No. 22A17

In the Supreme Court of the United States

UNITED STATES OF AMERICA ET AL.,
APPLICANTS,
V.
STATES OF TEXAS AND LOUISIANA,
RESPONDENTS.

TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON 8 1/2 BY 11 INCH PAPER IN SUPPORT OF RESPONDENTS TEXAS AND LOUISIANA OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, KENTUCKY, INDIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, WEST VIRGINIA, AND WYOMING

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JULY 13, 2022

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MOTION FOR LEAVE

The States of Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Indiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wyoming ("Amici States"), represented by their attorneys general, respectfully move for leave to file the attached proposed brief of amici curiae in support of Respondents Texas and Louisiana and in opposition to the Federal Petitioners' Application for a Stay of Judgment. Amici States therefore seek leave file the attached brief (1) without 10 days' advance notice to the parties and (2) on 8 1/2 by 11 inch paper, rather than in booklet form.

In light of the expedited briefing schedule set by this Court, Amici States could not provide 10 days' notice of their intent to file. Counsel for the State of Arizona, however, provided notice to the parties of Arizona's intent to file an amicus brief on behalf of itself and additional states on the same day that Federal Petitioners filed their application (July 8). Amici States further sought the consent of the parties for the filing on this brief. Respondents consent to the filing of the attached amicus brief, while Federal Petitioners take no position on this motion.

Amici States are suffering similar harms as Respondents Texas and Louisiana from Petitioners' intentional and pervasive violations of mandatory requirements of federal immigration laws and the APA—which the district court's vacatur substantially remedied. Much like Respondents, Amici States would therefore suffer extensive harms if this Court were to grant the stay sought by Federal Petitioners,

and therefore have a strong interest supporting their sister states in defense of the vacatur they deservedly obtained.

More generally, this Court has observed that States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). The challenged Final Memo substantially increases the volume of illegal immigration through intentionally and unlawfully degrading immigration enforcement—all at a time when illegal border crossings are already at historically unprecedented levels. The Final Memo thus predictably increases the already enormous burdens placed upon the States from DHS's abysmal failure to secure our nation's borders.

The expedited filing and consideration of the Application prevented the Amici States from printing and filing this brief in booklet form. In light of the expedited proceedings and emergency nature of the Application, Amici States request the Court grant this motion and accept the paper filing.

July 13, 2022

Respectfully submitted,

/s/ Drew C. Ensign

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PROPOSED BRIEF OF AMICI CURIAE THE STATES OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, KENTUCKY, INDIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, WEST VIRGINIA, AND WYOMING IN OPPOSITION TO PETITIONERS' REQUEST FOR A STAY

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INTEREST OF AMICI CURIAE

As this Court has previously observed, States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). In the last 17 months, the volume of unlawful immigration has soared to levels unseen in the United States in decades—and, quite likely, ever. So too have the resulting burdens placed on the States.

But the federal government steadfastly refuses to acknowledge those costs: either in considering the harms to States and their reliance interests in rulemaking, as the Administrative Procedure Act ("APA") demands, or in court by refraining from reflexively advancing baseless standing arguments premised on the States somehow never suffering a scintilla of cognizable harms from DHS's unprecedented and appalling failures. DHS's lawless refusal to enforce immigration laws as written—exemplified by the challenged action here, which reads multiple "shall"s as mere "may"s—continues to impose significant costs on the States, including billions of dollars in new expenses relating to law enforcement, education, and healthcare programs. Those harms are exacerbated by DHS's increasingly brazen disrespect for the requirements of our nation's immigration laws and the APA.

As sovereigns within our federal system of dual sovereigns, the States also have an important interest in ensuring that the federal government respects the rule of law. DHS's challenged policies here, however, reflect a corrosive disrespect for that bedrock principle.

ARGUMENT

The States of Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Indiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, West Virginia, and Wyoming ("Amici States"), submit this brief in support of their sister states Texas and Louisiana and in opposition to Federal Petitioners' ("DHS's") request for a stay of the district court's judgment. This brief advances four principal points to provide important context to this Court's resolution of DHS's application. *First*, the current situation at the U.S.-Mexico border is an unmitigated disaster. The number of illegal crossings per month is at levels unseen in at least a generation. DHS's own data and declarations make these facts painfully clear—and further reveal just how wildly implausible DHS's contention that *none* of this crisis has inflicted any cognizable injury on Texas and Louisiana is here.

Second, the challenged Final Memo (a.k.a. "Guidance," "Permanent Guidance" or "Permanent Memorandum") is the product of escalating lawlessness by DHS. Both of the Final Memo's predecessors were enjoined for *inter alia* violating the APA's notice-and-comment requirements. But despite having sufficient time to take and respond to comments before issuing the Final Memo, DHS instead decided to triple down on its APA violations. The Final Memo also continues DHS's serial refusals to consider the reliance interests of States—despite this Court's unequivocal holding in *DHS v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891 (2020) that it do so.

