courts" and also that "the 'aggravated felony' category is an imperfect proxy for severity of offense." (*Id.*).

That does not just prioritize the statutory categories; it alters them. To conclude otherwise would allow resource constraints to displace statutory mandates—an impermissible result. *See In re Aiken*, 725 F.3d at 260–61. The inability to fully comply is not a license to ignore the boundaries imposed by law. Indeed, as the Supreme Court has stated, an agency has no "power to revise clear statutory terms that turn out not to work in practice." *Util. Air Regul. Grp.*, 573 U.S. at 327, 134 S.Ct. at 2446. None of this should come as a surprise. Prior administrations have made clear that their priorities do not displace "mandatory detention." (Dkt. No. 146-4 at 3); (Dkt. No. 146-6 at 5).

In sum, DHS "went well beyond the bounds of its statutory authority." *Util. Air Regul. Grp.*, 573 U.S. at 326, 134 S.Ct. at 2445 (internal quotations omitted). A plea to prioritization and discretion cannot alter this reality.

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The Court holds that the Final Memorandum is contrary to law under the APA. Accordingly, the Court will enter judgment in favor of the States on Counts I and II of the Amended Complaint. *See* (Dkt. No. 109 at 26–30).

B. ARBITRARY AND CAPRICIOUS (COUNT III)

The APA directs courts to "hold unlawful and set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, ___ U.S.

____, ____, 141 S.Ct. 1150, 1158, 209 L.Ed.2d 287 (2021). This standard is "deferential." *Id.* The Court must "not substitute its own policy judgment for that of the agency." *Id.* But the Court must also ensure "that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

Agency action is arbitrary and capricious

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866–67, 77 L.Ed.2d 443 (1983). Indeed, the agency action must rise or fall on the reasons the agency gave when it acted,[62] *see Regents*, ____ U.S. at ____, 140 S.Ct. at 1909, and the Court must not consider *post hoc* rationalizations. *State Farm*, 463 U.S. at 50, 103 S.Ct. at

[62] Known as the "record rule," evaluation of an agency's actions are generally confined to the administrative record alone. *Medina Cnty. Envir. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010). For good reason. Absent this rule, "there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 555, 98 S.Ct. 1197, 1217, 55 L.Ed.2d 460 (1978). While there are exceptions to the record rule, *see Medina,* 602 F.3d at 706, supplementation of the administrative record is only allowed in "unusual circumstances." *Id.* The Parties have disputed the need for extra-record evidence. *See*, *e.g.*, (Dkt. No. 189) (Government's brief in opposition); (Dkt. No. 191) (States' brief in favor). They agree that the record rule does not apply to issues such as standing or remedies. (Dkt. No. 189 at 8); (Dkt. No. 191 at 5). The Court has not based its review of the States' arbitrary and capricious claim on any evidence outside the administrative record, except where evidence is judicially noticeable.

2870. But arbitrary and capricious review "is not toothless." *Texas MPP*, 20 F.4th at 989 (citation omitted). "In fact, after *Regents*, it has serious bite." *Id.* (citation omitted).

DHS points the Court to the Considerations Memorandum to supplement its reasoning in the Final Memorandum despite not referencing it in the Final Memorandum. (Dkt. No. 146-1). A review of the Considerations Memorandum reveals that there was important information that DHS did not consider.

1. Recidivism and Abscondment

Congress's concerns about the high rates of abscondment and recidivism among criminal aliens and aliens with final orders of removal animated the passage of IIRIRA. DHS's failure to consider recidivism and abscondment are some of the reasons why the Court enjoined the February Memorandum. The Court has gone to great pains to make clear that only a subset of aliens is implicated by the statutes at issue in this litigation: those covered by Sections 1226(c) and 1231(a)(2). Those, in turn, are aliens who have been convicted of or are implicated in serious crime and aliens who have received a final order of removal. Notwithstanding, the Considerations Memorandum reveals that DHS still did not substantively consider recidivism and abscondment for these classes of aliens. The Considerations Memorandum relies on studies about criminality among all aliens, not to studies about aliens who have already been convicted of a serious crime.[63] (Dkt.

[63] The Considerations Memorandum references three sources. First, it maintains "academic literature [] points to a negative relationship between immigration and crime." (Dkt. No. 146-1 at 13). Second, it asserts "[t]hese findings are further bolstered by micro-level research that generally finds lower criminal involvement by foreign-born individuals, relative to their native-born counterparts." (*Id.*). Last, it concludes "[w]here status information has been made

No. 146-1 at 13). The studies cited may indeed be correct, but DHS's analysis misunderstands its obligation.

The only study that was both cited *and* included in the record examines crime rates among U.S. citizens, legal immigrants, and illegal immigrants. (Dkt. No. 149-15). But the study does not examine recidivism at all, let alone examine recidivism specifically among aliens—again, both legal and illegal—who have already been convicted of one of the serious crimes for which Congress imposed mandatory detention upon DHS. Nor does DHS assert that the criminality of *aliens in general* has a connection to recidivism and abscondment rates of *aliens who have already been convicted of crimes*. This decision, accordingly, is not an examination of "the relevant data" and is not a "rational connection between the facts found and the choice made." *See Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2569 (citation omitted).

The best case for DHS's reasoning would be the inference that because aliens commit less crimes, they recidivate at lower rates. But this inference, without more, is improper because the data include *all* aliens, not just criminal aliens covered by the statute. In fact, DHS has already found that criminal aliens recidivate and abscond at alarmingly high rates. As recently as 2019, DHS found:

> Of the 123,128 ERO administrative arrests in FY 2019 with criminal convictions or pending criminal charges, the criminal history for this group represented 489,063 total

available—including in the state of Texas itself—the evidence indicates that undocumented noncitizens are *less* likely to recidivate." (*Id.*) (emphasis in the original).

As a separate matter, neither of the first two sources are actually included in the administrative record. *See* (Dkt. No. 149-12); (Dkt. No. 149-22). Moreover, the Considerations Memorandum blanket-cites both, frustrating meaningful review.

> criminal convictions and pending charges as of the date of arrest, which equates to *an average of four criminal arrests/convictions per alien*, highlighting the recidivist nature of the aliens that ICE arrests.

(Dkt. No. 153-10 at 15) (emphasis added). Equally relevant are DHS's findings about abscondment in the same report. DHS noted that aliens who were permitted to participate in its "alternatives to detention" program absconded at a rate of 26.9% for families and 12.3% for non-family unit participants.[64] (*Id.* at 14). This was one of the primary reasons Congress *mandated* detention in this circumstance. *Demore*, 538 U.S. at 519–20, 123 S.Ct. at 1715–16. Given that aliens are only enrolled in the alternatives to detention program after they have been "thoroughly vetted" and ICE determines they are *unlikely* to abscond,[65] and the abscondment rate was still that high, the onus was on DHS to carefully consider abscondment in the Final Memorandum.

When an agency changes course, it should "ordinarily" "display awareness that it is changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16, 129 S.Ct. 1800, 1811, 173 L.Ed.2d 738 (2009). DHS does neither and fails to offer "a reasoned explanation" "for disregarding

[64] ICE's website describes the alternatives to detention program as follows: "On a case by case basis, local ICE ERO Deportation Officers determine the type and manner of monitoring that is appropriate for each participant, including the specific type of technology – global positioning system (GPS) tracking devices, telephonic reporting (TR), or a smartphone application (SmartLINK) – and case management levels, which include frequency of office or home visits." *Detention Management*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/detain/detention-management (last visited June 8, 2022).

[65] "Adults age 18 and over may be eligible for participation in ATD but must be thoroughly vetted by ERO officers, who review an alien's criminal, immigration, and supervision history, family and/or community ties, status as a caregiver or provider, and humanitarian or medical considerations when making enrollment determinations in order to determine whether a candidate is likely to comply with the terms of the program." (Dkt. No. 153-10 at 14).

facts and circumstances that underlay or were endangered by the prior policy." *See id.* at 516, 129 S.Ct. at 1811. DHS was required to consider criminal alien recidivism and abscondment *and* to show its work. It either failed or refused to do so. This was arbitrary and capricious. *Texas MPP*, 20 F.4th at 991 ("DHS nonetheless failed to discuss *any* of its prior factual findings—much less explain why they were wrong. That failure provides another basis for our conclusion that the [decision] was arbitrary and capricious." (emphasis in original)).

2. Costs to the States and Reliance Interests

"When an agency changes course it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Texas MPP*, 20 F.4th at 990 (cleaned up). But DHS does not demonstrate that it actually considered the costs its decision imposes on the States, nor their reliance interests on mandatory detention. "That alone is fatal." *Id*. at 989.

The Final Memorandum itself has no discussion of the harms to the States that may be implicated by its directives. DHS purports to address those concerns in the Considerations Memorandum. (Dkt. No. 146-1 at 14–17). But DHS only pays lip service to the States' concerns. DHS undersells the States' interests as being concerned with "indirect" and "downstream" effects, in contrast to the "predictable (and measurable) impacts" that DHS "endeavors to consider." (*Id.* at 14). In place of a good-faith attempt to measure costs and benefits, DHS points the Court to a single study and argues that it is *difficult* to measure the fiscal cost of its policy—therefore, DHS doesn't have to. (*Id.* at 15). Further, DHS conjectures "there is good reason to believe that any effects from

implementation of priorities guidance are unlikely to be significant, and could have a net positive effect," (*id.*), such as increasing compliance with U.S. labor laws by encouraging illegal immigrants to come forward with violations, (*id.* at 14) ("It does not serve the public interest when [worker] rights go unvindicated or when crimes go unprosecuted."), or decreasing COVID-19 vaccine hesitancy among illegal immigrants, (*id.* at 16).

The same goes for reliance interests. In the section of the Considerations Memorandum devoted to reliance interests, DHS writes that it "has considered" reliance interests, but that "no such reasonable reliance interests exist" because DHS "is unaware of any State that has materially changed its position to its detriment" in reliance and because "any such change by any party would be unreasonable[.]" (*Id.*). Further, as with costs imposed on the States, DHS maintains that it is "extremely difficult to quantify" the reliance interests of the States. Therefore, DHS does not have to. (*Id.*). This cannot be true. Litigation (in which DHS is a party) has demonstrated that there are quantifiable reliance interests. *See*, *e.g.*, *Texas v. Biden*, 554 F. Supp. 3d 818, 848–49 (N.D. Tex. 2021), *aff'd*, *Texas MPP*, 20 F.4th at 928, *cert. granted*, 142 S.Ct. 1098, 212 L.Ed.2d 1 (2022). Moreover, the contention that DHS had no obligation to consider the States' reliance interests "is squarely foreclosed by *Regents*." *Texas MPP*, 20 F.4th at 990 (citation omitted).

Thus, DHS's cursory acknowledgement of various concerns violates a foundational principle of administrative law: "[s]tating that a factor was considered . . . is not a substitute for considering it." *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Texas MPP*, 20 F.4th at 993 ("As an overarching matter, the June 1 Memorandum sometimes baldly asserted that DHS considered this or that factor—

in lieu of showing its work and actually considering the factor on paper . . . . [T]o the extent they rely on substituting DHS's *assertions about explanations* with *explanations* themselves, we reject those arguments with redoubled vigor." (emphasis in original)). Here, DHS did not meet its obligation to consider reliance interests by simply citing to one study that asserts that measuring the fiscal effects of a policy is just too difficult. *See* (Dkt. No. 146-1 at 14–16); *cf. Dep't of Com.*, ____ U.S. at ____, 139 S.Ct. at 2576 ("Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.").

In light of *Regents*, DHS had a duty to consider the reliance interests of the States *and* to show its work. *Texas MPP*, 20 F.4th at 990 ("[A]gencies must consider reliance interests, and [the] failure to do so is arbitrary and capricious."). It failed to do so.

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The Court holds that the Final Memorandum is arbitrary and capricious. Accordingly, the Court will enter judgment in favor of the States on Count IV of the Amended Complaint. *See* (Dkt. No. 109 at 30–32).

C. NOTICE AND COMMENT (COUNT IV)

The last APA claim raised by the States is that the Final Memorandum had to undergo the notice and comment requirements of the APA. *See* 5 U.S.C. § 553. The APA's notice and comment requirements apply to "substantive" or "legislative" rules, but the APA makes exceptions for certain categories of "non-legislative" rules, to which the notice and comment requirements do not apply. *Texas DAPA*, 809 F.3d at 170–71; *Dep't.*

of Lab. v. Kast Metals Corp., 744 F.2d 1145, 1152 (5th Cir. 1984). "[I]f a rule is 'substantive,' the exemption is inapplicable, and the full panoply of notice-and-comment requirements must be adhered to scrupulously." *Texas DAPA*, 809 F.3d at 171. Importantly, "the APA's notice and comment exemptions must be narrowly construed." *Id.* (cleaned up).

The Government does not dispute that the Final Memorandum is an APA rule under 5 U.S.C. § 551(4), nor does it claim to have complied with the APA's notice and comment requirements. Rather, the Government contends that the Final Memorandum is not a legislative rule, invoking two of the exceptions to the notice and comment requirement. *See* 5 U.S.C. § 553(b)(A). First, the Government claims the Final Memorandum is a general statement of policy. Alternatively, it claims the Final Memorandum is a rule of agency procedure, or "procedural rule."

1. General Statement of Policy

A general statement of policy advises "the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197, 113 S.Ct. at 2034 (citation omitted). The Fifth Circuit distinguishes general statements of policy from legislative rules using two criteria: "whether the rule (1) imposes any rights and obligations and (2) genuinely leaves the agency and its decision-makers free to exercise discretion." *Texas DAPA*, 809 F.3d at 171 (cleaned up). Courts should note that there "is some overlap in the analysis of those prongs" and also be "mindful but suspicious of the agency's own characterization" of its action. *Id.* (citations omitted). But most importantly, the Court should focus "primarily on whether the rule has binding effect on agency discretion or severely restricts it." *Id.* (citation omitted). "An agency

pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Id.* (cleaned up).

That should sound familiar. As discussed above, the Fifth Circuit also uses this inquiry to determine whether an agency action is final. *See supra* III.A. The Court has already determined that the Final Memorandum is facially binding and being applied by DHS in a way that makes it binding in its final agency action analysis above. *See supra* III.A. Recall that the Final Memorandum binds DHS personnel to consider and apply certain priorities and factors and forecloses reliance on the fact of conviction or a database search alone when taking enforcement action. *See generally* (Dkt. No. 109-5). DHS personnel do not have discretion to ignore the Final Memorandum's priority categories, and but for the Final Memorandum, DHS personnel would have discretion to take enforcement action based on the fact of conviction alone without considering additional factors and priorities. Put simply, the Final Memorandum is both facially binding and applied in a way that demonstrates it is binding. *See Texas DAPA*, 809 F.3d at 171. Furthermore, the Final Memorandum imposes rights and obligations by allowing aliens to challenge enforcement actions taken against them if they believe they do not fall within the Final Memorandum's priorities. (F.F. No. 67).[66]

[66] The Court recognizes that this is extra-record evidence. The Government contends that extra-record evidence cannot be considered for the States' APA merits claims, including their notice and comment claim. (Dkt. No. 189 at 8). But the Court concludes that consideration of extra-record evidence for the States' notice and comment claim is proper. First, the Fifth Circuit's tests for determining whether an agency rule is covered by the APA's exceptions to the notice and comment requirements make evaluation of the rule's *effects* necessary. *See Texas DAPA*, 809

This is consistent with the Fifth Circuit's holding in *Texas DAPA*. 809 F.3d at 171–76. There, the Fifth Circuit held that the DAPA Memo did not "genuinely leave the agency and its employees free to exercise discretion." *Id.* at 176. This holding was based on the Fifth Circuit's determination that even though the DAPA Memo purportedly conferred discretion on DHS personnel, that "discretionary language was pretextual." *Id.* at 171–76. Similarly here, the ostensibly discretionary language in the Final Memorandum does not change the effect. As explained above, *see supra* III.A., the smattering of discretionary language in the Final Memorandum is inconsistent with the mandatory language throughout the document, making clear that the priorities and factors are not optional. This makes the Final Memorandum binding on DHS personnel. Because the Final Memorandum has a binding effect on agency discretion and severely restricts it, the exception to the APA's notice and comment requirement for general statements of policy does not apply. *See Texas DAPA*, 809 F.3d at 171.

2. Procedural Rule

Even if an agency rule is binding and therefore not a general statement of policy, it can still be exempt from the notice and comment requirement "if it is one 'of agency organization, procedure, or practice.'" *Texas DAPA*, 809 F.3d at 176 (quoting 5 U.S.C.

F.3d at 171 (explaining that whether a rule is a general statement of policy turns on whether it "has binding effect"); *Id.* at 176 (whether a rule is procedural turns on whether it has a "substantial impact"). Thus, the rule against extra-record evidence cannot apply. Alternatively, the third *Medina* exception allows for consideration of extra-record evidence when "the agency failed to explain administrative action so as to frustrate judicial review." *Medina Cnty.*, 602 F.3d at 706. Because consideration of the effects of the Final Memorandum is necessary to determine whether the Final Memorandum is a general statement of policy or a procedural rule, *see Texas DAPA*, 809 F.3d at 171–76, excluding that evidence would "frustrate judicial review"; thus, it is admissible under the third *Medina* exception. *See Medina Cnty.*, 602 F.3d at 706.

§ 553(b)(A)). In the Fifth Circuit, this exception is governed by the "substantial impact test." *Id.*; *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 620 (5th Cir. 1994). This test "is the primary means by which [the court] look[s] beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation." *Texas DAPA*, 809 F.3d at 176 (citation omitted). Under this test, an agency rule is actually legislative and not procedural when it "has a *substantial* impact on the regulated industry, or an important class of the members or the products of that industry[.]" *Phillips Petroleum Co.*, 22 F.3d at 620 (emphasis in original). To determine if an agency rule has a substantial impact on the regulated industry, the Court asks whether the agency rule "modifies substantive rights and interests." *Texas DAPA*, 809 F.3d at 176. "An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply." *Id.* (citation omitted).

In *Texas DAPA*, the Fifth Circuit applied the substantial impact test to DHS's DAPA Memo, which conferred "lawful presence" on a particular class of illegal aliens. *Id.* The Fifth Circuit held that the DAPA Memo had a substantial impact because, by granting lawful presence to the covered class of illegal aliens, the DAPA Memo forced Texas "to choose between spending millions of dollars to subsidize driver's licenses and amending its statutes." *Id.* Accordingly, the DAPA Memo was not a procedural rule. *Id.*

In *Phillips Petroleum Co.*, the Fifth Circuit applied the substantial impact test to an action by the Department of Interior. 22 F.3d at 618. That action created "new criteria for valuing natural gas liquid products" used to calculate royalties owed to the government by oil and gas lessees. *Id.* Instead of calculating values using "the range of the various

types of prices prescribed in the governing regulation," the Department's action directed its personnel to rely on only "one type of price, the spot market price." *Id.* The Fifth Circuit held that the action was not a procedural rule because, even though it "plainly relate[d] to the internal practices" of the agency, the action had "a substantial impact on those regulated in the industry." *Id.* at 620. The Fifth Circuit reasoned that the action "narrowly restricts the discretion of [agency] officials in determining the value of" natural gas liquid products and, consequently, it "dramatically affects the royalty values of all oil and gas leases." *Id.* at 620–21. The Fifth Circuit also noted that the valuation criteria in the agency action required the use of different criteria than what the governing regulation required. *Id.*

The Final Memorandum also modifies substantive rights and interests such that it has a substantial impact. It modifies the substantive rights and interests of criminal aliens as demonstrated by the significant decrease in ICE's detention of aliens with criminal convictions under the Final Memorandum and its precursors. (F.F. No. 92); (F.F. No. 102). The Final Memorandum's impact on criminal aliens' rights and interests is further manifest by the fact that the Texas Board of Pardons and Paroles has revoked parole for some aliens with criminal convictions whom ICE does not detain, leading to continued custody in the Texas criminal justice system. (F.F. No. 105). Plus, as has been discussed, the Final Memorandum modifies aliens' substantive rights and interests by giving them the right to challenge enforcement actions taken against them by invoking their non-priority status. (F.F. No. 67). And just as the DAPA Memo forced Texas to "choose between spending millions of dollars to subsidize driver's licenses and amending its

statutes," *Texas DAPA*, 809 F.3d at 176, the Final Memorandum has forced the States to incur significant costs to the tune of millions of dollars. (F.F. Nos. 103–04); (F.F. No. 107); (F.F. No. 118); (F.F. Nos. 128–29). Additionally, just as in *Phillips Petroleum Co.*, the Final Memorandum "narrowly restricts the discretion of [agency] officials" (as has been discussed at length) and similarly deviates from the requirements of Sections 1226(c) and 1231(a)(2). *See Phillips Petroleum Co.*, 22 F.3d at 620–21. Because the Final Memorandum satisfies the substantial impact test, it is not a procedural rule.

***

The Final Memorandum is neither a general statement of policy nor a procedural rule. *See* 5 U.S.C. § 553(b)(A). It is a legislative rule. This holding is consistent with some of the central purposes of notice of comment, including "to subject agency decisionmaking to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced," and "to ensure the parties develop a record for judicial review." *See, e.g.*, *Make the Road New York v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020) (citations omitted). Accordingly, the Court holds that the Final Memorandum was required to comply with the APA's notice and comment provisions. *See Texas DAPA*, 809 F.3d at 171. Thus, the Court will enter judgment in favor of the States on Count IV of the Amended Complaint. *See* (Dkt. No. 109 at 32).

D. AGREEMENTS BETWEEN THE STATES AND GOVERNMENT (COUNT V)

Louisiana raises an additional claim based on its January 8, 2021 agreement with DHS.[67] Louisiana claims that DHS violated the terms of the agreement by failing to consult Louisiana and consider its views before issuing the Final Memorandum. *See* (Dkt. No. 153-8 at 56); (Dkt. No. 153-9 at 1). It appears that Louisiana's claim is not one for breach-of-contract,[68] rather, Louisiana contends the Government's failure to comply with the terms of the agreement is an additional basis on which the Court should find the Final Memorandum arbitrary and capricious and contrary to law under the APA. Louisiana's claim turns on whether the agreement is valid, and Louisiana has failed to show that it is.

This agreement is a new phenomenon. Despite Louisiana's assurances that this agreement takes nothing away from the federal government's authority, Louisiana understates the magnitude of what it asks the Court to find. Establishing the Nation's immigration laws is a power of Congress, and enforcing those laws is a power vested in the Executive Branch. U.S. Const. art. I, § 8, cl. 4; U.S. Const. art. II, § 1, cl. 1; *Arizona*, 567 U.S. at 396–97, 132 S.Ct. at 2499. Louisiana would have the Court hold that an outgoing DHS official from a lame-duck administration can significantly constrain the incoming administration by giving individual states an enforceable right to weigh in before the

[67] Texas concedes that its nearly identical agreement with DHS was terminated before the Final Memorandum was issued. (Dkt. No. 109 at ¶ 76); (Dkt. No. 231 at 11).

[68] Louisiana states that it is not seeking monetary damages or "specific performance to affirmatively require DHS to provide notice and follow the procedures in the Agreement. Rather, it seeks the standard remedies for unlawful agency action, holding unlawful and setting aside the challenged memoranda." (Dkt. No. 231 at 15); *see also* (Dkt. No. 109 at ¶ 139). Because Louisiana's claim is an APA claim, not a breach of contract claim, the Court does not address the Parties' arguments concerning the Tucker Act and sovereign immunity. *See* (Dkt. No. 223 at 31–33); (Dkt. No. 231 at 14–15).

incoming administration makes changes. Such a holding would have profound constitutional implications. Louisiana has provided insufficient support for its claim to an enforceable right of such consequence.

First, Louisiana points to statutes that direct DHS to develop processes for receiving input from states and empower DHS to perform acts necessary to carrying out its responsibilities. *See* 6 U.S.C. § 361(b)(4); 8 U.S.C. § 1103(a)(3). To be sure, these statutes authorize DHS to *seek* Louisiana's input. But they do not permit DHS to *surrender* power to Louisiana by subjecting itself to an enforceable consultation requirement. In the Court's view, reading these statutes as authorizing this type of surrender of authority is a bridge too far. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468, 121 S.Ct. 903, 909–10, 149 L.Ed.2d 1 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

The caselaw Louisiana relies on is not sufficient to support its position. Louisiana cites three cases for the proposition that agencies can choose to commit themselves to "more rigorous" procedures such as a consultation requirement with Louisiana and that such a commitment is enforceable in court. Two of Louisiana's cases stand for, at most, the proposition that agencies must follow their own internal procedures. *See Morton*, 415 U.S. at 235, 94 S.Ct. at 1074; *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 295 (2d Cir. 2006). Neither addresses the question of whether an agency may subject its decision-making to consultation with an outside party.

Louisiana's strongest case is *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979). There, the Court held that an action taken by the Bureau of Indian Affairs violated the APA because it did not to comply with the Bureau's internal requirement of consulting the Tribe before making Bureau employment decisions. *Id.* at 721. But the DHS agreement requiring consultation with Louisiana before making nearly *any* immigration enforcement decision, *see* (Dkt. No. 153-8 at 54–56); (Dkt. No. 153-9 at 1–6), is on a completely different scale than the Bureau of Indian Affairs' internal policy of consulting the tribes before making its own employment decisions. *See Andrus*, 603 F.3d at 717–18. This is particularly true given the Bureau's longstanding preference for hiring tribal members—a preference expressly authorized by Congress and unanimously approved by the Supreme Court. *See Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974).

DHS's alleged failure to comply with this agreement cannot provide a basis for finding that the Final Memorandum violated the APA. *Cf. Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1172 (10th Cir. 2004) ("The executive branch does not have authority to contract away the enumerated constitutional powers of Congress or its own successors[.]"). In reaching this conclusion, the Court does not downplay Louisiana's considerable interest in the enforcement of immigration law, but that interest cannot circumvent the fact that the Constitution vests the enactment and enforcement of immigration law in the federal government. *Arizona*, 567 U.S. at 394, 132 S.Ct. at 2498 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Chy v. Freeman*, 92 U.S. 275, 280, 23 L.Ed. 550 (1875)

("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. . . . [T]he responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government."). But despite Louisiana's important interest, immigration law remains a federal prerogative. *Cf. Arizona*, 567 U.S. at 416, 132 S.Ct. at 2510 ("Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.").

The Court holds that DHS's alleged failure to comply with the agreement cannot provide a basis for finding that the Final Memorandum violated the APA. Accordingly, the Court will enter judgment in favor of the Government on Count V of the Amended Complaint. *See* (Dkt. No. 109 at 32–33).

E. TAKE CARE CLAUSE (COUNT VI)

The States assert a claim under the Take Care Clause of the Constitution. *See* U.S. Const. art. II, § 3 ("he shall take Care that the Laws be faithfully executed"). A federal court normally does not reach a constitutional question if it can dispose of the case on another ground. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205, 129 S.Ct. 2504, 2513, 174 L.Ed.2d 140 (2009); *United States v. Johnson*, 956 F.3d 740, 743 (5th Cir. 2020). Indeed, courts "ought not to pass on questions of constitutionality unless such adjudication is unavoidable." *Matal v. Tam*, ____ U.S. ____, ____, 137 S.Ct. 1744, 1755, 198 L.Ed.2d 366 (2017) (cleaned up). Accordingly, the Court will not reach Count VI of the

Amended Complaint raising the States' Take Care Clause claim in this case. *See* (Dkt. No. 109 at 33–34); *Texas*, 549 F. Supp. 3d at 622; *see also Texas DAPA*, 809 F.3d at 146 n.3.

V. REMEDY

The States ask the Court to hold unlawful and set aside the Final Memorandum, issue a permanent injunction, and award declaratory relief.

A. HOLD UNLAWFUL AND SET ASIDE

The States ask the Court to vacate the Final Memorandum in its entirety. Under the APA, a court "shall . . . hold unlawful and set aside agency action" that is contrary to law, arbitrary and capricious, or without observance of procedure. 5 U.S.C. § 706(2). "Agency action" includes a "rule." 5 U.S.C. § 551(13). Again, it is undisputed that the Final Memorandum is a "rule" under the APA. Thus, the Court must decide to what extent it will set aside the Final Memorandum.

Under existing precedent, there are two options when awarding relief under Section 706(2): remand with vacatur or remand without vacatur. The default approach is to remand the agency action *with* vacatur. *Texas MPP*, 20 F.4th at 1000; *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). This is especially true when there is a procedural violation. *See Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020). Remand with vacatur "restores the status quo before the invalid rule took effect," leaving the agency free to consider the problem anew. *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004).

Unlike remand with vacatur, remand *without* vacatur leaves the rule in place during remand. *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 43 (D.D.C. 2013). For

this reason, "remand without vacatur creates a risk that an agency may drag its feet and keep in place an unlawful agency rule." *EME Homer City Generation, L.P. v. E.P.A.*, 795 F.3d 118, 132 (D.C. Cir. 2015). Remand without vacatur is "generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas MPP*, 20 F.4th at 1000 (citation omitted). It is an "exceptional remedy." *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020).

1. Remand with Vacatur

When deciding whether to remand *with* vacatur, a federal court considers two factors. First, "the seriousness of the deficiencies of the action, that is, how likely it is the agency will be able to justify its decision on remand." *Texas MPP*, 20 F.4th at 1000. Second, "the disruptive consequences of vacatur." *Id.* "A strong showing of one factor may obviate the need to find a similar showing of the other." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 674 (D.C. Cir. 2019).

Regarding the first factor, the Final Memorandum is deficient in more than one way: it is contrary to law, arbitrary and capricious, and failed to observe procedure. *See Texas MPP*, 20 F.4th at 1000. DHS knew of these failings when it issued the Final Memorandum. For almost a year and a half, the Government has litigated three separate memoranda but has failed to cure fundamental defects in its civil immigration enforcement priorities. Each of this Court's opinions placed the Government on notice about the problems with its decisionmaking. "And it still failed to correct them." *See id.* Moreover, any post-remand memorandum may constitute "an impermissible *post hoc*

rationalization under *Regents*." *See id.* at 1001. This factor alone warrants remand with vacatur.

Regarding the second factor, vacatur is disruptive to the extent that DHS will no longer have nationwide immigration enforcement guidance. But "disruptive consequences matter only insofar as the agency may be able to rehabilitate its rationale." *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) (internal quotations omitted). It is doubtful that an agency can offer a post-hoc rationalization following remand when the rule itself is arbitrary and capricious. *See Texas MPP*, 20 F.4th at 1000-01.

Nonetheless, the second factor does not warrant remand without vacatur either. The disruption to DHS is largely the "uncertainty that typically attends vacatur of any rule." *See Wheeler*, 955 F.3d at 85. To be sure, the most compelling argument is that DHS has already trained its agents on the Final Memorandum. But that training is premised on a fundamental misunderstanding of federal law. For over a year, DHS has not treated "shall" as mandatory under Sections 1226(c) and 1231(a)(2). And that interpretation has resulted in irreparable harm to the States. *Cf. Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 80 (D.D.C. 2010) ("[V]acatur is appropriate in order to prevent significant harm resulting from keeping the agency's decision in place."). In any event, DHS has shown the ability to refine its immigration enforcement priorities in response to litigation over

the last year. DHS can, for example, draw upon its prior immigration enforcement priorities that contemplate mandatory detention.[69]

In sum, the "limited circumstances" in which remand without vacatur is the proper remedy do not apply here. *See Am. Great Lakes Ports Ass'n*, 962 F.3d at 518. Any disruption does not outweigh the seriousness of DHS's fundamental error. Accordingly, the Court takes the normal approach and remands with vacatur.

Further, vacatur applies to the entire Final Memorandum. Recall that the Final Memorandum is only self-styled as such. As the Government openly acknowledges, it is really a rule under the APA. (Dkt. No. 211 at 114). Section 706 governs the "scope of review" of agency action. A federal court "shall . . . hold unlawful and set aside agency action" that is unlawful. 5 U.S.C. § 706(2). "Agency action" includes "the whole or part of an agency rule." 5 U.S.C. § 551(4), (13). Thus, the APA contemplates wholesale vacatur of entire rules.

While the Government urges the Court to limit relief, it makes no compelling argument regarding how the Court can practically vacate and remand portions of this rule rather than the entire rule. *See Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360, 388 (5th Cir. 2018). Unlike some agency rules, which may include a severability provision or "sensibly be given independent life," *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C.

[69] DHS is, of course, free to either craft a memorandum that is not subject to review under the APA or cure the fundamental defects in a subsequent memorandum that is subject to review. Indeed, not all self-styled "guidance" is subject to judicial review. *See*, *e.g.*, *Texas MPP*, 20 F.4th at 986–87. And of course, DHS is not required to issue a new memorandum. This opinion should not be construed as ordering DHS to act. The only remedy is vacatur of the Final Memorandum.

Cir. 1994), the Final Memorandum is arbitrary and capricious, contains language that is contrary to law throughout the document, is being applied in a way that violates federal statutes, and failed to observe procedure. Consequently, the Final Memorandum is not like other cases in which partial vacatur was appropriate because the rules "were plainly divisible."[70] *Cf. Am. Waterways Operators v. Wheeler*, 507 F. Supp. 3d 47, 78 (D.D.C. 2020). There is no workable path to afford the States meaningful relief other than setting aside the complete Final Memorandum. *Cf. Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291–92, 80 S.Ct. 332, 335, 4 L.Ed.2d 323 (1960).

2. Scope of Relief

Next, the scope of relief. When a federal court vacates a rule, relief is not limited to prohibiting the rule's application to the named plaintiffs. *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). This means that, by necessity, vacating a rule applies universally. *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see also Texas MPP*, 20 F.4th at 985, 1000–01. The APA itself "contemplates nationwide relief from invalid agency action." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, ____ U.S. ____, ____ n.28, 140 S.Ct. 2367, 2412 n.28, 207 L.Ed.2d 819 (2020) (Ginsburg, J., dissenting). Courts across the country interpret the APA the same way. *See, e.g.*, *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 66–72 (D.D.C. 2019) (Jackson, J.) (explaining that limited relief under Section 706 is inconsistent with text and

[70] The Final Memorandum could not, for instance, be vacated only as to detentions. This is because vacatur requires actual revocation of the agency's rule or portions of it. Leaving an agency rule in place but limiting its application would be enjoining its enforcement, not vacatur.

precedent, would not work in practice, and reflects "a spirit of defiance of judicial authority"), *rev'd and remanded on other grounds*, 962 F.3d 612 (D.C. Cir. 2020); *New York v. Dep't of Com.*, 351 F. Supp. 3d 502, 672 (S.D.N.Y. 2019), *aff'd in part, rev'd in part on other grounds*, ____ U.S. ____, 139 S.Ct. 2551, 204 L.Ed.2d 978 (2019).

Here, the Government makes little effort at proposing an alternative path forward other than citing cases that discuss crafting injunctive relief—an entirely different exercise because this is not an injunction. *See Pennsylvania v. President United States*, 930 F.3d 543, 575–76 (3d Cir. 2019), *rev'd and remanded on other grounds*, ____ U.S. ____, 140 S.Ct. 2367, 207 L.Ed.2d 819 (2020). Simply put, the contention that vacatur should be limited to the States of Texas and Louisiana is in conflict with the overwhelming weight of authority. *O.A. v. Trump*, 404 F. Supp. 3d 109, 153–54 (D.D.C. 2019) (collecting cases); *see also* Mila Sohoni, *The Power to Vacate A Rule*, 88 Geo. Wash. L. Rev. 1121 (2020).