Third, the Final Memo plainly inflicts harms upon both Respondent States and Amici States. In particular, increased law enforcement expenses is the predictable—

and realized—result of the Final Memo and its equivalent predecessors. Indeed, DHS's own officer readily admitted in a deposition that the Final Memo's predecessor was the only conceivable cause of the "big drop-off" (his words) both in immigration detainers being issued and in final removal orders being effectuated.

Fourth, the Final Memo's interpretation of sections 1226(c) and 1231(a) violate those sections' plain text—which imposes an actual mandate by commanding that DHS "shall" take particular actions, rather than "may" take them (which is the central premise of the Final Memo). These conclusions are confirmed by the applicable canons of construction and the legislative history, including the 1996 amendments, which manifestly intended to obliterate the very discretion that DHS now arrogates to itself. Even more importantly, the Final Memo violates *this Court's construction* of those *precise* provisions. *Nielsen v. Preap*, 139 S.Ct. 954, 959 (2019) (holding that under §1226(c), "aliens *must be* arrested 'when [they are] released' from custody on criminal charges" (emphasis added)); *Johnson v. Guzman Chavez*, 141 S.Ct. 2271, 2281 (2021) (holding under §1231(a)(1)(A) that "[o]nce an alien is ordered removed, DHS *must* physically remove him … within a 90-day 'removal period.'" (emphasis added)). DHS tellingly cites neither case in its application to this Court.

The Final Memo's contrary conclusions—which directly violate the holdings of this Court—are as audaciously unlawful as agency actions come.

I. The Situation At The Border Deteriorated While The Final Memo And Its Predecessors Were In Effect

The challenged Final Memo here is part of a constellation of policies that have intentionally hobbled immigration enforcement and led to enormous increases in

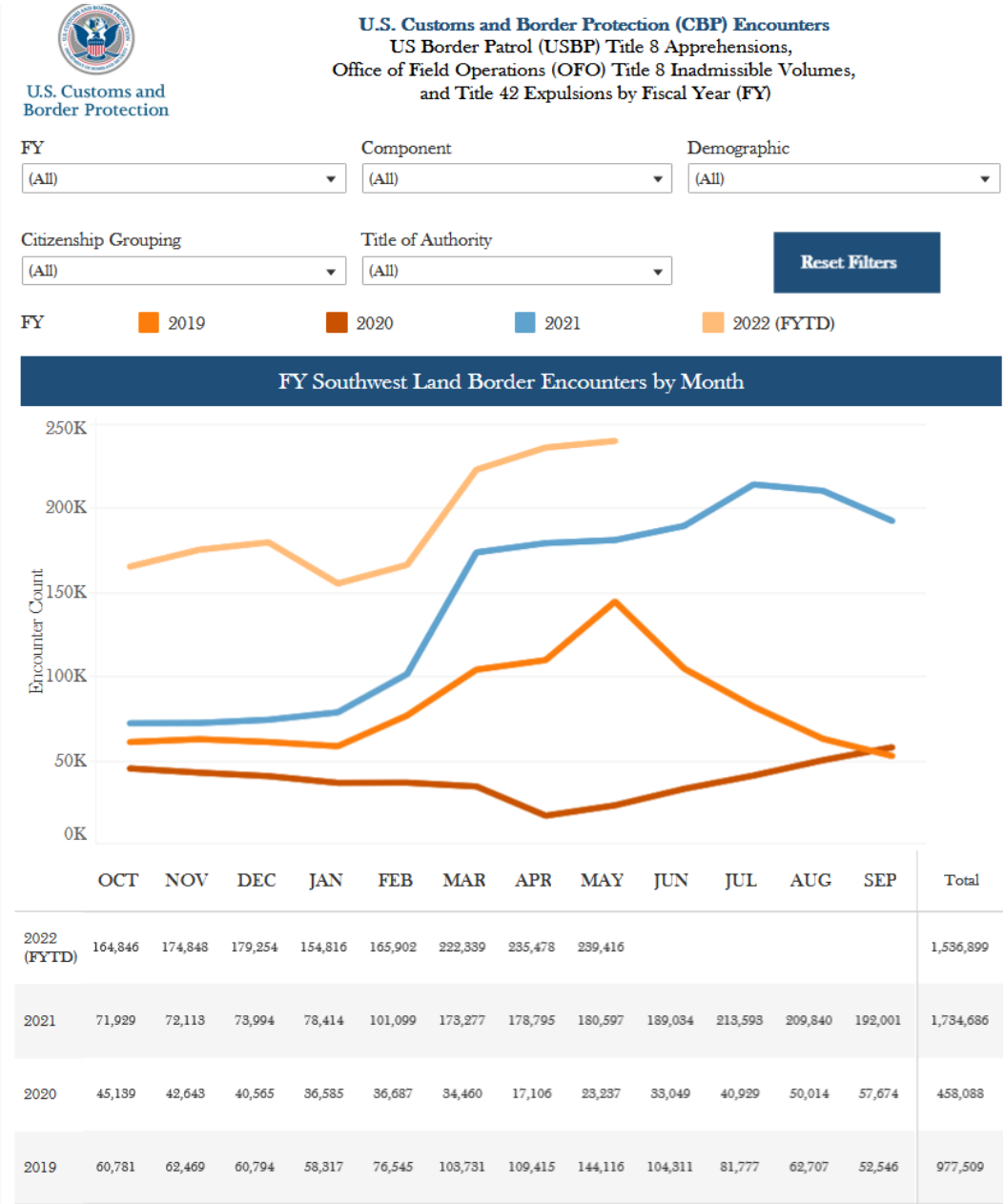
attempted (and successful) illegal border crossings. This, in turn, has caused the Amici States extensive harms through increased law enforcement, education, and health care expenditures. To put those harms in perspective, it is useful to consider first the unprecedented scale of the current border crisis.