Universal relief when setting aside an agency action under the APA is only magnified in the immigration context. Universal relief can be appropriate to ensure uniformity in immigration policies as prescribed by federal law. *See Texas DAPA*, 809 F.3d at 187–88; *see also Trump v. Hawaii*, ____ U.S. ____, ____ n.13, 138 S.Ct. 2392, 2446 n.13, 201 L.Ed.2d 775 (2018) (Sotomayor, J., dissenting). The Final Memorandum governs immigration, which is designed to be uniform across the Nation. U.S. Const. art. I, § 8, cl. 4; Pub. L. No. 99-603, § 115(1). Moreover, the States are irreparably harmed when aliens with certain criminal convictions or aliens with final orders of removal inevitably move to Texas and Louisiana after those aliens are released, have detainers rescinded, or are otherwise not detained under the Final Memorandum. *See Texas DAPA*, 809 F.3d at

188; (Dkt. No. 217-12 at 5–6); (Dkt. No. 217-13 at 7); (Dkt. No. 217-15 at 2); (Dkt. No. 203 at 82).

None of this is to say that universal relief is appropriate in all cases. Unlike normal cases, in which courts determine whether the *application* of a law to the named plaintiffs is lawful, the APA tasks courts with determining whether the rule *itself* is lawful. As such, the standard debate about nationwide or universal relief under Article III is not directly implicated here; "the Court is vacating an agency action pursuant to the APA, as opposed to enjoining it as a violation of the Constitution or other applicable law." *NAACP v. Trump*, 315 F. Supp. 3d 457, 474 n.13 (D.D.C. 2018).

***

The Court holds unlawful and sets aside the Final Memorandum.[71]

B. INJUNCTIVE RELIEF

The States also request a permanent injunction. If vacatur is sufficient to address the injury, it is improper to also issue an injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66, 130 S.Ct. 2743, 2761, 177 L.Ed.2d 461 (2010). The only justification that the States offer for granting relief other than vacatur is that vacatur does not order the Government to detain under Sections 1226(c) and 1231(a)(2). (Dkt. No. 109 at 34);

[71] The Court is mindful that the Supreme Court recently requested supplemental briefing on, among other issues, "Whether 8 U.S.C. § 1252(f)(1) imposes any jurisdictional or remedial limitations on the entry of injunctive relief, declaratory relief, or relief under 5 U.S.C. § 706." *Biden v. Texas*, ____ S.Ct. ____, ____, No. 21-954, 2022 WL 1299971, at *1 (May 2, 2022). Section 1252(f) does not apply here because, among other reasons, the Court vacates a rule. *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 60 (D.D.C. 2020); *see also Texas MPP*, 20 F.4th at 1003–04; *Preap*, ___ U.S. at ____, 139 S.Ct. at 962; *Texas I*, 524 F. Supp. 3d at 641.

(Dkt. No. 231 at 16). The purported source for the Court's authority to order detentions is 5 U.S.C. § 706(1). (Dkt. No. 111 at 39).

Under Section 706, a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1). A court can grant relief under Section 706(1) "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63–64, 124 S.Ct. 2373, 2379, 159 L.Ed.2d 137 (2004) (emphases in original). As such, Section 706(a) precludes a broad programmatic attack. *Id.* at 63, 124 S.Ct. at 2379–80. The APA is designed "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Id.* at 66, 124 S.Ct. at 2381. Moreover,

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

Id. at 66–67, 124 S.Ct. at 2381. The Court declines that approach.

The States spend less than a page of briefing in support of their request for a positive injunction and do not grapple with *Norton*. In addition, district courts routinely decline to issue an injunction after vacating a rule while also leaving the door open for additional relief if future events require it. *See, e.g.*, *Franciscan All., Inc. v. Azar*, 414 F.

Supp. 3d 928, 946 (N.D. Tex. 2019). The Court sees no reason to depart from this well-reasoned approach.[72] The Court denies the request to issue injunctive relief.

C. DECLARATORY JUDGMENT

The States also request a declaratory judgment. (Dkt. No. 224 at 22–23, 30). The States, however, do not explain how vacatur does not award them complete relief. *See Monsanto Co.*, 561 U.S. at 165–66, 130 S.Ct. at 2761. The Court has already held unlawful and set aside the Final Memorandum. The Court denies this request for relief.

VI. CONCLUSION

The Court finds that the States have proven Counts I, II, III, and IV by a preponderance of the evidence. The Court finds that the States have not proven Count V by a preponderance of the evidence. The Court declines to reach Count VI. The Court **VACATES** the Final Memorandum as arbitrary and capricious, contrary to law, and failing to observe procedure under the Administrative Procedure Act. The Court **DENIES** all other requested relief. The Court will enter a final judgment, including a seven-day administrative stay, by separate order.

It is SO ORDERED.

Signed on June 10, 2022.

Drew B Tipton

DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

[72] The Government urges the Court to limit any relief to remand without vacatur or, in the alternative, remand with vacatur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

The STATE OF TEXAS and the STATE OF LOUISIANA,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 6:21-CV-00016**
	§	
The UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary of the United States Department of Homeland Security, in his official capacity; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; TAE JOHNSON, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, Senior Official Performing the Duties of the Director of the U.S. Citizenship and Immigration Services, in her official capacity; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

For the reasons stated in the accompanying Memorandum Opinion and Order issued under Rule 52 of the Federal Rules of Civil Procedure on this date, it is hereby

ORDERED and ADJUDGED that Final Judgment is entered in favor for the Plaintiffs on Counts I, II, III, and IV in the Amended Complaint. *See* (Dkt. No. 109 at 26–32).

ORDERED and ADJUDGED that Final Judgment is entered in favor of the Defendants on Count V in the Amended Complaint. *See* (Dkt. No. 109 at 32–33).

ORDERED and ADJUDGED that the Court does not reach Count VI in the Amended Complaint. *See* (Dkt. No. 109 at 33–34).

The Court **DECLARES UNLAWFUL and VACATES**, in its entirety, the Secretary of Homeland Security's September 30, 2021 memorandum titled *Guidelines for the Enforcement of Civil Immigration Law*. (Dkt. No. 109-5). The Court **REMANDS** this matter to the Secretary of Homeland Security for further consideration. The Court **DENIES** all other requested relief.

The Court **STAYS** the effect of this Final Judgment for seven days from the date of entry to allow the Defendants to seek relief at the appellate level.

It is SO ORDERED.

Signed on June 10, 2022.

Drew B Tipton

DREW B. TIPTON
UNITED STATES DISTRICT JUDGE

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

September 30, 2021

MEMORANDUM TO: Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement

CC: Troy Miller
Acting Commissioner
U.S. Customs and Border Protection

Ur Jaddou
Director
U.S. Citizenship and Immigration Services

Robert Silvers
Under Secretary
Office of Strategy, Policy, and Plans

Katherine Culliton-González
Officer for Civil Rights and Civil Liberties
Office for Civil Rights and Civil Liberties

Lynn Parker Dupree
Chief Privacy Officer
Privacy Office

FROM: Alejandro N. Mayorkas
Secretary

SUBJECT: Guidelines for the Enforcement of Civil Immigration Law

This memorandum provides guidance for the apprehension and removal of noncitizens.

I am grateful to you, the other leaders of U.S. Immigration and Customs Enforcement, and our frontline personnel for the candor and openness of the engagements we have had to help shape this guidance. Thank you especially for dedicating yourselves – all your talent and energy – to the noble law enforcement profession. In executing our solemn responsibility to enforce immigration

law with honor and integrity, we can help achieve justice and realize our ideals as a Nation. Our colleagues on the front lines and throughout the organization make this possible at great personal sacrifice.

I. Foundational Principle: The Exercise of Prosecutorial Discretion

It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders. The exercise of prosecutorial discretion in the immigration arena is a deep-rooted tradition. The United States Supreme Court stated this clearly in 2012:

> "A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."

In an opinion by Justice Scalia about twelve years earlier, the Supreme Court emphasized that enforcement discretion extends throughout the entire removal process, and at each stage of it the executive has the discretion to not pursue it.

It is estimated that there are more than 11 million undocumented or otherwise removable noncitizens in the United States. We do not have the resources to apprehend and seek the removal of every one of these noncitizens. Therefore, we need to exercise our discretion and determine whom to prioritize for immigration enforcement action.

In exercising our discretion, we are guided by the fact 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 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. Numerous times over the years, and presently, bipartisan groups of leaders have recognized these noncitizens' contributions to state and local communities and have tried to pass legislation that would provide a path to citizenship or other lawful status for the approximately 11 million undocumented noncitizens.

The fact an individual is a removable noncitizen therefore should not alone be the basis of an enforcement action against them. We will use our discretion and focus our enforcement resources in a more targeted way. Justice and our country's well-being require it.

By exercising our discretionary authority in a targeted way, we can focus our efforts on those who pose a threat to national security, public safety, and border security and thus threaten America's well-being. We do not lessen our commitment to enforce immigration law to the best of our ability. This is how we use the resources we have in a way that accomplishes our enforcement mission most effectively and justly.

II. Civil Immigration Enforcement Priorities

We establish civil immigration enforcement priorities to most effectively achieve our goals with the resources we have. We will prioritize for apprehension and removal noncitizens who are a threat to our national security, public safety, and border security.

A. Threat to National Security

A noncitizen who 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, is a priority for apprehension and removal.

B. Threat to Public Safety

A noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal.

Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

There can be aggravating factors that militate in favor of enforcement action. Such factors can include, for example:

- the gravity of the offense of conviction and the sentence imposed;
- the nature and degree of harm caused by the criminal offense;
- the sophistication of the criminal offense;
- use or threatened use of a firearm or dangerous weapon;
- a serious prior criminal record.

Conversely, there can be mitigating factors that militate in favor of declining enforcement action. Such factors can include, for example:

- advanced or tender age;
- lengthy presence in the United States;
- a mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;
- status as a victim of crime or victim, witness, or party in legal proceedings;
- the impact of removal on family in the United States, such as loss of provider or caregiver;
- whether the noncitizen may be eligible for humanitarian protection or other immigration relief;
- military or other public service of the noncitizen or their immediate family;

- time since an offense and evidence of rehabilitation;
- conviction was vacated or expunged.

The above examples of aggravating and mitigating factors are not exhaustive. The circumstances under which an offense was committed could, for example, be an aggravating or mitigating factor depending on the facts. The broader public interest is also material in determining whether to take enforcement action. For example, a categorical determination that a domestic violence offense compels apprehension and removal could make victims of domestic violence more reluctant to report the offense conduct. The specific facts of a case should be determinative.

Again, our personnel must evaluate the individual and the totality of the facts and circumstances and exercise their judgment accordingly. The overriding question is whether the noncitizen poses a current threat to public safety. Some of the factors relevant to making the determination are identified above.

The decision how to exercise prosecutorial discretion can be complicated and requires investigative work. Our personnel should not rely on the fact of conviction or the result of a database search alone. Rather, our personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of the facts and circumstances of the conduct at issue. The gravity of an apprehension and removal on a noncitizen's life, and potentially the life of family members and the community, warrants the dedication of investigative and evaluative effort.

C. Threat to Border Security

A noncitizen who poses a threat to border security is a priority for apprehension and removal.

A noncitizen is a threat to border security if:

(a) they are apprehended at the border or port of entry while attempting to unlawfully enter the United States; or

(b) they are apprehended in the United States after unlawfully entering after November 1, 2020.

There could be other border security cases that present compelling facts that warrant enforcement action. In each case, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. Our personnel should evaluate the totality of the facts and circumstances and exercise their judgment accordingly.

III. Protection of Civil Rights and Civil Liberties

We must exercise our discretionary authority in a way that protects civil rights and civil liberties. The integrity of our work and our Department depend on it. A noncitizen's race, religion, gender, sexual orientation or gender identity, national origin, or political associations shall never be factors in deciding to take enforcement action. A noncitizen's exercise of their First Amendment rights also should never be a factor in deciding to take enforcement action. We must ensure that enforcement actions are not discriminatory and do not lead to inequitable outcomes.

This guidance does not prohibit consideration of one or more of the above-mentioned factors if they are directly relevant to status under immigration law or eligibility for an immigration benefit. For example, religion or political beliefs are often directly relevant in asylum cases and need to be assessed in determining a case's merit.

State and local law enforcement agencies with which we work must respect individuals' civil rights and civil liberties as well.

IV. Guarding Against the Use of Immigration Enforcement as a Tool of Retaliation for the Assertion of Legal Rights

Our society benefits when individuals – citizens and noncitizens alike – assert their rights by participating in court proceedings or investigations by agencies enforcing our labor, housing, and other laws.

It is an unfortunate reality that unscrupulous employers exploit their employees' immigration status and vulnerability to removal by, for example, suppressing wages, maintaining unsafe working conditions, and quashing workplace rights and activities. Similarly, unscrupulous landlords exploit their tenants' immigration status and vulnerability to removal by, for example, charging inflated rental costs and failing to comply with housing ordinances and other relevant housing standards.

We must ensure our immigration enforcement authority is not used as an instrument of these and other unscrupulous practices. A noncitizen's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion.

V. The Quality and Integrity of our Civil Immigration Enforcement Actions

The civil immigration enforcement guidance does not compel an action to be taken or not taken. Instead, the guidance leaves the exercise of prosecutorial discretion to the judgment of our personnel.

To ensure the quality and integrity of our civil immigration enforcement actions, and to achieve consistency in the application of our judgments, the following measures are to be taken before the effective date of this guidance:

A. Training

Extensive training materials and a continuous training program should be put in place to ensure the successful application of this guidance.

B. Process for Reviewing Effective Implementation

A review process should be put in place to ensure the rigorous review of our personnel's enforcement decisions throughout the first ninety (90) days of implementation of this guidance. The review process should seek to achieve quality and consistency in decision-making across the entire agency and the Department. It should therefore involve the relevant chains of command.

Longer-term review processes should be put in place following the initial 90-day period, drawing on the lessons learned. Assessment of implementation of this guidance should be continuous.

C. Data Collection

We will need to collect detailed, precise, and comprehensive data as to every aspect of the enforcement actions we take pursuant to this guidance, both to ensure the quality and integrity of our work and to achieve accountability for it.

Please work with the offices of the Chief Information Officer; Strategy, Policy, and Plans; Science and Technology; Civil Rights and Civil Liberties; and Privacy to determine the data that should be collected, the mechanisms to collect it, and how and to what extent it can be made public.

D. Case Review Process

We will work to establish a fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken. Discretion to determine the disposition of the case will remain exclusively with the Department.

VI. Implementation of the Guidance

This guidance will become effective in sixty (60) days, on November 29, 2021. Upon the effective date, this guidance will serve to rescind (1) the January 20, *2021 Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* issued by then-Acting Secretary David Pekoske, and (2) the *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* issued by Acting ICE Director Tae D. Johnson.

We will meet regularly to review the data, discuss the results to date, and assess whether we are achieving our goals effectively. Our assessment will be informed by feedback we receive from our law enforcement, community, and other partners.

This guidance is Department-wide. Agency leaders as to whom this guidance is relevant to their operations will implement this guidance accordingly.

VII. Statement of No Private Right Conferred

This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Homeland Security

Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law

September 30, 2021

Introduction

On January 20, 2021, President Biden issued Executive Order 13993, 86 Fed. Reg. 7051, *Revision of Civil Immigration Enforcement Policies and Priorities*.[1] The Executive Order established that the policy of the Biden-Harris Administration is to "protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety." The Executive Order also committed to adhering to "due process of law as we safeguard the dignity and well-being of all families and communities." In order to better align with these values and priorities, the Executive Order revoked Executive Order 13768, 82 Fed. Reg. 8799, promulgated on January 25, 2017, and called for a "reset" of the "policies and practices for enforcing civil immigration laws."[2]

Also on January 20, 2021, then-Acting Secretary David Pekoske issued a memorandum (the "Pekoske Memorandum") calling for a comprehensive review of the Department of Homeland Security's (the "Department" or "DHS") immigration enforcement policies and priorities and establishing civil immigration enforcement guidelines.[3] By its terms, the Pekoske Memorandum contemplated issuance of revised policies following such a review. On February 18, 2021, U.S. Immigration and Customs Enforcement ("ICE") Acting Director Tae Johnson issued interim guidance (the "Johnson Memorandum") to all ICE employees in support of the interim priorities contained in the Pekoske Memorandum and making certain approved revisions.[4]

The Pekoske and Johnson Memoranda have been challenged in four different lawsuits, two of which were dismissed by district courts on the grounds that the memoranda are not subject to judicial review and one of which remains pending in the Southern District of Texas.[5] In the fourth suit brought by the states of Texas and Louisiana, a federal judge in the Southern District of Texas on August 19, 2021, issued a preliminary injunction enjoining the Department from

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[1] Exec. Order 13993, *Revision of Civil Immigration Enforcement Policies and Priorities,* 86 Fed. Reg. 7051 (Jan. 20, 2021), available at https://www.federalregister.gov/documents/2021/01/25/2021-01768/revision-of-civil-immigration-enforcement-policies-and-priorities.

[2] *Id.*

[3] Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021).

[4] Memorandum from Tae Johnson, Acting Dir. of U.S. Immigr. and Customs Enf't, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021).

[5] *Arizona v. Dept. of Homeland Sec.,* Case No. 21-cv-186 (D. Ariz.); *Florida v. United States*, Case No. 21-cv-541 (M.D. Fla.); *Coe v. Biden*, Case No. 21-cv-168 (S.D. Tex.).

enforcing and implementing the enforcement guidelines contained in both memoranda. *Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 3683913 (S.D. Tex. Aug. 19, 2021). On September 15, 2021, the Fifth Circuit Court of Appeals stayed the district court's injunction in most respects while the government's appeal is pending but left the injunction in place insofar as it "prevents DHS and ICE officials from relying on the memos to refuse to detain aliens described in [8 U.S.C. §] 1226(c)(1) against whom detainers have been lodged or aliens who fall under section 1231(a)(1)(A) because they have been ordered removed." *Texas v. United States*, --- F.4th ---, 2021 WL 4188102, *7 (5th Cir. Sept. 15, 2021).

In so ruling, the Fifth Circuit emphasized the "deep-rooted tradition of enforcement discretion when it comes to decisions that occur before detention, such as who should be subject to arrest, detainers, and removal proceedings," *id.* at *6, and reaffirmed the Supreme Court's holding that law enforcement discretion extends throughout the removal process, including to the discretionary decision of whether to "abandon the endeavor." *Id.* at *4 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999)).

Over the past seven months, the Secretary and Department personnel have held numerous engagements with internal and external stakeholders and have closely monitored the implementation of the Pekoske and Johnson Memoranda. The Secretary's *Guidelines for the Enforcement of Civil Immigration Law*, issued today on September 30, 2021, reflect the information collected throughout this period as well as the Secretary's own experience as a career public servant, including 12 years as a federal prosecutor, three years of which as the United States Attorney for the Central District of California, and more than 7 years as Deputy Secretary of Homeland Security and Director of U.S. Citizenship and Immigration Services. This document contains a summary of the considerations informing the guidelines being issued today.

Prosecutorial and Enforcement Discretion in the Immigration Context

History of Immigration Enforcement Policies and Priorities

"A principal feature" of the Nation's immigration laws "is the broad discretion exercised by immigration officials." *Arizona v. United States*, 567 U.S. 387, 396 (2012). This discretion derives not only from the U.S. Constitution, which vests enforcement authority in the Executive Branch, but also from the immigration laws themselves. *See, e.g.*, 6 U.S.C. § 202(5) (expressly directing the Secretary to "[e]stablish national immigration enforcement policies and priorities").

For over a century, the Executive has exercised discretion to prioritize which noncitizens to arrest, detain, or remove. For example, as far back as 1909, the Immigration and Naturalization Service ("INS"), which then handled many of the immigration-enforcement functions now handled by DHS, had a prosecutorial-discretion policy directing that officers generally would not have good cause to initiate proceedings to cancel a fraudulent or illegally procured naturalization certificate "unless some substantial results are to be achieved thereby in the way of betterment of

the citizenship of the country."[6] And in 1976, the INS General Counsel issued a legal opinion providing broader policy guidance on the exercise of prosecutorial discretion.[7]

In 2000, INS Commissioner Doris Meissner issued a memorandum to senior INS officials on the exercise of prosecutorial discretion (the "Meissner Memorandum").[8] The Meissner Memorandum adopted a "totality of the circumstances" approach to immigration enforcement that was guided by a non-exhaustive list of both positive and negative factors (*e.g.*, immigration status, length of residence in the United States, criminal history, current or future eligibility for relief from removal).[9] The memorandum expressly provided that "service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process" and that it is "appropriate and expected that the INS will exercise [prosecutorial discretion] authority in appropriate cases."[10] It also directed officers to "take into account the principles described [in the memorandum] in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice."[11] Ultimately, determinations were committed to "the exercise of judgment by the responsible officer" who was "encouraged," but not required, to seek supervisor input in "questionable cases."[12]

The Meissner Memorandum provided the primary guidance for immigration officers' exercise of prosecutorial discretion for nearly a decade.[13] In June 2010, ICE Director John Morton issued a memorandum to all ICE employees (the "Morton Memorandum") identifying categories of individuals who should be prioritized for enforcement, with the highest priority being noncitizens who pose a danger to national security or public safety (including individuals convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders, as well as those who otherwise pose a serious risk to public safety), and the secondary priorities being recent illegal entrants and individuals with prior orders of removal.[14] With respect to prioritizing the removal of individuals with criminal convictions, the national security and public safety priority identified three priority levels: (1) aggravated felons and noncitizens with multiple felonies; (2) noncitizens with a single felony or three or more misdemeanors; and (3) noncitizens with a misdemeanor conviction.[15]

In June 2011, Director Morton issued a second memorandum on the exercise of prosecutorial discretion that eschewed the priorities-based approach in his earlier memorandum and instead followed the same basic structure as the Meissner Memorandum: vesting line officers with broad discretion and instructing them to consider the totality of the circumstances, guided by a long list

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[6] *Department of Justice Circular Letter Number 107*, dated Sept. 20, 1909.
[7] *See* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).
[8] Memorandum from Doris Meissner, Comm'r, INS, *Exercising Prosecutorial Discretion* (Nov. 17, 2000).
[9] *Id.* at 7–8.
[10] *Id.* at 5–7.
[11] *Id.*
[12] *Id.* at 5, 9, 11.
[13] In 2005, the ICE Principal Legal Advisor issued a memorandum providing guidance for when ICE attorneys within the Office of the Principal Legal Advisor could join in or file motions to dismiss proceedings without prejudice in immigration court to permit noncitizens to request adjustment of status before USCIS.
[14] Memorandum from John Morton, ICE Dir., *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Jun 30, 2010), 1–2.
[15] *Id.* at 2.

of positive and negative equities.[16] This memorandum also included a second list of positive and negative factors requiring "particular care."[17]

In 2014, Secretary of Homeland Security Jeh Johnson issued a memorandum (the "Jeh Johnson Memorandum") that exercised discretion at the policymaking level of the Secretary and additionally vested significant authority in the hands of field office leadership to direct exercises of prosecutorial discretion.[18] The Jeh Johnson Memorandum established three priority categories:

1. Threats to national security, border security, and public safety;

2. Misdemeanants and new immigration violators; and

3. Other immigration violations.

With respect to individuals who fell within these priority categories, the memorandum encouraged the exercise of prosecutorial discretion based on a "totality of the circumstances" approach guided by an enumerated list of considerations.[19] The Jeh Johnson Memorandum further specified that immigration officers may pursue removal of individuals outside the established priorities where, "in the judgment of an ICE Field Office Director, removing such [a noncitizen] would serve an important federal interest."[20] This requirement echoes language provided in the Meissner Memorandum, which referenced the Principles of Federal Prosecution governing the conduct of U.S. Attorneys to explain that "[a]s a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial."[21] The Jeh Johnson Memorandum excluded from the priority categories: (1) individuals with one or two misdemeanor convictions, with the exception of those described as "significant misdemeanors" based on the nature of the offense and length of time the individual was sentenced to serve in custody; and (2) individuals with prior orders of removal entered before 2014.[22]

At the beginning of the last Administration, President Trump issued Executive Order 13768, *Enhancing Public Safety in the Interior of the United States*,[23] which purported to diverge from the longstanding use of prioritization schemes to guide the exercise of enforcement discretion. Contrary to prior guidance, Executive Order 13768 stated that, with limited exceptions, "[i]t is the policy of the executive branch to … ensure the faithful execution of the immigration laws … against *all removable aliens*," and specifically directed "agencies to employ all lawful means to

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[16] Memorandum from John Morton, ICE Dir., *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011).
[17] *Id.* at 5.
[18] Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).
[19] *Id.* at 5–6.
[20] Jeh Johnson Memorandum at 5.
[21] Meissner Memorandum at 5.
[22] *Id.* at 3–4.
[23] Exec. Order 13768, *Enhancing Public Safety in the Interior of the United States*, 59 Fed. Reg. 8799 (Jan. 25, 2017).

ensure the faithful execution of the immigration laws … against *all removable aliens*."[24] Insofar as the Executive Order established enforcement priorities, it identified large categories of people subject to inadmissibility and deportability grounds, as well as an expansive list of characteristics that effectively described all removable noncitizens. The same "enforcement priorities" were contained in an implementation memorandum issued on February 20, 2017, by Secretary of Homeland Security John Kelly (the "Kelly Memorandum"), which officially rescinded the Jeh Johnson Memorandum.[25]

In short, the prior Administration did away with notable features of enforcement priorities memoranda from the prior two decades, including: (1) tiered priority groups; (2) positive and negative factors guiding discretionary deviations from the priorities; (3) distinctions among different criminal convictions and records based on seriousness and similar considerations; (4) the general focus on individuals convicted of crimes, as opposed to those merely charged with crimes or who may have "committed acts which constitute a chargeable criminal offense;"[26] and (5) some degree of supervisory review of exercises of prosecutorial discretion. At the same time, however, the prior Administration did not actually initiate or pursue removal proceedings against all removable noncitizens, arrest or detain all potentially detainable noncitizens, or remove all noncitizens with final orders of removal—nor could the Administration have done so, in light of available resources. Instead, the prior Administration effectively delegated prioritization decisions to individual line agents, without necessary training or guidance to steer the exercise of this discretion, raising the potential for contradictory and unfair enforcement of the immigration laws across the system and undermining the Executive's ability to focus resources on a systemwide level on pursuing enforcement against the noncitizens who pose the greatest threats to safety and security.

Resource Limitations Necessitating Enforcement Priorities

The need to make smart and strategic choices about how to utilize the limited resources provided by Congress is a common theme in many of the Department's prosecutorial discretion and enforcement priorities guidelines across administrations.[27] DHS has insufficient resources to

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[24] *Id.* (emphases added).

[25] Memorandum from John Kelly, Sec'y of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).

[26] *Id.* at 2.

[27] Meissner Memorandum at 4 ("Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals."); Morton Memorandum at 1 ("In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security."); Jeh Johnson Memorandum at 2 ("Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities."); Kelly Memorandum at 2 ("The Director of ICE, the Commissioner of CBP, and the Director of USCIS may, as they determine is appropriate, issue further guidance to allocate appropriate resources to prioritize enforcement activities within these categories—for example, by prioritizing enforcement activities against removable aliens who are convicted felons or who are involved in gang activity or drug trafficking.").

conduct immigration enforcement against *all* of the more than 11 million undocumented or otherwise removable noncitizens estimated to be in the country today or to efficiently and effectively remove the more than one million noncitizens who already have final orders of removal. Further, immigration enforcement often touches upon foreign affairs, which must be taken into account in certain enforcement contexts. This consideration is especially salient in the context of executing removal orders, where there is a need to work with foreign countries to accept the return of individuals ordered removed. Foreign-affairs concerns often necessitate expending significant resources when trying to remove certain noncitizens who pose serious threats to public safety and national security. But while prioritization is a long-standing practice in immigration and law enforcement, the resource constraints DHS and its components face in the civil immigration enforcement context have increased dramatically over the years. As a result, the need for thoughtful enforcement priorities that effectively focus the Department's resources on the cases most important to the national interest is especially vital today.

In recent years, the United States has faced a significant, ongoing enforcement and humanitarian challenge at the border. Even before this, the government agencies involved in immigration enforcement, including ICE, CBP, and the Executive Office for Immigration Review (EOIR) within the Department of Justice, were faced with significant resource challenges. For example, while the number of removal proceedings pending in immigration court grew from 262,757 cases in 2010 to 1,328,413 at the end of the third quarter in fiscal year 2021—an increase of more than 400% in a little over a decade—the annual number of case completions has remained largely flat.[28] Much of the growth in the immigration court backlog took place over the course of the last Administration, when the Department operated under that Administration's stated policy that all removable noncitizens should be removed. Between the end of Fiscal Year 2016 and the end of Fiscal Year 2020, the number of pending cases increased from 521,526 to 1,260,039.[29]

ICE, too, faces significant resource challenges for myriad reasons. At present, ICE's approximately 6,500 Enforcement and Removal Operations officers manage a docket of more than 3 million noncitizens either in removal proceedings or subject to orders of removal. Beyond funding constraints, ICE's detention capacity is currently limited by pending litigation and COVID-19 considerations. In total, ICE has sufficient appropriations to fund approximately 34,000 detention beds; in light of those additional constraints, however, ICE presently has the ability to detain approximately 26,800 noncitizens at any given time—less than 1% of the number in removal proceedings or subject to orders of removal.

The ICE Office of the Principal Legal Advisor (OPLA), which is responsible for representing DHS in removal proceedings, is similarly resource-constrained, further illustrating the need for resource prioritization in enforcement. Although the immigration court docket has grown dramatically in the last decade (as discussed above), OPLA has not received sufficient additional appropriations to grow with that docket. Consequently, OPLA currently has hundreds fewer attorneys than it would need to adequately support the workload associated with the current number of pending removal proceedings. As a result, OPLA faces serious constraints on its ability to meaningfully prepare for all cases set for hearings or even attend every such hearing.

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[28] Executive Office for Immigration Review Adjudication Statistics, Pending Cases, New Cases, and Total Completions, available at www.justice.gov/eoir/workload-and-adjudication-statistics.
[29] *Id.*

These challenges and limitations, particularly in light of the lack of meaningful prioritization during the previous Administration that contributed to the significant growth in both ICE and EOIR's caseloads, make it impossible for OPLA to effectively manage its work without thoughtful prioritization policies and the exercise of discretion.

These severe constraints underscore the importance of exercising enforcement discretion in a manner that focuses the agency's efforts on those noncitizens who pose the greatest threat to national security, public safety, and border security. These prioritization decisions should also be informed by the values of the enforcement agency and the Nation. In remarks delivered at the Second Annual Conference of United States Attorneys more than 80 years ago, Attorney General Robert H. Jackson said:

> Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.[30]

On his first day in office, President Biden affirmed that "advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government."[31] In the immigration enforcement context, scholars and professors have observed that prosecutorial discretion guidelines are essential to advancing this Administration's stated commitment to "advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."[32]

The use of prosecutorial discretion to advance the interests of justice is built upon years of precedent. As mentioned above, the Meissner Memorandum in 2000 instructed that "[s]ervice officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process" and directed that "officers *must* take into account the principles described [in the memorandum] in order to promote the efficient and effective enforcement of the immigration laws *and the interests of justice*."[33] As mentioned above, the Jeh Johnson Memorandum in 2014 authorized enforcement outside the established priorities where, "in the judgment of an ICE Field Office Director, removing such [a noncitizen] would serve an important federal interest."[34] The Meissner Memo 14 years earlier referenced the Principles of Federal Prosecution governing the conduct of U.S. Attorneys to explain that "[a]s a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial."[35]

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[30] Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18, 18–19 (1940).
[31] Exec. Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Jan. 20, 2021).
[32] *Id.*
[33] Meissner Memorandum at 1 (emphasis added).
[34] Jeh Johnson Memorandum at 5.
[35] Meissner Memorandum at 5.

More recently, ICE Principal Legal Advisor John Trasviña issued guidance to trial attorneys aptly explaining that

> Prosecutorial discretion is an indispensable feature of any functioning legal system. The exercise of prosecutorial discretion, where appropriate, can preserve limited government resources, achieve just and fair outcomes in individual cases, and advance the Department's mission of administering and enforcing the immigration laws of the United States in a smart and sensible way that promotes public confidence.[36]

Moreover, the Board of Immigration Appeals explained in an en banc decision that "[i]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done."[37]

These sentiments are also reflected in recommendations on prosecutorial discretion advanced by NGO advocates for noncitizens. For example, the We Are Home Campaign[38] has encouraged the exercise of prosecutorial discretion to ensure that the interests of justice are met for people exercising workplace rights or serving as witnesses in labor disputes; people engaged in civil, faith, housing, First Amendment, and other human rights activities; and victims and witnesses in civil, administrative, or criminal proceedings, among others. Advocates argue that strict application of our immigration laws without considerations such as these risks perverse outcomes, unjust results, and diminished confidence in the rule of law.

The Biden-Harris Administration's Approach to Immigration-Enforcement Priorities

Interim Civil Immigration Enforcement Policies and Priorities

In line with historical practice and in full recognition of the resource constraints that require the use of civil immigration enforcement priorities to guide the workforce, on January 20, 2021, Acting Secretary David Pekoske issued a memorandum, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*. The Pekoske Memorandum called for a comprehensive review of enforcement policies and priorities and immediately rescinded and superseded several prior policies, including a February 20, 2017, memorandum establishing the Department's previous enforcement priorities, as well as various implementing memoranda issued by components. The memorandum additionally established and defined three Department-wide priorities:

1. **National security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.

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[36] Memorandum from John Trasviña, ICE Principal Legal Advisor, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021).
[37] *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) (en banc).
[38] We Are Home Campaign, *Recommendations for the Use of Prosecutorial Discretion* (June 16, 2021).

2. **Border security.** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.

3. **Public safety.** Individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety.[39]

Although the memorandum directed that resources be allocated to address these enumerated priorities, it specified that "nothing in this memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities herein," and explicitly disclaimed any notion that the guidelines and priorities may be relied upon to create any enforceable right or benefit.[40]

On February 18, 2021, Acting ICE Director Tae Johnson issued a memorandum that both supported the interim priorities laid out in the Pekoske Memorandum and modified them in certain respects. Importantly, the Johnson Memorandum made clear that at-large enforcement actions of presumed-priority individuals could be taken without prior approval,[41] and that individuals who are not presumed priorities may nevertheless be subject to apprehension and removal—under some circumstances, even in the absence of prior approval—if they pose a threat to public safety. The Johnson Memorandum directed ICE field offices to collect data on enforcement and removal actions, both to promote compliance with the guidance and consistency across geographic areas of responsibility, and to inform the development of new Departmental enforcement guidance. Some of the findings from that data are discussed further below.

Litigation Challenging Immigration Enforcement Guidance in the Pekoske and Johnson Memoranda

The immigration enforcement guidance contained in the Pekoske and Johnson Memoranda have been challenged in four separate lawsuits.[42] One suit, which was filed by Texas and Louisiana, contends that the memoranda run afoul of the Administrative Procedure Act (APA) because they violate the Department's duty to detain certain individuals pursuant to 8 U.S.C. §§ 1226(c) and 1231(a)(2), are arbitrary and capricious, and are agency rules that must be adopted following notice and comment. Other lawsuits filed by Florida, Arizona, and Montana, and various local

[39] *Id.* at 2. The Pekoske Memorandum additionally announced a 100-day pause on certain removals that was enjoined.
[40] *Id.* at 3-4.
[41] The Johnson Memorandum expanded the category of presumed public safety threats to include certain individuals who are qualifying members of criminal gangs or transnational criminal organizations.
[42] *See Arizona, et al. v. United States, et al.*, No. 2:21-cv-186 (D. Ariz.); *Coe, et al. v. Biden, et al.*, No. 3:21-cv-168 (S.D. Tex.); *Florida v. United States, et al.*, No. 8:21-cv-541 (M.D. Fla.); *Texas, et al. v. United States, et al.*, 6:21-cv-00016 (S.D. Tex.).

governments and an association of ICE officers raise similar claims focusing on a variety of detention provisions, including 8 U.S.C. §§ 1225(b), 1226(c), and 1231(a)(1).