DHS has itself admitted that it is "encountering record numbers of noncitizens ... at the border," which "ha[s] strained DHS operations and caused border facilities to be filled beyond their normal operating capacity." Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100, ECF No. 116 (D.D.C. Aug. 6, 2021).

DHS's own statistics reveal the unprecedented surge of unlawful migration and the collapse of DHS's operational control of the border. Nearly a year ago, DHS admitted that July 2021 had the highest number of monthly encounters in *decades*—and, very likely, *ever* (up to that point). *Id.* at 7 (reporting "the highest monthly encounter number since Fiscal Year 2000"). "Monthly family encounter rates have generally been increasing since April 2020, rising 100-fold from 738 encounters in April 2020 to over 75,000 in July 2021." *Id.* at 9. DHS itself characterized these summer-2021 numbers as "an historic surge" and an "influx." *Id.* at 3, 6.

That "historic surge" has only gotten worse since then. U.S. Border Patrol statistics for migrants illegally crossing the southwestern border show that, in *each month* in 2021, alien encounters were significantly higher than encounters during the same month in previous years. And, so far, monthly encounters for each month in 2022 was higher than the number of encounters in 2021.

The most recent DHS data, from June 2022, (copied below) illustrates the unprecedented nature of the crisis. Notably, the number of encounters in May 2022 with illegal border-crossers—239,416—was more than *ten times* the May 2020 numbers, and more than *1.5 times* the corresponding number for May 2019.



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2022 (FYTD)	164,846	174,848	179,254	154,816	165,902	222,339	235,478	239,416					1,536,899
2021	71,929	72,113	73,994	78,414	101,099	173,277	178,795	180,597	189,034	213,593	209,840	192,001	1,734,686
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509

Source: U.S. Customs and Border Protection, *Southwest Land Border Encounters*, *available at* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

As the Washington Post explained, "Immigration arrests along the U.S. southern border rose in May *to the highest levels ever recorded*.... CBP made 239,416 arrests along the Mexico border last month.... The agency is on pace to exceed 2 million detentions during fiscal 2022 ... after tallying a record 1.73 million in 2021."[1]

Border encounters with DHS unfortunately only tell a small part of the story. DHS fails to encounter (*i.e.*, apprehend) *most* illegal border-crossers entirely. These so-called "gotaways" comprise about three-fourths of all border crossers. *See Louisiana v. CDC*, __ F.Supp.3d __, 2022 WL 1604901, at *6 (W.D. La. May 20, 2022) ("[O]nly 27.6% of undocumented persons crossing the southern border were apprehended by DHS personnel."). Thus, the actual number of crossers may be *four times* DHS's reported encounter numbers (*i.e.*, roughly three gotaways for every DHS encounter).

Many of those migrants encountered by DHS are nonetheless permitted entry into the U.S. Although most are *supposed* to be subject to mandatory detention if they are not immediately removed, *see, e.g.*, 8 U.S.C. §1225(b), DHS has also circumvented this mandate through abuse of its parole authority under 8 U.S.C. §1182(d)(5).

As this Court recently observed, parole "authority is not unbounded: DHS may exercise its discretion to parole applicants 'only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.'" *Biden v. Texas*, __ S. Ct. __, 2022

[1] Nick Miroff, *U.S. border arrests rose to record high in May, data shows*, THE WASHINGTON POST, June 16, 2022 (emphasis added), https://www.washingtonpost.com/immigration/2022/06/16/united-states-border-immigration-arrests/.

WL 2347211, at *12 (U.S. June 30, 2022) (quoting 8 U.S.C. § 1182(d)(5)(A)). But DHS has instead unlawfully been "releas[ing] undocumented immigrants into the United States *en masse*" under its limited parole authority. *Texas v. Biden*, 20 F.4th 928, 996 (5th Cir. 2021) *rev'd in part* 2022 WL 2347211 (2022).

Thus, in May 2022, DHS paroled 68,527 aliens into the U.S.; in April, the number was 91,250 aliens. *Texas v. Biden*, No. 21-cv-67, ECF No. 139 at 3 and ECF No. 140 at 3 (N.D. Tex. June 15, 2022). These numbers are escalating rapidly: in March 2022, DHS "only" paroled 36,777. *Id.* ECF No. 136.