On August 19, 2021, a federal district court issued an opinion ruling in favor of Texas and Louisiana on their APA claims and preliminarily enjoining the Department from enforcing and implementing Section B of the Pekoske Memorandum and the operative part of the Johnson Memorandum, which provide guidance on the implementation of the Department's civil immigration enforcement and removal priorities. On September 15, 2021, the Fifth Circuit Court of Appeals largely stayed the district court injunction pending appeal in an opinion that reaffirmed the "broad discretion" entrusted to immigration officials—including with respect to "who should face enforcement action in the first place," *Texas*, 2021 WL 4188102 at *3 (quoting *Arizona*, 567 U.S. at 396)—that was, with limited exceptions, left unencumbered by the detention authorities found at 8 U.S.C. §§ 1226(c) and 1231(a)(2). The court's decision was grounded in the fact that policies such as these that are entrusted to agency discretion by law are generally nonreviewable under the APA. And district courts in the Florida and Arizona and Montana lawsuits similarly concluded that the States' claims were unreviewable because the prioritization of enforcement actions is committed to agency discretion by law.

In arguing that the adoption of the Pekoske and Johnson Memoranda violated the APA because they were arbitrary and capricious and ignored statutory mandates, the plaintiffs in these suits have focused on a series of concerns that they alleged the Department failed to consider when crafting the policies. The district court that enjoined the memoranda similarly pointed to a number of these considerations in its analysis. These concerns ranged from the adequacy of the Department's consideration of whether the memoranda would enhance public safety and appropriately address the risk of recidivism by noncitizens convicted of criminal offenses; the costs that states would allegedly bear as a result of enforcement decisions made in reliance on the memoranda (e.g., costs related to additional incarceration, post-release supervision, and education, health care, and social services); how deciding not to detain certain individuals during the pendency of removal proceedings could affect future removal efforts, adding costs tied to delays and increasing the rate of abscondment; and how the priorities would interact with various statutory enforcement and detention mandates.

Listening Sessions to Help Evaluate Interim Priorities and Develop Updated Guidance

Throughout the past year, Department officials engaged in multiple discussions with leadership from ICE, USCIS, and CBP, as well as ICE personnel in the multiple field locations. Department officials also met with external stakeholders, including law enforcement groups, state and local government representatives, and non-governmental entities, including immigrant advocacy organizations. These conversations helped the Department evaluate its interim immigration enforcement and removal priorities and properly understand and consider the various interests of both internal and external stakeholders, thereby ensuring that the Department's development of new priorities was informed by all of the relevant evidence and interests.

Over the course of four listening sessions with representatives from the National Sheriffs' Association, the Southwest Border Sheriffs' Coalition, the Major Cities Chiefs Association, the U.S. Conference of Mayors, the National Association of Counties, and others, participants talked

about the types of criminal offenses that pose threats to public safety and should be prioritized by ICE. Many suggested replacing the "aggravated felony" language in the interim priorities. Some suggested a list that was untethered to the definition of "aggravated felony" and could include sexual assault crimes, crimes against children, gang and drug activities, violent crimes, and property crimes for repeat offenders. Several participants recommended that the recency of the offense should also be a factor.

Internal engagements similarly revealed interest from some ICE personnel to have greater discretion to arrest a wider range of individuals. Some appeared to understand the "presumed priority" categories in the interim enforcement guidance as restrictive mandates rather than presumptions that can be overcome. Other personnel expressed a desire for more specificity – for instance, by defining "border security" using parameters that are clearly identifiable (e.g. "entered the United States within two years").

Conversely, NGO advocates for noncitizens, representatives of state and local governments, and other stakeholders observed that under the existing framework, individuals falling outside the presumed priority categories are frequently arrested and removed. The resulting uncertainty, created by the possibility of enforcement outside of the presumed priorities, meant that individuals were fearful. Many warned that such fear can chill victim participation in law enforcement investigations and deter noncitizens from COVID-19 testing and vaccination. Some of these stakeholders also expressed concern that DHS personnel are determining individuals to be "public safety" threats based on single interactions with the criminal justice system, sometimes many years ago, without additional derogatory information or further assessment.

Finally, representatives of immigrant workers and labor unions observed that employers in certain industries sometimes seek to leverage immigration-enforcement actions (or the threat of them) to quash worker organizing or to dissuade workers from asserting their rights. These views were echoed by some mayors and police chiefs, who expressed concerns that ICE's enforcement activities and reputation may deter victims and witnesses from contacting public safety authorities. These groups suggested that ICE could ameliorate this problem by engaging in better public communication, curtailing certain enforcement practices, or a combination of both.

Discussion of Key Considerations

Public Safety Considerations

Public safety has long been a central focus of DHS (and, previously, INS), and it has been a key feature of multiple past guidance memoranda on enforcement priorities. Under the Pekoske Memorandum, the public safety threat category includes "individuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an 'aggravated felony,' as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety." The Johnson Memorandum expands that presumed priority category to apply more generally to noncitizens who pose a threat to public safety and who have been convicted of an aggravated felony, convicted of an offense involving participation with a criminal street gang, or who have certified specified ties to criminal street gangs or transnational criminal

organizations. The Johnson Memorandum additionally clarifies that, generally with prior approval, any noncitizen who poses a threat to public safety may be deemed an enforcement priority even if they do not fall within the categories of individuals presumed to be such a priority, and specifies a variety of relevant factors to be considered, including "the nature and recency of the noncitizen's convictions, the type and length of sentence imposed, [and] whether the enforcement action is otherwise an appropriate use of ICE's limited resources."

In the Department's engagements with internal and external stakeholders, including with the ICE workforce, concerns were raised about whether the focus on individuals convicted of "aggravated felonies" was both over- and under-inclusive. The aggravated felony definition can be challenging to administer in many instances; its various elements are subject to evolving definition by the Board of Immigration Appeals and the federal courts. Moreover, the "aggravated felony" category is an imperfect proxy for severity of offense. On the one hand, aggravated felonies may include certain crimes unlikely to be indicative of a public safety threat, such as certain drug possession offenses or filing a false tax return. On the other hand, certain offenses more likely to support a public safety threat finding—including, for example, certain murder and sex offenses—may not qualify as aggravated felonies based on the specific way in which a particular criminal statute is worded. In designing a new public safety enforcement priority category, the Department considered these concerns and chose to place greater emphasis on the totality of the facts and circumstances that inform whether an individual poses a current threat to public safety—typically because of serious criminal conduct—including by looking at key aggravating factors related to the individual's criminal offense and history as well as various mitigating factors.

The approach taken in the guidelines to public safety threats also addresses a central concern raised by the Texas district court in its ruling that the Pekoske and Johnson Memoranda were unlawfully arbitrary and capricious because they chose to focus enforcement efforts on "merely *some* criminal illegal aliens—those with aggravated felonies and criminal gang affiliations." *Texas*, 2021 WL 3683913 at *47. The district court stated that the Department ignored a supposed "well-established concept that *all* criminal illegal aliens or 'deportable aliens pose high risks of recidivism.'" *Id.* (citing *Demore v. Kim*, 538 U.S. 510, 518 (2003)). The updated guidance addresses the district court's concern by calling for a context-specific consideration of aggravating and mitigating factors, the seriousness of an individual's criminal record, the length of time since the offense, and evidence of rehabilitation. These factors are to be weighed in each case to assess whether a noncitizen poses a current threat to public safety, including through a meaningful risk of recidivism.

There is no question that enhancing public safety is an appropriate priority for the Department. In fact, it is an imperative, given the Department's mission. Executive Order 13993 directed DHS to issue enforcement guidance, in alignment with the Administration's policy to "protect national and border security, … and ensure public health and safety." This aim is furthered by a prioritization scheme that directs civil immigration enforcement resources towards apprehending and removing those individuals who are likely to present the greatest risks to public safety: individuals who are convicted of particularly grave offenses that cause significant harm, individuals who commit an offense while using or threatening to use a firearm or other dangerous weapon, individuals who have a serious prior criminal record, and individuals who, in

light of their actions and circumstances, are unlikely to rehabilitate. While it is impossible to predict with certainty in each case whether a particular individual will re-offend, the Department has exercised its expert judgment and experience to identify those factors that make an offender particularly more likely or less likely to recidivate. And the Department's judgments regarding these factors are further supported by evidence developed by the United States Sentencing Commission, which demonstrates that reconviction rates drop off significantly for individuals who are crime-free for 5 years post-release, those sentenced to 6 months or less of imprisonment, and those who were 40 or older when released.[43]

In working to achieve its public safety goal, the Department has frequently made distinctions between individuals based on the nature of their convictions and conduct. This approach is further supported by the academic literature, which points to a negative relationship between immigration and crime (i.e., that as immigration increases, crime rates decrease).[44] These findings are further bolstered by micro-level research that generally finds lower criminal involvement by foreign-born individuals, relative to their native-born counterparts.[45] The Texas district court's reference to the "well-established" propensity for certain removable noncitizens to recidivate does not appear to be grounded in empirical data, at least in part because legal status is not generally collected by law enforcement agencies. Where status information has been made available—including in the state of Texas itself—the evidence indicates that undocumented noncitizens are *less* likely to recidivate.[46]

Additionally, it is a mistake to assume that the threat that an individual poses to public safety can be reduced to simply the question of whether the individual is likely to recidivate. Not all offenses present the same risk to public safety. As a result, while an individual with a substance abuse addiction may be highly likely to recidivate and be convicted again for a simple controlled substance offense, that individual may pose a smaller risk to public safety than an individual who has committed a recent violent assault. Law enforcement decisions such as these require consideration of the totality of circumstances, looking at the individual facts presented and both aggravating and mitigating circumstances and weighing all of those facts and circumstances in light of agency officials' informed judgment and experience.

Deconfliction Considerations

The Department has long recognized that civil immigration enforcement activity may have adverse effects on the enforcement of other laws. Law enforcement officials may have difficulty engaging noncitizen victims and witnesses in criminal investigations, if such victims and witnesses are potentially subject to removal. Likewise, efforts of agencies enforcing our labor

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[43] United States Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, (Mar. 2016) Table 2, Figure 10, Figure 6, respectively, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.
[44] Graham C. Ousey and Charis E. Kubrin, *Immigration and Crime: Assessing a Contentious Issue*, Annual Review of Criminology, https://www.annualreviews.org/doi/abs/10.1146/annurev-criminol-032317-092026.
[45] Jacob Stowell and Stephanie DiPietro, *Ethnicity, Crime, and Immigration in the United States Crimes By and Against Immigrants*, The Oxford Handbook of Ethnicity, Crime, and Immigration, 2014.
[46] Michael T. Light, et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, Proceedings of the National Academy of Sciences of the USA, (Dec. 12, 2020), available at https://www.pnas.org/content/117/51/32340.

laws may be frustrated if noncitizen workers are disinclined to report violations of wage, workplace safety and other standards. It does not serve the public interest when these rights go unvindicated, or when crimes go unprosecuted. The Department has, over the years, adopted some policies to address elements of these challenges, some applicable to certain contexts, and some to specific components of the Department. In 2011 the Department entered into a memorandum of understanding with the Department of Labor to ensure that the Departments work together to ensure that their respective civil worksite enforcement activities do not conflict.[47] Consistent with those concerns, the Department believes it is important that the guidelines being issued today convey clearly to various stakeholders, including the public generally and agencies that conduct investigations, that a particular noncitizen's use of, or cooperation with, civil and criminal enforcement authorities will generally be considered a mitigating factor in connection with enforcement decisions (even though such a mitigating factor may be outweighed by aggravating factors based on the particular facts and circumstances of the particular case).

Impact on States

The State-plaintiffs in several of the lawsuits alleged that the Department failed to consider the additional costs that States would incur as a result of the Pekoske and Johnson Memoranda and failed to consider whether the States had any reliance interests on the previous Administration's prioritization scheme. For instance, Texas alleged that it would incur additional criminal incarceration costs due to the Department's change in enforcement priorities because some noncitizens who would otherwise have been detained will now be released and may commit new criminal violations. *Texas*, 2021 WL 3683913 at *12. Texas additionally asserted that because some noncitizens are released from detention and, as a result, are less likely to be removed from the country, the state would bear additional healthcare costs such as those provided through Emergency Medicaid, the Texas Family Violence Program, and the Texas Children's Health Insurance Program, as well as additional educational costs for educating the children of such noncitizens. Louisiana alleged that it would incur similar costs. In its order enjoining the implementation and enforcement of the memoranda, the federal district court concluded that "the Memoranda bear no thought or indication as to whether the new prioritization scheme minimizes and limits state costs due to crime." *Id.* at *50.

In the Department's considered judgment, none of the asserted negative effects on States—either in the form of costs or the form of undermining reliance interests—from adopting a prioritization scheme outweighs the benefits of the scheme. As an initial matter, any immigration policy may have indirect, downstream impacts on a significant number of actors—including, potentially, State governments, businesses, and individual citizens—and the Department, regardless of Administration, cannot provide an exhaustive analysis of all of these potential impacts every time it adopts a change in immigration policy. The Department endeavors to consider the predictable (and measurable) impacts that its policies may have on those most directly affected by those policies.

[47] Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, Dec. 7, 2011, available at https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf.

Further, an assessment of any potential impacts on State governments is uniquely difficult to conclude with certainty. As the Department explained recently in the Notice of Proposed Rulemaking regarding the Deferred Action for Childhood Arrivals policy, it is challenging to measure the overall fiscal effects of enforcement priorities guidance on state and local governments.[48] This is in large part due to those governments' budgetary control, and the reality that any fiscal consequences are driven by policy decisions that state and local governments are themselves making. The 2017 National Academy of Sciences report canvassed studies of the fiscal impacts of immigration as a whole, and described such analysis as extremely challenging and dependent on a range of assumptions.[49]

In addition, while second-order effects also clearly occur, analysis of such effects similarly presents methodological and empirical challenges. For example, as with the native-born population, the age structure of the noncitizen demographic plays a major role in assessing any fiscal impacts. Children and young adults contribute less to society in terms of taxes and draw more in benefits by using public education, for example. As people age and start participating in the labor market they become net contributors to public finances; those in post-retirement again could become net users of public benefit programs. Compared to the native-born population, noncitizens also can differ in their characteristics in terms of skills, education levels, income levels, number of dependents in the family, the places they choose to live, etc., and any combination of these factors could have varying downstream fiscal impacts. As noted above, local and state economic conditions and laws that govern public finances and availability of public benefits also vary and can influence the fiscal impacts of immigration.

Based on the information presented in the 2017 NAS report, DHS has approached the question of state and local fiscal impacts as follows. First, it is clear that the fiscal impacts of proposed policies to state and local governments would vary based on a range of factors, such as the demographic characteristics of the affected population within a particular jurisdiction at a particular time (or over a particular period of time). In addition, fiscal effects would vary significantly depending on local economic conditions and the local rules governing eligibility for public benefits, detention costs, and other laws and practices. These costs to states and localities will be highly location-specific and are, therefore, difficult to quantify.

Second, in the Department's experience and judgment, there is good reason to believe that any effects from implementation of priorities guidance are unlikely to be significant, and could have a net positive effect. Under no circumstance—including under a framework that effectively sets no enforcement priorities—will DHS be able to arrest, detain, or remove more than a fraction of the overall removable population. Without a dramatic change in the level of resources, most

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[48] *Deferred Action for Childhood Arrivals*, 86 Fed. Reg. 53,736, 53,801–02 (Sept. 28, 2021).
[49] *See* NAS, *The Economic and Fiscal Consequences of Immigration* (2017), 28, available at https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration ("[E]stimating the fiscal impacts of immigration is a complex calculation that depends to a significant degree on what the questions of interest are, how they are framed, and what assumptions are built into the accounting exercise. The first-order net fiscal impact of immigration is the difference between the various tax contributions immigrants make to public finances and the government expenditures on public benefits and services they receive. The foreign-born are a diverse population, and the way in which they affect government finances is sensitive to their demographic and skill characteristics, their role in labor and other markets, and the rules regulating accessibility and use of government-financed programs.").

noncitizens who are removable will likely remain in the country. This is, of course, not a new phenomenon. According to 2018 estimates by the Migration Policy Institute, approximately three-in-five undocumented noncitizens in the United States had lived in the country for at least 10 years.[50] Additionally, as the Department heard from multiple stakeholder engagements, including with law enforcement partners and local government officials, a civil immigration enforcement framework that lacks clear priorities is likely to increase fear and sow mistrust between noncitizens and government. Such an environment can breed "hesitancy in accessing services, relief, and even vaccines during the COVID-19 pandemic."[51] Likewise, states and localities benefit from civil immigration enforcement policies that are more likely to lead to the arrest and removal of individuals who are threats to public safety.

Finally, even if the Department's guidelines for the enforcement of civil immigration laws have indirect fiscal impacts on states, that is no different from countless other policy decisions that Federal agencies make every day, including decisions by other law enforcement entities regarding where to focus their limited enforcement resources. Enforcement decisions made by the Department of Justice Civil Rights Division and the Environmental Protection Agency can have profound fiscal impacts on states and localities, but those actions are nevertheless pursued when they advance the important mission of those Federal agencies. For the Department of Homeland Security to achieve its critical mission, it similarly must set sensible priorities for the enforcement of the Nation's civil immigration laws and to guide the exercise of prosecutorial discretion.

Similarly, with respect to reliance interests, the Department has considered whether any States or other third parties may have valid reliance interests invested in the previous Administration's priorities scheme or in the scheme developed by the interim guidance. In the Department's view, no such reasonable reliance interests exist, both because the Department is unaware of any State that has materially changed its position to its detriment as a result of those previous policies and because any such change by any party would be unreasonable in light of the long history of the Executive's use of evolving enforcement priority schemes in this area. In addition, to the extent that any marginal reliance interests do exist, the Department believes that the benefits of the prioritization scheme outweigh those interests.[52]

In short, while any set of priorities may result in some indirect fiscal effects on state and local governments (both positive and negative), such effects are extremely difficult to quantify fully, are highly localized, and would vary based on a range of factors, including policy choices made by such governments and outside our control. Moreover, they would be a necessary consequence of the Department carrying out its congressionally mandated duties in service to the national interest. The Department further believes that previous prioritization schemes have not engendered any reasonable or substantial reliance interests. Therefore, the Department has

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[50] Migration Policy Institute, *Profile of the Unauthorized Population: United States*, available at https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US.

[51] E-mail from Nora Preciado, Director, Immigrant Affairs, to Kamal Essaheb, Counselor to the Secretary, DHS (Sept. 23, 2021, 05:42) (on file with author).

[52] The Department is aware that several states purported to enter into "agreements" with the Department at the end of the previous Administration. As the Department has explained in litigation, those documents were void ab initio and unenforceable. Any reliance on those documents is therefore unreasonable. To the extent those documents were ever valid, the Department has since terminated them.

determined that, even in light of the potential for such indirect fiscal effects or the theoretical possibility of reliance interests, the enforcement priorities articulated by the Department are an appropriate exercise of the Department's discretion.

Resource Considerations

Resource considerations have long justified the necessary application of enforcement policies and priorities. Nevertheless, the *Texas* district court in its injunction expressed skepticism over the Department's reference to resource limitations in the Johnson Memorandum, noting that the Government produced no evidence that "the resources it previously used for enforcement of the deprioritized categories are now being allocated to boost enforcement of the prioritized categories." *Texas*, 2021 WL 3683913 at *17. Rather, the Court cited anecdotal evidence presented by the States that, according to the Court, suggested that the Johnson Memorandum only resulted in a drop in enforcement actions against certain categories of noncitizens, but not a corresponding increase in enforcement actions against other categories of noncitizens.

Based upon data collected between the issuance of the Johnson Memorandum on February 18 and August 31, 2021, the interim priorities focus on public safety, national security and border security proved to be effective in channeling ICE officers' and agents' efforts toward cases these priorities. For instance, as the Johnson Memorandum defined the "public safety" category to include, in part, noncitizens convicted of aggravated felony offenses, ICE during this period arrested 6,046 individuals with such convictions compared to just 3,575 in the same period in 2020. Similarly, consistent with the Johnson Memorandum's border security prioritization of any noncitizen who entered the United States "on or after November 1, 2020" or who "was not physically present" in the United States before that date, ICE allocated enforcement resources to the southwest border to assist CBP in transporting, processing, transferring, and removing recently-arrived migrants, particularly through June, July, and August of 2021. These facts show that the guidance to the field matters; resource allocation shifted to focus on what the guidance required.

More generally, the Texas district court questioned whether the enforcement prioritization scheme would actually increase costs by delaying deportations of individuals who may not be deemed a priority, thereby increasing their incentives to file frivolous and time-consuming appeals and to ultimately abscond. This criticism is based on the misconception that if the Department did not prioritize its enforcement efforts—or if it prioritized enforcement in some different way—a significantly greater number of people could be arrested, detained, moved through removal proceedings, and processed for removal. But that is false. Resource limitations make that an impossibility, as has been the case since the Department was formed (and before that as well). Moreover, such an approach ignores the reality that the Department's overall safety and security mission is not best served by simply pursuing the greatest overall number of enforcement actions but is rather best advanced by directing resources to prioritize enforcement against those noncitizens who most threaten the safety and security of the Nation.

Relationship Between Enforcement Priorities and Statutory Mandates

Implicit in the notion of prosecutorial discretion is the idea that discretion only may be exercised within the bounds of the law. As discussed above, courts have long recognized that immigration officials possess broad discretion over immigration enforcement, including "whether to pursue removal at all." *Arizona*, 567 U.S. at 396. These concerns are "greatly magnified in the deportation context." *Crane v. Johnson*, 783 F.3d 244, 247 n.6 (5th Cir. 2015) (quotation omitted). Indeed, the Supreme Court has never required law enforcement officers to bring charges against an individual or group of individuals. *See Texas v. United States*, --- F.4th ---, 2021 WL 4188102, *4 (5th Cir. Sept. 15, 2021). In recent challenges to the Department's interim immigration enforcement and removal priorities, litigants have argued that various detention provisions within the INA constrain the Department's discretionary authority and even create affirmative duties to arrest, detain, and seek to remove broad categories of noncitizens. But the fact that many INA provisions state that the Executive Branch "shall" take certain actions does not eliminate the Department's discretion. To the contrary, longstanding Supreme Court precedent "hold[s] that the use of 'shall' . . . does not limit prosecutorial discretion." *See Texas*, 2021 WL 4188102, at *5 (listing cases). Indeed, the Fifth Circuit Court of Appeals recently rejected such an argument, explaining that although the two detention states at issue in the case before it—8 U.S.C. §§ 1226(c) and 1231—contained the word "shall," it ultimately concluded that provisions "override the deep-rooted tradition of enforcement discretion when it comes to decisions that occur before detention, such as who should be subject to arrest, detainers, and removal proceedings." *Id.* at *6.

The Executive Branch has also long recognized this discretion. For example, the 2000 Meissner Memorandum explicitly contrasted the "specific limitation on releasing certain criminal aliens in" 8 U.S.C. § 1226(c)(2) with the general direction "that the INS 'shall' remove removable aliens" to illustrate how Congress can effectively limit agency discretion by statute.[53] But recognizing that even the limitation on release authority contained in § 1226(c)(2) did not override the agency's general prosecutorial discretion to decide whether to pursue removal of an individual or to abandon the endeavor entirely, that memorandum reaffirmed the authority of immigration officers—even with respect to noncitizens who would be subject to mandatory detention under a provision like § 1226(c)(2)—to cancel a Notice to Appear prior to filing with the immigration court or move for dismissal in immigration court.[54] That same principle would apply to the decision to cancel a detainer and choose not to pursue removal of such an individual in the first place. The Jeh Johnson Memorandum similarly recognized that although mandatory detention provisions may limit the authority of immigration officers to release individuals who would generally not be priorities for detention (e.g., noncitizens "who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest"), field office directors could consult with local ICE attorneys for guidance when confronted with such cases.[55]

Having said that, the Department does recognize that certain provisions within the INA place constraints on its authority to release noncitizens from ICE custody while the Department is pursuing their removal or during the statutory removal period. For instance, once ICE arrests a

[53] Meissner Memorandum at 3.
[54] *Id.* at 6.
[55] Jeh Johnson Memorandum at 5.

noncitizen who is subject to the custody provisions of 8 U.S.C. § 1226(c)(1), that noncitizen generally must remain in custody during the pendency of removal proceedings unless otherwise eligible for release pursuant to § 1226(c)(2), or as required to comply with a court order. Likewise, all noncitizens in ICE custody who are subject to the mandatory custody provisions of 8 U.S.C.§ 1231(a)(2)—those who have been found inadmissible under 8 U.S.C. § 1182(a)(2) or 1182(a)(3)(B) or deportable under § 1227(a)(2) or 1227(a)(4)(B)—must remain detained for the duration of the removal period unless release is required to comply with a court order. The Department's updated *Guidelines for the Enforcement of Civil Immigration Law* are fully consistent with these constraints and do not purport to override them.

Consideration of Alternative Approaches

The Department's focus on national security, public safety, and border security remains unchanged. The numerous stakeholder engagements, internal discussions, and reviews of policies, protocols, and priorities make clear that these are and should remain the overriding Departmental priorities.

The new guidelines however will mark a significant shift in how those priorities are operationalized. Specifically, they—reflecting lessons learned from numerous engagements and internal reviews—reject a categorical approach to the definition of public safety threat. They will reject as both under- and over-inclusive the interim guidelines' focus on whether an individual was convicted of an "aggravated offense" under immigration law, or an offense for which an element was active participation in a criminal street gang. In its place, the new guidelines will require the workforce to engage in an assessment of each individual case and make a case-by-case assessment as to whether the individual poses a public safety threat, guided by a consideration of aggravating and mitigating factors.

More specifically, the guidelines will provide general direction that a noncitizen found to pose a current threat to public safety—typically because of serious criminal conduct—is a priority for apprehension and removal. But the specific determination as to who presents a public safety threat is delegated to the field, which is instructed and empowered to make individualized decisions based on a case-by-case analysis and taking into consideration aggravating factors—such as the gravity of the offense of conviction and the sentence imposed, the nature and degree of harm of the offense, the sophistication of the criminal offense, the use or threatened use of a firearm or dangerous weapon, and a serious prior criminal record, and mitigating factors—including advance or tender age, lengthy presence in the United States, impact of removal on family in the United States, and other relevant considerations. Bottom line: these factors should be used to ensure that officer and agents are focusing on actual threats, rather than making on pre-conceived determinations of the nature or a threat. Meanwhile, the grandmothers, clergy, teachers, and farmworkers who have lived and worked in the United Sates, contributing to the country without causing harm, should not be a priority based solely on the fact that they are removable.

The Department also recognizes that implementation will require significant training, guidance, and effective review of decisions. But it reflects a determination that officers and agents need the

discretion to make case-by-case determinations to identify who poses a threat. Any catch-all definition or bright-line rule runs the risk of being both over- and under-inclusive.

The guidelines also will differ from the interim priorities by dispensing with the pre-approval process in the exercise of this discretion. This decision was based largely on feedback from members of the workforce, who sought additional flexibility in the exercise of their judgment. The guidelines will be coupled with extensive and continuous training program on the new guidelines, the creation of short- and long-term processes to review enforcement decisions to achieve quality and consistency, and comprehensive data collection and analysis. Each of these will be critical to ensuring that discretion is being exercised consistent with the guidelines and in furtherance of the Department's highest priorities. Importantly, implementation won't begin until 60 days after issuance to ensure that there is time to do this training—and do it well. The first 90 days will also be subject to particularly rigorous review, to allow for adjustments as needed, so as to ensure that discretion is exercised as intended—to focus on those who pose a threat to national security, public safety, and border security.

But at its core, the priorities reflect a determination that officers and agents need the discretion to make case-by-case determinations to identify who poses a threat. Conversely, they are guided by a determination that the many noncitizens that have been contributing members of our communities for years—including teachers, clergy, farmworkers, and nannies—generally should not be an enforcement priority.

In adopting this approach, the Department also considered several alternatives, including a so-called "checklist" approach, in which officers' and agents' discretion would have been more tightly controlled by strict lists of what types of actions to pursue. The so-called checklist approach has the advantage of predictability; it relies least on officers' and agents' discretionary decision-making, and it most strictly predetermines which noncitizens will be subject to an enforcement action. However, this approach has the disadvantage of foreclosing a nuanced, individualized assessment of each noncitizen's aggravating and mitigating attributes, and therefore risks overinclusive and underinclusive decisionmaking, which yield unjust or unwise outcomes.

Another alternative approach that was considered was the delineation of certain categories for which no discretion should be exercised (i.e., where enforcement actions are mandated). The legal claims hinge in part on the theory that Congress commanded that certain individuals be arrested, detained, and removed. For the reasons discussed above, it is the Department's position that its enforcement discretion is not circumscribed by the enactment of these provisions. That said, the Department could adopt such a requirement as a matter of policy. But the Department has concluded that doing so would be counterproductive. It would undermine the Department's ability to effectively prioritize its limited resources to focus on the particular noncitizens who pose the greatest threat to safety and security. For instance, were the Department to choose to pursue removal of all individuals encountered who would, upon being taken into custody, be subject to mandatory detention under § 1226(c), the Department's detention capacity would quickly be exhausted. The same is true with respect to those whose detention would be mandatory during the removal period and those subject to various detention authorities in 8 U.S.C. § 1225. Without a set of priorities to guide the exercise of enforcement discretion, where

legally permissible, the Department would have little to no control over how its resources were being spent and would be unable to achieve its highest national security, public safety, and border security priorities.

After much consideration and deliberation, the Department has chosen a path that couples priorities with discretion, training and oversight. This approach is founded in a steadfast focus on national security, public safety and border security, coupled with a steadfast commitment to the interest of justice and individualized assessment of threat.

DECLARATION OF DANIEL BIBLE

I, Daniel Bible, declare the following under 28 U.S.C. § 1746:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Deputy Executive Associate Director. I have held this position since February 14, 2022, in an acting capacity, and formally accepted the position on May 8, 2022. As Deputy Executive Associate Director, I oversee the mission of ERO's eight headquarters divisions: Enforcement, Removal, Non-Detained Management, Custody Management, Field Operations, ICE Health Service Corps, Law Enforcement Systems and Analysis, and Operations Support.
2. Prior to this position, I served as the Acting Assistant Director for Field Operations beginning on January 16, 2022. In this capacity, I was responsible for the oversight, direction, and coordination of immigration enforcement activities, programs, and initiatives carried out by ERO's 25 Field Offices, including 208 sub-offices and other locations with an ERO presence. I further managed ERO Headquarters components, including Domestic Operations and Special Operations.
3. I have been employed with ICE and the former Immigration and Naturalization Service (INS) since 1998, when I was hired as an Immigration Agent in Huntsville, Texas. From 2001 to 2006, I served as a Deportation Officer in Oakdale, Louisiana. In 2006, I was

promoted to the position of Supervisory Detention and Deportation Officer (SDDO) in San Francisco, California. During my tenure as SDDO, I was responsible for supervisory oversight of two fugitive operations teams, the non-detained section, and the alternatives to detention (ATD) section. In 2009, I was promoted to the position of Assistant Field Office Director (AFOD) for the Washington Field Office. During my tenure as AFOD, I had supervisory oversight of SDDOs in charge of the criminal apprehensions program; the 287(g) program; the Field Office's command center; the office currently titled the ERO criminal prosecutions unit; and two fugitive operations teams. In 2012, I was promoted to the position of Deputy Field Office Director (DFOD) for the New York Field Office. From June 2015 to June 2016, I served as the Field Office Director (FOD) in the Salt Lake City Field Office. From June 2016 to June 2020, I served as FOD in the San Antonio Field Office. From June 2020 until January 16, 2022, I served as FOD for the Houston Field Office. I am a member of the Senior Executive Service, and I report directly to ERO Executive Associate Director Corey Price.

4. This declaration is based on my personal knowledge and experience as a law enforcement officer and information provided to me in my official capacity.

II. Overview of ERO

5. Following enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including INS and the U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote

homeland security and public safety through the enforcement of criminal and civil federal laws governing border control, customs, trade, and immigration. Within ICE, ERO oversees programs and conducts operations to identify and apprehend removable noncitizens, to detain these individuals when necessary, and to remove noncitizens with final orders of removal from the United States. ERO manages and oversees all aspects of the removal process within ICE, including domestic transportation, detention, alternatives to detention programs, bond management, supervised release, and removal to more than 170 countries around the world. As part of the removal process, ERO manages a non-detained docket of more than 4 million cases, which includes noncitizens currently in removal proceedings and those who have already received removal orders and are pending physical removal from the United States.

6. ERO employs approximately 6,000 immigration officers nationwide, including executive leadership, the supervisory chain of command, and all field officers. ICE's other law enforcement component, Homeland Security Investigations (HSI), employs approximately 6,000 Special Agents, who are both customs officers and immigration officers. HSI's mission is to investigate, disrupt, and dismantle terrorist, transnational, and other criminal organizations that threaten or seek to exploit the customs and immigration laws of the United States. HSI is responsible for federal criminal investigations into the illegal cross-border movement of people, goods, money, technology, and other contraband into, out of, and throughout the United States. HSI

Special Agents are thus limited in their ability to engage in civil immigration enforcement.[1]

7. ERO's detention network is similarly limited and has been increasingly populated by individuals apprehended at or near the Southwest Border while seeking to enter the United States. In April of this calendar year alone, U.S. Customs and Border Protection (CBP) apprehended a total of more than 233,000 individuals seeking to cross the Southwest Border. *See* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited June 12, 2022). Even with more than 96,000 of those individuals expelled pursuant to the U.S. Centers for Disease Control and Prevention's (CDC) Title 42 authorities, over 137,000 were processed under Title 8 of the U.S. Code. Nearly 111,000 Title 8 cases were apprehended in March; 73,000 in February; 75,000 in January; 97,000 in December 2021; 84,000 in November 2021; and 70,000 in October 2021. Given these numbers and the Department's important border security mission, ERO's detention population is increasingly occupied by recent border crossers apprehended by CBP and processed pursuant to Title 8 of the U.S. Code. As of June 4, 2022, nearly 84% of the 226,458 noncitizens booked into ICE custody since October 1, 2021, were apprehended by CBP. By comparison, approximately 65% of the 2,316,845 noncitizens booked into ICE custody between FY14-FY19 were apprehended by CBP.

[1] Indeed, the House Report incorporated into the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2022, expresses the intent of Congress to prohibit HSI's "engagement in civil immigration enforcement activities without probable cause that an individual who is the subject of enforcement action has committed a criminal offense not solely related to immigration status." H.R. Rep. No. 117-87, at 5 (2021); *see* Joint Explanatory Statement on Department of Homeland Security Appropriations Act, 2022, available at https://docs.house.gov/billsthisweek/20220307/BILLS-117RCP35-JES-DIVISION-F.pdf.

8. While some individuals encountered by CBP may be processed entirely within CBP's short-term custody settings, such as some of those who are processed for expulsion pursuant to the CDC's Title 42 authorities and some of those processed for expedited removal, most noncitizens processed for immigration proceedings under Title 8 authorities, including most processed for expedited removal, are held in ICE custody. Additionally, some of those processed for expulsion pursuant to Title 42 must be transferred to ICE custody. ICE is responsible for and manages DHS's longer-term immigration detention operations, including for those originally apprehended by CBP.