In a nutshell: aliens are unlawfully crossing the southwestern border in historically unprecedented numbers. Most—roughly ¾—elude DHS entirely. And for that small portion that does not slip through DHS's fingers entirely, the agency unlawfully paroles many of them into the U.S. rather than detaining them. For the vast majority of migrants unlawfully entering the United States, actual enforcement of U.S. immigration laws by DHS is thus the rare exception, rather than the rule.

This is a crisis, even if the Administration steadfastly will not describe it as such.

II. The Need For The District Court's Vacatur Is Underscored By The Administration's Lawless Actions

The Administration's brazen defiance of APA requirements underscores the need for federal courts to act decisively to break the Administration's escalating pattern of lawlessness. DHS has engaged in a systematic pattern of violating the APA for 17 months now. These serial APA violations underscore why DHS's requested stay is particularly unwarranted here.

A. DHS Has Repeatedly Violated Notice-and-Comment Requirements

The decision below vacating the Final Memo is only the latest iteration in a string of decisions reviewing successive DHS anti-enforcement rules/memoranda. The first rule was a memorandum issued—without notice-and-comment—on January 20, 2021, the "January Memorandum." The January Memorandum imposed a 100-day moratorium on all deportations and also created a list of "enforcement priorities" significantly limiting detention and removal of aliens going forward.

The Southern District of Texas quickly concluded that the January Memorandum was both procedurally and substantively invalid. That court specifically held that it was "a rule that is not exempt from the notice and comment requirements of section 553." *Texas v. United States*, 524 F. Supp. 3d 598, 662 (S.D. Tex. 2021); *accord Texas v. United States*, 515 F. Supp. 3d 627, 638 (S.D. Tex. 2021) (granting temporary restraining order). That court further held that the January Memorandum violated 8 U.S.C. §1231(a)(1)(A) and was arbitrary and capricious. 524 F. Supp. 3d at 644-56.

DHS neither appealed that decision, nor attempted to comply with it. Instead, the agency doubled down. DHS thus issued a new, superseding memorandum on February 18, 2021 (the "Interim Guidance")—also without complying with notice-and-comment procedures, even though it adopted "enforcement priorities" substantially similar to its predecessor.

The Southern District unsurprisingly held this was unlawful, again, and issued a preliminary injunction. *Texas v. United States*, 555 F. Supp. 3d 351, 435 (S.D.

Tex. 2021). Once again, that court held that DHS had violated notice-and-comment requirements (among other mandates). *Id.* at 426-35. This time DHS did appeal and initially obtained a partial stay pending appeal, but the Fifth Circuit then granted rehearing en banc and dissolved the stay. *See Texas v. United States*, 14 F.4th 332 (5th Cir.) (granting stay), *vacated on rehearing en banc* 24 F.4th 407 (5th Cir. 2021).

By this time, DHS's third serial notice-and-comment violation was already well underway. DHS issued a successor memorandum on September 30, 2021, the "Final Memo," along with an accompanying "Considerations Memorandum"—again without complying with notice-and-comment procedures. *See Texas v. United States*, __ F.Supp.3d __, No. 6:21-CV-00016, 2022 WL 2109204, at *10 (S.D. Tex. June 10, 2022).

DHS's third evasion of notice-and-comment requirements was not the charm: The same district court again held DHS's circumvention unlawful. *Id.* at *39-42. DHS's persistent refusal either (1) to abide by the APA's requirements or (2) attempt to address any of the district court's repeated holdings that DHS violated applicable legal requirements, is lawless. And this third violation was particularly noteworthy, as DHS had more than seven months after issuing the Interim Guidance—*i.e.*, ample time—to take and respond to public comment.

But despite having sufficient time to conduct notice-and-comment rulemaking for the Final Memo here, DHS simply *chose* not to do so—apparently concluding that the judicial rebukes it has received to date were not yet sufficiently stinging to justify any change of course. Denial of a stay here may start the very necessary process of convincing DHS that APA compliance is not optional and readily dispensed with.

Notably, the Administration's serial APA notice-and-comment violations for DHS's anti-enforcement memoranda are paired with other parallel APA violations in the immigration context. In particular, the CDC issued an order purporting to terminate the federal government's "Title 42 policy" without notice-and-comment rulemaking. The Western District of Louisiana concluded this too violated the APA and issued a preliminary injunction. *Louisiana*, 2022 WL 1604901, at *21. CDC appealed that decision, but has neither sought a stay pending appeal nor begun attempting to comply with notice-and-comment requirements in the meantime. DHS was also caught red-handed illegally—and clandestinely—implementing the Title 42 Termination Order before its actual effective date, necessitating a temporary restraining order. *See Louisiana v. CDC*, No. 22-CV-885, 2022 WL 1276141 (W.D. La. Apr. 27, 2022).

B. DHS Has Repeatedly And Illegally Refused To Consider The States' Reliance Interests

Notice-and-comment requirements are hardly the only APA mandates of which DHS is a repeat offender. In particular, DHS has *repeatedly* failed to consider the States' reliance interests in promulgating its immigration (non-)enforcement policies.

"When an agency changes course … it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Regents*, 140 S.Ct. at 1913 (cleaned up) (citation omitted). "It would be arbitrary and capricious to ignore such matters." *Id.*

The Final Memo, however, makes no attempt to consider the States' reliance interests. Instead, DHS endeavors only to *delegitimize* those reliance interests, rather

than weigh them meaningfully or fairly. Thus, just as in *Regents*, DHS "does not contend that [it] considered potential reliance interests; it counters that [it] did not need to." *Id.* at 1913.

In *Regents*, DHS argued that "DACA recipients have no 'legally cognizable reliance interests' because the DACA Memorandum stated that the program 'conferred no substantive rights' and provided benefits only in two-year increments." *Id.* In other words, echoing its rationale here, DHS argued in *Regents* that any reliance interests were not reasonable or legitimate because the immigration enforcement program at issue created no vested rights and was inherently temporary. This Court made plain that this rationale squarely violates the APA. *Id.* at 1913-15. *Regents* further faulted DHS explicitly for failing to consider the reliance interests of "States and local governments [which] could lose $1.25 billion in tax revenue each year." *Id.* at 1914.

Recalcitrant in the face of *Regents*'s holding, DHS recycles its same discredited rationale here. DHS thus claims that the States' reliance on prior enforcement policies was illegitimate as a matter of law since, in DHS's view, it "would be unreasonable in light of the long history of the Executive's use of evolving enforcement priority schemes in this area." Considerations Memorandum at 16.

But this Court has already rejected this precise argument: "[N]either the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any." *Regents*, 140 S.Ct. at 1913-14. Moreover, *Regents* too involved an "evolving

enforcement priority schemes"—*i.e.*, DACA and DAPA. DHS's reasoning here thus offers nothing beyond what the agency already said in *Regents*, which this Court found wanting.

Moreover, the Fifth Circuit *already* invalidated on the same basis *another* equivalent rationale post-*Regents*, involving the MPP or "Remain in Mexico" program—a holding DHS did not seek review of in *Biden v. Texas*. There too, DHS had discounted outright the States' reliance interests based on its assertion that the agency "had *no* obligation to consider the States' reliance interests at all." *Texas v. Biden,* 20 F.4th at 990. This Fifth Circuit, however, found that rationale "astonishing[]" since it was "squarely foreclosed by *Regents*." *Id.* It is no less astonishingly bad here.

Defendants' refusal to consider the States' reliance interests is particularly egregious because Defendants *did* consider the reliance interests of, and practical impact on, "non-governmental entities, including immigrant advocacy organizations." Considerations Memo at 8, 11. But no such consideration was extended to the States, even though they "bear[] many of the consequences of unlawful immigration." *Arizona*, 567 U.S. at 397. DHS's contempt for the States is thus paired with palpable solicitude for the interests of the Administration's ideological allies. The APA exists *precisely* to avoid this sort of myopic decision-making in which only the interests and input of political pals is considered.

DHS's *repeated* refusal to consider the reliance interests of the States thus underscores the lawlessness that pervades the Final Memo.

* * *

These violations of the requirements of notice-and-comment rulemaking and considering States' reliance interests are merely some of the most egregious legal violations by DHS in its efforts to cripple immigration enforcement. DHS's own Inspector General, for example, has concluded that the agency violated procurement law in awarding a $17 million no-bid contract, putatively for supplementing DHS's detention capacity—but the agency then overwhelmingly failed to use the capacity that it had unlawfully secured.[2] DHS also contrived last week to reduce its detention capacity through settling a suit with its ideological allies—thereby further degrading its enforcement efforts and virtually guaranteeing additional parole grants. Rae Ann Varona, *ICE Agrees To Restrictions In COVID-19 Hot Spot Settlement*, LAW360, (July 7, 2022), https://www.law360.com/articles/1509393/ice-agrees-to-restrictions-in-covid-19-hot-spot-settlement. And, as explained above, DHS also secretly and illegally began implementing CDC's attempted rescission of Title 42 Orders *more than a month* before the effective date. *Supra* at 10.[3]

Nor is the rest of this Administration any paragon of the rule of law. President Biden announced his judgment that any extension of the CDC eviction moratorium

[2] Office of Inspector Gen., ICE Spent Funds on Unused Beds, Missed COVID-19 Protocols and Detention Standards while Housing Migrant Families in Hotels (April 12, 2022), https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-Apr22.pdf.

[3] The States only discovered the premature illegal implementation from news reports. Even though the States had a pending motion for a preliminary injunction, DHS declined to inform the States that the actions they sought to enjoin were already underway before the purported implementation date of the disputed rule at issue.

was likely illegal—while simultaneously commanding CDC to extend it anyway.[4] The President further observed that—legal or not—he was likely to be able to impose his will for at least a time: "[B]y the time it gets litigated, it will probably give some additional time."[5] CDC then predictably and obsequiously obeyed.