III. Guidance for Immigration Enforcement and Removal Actions

9. On September 30, 2021, Secretary of Homeland Security Alejandro Mayorkas issued Department-wide civil immigration enforcement guidance in a memorandum titled Guidelines for the Enforcement of Civil Immigration Law (Mayorkas Memorandum). The guidance took effect November 29, 2021. The Mayorkas Memorandum calls for the prioritization of DHS's limited law enforcement resources on the apprehension and removal of noncitizens who are a threat to national security, public safety, and border security.
10. The Mayorkas Memorandum provides that whether a noncitizen poses a current threat to public safety is not to be determined based on bright-line rules or categories. Instead, application of the public safety priority requires an assessment of the individual and the totality of the facts and circumstances and, to the extent possible, review of administrative and criminal records and other investigative information. The Mayorkas

Memorandum provides that, when evaluating whether a noncitizen poses a current threat to public safety, aggravating or mitigating factors may militate in favor of taking or declining to take enforcements actions.

11. The Mayorkas Memorandum also identifies noncitizens who pose a threat to border security and prioritizes their apprehension and removal. Per the guidance, a noncitizen poses a threat to border security who is apprehended: (1) at the border or port of entry while attempting to unlawfully enter the United States, or (2) in the United States after unlawfully entering after November 1, 2020. The guidance acknowledges that other border security cases may present compelling facts that warrant enforcement action. The guidance further provides that mitigating or extenuating facts and circumstances may militate in favor of declining to take enforcement action in border security cases.

12. Unlike prior civil immigration enforcement prioritization memoranda, including the interim memoranda issued on January 20, 2021, by then-Acting Secretary David Pekoske, and on February 18, 2021, by Acting ICE Director Tae D. Johnson, the Mayorkas Memorandum does not provide guidance pertaining to detention and release determinations. Rather, the Mayorkas Memorandum provides guidance for the apprehension and removal of noncitizens.

13. Additionally, even where prior enforcement guidance memoranda have addressed detention and release, ICE has interpreted and applied such guidance consistent with its longstanding understanding of statutory requirements, case law, and court orders. Specifically, ICE recognizes that except for the specific circumstances described in 8 U.S.C. § 1226(c)(2), and where required to comply with court orders, the agency does not have discretion to release from custody a noncitizen described in 8 U.S.C. §

1226(c)(1), if such noncitizen is in DHS custody and removal proceedings are pending against them. Similarly, ICE recognizes that except where required to comply with court orders, the agency does not have discretion during the removal period to release from custody a detained noncitizen who falls within the removability grounds contained in the second sentence of 8 U.S.C. § 1231(a)(2).

14. Upon issuance of the Mayorkas Memorandum, ERO conducted extensive targeted and continuous training for personnel on the implementation of the guidance, equipping the workforce with the foundational knowledge to implement the Mayorkas Memorandum and apply a thorough analysis of each case based on the totality of the facts and circumstances, to include a holistic assessment of both the aggravating and mitigating factors present in each case. ICE delivered training through the Performance and Learning Management System (PALMS), ERO Supervisory Training, Review of Effective Analysis and Decision (READ) Sessions, and leadership town halls. Foundational and supervisory training took more than four months to develop and deliver to ICE staff resulting in the training of more than thirteen thousand officers, agents, and support personnel. To date, ERO has held more than five thousand READ sessions, real-time continuous learning driven through scenario-based discussions. Over 90 hand-selected Field Trainers lead the training delivery of this effort. ERO implemented multiple feedback surveys at various iterations which allows field staff to ask questions and share feedback on the various trainings and process improvements in place. Contract support alone was approximately $5 million.

15. ERO also established a process by which a supervisory official reviews discretionary decisions in order to ensure continuity, completeness, and accuracy in the application of

departmental priorities. This process is accomplished through reporting by the local field offices in the Activity Analysis Reporting Tool (AART). Officers and agents are required to submit public safety cases through AART for supervisory review and include the selection of aggravating and mitigating factors that were considered by the official in deciding to take an enforcement action. The supervisory official reviews and confirm submissions within the public safety enforcement priority for completeness and accuracy. This kind of supervisory review is not new. ICE has utilized a review process since February 22, 2021, before the Mayorkas Memorandum was issued.

IV. Irreparable Harm from Vacatur

16. As a result of the court's vacatur of the enforcement guidance, DHS must either operate without guidance that affords any prioritization, or issue new guidance that reflects the district court's interpretations of 8 U.S.C. §§ 1226(c) and 1231(a)(2), even though DHS lacks the capacity to detain all noncitizens subject to mandatory detention under those statutes, and even if others pose a greater public safety threat. This will divert resources for public safety, national security, and border security missions, in ways that will make the nation less safe. It will create inconsistency among the workforce. And it is simply not feasible to implement what the court has suggested.

Impossibility of Complying with the Mandatory Detention Provisions in the Manner the Court Suggests

Detainers

17. In order to facilitate the transfer of custody of a noncitizen from a federal, State, or local law enforcement agency (LEA) to ICE, ICE officers frequently utilize detainers.

Detainers alert such LEAs of ICE's interest in taking custody of noncitizens in their custody for whom ICE possesses probable cause of removability. ICE detainers are non-binding requests by ICE for the receiving LEA to both: (1) notify ICE as early as practicable, at least 48 hours, if possible, before a removable noncitizen is released from criminal custody; and (2) maintain custody of the noncitizen for a period not to exceed 48 hours beyond the time the noncitizen would otherwise have been released to allow ICE to assume custody. All detainers are accompanied by either a warrant of arrest (Form I-200) or a warrant of removal (Form I- 205), issued upon a determination by an immigration officer as to probable cause of removability. *See* ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, available at https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. Detainers do not serve to transfer custody to ICE. Rather, an ICE officer must appear at the LEA's facility and make an arrest following notification by the LEA.

18. ERO has identified nearly 500 institutions that do not honor detainers, impacting almost all of ERO's 25 field offices. ERO has identified nearly 140 institutions that accept detainers only in a limited fashion, such as providing advance notification prior to release but not adequate hold time to allow ERO to assume custody. For instance, in some areas of the country, it may take an ERO officer two hours or more to travel from the local office to the jail facility holding the noncitizen, yet the LEA that owns and operates the facility may only provide 15 minutes' notice prior to release. If the mandatory custody provisions of § 1226(c) were interpreted as applying prior to ICE taking custody, in those instances in which the agency does not receive sufficient

advance and official notice prior to a release, the agency would, for these reasons, face significant difficulty in complying through no fault of its own.

19. Prohibiting ICE immigration officers from consulting the Secretary's enforcement guidance regarding the prioritization of national security, public safety, and border security threats when making decisions about whether to take custody over a particular noncitizen being released from federal, state, or local criminal custody also may lead to inconsistent enforcement decisions in field offices around the country. A lack of consistency and predictability can lead to further confusion among the workforce, undermine the agency's ability to project a coherent message to law enforcement partners across the country as well as the public, and subvert efforts to pursue sensible enforcement priorities.

1226(c)

20. Historically, DHS has, as an operational matter, generally determined whether the mandatory custody provisions of 8 U.S.C. § 1226(c) apply *after* a noncitizen is arrested and booked into ICE custody. ERO's operations would be severely impacted if, applying the court's interpretation of § 1226(c), ICE were to make determinations of whether noncitizens in federal, State, or local criminal custody are subject to § 1226(c) mandatory detention—even before the noncitizens are booked into ICE custody thereby triggering applicability of that statute.

21. The immigration laws generally provide the agency with a period of 48 hours from the time when ICE effectuates an arrest of a noncitizen, including from a federal, State, or local custodial setting, to make a custody determination. *See* 8 C.F.R. § 287.3(d). During the custody determination process, ICE assesses whether the noncitizen should be

detained or released, and if released, whether any conditions of release should be imposed. It is subsequent to taking custody, generally during that custody determination process, that an ICE officer must consider whether an individual in ICE custody is subject to 8 U.S.C. § 1226(c) and its restrictions on release.

22. As an initial matter, DHS is not, and has never been, aware of all noncitizens in the United States who are described in one of the categories of mandatory detention under § 1226(c). Additionally, an officer's determination whether an individual is subject to 8 U.S.C. § 1226(c) can be a complicated inquiry that may entail additional investigation and analysis, including, but not limited to, obtaining additional documents (*e.g.*, the record of conviction, charging instrument, written plea agreement, transcript of plea colloquy, jury instructions, or any explicit factual finding by the trial judge). Due to the legal complexity of assessing certain grounds of removability based on state convictions, officers also routinely have to consult with agency counsel before a custody decision can be made. In addition, it is my experience that case law in this area can often change and a state conviction that would render a noncitizen subject to 8 U.S.C. § 1226(c) at the time the detainer was placed may no longer subject a noncitizen to 8 U.S.C. § 1226(c) when ICE is notified of release, or vice versa. I also understand that variations in case law are such that a conviction may give rise to grounds of removability (and potentially trigger 8 U.S.C. § 1226(c)) in one jurisdiction but not in another. Because these complexities require case-by-case review and local coordination, ICE often does not know whether a noncitizen would be covered by 8 U.S.C. § 1226(c) prior to ICE taking custody and conducting the relevant review. Moreover, the applicable charge(s) of removability in a given case may not readily identify the noncitizen as being subject to

mandatory custody. For example, if a noncitizen who is in removal proceedings as a non-criminal visa overstay is arrested and convicted for a removable offense listed in 8 U.S.C. § 1226(c)(1)(A)–(D), that ground does not need to be formally charged as the basis of removal in order to trigger mandatory detention. *See Matter of Kotliar*, 24 I&N Dec. 124, 126–27 (BIA 2007). And, because, in most cases, a criminal charge alone (as opposed to a conviction) will not generally trigger 8 U.S.C. § 1226(c), noncitizens with pending criminal charges may shift from being subject to 8 U.S.C. § 1226(a) to § 1226(c) upon being convicted. Accordingly, even information in ICE databases regarding charges of removability lodged in a given case would not necessarily indicate whether § 1226(c) applies.

23. Further, ERO may not be aware of a noncitizen's criminality at the time a Notice to Appear (NTA) is issued by another DHS component, making any requirement that ERO arrest any noncitizen potentially subject to § 1226(c) impossible. For example, U.S. Citizenship and Immigration Services (USCIS) may issue an NTA to a removable noncitizen after adjudicating and denying an application over which it has jurisdiction, such as an asylum application or an application for adjustment of status. ERO is not generally notified when USCIS issues an NTA, and an NTA issued by USCIS may not charge criminal grounds of removability in all cases in which they are applicable.

24. In addition, it is my experience that while individuals subject to 8 U.S.C. § 1226(c) are not eligible for release on bond, they are eligible for what is referred to as a "*Joseph* hearing" in which an immigration judge will determine whether the individual is "properly included" in the scope of 8 U.S.C. § 1226(c). *See* 8 C.F.R. § 1003.19(h)(2)(i)(D); *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). If ICE were

required to arrest every noncitizen who *may* be subject to § 1226(c) detention, without any prioritization based on public safety of national security threat, this would have cascading impacts not only on ERO, but also on ICE's Office of the Principal Legal Advisor (OPLA), whose attorneys must appear at all of these hearings, and the Department of Justice's Executive Office for Immigration Review, which must provide an immigration judge to consider the evidence and render a decision. Such resources are limited. An increased workload in this area could negatively effect and slow down other priority immigration proceedings, hindering DHS efforts to secure final orders of removal, including those related to individuals who present egregious national security or public safety risks. It would also sharply curtail any progress being made to reduce the backlog in the immigration court system.

25. If ICE were to arrest all noncitizens who have removal proceedings pending and who could possibly be subject to restrictions on release from custody upon arrest would be extraordinarily burdensome—and likely impossible—for ERO to achieve compliance. As of June 5, 2022, there were nearly 327,000 noncitizens in pending removal proceedings on ERO's non-detained docket with either criminal convictions or pending criminal charges.

26. If, applying the court's interpretation of § 1226(c), DHS were to make a § 1226(c) determination for all noncitizens who are in removal proceedings—including noncitizens who are not currently detained by ICE—it would impose insurmountable burdens on ERO, which would have to shift considerable resources to make those complicated determinations and then conduct at-large arrest operations.

27. At-large arrests of removable noncitizens are resource intensive and, like any law enforcement operation, can pose a danger to ICE officers, the noncitizen at issue, and members of the public. At-large arrests of removable noncitizens generally require at least two officers to be present for officer safety reasons, and arrests at a residence usually require five or more officers. During an at-large arrest, the target may be armed; the officers have no physical control over the location; and there is always the potential for disruption of the enforcement action by the target's family members, associates of the target, or members of the community. Moreover, a team of ICE officers must engage in time-consuming work (e.g., database searches, visits to addresses(es) associated with the target, deconfliction with the activities of other law enforcement agencies, and surveillance), in order to locate each at-large noncitizen.

28. In my experience, which has spanned 24 years and five presidential administrations, the agency has never, to my knowledge, enforced § 1226(c) as mandating the arrest of any individuals. To the contrary, I have always understood it to prohibit the release of those who have been arrested and taken into ICE custody.

Section 1231

29. As of June 5, 2022, there were 5,013 noncitizens with final orders of removal in ICE custody. Nearly 1.2 million noncitizens with final orders of removal remain non-detained. Many of these individuals likely were never detained during removal proceedings or were released from custody at some point in accordance with the discretionary authority vested in ICE immigration officers by statute or pursuant to orders by immigration judges or federal courts.

30. DHS has historically understood § 1231(a)(2) as authorizing the detention of noncitizens during the removal period, and prohibiting the release during the removal period only of those noncitizens who are already detained and have been found inadmissible under § 1182(a)(2) or (a)(3)(B) or deportable under § 1227(a)(2) or (a)(4)(B). Accordingly, ICE has long exercised its discretionary authority to release some detained noncitizens during the removal period who have not been found inadmissible or deportable based on the specific grounds referenced in § 1231(a)(2).
31. If ICE was required to maintain custody of every detained noncitizen during the removal period and not simply those that the statute says the agency shall release "under no circumstance," ICE would not have sufficient detention resources to implement the order while carrying out its broader mission priorities effectively.
32. ICE is appropriated for limited bed space and simply lacks capacity to continue to detain each detained noncitizen during the removal period. ICE must balance competing detention priorities, including individuals apprehended while attempting to enter the United States and individuals subject to § 1226(c) custody or who otherwise pose national security or public safety risks, when allocating detention space.
33. Additionally, implementation of such a requirement would significantly alter ICE operations in support of its mission. Detention during the removal period is intended to facilitate removal. Factors beyond ICE's control may limit—or frustrate entirely—its ability to remove a noncitizen during the removal period. For example, many receiving countries have lingering COVID-related border closures and pre-removal testing and/or vaccination requirements that can complicate removal operations. This is further exacerbated in receiving countries that were already reluctant or uncooperative prior to

the pandemic. Several countries do not issue travel documents for their citizens, or only do so on a very limited basis. Limited direct and transit flight routes pose further complications. Natural disasters and armed conflict can further prevent removal during the removal period. In just one recent example, the situation in Ukraine significantly complicated potential removals of Ukrainian nationals. Absent special circumstances justifying continued detention, and as is constitutionally required, ICE generally releases a noncitizen who is subject to a final order of removal after expiration of the removal period when there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). When it is clear that this is going to be the case, ICE often releases such noncitizens during the removal period, so long as it not constrained by the "under no circumstance" limitation in the statute. If ICE were required to maintain custody of all noncitizens throughout the removal period, without regard to the distinct treatment that the statute provides in the second, "under no circumstance," sentence, it would require ICE to detain individuals whom it anticipates will be released after expiration of the removal period because there is no significant likelihood of removal in the reasonably foreseeable future, needlessly wasting limited detention resources.

34. If ICE had to maintain custody of every detained noncitizen during the removal period, that requirement would also bar the release of noncitizens who have been granted withholding of removal under § 1231(b)(3) or the Convention Against Torture (CAT) regulations. While a grant of withholding of removal only limits repatriation to certain countries, removal to third countries is rare. Yet, noncitizens granted withholding of

removal are subject to § 1231 detention. *See* 8 C.F.R. § 241.4(b)(3). There would be no operational reason to continue to detain noncitizens for 90 days who have established a clear probability of persecution on account of a protected ground or torture in the country of removal but who lack a significant likelihood of removal in the reasonably foreseeable future.

35. Enforcement actions against and continued detention of the entire population covered by §§ 1226(c) and 1231(a)(2) would require ICE bedspace, personnel, and other resources that simply do not exist. Prior to March 15, 2022, ICE was funding for 34,000 beds. That number included 2,500 family unit beds. The budget that went into effect March 15, 2022, does not include funding for 2,500 family unit beds. This reduced ICE's total available bed space from 34,000 to 31,500. The number of adult beds did not change. ICE's access to its full inventory of bedspace is limited, however, due to various court orders limiting the intake of noncitizen detainees, an increase in detention facility contract terminations, and detention facility contract modifications. The ongoing COVID-19 pandemic has also had a significant impact. It has led to cohorting and quarantine requirements for facilities, as well as social distancing within facilities, which often results in unusable beds.

Damaging Costs to National Security and Public Safety

36. Due to this finite number of detention beds, to meet the Department's important mission, ERO must prioritize its detention resources to facilitate the detention of certain noncitizens, including those who are convicted criminals, public safety threats, and/or recent border entrants. As of June 5, 2022, the currently detained population of 24,700 noncitizens constitutes more than 92% of the approximately 26,800 currently available

beds. If, applying the court's interpretation of §§ 1226(c) and § 1231(a)(2), ICE had to conduct enforcement actions against all noncitizens potentially subject to § 1226(c) or § 1231(a)(2), it would be impossible for ICE to prioritize the use of its finite detention resources to carry out its public safety, national security, and border security mission in a fair, consistent, and effective manner. Specifically, following the court's interpretation of those statutes could result in the release from federal, state, and local criminal custody of noncitizens ICE would otherwise deem priorities for removal, given their public safety, national security or border security threat.