It fell then to this Court to remind CDC that it has no authority to act unlawfully. *See Alabama Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2488 (2021) (holding that it was "difficult to imagine" that CDC's actions were lawful). Thus, while Petitioners lament (at 4), the number of suits by States, they tellingly fail to consider the possibility that their own lamentable lack of respect for legal niceties might be the cause of the increased number of actions. And while Petitioners point (at 4) to "bedrock Article III and equitable principles," they forget another foundational Article III principle: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Thus, if an administration policy unlawfully injures the States and the action is otherwise reviewable, federal courts' duty is to declare that legal violation, rather than fret that such action would exceed their injunction/vacatur allowance for the quarter. Nor do equitable principles "permit agencies to act unlawfully even in pursuit of desirable ends." *Alabama Realtors*, 141 S.Ct. at 2490.

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[4] President Biden specifically acknowledged that "[t]he bulk of the constitutional scholarship says that [the action was] not likely to pass constitutional muster." Joseph Biden, Remarks at the White House (August 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic/.

[5] *Id.*

If the Administration is intent on engaging in pervasive legal violations—even, at times, publicly admitting the likely illegality of its acts while engaging in them anyway—it can no more fairly claim surprise at being sued by States than Captain Renault could be shocked to find that gambling was occurring in Rick's Café. And if the Administration wishes to reduce the number of injunctions/vacaturs that States obtain against it, the correct tool for it to employ is a mirror, not distortions of Article III and equitable principles. *See also*, *e.g.*, *West Virginia v. EPA*, __ S. Ct. __, 2022 WL 2347278, at *10-11 (June 30, 2022) (rejecting Administration's latest attempt to invoke Article III to shield its illegal actions from judicial review sought by States).

The district court and Fifth Circuit refused to indulge DHS's further lawlessness with the Final Memo below. This Court should too by denying DHS's request for a stay.

III. The Final Memo Harms States Through Increased Law Enforcements Costs And Additional Crime

Amici States are also suffering harms under the Final Memo similar to those of Texas and Louisiana here. Arizona's experience provides an illustration of this, including harms recognized by the Western District of Louisiana and the District of Arizona. *Louisiana*, 2022 WL 1604901, at *5-6 (discussing law enforcement, incarceration, and health costs to Arizona caused by increased immigration); *Arizona v. DHS*, No. CV-21-186, 2021 WL 2787930, at *6-8 (D. Ariz. June 30, 2021) (same).

The Western District of Louisiana also recognized the harms caused by increased immigration to non-border states, such as Missouri. *Louisiana*, 2022 WL

1604901, at *7 (recognizing education, health, and administrative costs to Missouri of increased immigration). These harms are ongoing and compounding by the day.

In particular, the Amici and Plaintiff States have suffered, and will suffer, increased costs of incarceration and other law enforcement services due to the challenged actions. Significantly, the Final Memo has directly resulted in ICE lifting detainers on criminals who have completed their sentences. *Texas v. United States*, 2022 WL 2109204, at *10-13 ("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."). Instead of being removed, these individuals are instead being released onto the streets and into communities. *Id.* at *13-15.

DHS's actions have directly led to States incurring supervised-release costs that they otherwise would not incur. Arizona, for example, has identified convicted criminal aliens whose ICE detainers were lifted prior to their release from state prisons due to the new removal priorities in just the first two months since DHS adopted them. *See Louisiana*, 2022 WL 1604901, ECF No. 13-3 at 44-430 (Declaration of Jennifer Abbotts). Indeed, emails received from ICE itself specify that the new removal priorities were the reason ICE lifted each detainer. *See, e.g.*, *id.* at 50-52, 57, and 62-62. These individuals were placed on community supervision (similar to federal supervised release), which costs Arizona $4,163.60 annually per individual. *See id.* at 432-35 (Declaration of Shaka Okougbo). The population involved is large: "over 6% of Arizona's prison population—2,434 noncitizen inmates—currently have ICE detainers lodged against them." *Arizona v. DHS*, 2021 WL 2787930, at *7.

Defendants' actions also impose direct law enforcement costs and crime-based injuries due to criminal recidivism committed by removable criminal aliens that DHS refuses to remove. *See, e.g.*, *Arizona*, 2021 WL 2787930, ECF No. 15-1 at 6-9. Generally, among released prisoners, 68% are re-arrested within 3 years, 79% within 6 years, and 83% within 9 years. *See* National Institute of Justice, Measuring Recidivism (Feb. 20, 2008), https://nij.ojp.gov/topics/articles/measuring-recidivism#statistics. Given those recidivism rates, the release of convicts into the community under the Final Memo makes it virtually certain that the States will incur additional law enforcement and incarceration costs, as well as direct crime-based losses, from the Final Memo's provisions, which closely mirror the Interim Guidance.

Testimony of senior ICE official Albert Carter confirms that the "only factor" for the "big drop-off" both in immigration detainers being issued and in removals being carried out from before and after February 2021 was the new enforcement priorities (there the Interim Guidance). *Arizona*, 2021 WL 2787930, ECF No. 79-1 at 18-20 (Deposition of Albert Carter at 81:10-84:5; 87:1-89:11).[6] Director Carter further testified that ICE is releasing detainers for aliens who do not fit Interim Guidance priorities, and when detainers are released, jails have to put aliens on supervisory release or just release them into the community. *Id.* at 84:6-14. The same is true of the operation of the Final Memo—whose provisions overwhelmingly mirror the Interim Guidance.

[6] Albert Carter is a career law enforcement officer who served as the Acting ICE Phoenix Filed Office Director from December 2020 to early-May 2021. *Arizona*, 2021 WL 2787930, ECF no. 79-1 at 12-13 (Deposition of Albert Carter at 15:20-24; 18:15-19:19).

IV. "Shall" In 8 U.S.C. §§1231(a)(1)(A) And 1226(c) Means "Must"

A core issue in this case is whether the "shall"s in 8 U.S.C. §§1231(a)(1)(A) and 1226(c) impose mandatory duties on DHS to detain and remove aliens. The plain language of the statute, canons of construction, and legislative history all make clear that "shall" in these two provisions means "must."

That is undoubtedly why this Court has *already* construed both provisions to be mandatory. *See Nielsen*, 139 S.Ct. at 959 (Under §1226(c), "aliens *must be* arrested 'when [they are] released' from custody on criminal charges," and they must subsequently be detained. (emphasis added)); *Guzman Chavez*, 141 S.Ct. at 2281 ("Once an alien is ordered removed, DHS *must* physically remove him from the United States within a 90-day 'removal period.'" (emphasis added)). The Final Memo is thus brazenly unlawful in its conclusions that the "shall"s in §§1231(a)(1)(A) and 1226(c) actually mean "may."

But even if this Court were construing those provisions on a blank precedential slate, DHS's permissive interpretations are plainly untenable.

Plain Text

The plain texts of sections 1226(c) and 1231(a)(1)(A) establish that DHS has a non-discretionary duty to detain criminal aliens and aliens with final removal orders. "Shall" in those sections means just that: an actual mandate and not just a conveniently-ignorable suggestion.

"[A]ny question of statutory interpretation … begins with the plain language of the statute. It is well established that, when the statutory language is plain,

[courts] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted). Thus, this Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). That is just so here.

It is well-established that "'shall' generally means 'must.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995). That accords with dictionary definitions, both legal and non-legal. The "mandatory sense" of the word "shall" is the one "that drafters typically intend and that courts typically uphold." *Shall*, Black's Law Dictionary (11th ed. 2019). Similarly, American Heritage Dictionary defines "shall" as an "order, promise, requirement, or obligation." *Shall*, American Heritage Dictionary (5th ed.).

This Court has thus repeatedly made clear that "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations.'" *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (citation omitted)). Indeed, "the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). It is equally impervious to executive discretion.

Canons of Construction

The canons of construction confirm what the text of Section 1226(c) and 1231(a)(1)(A) already makes plain. Two are critical here: 1) the avoidance of surplusage, and 2) *expressio unius*.

- ***Canon Against Surplusage***

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). Defendants' interpretation of Sections 1226(c) and 1231(a)(1)(A) violates this cardinal principle.

Section 1226(c)(1) requires that the government "shall take into custody" any alien having certain kinds of criminal convictions or who is involved in terrorism. Section 1226(c)(2) goes on to state that the government "may release" such an alien if "necessary" to protect a witness cooperating with an investigation. That narrow exception is superfluous if DHS possesses the broad discretion it claims here.

Similarly, section 1231(a)(1)(A)'s requirement of removal "within 90 days" is completely superfluous if that section's "shall" means only "may." Under DHS's interpretation, that section is effectively rewritten as providing that DHS "may remove within 90 days, or after 90 days, or never."

- ***Expressio Unius***

Under the venerable *expressio unius* canon, "[t]he expression of one thing implies the exclusion of others." *Jennings v. Rodriguez*, 138 S.Ct. 830, 844 (2018). Thus, "'[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (citation omitted).

Under *expressio unius*, the enumeration of only the single exception for testifying aliens in Sections 1226(c)(2) and 1231(c)(2)(C) means, quite simply, that only one such exception exists. But DHS has never claimed that the Final Memo (or its predecessors, the January Memorandum and the Interim Guidance) can squeeze within that exception. The *expressio unius* canon thus strongly militates against reading in a second, unwritten exception, let alone complete discretion to release aliens that DHS asserts.

Similarly, section 1231(a)(1)(A) explicitly begins with an "[e]xcept as otherwise provided in this section" exception. Under the canon of *expression unius*, that explicit exception is presumably the *only* exception that Congress intended. And DHS does not argue that the Final Memo's exclusions from removals can be crammed within that exception either.

The Legislative History Makes Plain That the Final Memo is Unlawful.