37. Enforcement actions against the entire population described in the Court's order—that is, all noncitizens being released from federal, state, and local criminal custody pending removal proceedings that ICE has determined to be subject to § 1226(c)(1), and noncitizens in the removal period who are in ICE custody and for whom detention has long been understood not to be mandatory under § 1231(a)(2)—would require ICE bedspace, personnel, and other resources that simply do not exist and would detract from the agency's ability to meet other pressing operational needs, including those pertaining to supporting the Department's broader public safety and border security mission.

38. If, in an enforcement scheme that takes the court's reasoning into account, ICE had to pursue enforcement beyond those who the Department already recognizes cannot be released from detention pending removal proceedings while in ICE custody would require the arrest and detention of—and thus require expenditure of DHS's limited detention space on—noncitizens who do not constitute public safety threats, limiting the space available for those who do pose such threats. Notably, not all cases meeting the definition for mandatory custody constitute public safety threats. For example, a lawful

permanent resident convicted many years ago of certain drug possession offenses or of filing a false tax return can count as an aggravated felon for purposes of § 1226(c) detention. Conversely, some noncitizens who do pose a current threat to public safety, such as those convicted of certain sex offenses, are not covered by the § 1226(c) detention provision. Likewise, noncitizens who are recently and credibly accused of serious crimes like murder, but who are not convicted, may pose a more serious public safety threat than noncitizens who may have been convicted decades ago for a non-violent tax offense even though the mandatory custody provisions would apply in the case of the tax offense and not the accused murder.

39. As a result, by vacating the Department's central guidance for ICE immigration officers on the enforcement of civil immigration laws when deciding whether to take certain noncitizens into custody, release other noncitizens from detention, or execute certain removal orders, the court's order would make it difficult for ICE to effectively prioritize the use of its finite resources to carry out its public safety, national security, and border security mission in a fair, consistent, and effective manner, making the community *less safe*. Specifically, an enforcement scheme that applies the court's reasoning would likely result in the inability of ICE to take into custody and detain some noncitizens ICE has deemed priorities for removal, including recent border crossers, individuals charged but not convicted of serious public safety offenses, and sex offenders like those targeted for enforcement in operations like Operation SOAR (Sex Offender Arrest and Removal), a coordinated effort to arrest and remove noncitizens convicted of egregious offenses against persons that might not subject an individual to § 1226(c) custody. Once a noncitizen described in § 1226(c) is taken into custody, officers expressly lack discretion

to release that person while proceedings are pending, even if that person does not pose a threat to national security, public safety, or border security. Without clearly established guidelines optimizing agency resources, the already limited bedspace could become encumbered by lower-priority individuals, impeding ICE's ability to target high-priority individuals for enforcement. Although local needs and demands are pertinent considerations, they must all work together in an efficient manner. In order for the nation's immigration enforcement apparatus to operate in a holistic manner that optimizes agency resources while carrying out ICE's congressional mandate to enforce the nation's immigration laws, there needs to be some form of central coordination.

40. If ICE were required to arrest, take into custody, and detain all known noncitizens described in § 1226(c) or § 1231(a)(2), it would completely overwhelm ICE's current capacity and more significantly curtail ERO's ability to protect communities from public safety threats or support DHS's broader border security mission. Given the limited detention capacity described above, detaining such individuals would take up beds that might otherwise be used to hold individuals who present a greater danger to the community or flight risk than those described in § 1226(c) or in the second sentence of § 1231(a)(2). For example, a noncitizen with two petty theft offenses could be subject to detention under § 1226(c) or § 1231(a)(2), but a noncitizen with a serious DUI conviction or with pending charges for sex offenses or other violent felonies may not.

41. The implementation of the enforcement priorities has assisted ERO in re-deploying assets to meet the current threat and reality. Through effective prioritization of resources, ERO is better able to adjust in real time to pressing operational needs. For

example, ERO re-tasked several field operations teams to assist CBP in responding to state and local requests for assistance in the Rio Grande Valley, Del Rio, and Tucson areas to address increasing activity along the Southwest Border. Additionally, in recent months, ERO has continuously deployed approximately 300 officers to the Southwest Border to support CBP operations, for a total of 2,475 ERO personnel deployed during Fiscal Years 2021 and 2022. These deployments are expected to continue for the foreseeable future and may even increase depending on operational demands at the border. Officers and staff deployed from their normal duty stations to assist with border operations are generally unavailable to make arrests, manage detention, or effectuate removals in the interior. The support ERO provides at the Southwest Border includes, but is not limited to: transporting; processing; enrollment in ATD; removals; bedspace management of those taken into custody, including those subject to expedited removal proceedings pursuant to 8 U.S.C. § 1225(b)(1); and transfers of those taken into custody. This flexibility has enabled ERO to address border security, consistent with the Mayorkas Memorandum, by focusing its resources on targeting noncitizens who recently unlawfully entered the United States, while also targeting serious criminal elements operating in the United States. It also has freed up bed space needed to support certain Title 42 expulsions and expedited removal. If the Memorandum were vacated and the court's order were to go into effect, ICE's ability to support these key enforcement priorities would be significantly constrained.

42. While the agency continues to direct resources to the border, it is all the more critical that ICE be able to prioritize its finite law enforcement resources on its public safety mission and targeted enforcement operations to locate and arrest national security and

public safety threats. A shift in resources to detain those subject to §§ 1226(c)(1) or 1231(a)(2) also limits resources available to detain recent border-crossers, who, for lack of detention resources, will likely be released.

43. Taking away the ability of ICE immigration officers to consult the prioritization guidance of the Mayorkas Memorandum when making discretionary enforcement decisions—or that restricts their discretionary authority entirely in certain respects—will lead to disparate prioritization across the country and a lack of consistency in enforcement actions. This could result in an undesirable shift in enforcement away from those who present the greatest risk to public safety and undermine public confidence in the nation's immigration enforcement efforts. Further, an attempt to take enforcement actions indiscriminately among this population, instead of against certain prioritized noncitizens, would not be an efficient or reasonable use of ICE's limited resources and would likely prevent ICE from effectively focusing on those noncitizens who pose the greatest and most imminent threat to public safety.

44. The Mayorkas Memorandum appropriately focuses agency resources on enforcement actions against the most serious offenders in ways that better protect public safety and national security. As DHS collectively addressed the surge of migrants seeking to cross the Southwest Border, ICE shifted resources to the border consistent with the Mayorkas Memorandum, which prioritizes border security. As noted above, the number of CBP apprehensions along the border continues to increase, with processing under both Title 42 and Title 8 continuing at historic levels. ICE has been providing meaningful support in this effort. Among other things, ICE has taken on the role of completing processing of more than 300,000 cases involving noncitizens apprehended by CBP. ICE also

transports individuals from the border to ICE detention centers throughout the country, conducts removal and expulsion flights, enrolls others in ATD, liaises with local government officials, collects DNA of noncitizens, and updates ERO software with risk classification assessments including mitigating and aggravating factors, among other duties. Due to this shift in resources, ICE has had fewer resources available to devote to interior enforcement. With respect to interior enforcement actions, the Mayorkas Memorandum has enabled ICE to appropriately prioritize its limited resources to ensure that the actions ICE has taken are focused on the most serious public safety threats. Despite having to transfer resources to the Southwest Border, ICE has been able to use the Mayorkas Memorandum to ensure that important public safety goals were being met. In the first 180 Days of implementation of the Mayorkas Memorandum, ERO's percentage of enforcement actions involving noncitizens convicted or pending conviction of a felony (including aggravated felonies), Sex Offenses (Including Involving Assault or Commercialized Sex), and National Security Offenses was 14.9% higher than the same time frame in Fiscal Year 2020. Also in that period, the percentage of enforcement actions involving non-citizens convicted or pending conviction of Assault, Dangerous Drugs, Homicide, Robbery, Sex Offenses, Sexual Assault, and Weapon Offenses was 17.1% higher than the same time frame in Fiscal Year 2020.

Curtailment of Statutorily Authorized Discretion

45. An enforcement scheme that follows the court's reasoning also would undermine, if not effectively eliminate, the Secretary's statutory responsibility to "[e]stablish[] national immigration enforcement … priorities" consistent with 6 U.S.C. § 202(5) in a manner that the Secretary deems the best use of the agency's resources to support its missions.

The former INS, one of DHS's predecessor agencies, exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909, and continuing in every Administration, including after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, to maximize use of scarce agency resources, to protect the United States from national security threats, and to protect our citizens and communities from harm. *See Department of Justice Circular Letter Number 107*, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also, e.g.*, Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976).

Inconsistent Application

46. Implementation of an enforcement scheme consistent with the district court's order will likely result in inconsistent application among the ERO workforce, which, as discussed above, has been extensively trained to apply the Mayorkas Memorandum. Without such a rubric, the workforce would be left with no uniform guidance regarding certain enforcement decisions. This will likely lead to lack of consistency across enforcement actions, and is a vast deviation from ICE's prior exercise of discretion.

47. Notably, the Mayorkas Memorandum does not mandate any outcomes. Rather, it is framed in a way to empower officers to focus resources on individuals who present the most, actual threats. As implemented by ERO, the guidance promotes thoughtful deliberation by officers who have been trained to consider individual facts and circumstances prior to taking an enforcement action. Without a framework in place, there would still remain a large divergence between the number of noncitizens subject to detention under §§ 1226(c)(1) or 1231(a)(2) and available bedspace. The Mayorkas

Memorandum provides a mechanism for prioritizing amongst limited detention resources—focusing on the most significant public safety, national security, and border security threats. Without the Mayorkas Memorandum, officers will be left without a rubric to guide their decisions. One likely outcome is a first-come, first-served approach in which officers pursue enforcement action against anyone who falls within §§ 1226(c)(1) or 1231(a)(2), until bed space is full. The absence of a rubric could also result in a situation in which officers across the country are pursuing enforcement actions differently. Either of these situations risks significantly undermining public security and national security, as well as efforts to secure the border, by filling up bed space with noncitizens whose detention doesn't meet these goals, resulting in inefficient utilization of limited resources without adequately protecting public safety.

48. Reliance on the Mayorkas Memorandum provides consistency in enforcement. In its absence, there is likely to be inconsistency in how those entrusted with making determinations regarding enforcement of a noncitizen's final order of removal, resulting in possible inequitable outcomes. Notably, § 1231(c)(2) provides that the Secretary may stay the removal of a noncitizen if immediate removal is not "practicable or proper." The Secretary has delegated that authority to certain ICE officials. DHS has long considered its stay authority discretionary and exercised its authority to stay noncitizen's removal following case-by-case evaluation, consistent with the statutory standard, since before the Mayorkas Memorandum took effect. Notably, many of the factors militating in favor of declining to enforce a removal order under the Mayorkas Memorandum were also considered as part of DHS's discretionary decision-making before the memorandum took effect. Thus, for those individuals that fall within § 1231(a) but for which removal

has been determined is not "practicable or proper," ICE has historically not detained them during the removal period. The Court's interpretation of § 1231(a) seems to suggest that this approach may no longer be valid. If that were the case, ICE would be required to devote bedspace for 90 days to individuals it has no intention of removing, needlessly devoting resources to individuals that do not pose a threat and that ICE knows will be re-released to the community in a matter of months. This will inject considerable inconsistency and waste into the stay adjudication process.

49. Any potential policy or operational confusion due to vacatur could additionally harm ICE's relationship with state and local stakeholders. In particular, ICE must cultivate relationships with numerous state and local partners. To interact with state, tribal, and local jurisdictions, the Department needs to be able to articulate and defend its priorities. Operating without an overarching plan could irreparably harm ICE's relationships with key partners.

Ripple Effects and Resource Limitations

50. The vacatur of the Mayorkas Memorandum would have ripple and costly effects beyond ERO. For instance, OPLA, which represents ERO and all other DHS components in removal proceedings before the immigration courts, is facing crippling resource constraints that make prioritization essential. The number of cases pending before the immigration courts has more than doubled just since the end of Fiscal Year 2018, and the number of immigration judges has increased by more than 50 percent during that time. OPLA resource levels have not kept pace with this growth in docket size and the immigration bench, resulting in a deficit of several hundred OPLA attorney positions needed to litigate the administrative proceedings of noncitizens subject to removal under

the many grounds of removability established by Congress in the Immigration and Nationality Act (INA), including those who are subject to § 1226(c). *See* DHS, U.S. Immigration and Customs Enforcement Budget Overview – Fiscal Year 2023 Congressional Justification, at ICE-O&S-36 (explaining DHS's request for 341 additional OPLA positions in FY 2023 budget).[2]

51. Outside the context of immigration court, ERO relies heavily upon OPLA for legal advice and prudential counsel in performing our mission (including whether noncitizens are removable from the United States and under what authority they may be arrested and detained), and I have observed how these resource constraints have limited OPLA's availability to provide such services to ERO officers.

52. One way that OPLA has endeavored to address these resource challenges has been by building consideration of the priorities set forth in the Mayorkas Memorandum into its litigation practice before the immigration courts and Board of Immigration Appeals. *See* Memorandum from Kerry E. Doyle, Principal Legal Advisor, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion* (Apr. 3, 2022).[3] Already, OPLA has been able to remove thousands of nonpriority cases from the dockets by exercising prosecutorial discretion informed by the Mayorkas Memorandum. OPLA has also invested its time in conducting town hall meetings with stakeholders nationwide and updating ICE's public-facing website with Frequently Asked Questions and a Quick Reference Card to explain

[2] Available at https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement_Remediated.pdf; *see also* DHS, U.S. Immigration and Customs Enforcement Budget Overview – Fiscal Year 2022 Congressional Justification, at ICE-O&S-22 (elaborating on OPLA resource shortfall and requesting additional attorney positions in FY 2022), available at https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf.
[3] Available at https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

how it applies the Mayorkas Memorandum in representing DHS before the immigration courts.

53. In addition to further straining OPLA resources, I believe that vacating the Mayorkas Memorandum could lead to a lack of clarity among the public, including noncitizens and their legal representatives, who will be unclear how to request or receive consideration for prosecutorial discretion from the Agency's attorneys.

V. Re-programming funds/Detention Capacity

54. As an initial matter, reprogramming or transferring funds would not address the significant obstacles to identifying additional appropriate detention space. Over the past month, ERO has been working to identify additional beds and I am familiar with the many challenges associated with this effort. Finding and contracting for additional detention beds is a complicated process that requires several months per facility. First, ICE must identify available facilities. Second, ICE must conduct multiple preoccupancy inspections to ensure the facility is suitable for civil immigration detainees. Third, ICE negotiates with the detention provider and awards the contract that must be funded.

55. This process is complicated by the fact that detention providers are facing challenges in hiring appropriate staff, especially medical staff, and once staff are identified, ICE needs several weeks to ensure that they have appropriate clearances.

56. Notably, some facilities have terminated their contracts with ICE over the past two years. Further, civil immigration detention requires a heightened standard of care, and Congress has regularly required DHS to monitor facilities and discontinue agreements under certain circumstances. Available facilities are also impacted by state laws

prohibiting ICE detention. Further, ICE detention space has been limited by ongoing litigation that constrains ICE from using some of its detention capacity.

57. Based on the funding and operational challenges, I believe that ICE cannot readily add sufficient bedspace to accommodate the orders of magnitude of additional noncitizens that would need to be detained in order to comply with the court's order and also support its other interior enforcement and border security missions.

58. ICE has used ATD to increase the flexibility with which it addresses these and other challenges. ATD is not a form of detention; rather it is a flight mitigation tool ICE applies as a condition of release for certain noncitizens. Although ATD can take many forms, the most typical is placing the noncitizen on a form of electronic monitoring, with regular check ins. ICE's use of this technology is to promote an efficient and cost-effective way to ensure compliance with conditions of release for non-dangerous individuals. First, it frees detention space for those who pose a danger to the community, whether or not they fall under 8 U.S.C. §§ 1226(c) and 1231(a)(2). Second, it eliminates the need to unnecessarily expend detention resources – transport, housing, COVID quarantine protocols – on unnecessarily detained non-violent individuals. Congressional appropriation for ATD for fiscal year 2021 was $440.1 million. This reflects the fact that enrollment in ATD continues to increase. As of June 9, 2022, the ATD program had more than 270,000 enrolled participants, more than five times the approximately 53,000 participants in 2015. Program savings for utilizing ATD is also significant. The program cost per participant is under $5.00 per day. By comparison, the average daily bed rate for detained individuals is approximately $142 per day.

59. As reflected in its proposed budget request for Fiscal Year 2023 (FY23), the Administration is seeking to focus ICE's priorities on the gravest threats to the community and border security. This is being accomplished by focusing detention on those who truly pose a danger to the community, as well as supporting the border mission, and by reallocating funds to focus on ATD and transportation. Although the funding sought by the administration for bed space has decreased, the funding request for ATD has increased.

60. ICE is also playing an increasing role in border security. Since early 2021, ICE has found that it can best relieve impacted CBP stations by (1) enrolling migrants released by CBP in ATD and (2) using air and ground transportation resources to move migrants from impacted CBP stations to other places where they can be processed. In contrast to any suggestions that such funds are fungible, any significant reprogramming or transferring of funds from these valuable programs would also damage other important DHS priorities and programs. This could include funds appropriated to support important programs like Fugitive Operations and the Transportation and Removal program could be jeopardized by reallocation of funds without regard to the department's overall mission. ICE's budget is very constrained. In a climate where it is politically difficult for Congress to increase the topline funding for ICE, any increase in ICE programs like ATD and Transportation have required requisite decreases in other ICE programs like detention.

61. I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration is based on my

personal knowledge, as well as the information provided to me by other employees of the Department of Homeland Security.

Signed on this 13th day of June, 2022.

DANIEL A BIBLE

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Date: 2022.06.13 14:09:23 -04'00'

Daniel Bible
Deputy Executive Associate Director
Enforcement and Removal Operations
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