- ***1996 Amendments To Statutory Text.***

Congress adopted the current versions of Sections 1226 and 1231 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010). The changes made to those sections' texts in IIRIRA make plain Congress's intent to constrain sharply the discretion of the Attorney General (and now DHS) in effecting removals and detaining aliens subject to removal.

The plain language of Section 1226 is already clear enough, but the House Conference Report leaves no doubt that Congress's intent was strictly to limit the

government's discretion: "New section 236(c) provides that the Attorney General *must* detain an alien who is inadmissible under section 212(a)(2) or deportable under new section 237(a)(2).... This subsection also provides that such an alien may be released from the Attorney General's custody *only if* the Attorney General decides ... that release is *necessary to provide protection* to a witness ... [or] a person cooperating with an investigation into major criminal activity...." H.R. Conf. Rep. No. 104-828, at 210-211 (emphasis added).

Congress's amendments to Section 1231 also show its intent to limit the Executive's discretion. In enacting the current version of §1231, Congress made substantial changes. The old §1252 became §1231(a), and Table 1 shows the changes in language:

Table 1: Comparison Of Language Pre- and Post-IIRIRA

Prior §1252	**Current §1231(a) (emphasis added)**
"[D]uring [the six-month deporation period], at the Attorney General's *discretion*, the alien *may be* detained, released on bond in an amount and containing such conditions *as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe*." 8 U.S.C. §1252 (1996) (emphasis added).	"During the removal period, the Attorney General *shall detain* the alien." 8 U.S.C. §1231 (a)(2) (emphasis added).

Congress thus removed language that explicitly granted "discretion" and that allowed for release on "condition[s] as the Attorney General may prescribe" and replaced that language with a direct, clear, and laconic command: "shall detain."

Congress's intent to accelerate removals and decrease the Executive Branch's discretion to forego deportations is confirmed by other statutory changes. In particular, three predecessor sections that were consolidated into §1231 contained specific grants of discretion to the Attorney General (now DHS)—all of which Congress tellingly abolished. As the House Conference Report explains, IIRIRA "inserts a new section 241 [8 U.S.C. §1231]" that "restates and revises provisions in current sections 237, 242, and 243 [8 U.S.C. §§1227, 1252, and 1253] regarding the detention and removal of aliens." H.R. Conf. Rep. No. 104-828, at 215.

For example, the old §1252 provided that during the prior six-month removal period "the Attorney General shall have a period of six months ... to effect the alien's departure from the United States." 8 U.S.C. §1252 (c)(1) (1996). But IIRIRA amended Section 1231 to remove the prior language that only called for a general outcome to take place within a long period of time (six months) with an unequivocal command for the federal government to remove the alien within a time period less than half as long: "[T]he Attorney General *shall remove* the alien from the United States within a period of 90 days." 8 U.S.C. §1231(a)(1)(A) (emphasis added). Similarly, the prior §1227 stated that arriving aliens who are excluded "shall be immediately deported ... unless the Attorney General, in an individual case, *in his discretion*, concludes that immediate deportation is not practicable or proper." 8 U.S.C. §1227(a)(1) (1996) (emphasis added). But discretion too was expressly eliminated, and the current §1231(c) has no such "in his discretion" language.

Nor are these eradications of discretion isolated or subtle. While the word "discretion" appeared *thirteen times* in the prior versions of §§1227, 1252, and 1253, it no longer appears *even once* in the amended (and current) Section 1231. In essence, Congress through IIRIRA engaged in a search-and-destroy mission regarding the Executive Branch's discretion. That is hardly the action of a Congress that intended to confer unbounded and unreviewable discretion.

- ***Legislative History And Intent***

The legislative history and cases examining it confirms the intent already evident from IIRIRA's text. In IIRIRA, "Congress amended the INA aggressively to expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010). Congress's purpose in adopting IIRIRA was "to expedite the physical removal of those aliens not entitled to admission to the United States" and "[t]o that end, IIRIRA 'inverted' certain provisions of the INA, encouraging prompt voluntary departure and *speedy government action*." *Coyt,* 593 F.3d at 906 (emphasis added). The House Conference Report on IIRIRA similarly made plain that the bill's purpose was "to improve deterrence of illegal immigration to the United States by ... reforming exclusion and deportation law and procedures." H.R. Conf. Rep. No. 104-828, at 1 and 199 (1996).

DHS's interpretation thwarts this intent: while IIRIRA was intended to *expedite* removals and deter illegal entries, DHS invokes its provisions to assert unlimited and unreviewable discretion to *thwart and slow* removals. That result is neither what Congress intended nor what Congress's adopted text can bear.

CONCLUSION

The border is in crisis. This DHS Administration is lawless. And the States continue to suffer escalating irreparable harm as the border crisis continually intensifies to successive, ever-more-unprecedented levels of illegal crossings. To prevent the Final Memo from becoming a final countdown to complete loss of operational control at the southwestern border, this Court should deny DHS's application for a stay.

July 13, 2022

Respectfully submitted,

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