No. 22-58

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

—v.—

STATE OF TEXAS and STATE OF LOUISIANA,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF TEXAS, AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

Michael K.T. Tan
Omar C. Jadwat
Anand Balakrishnan
Daniel A. Galindo
Noor Zafar
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Cody Wofsy
Counsel of Record
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770
cwofsy@aclu.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

Statutes

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. The ACLU of Texas is a state affiliate of the ACLU.

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization, and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals, as well as before federal courts.

Amici have extensive experience representing immigrants and litigating issues related to immigration enforcement, and in particular the meaning and scope of 8 U.S.C. §§ 1226(c) and 1231(a)(2). Our cases before this Court include *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057 (2022); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021);

Nielsen v. Preap, 139 S. Ct. 954 (2019); *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Demore v. Kim*, 538 U.S. 510 (2003); and *Zadvydas v. Davis*, 533 U.S. 678 (2001). *Amici* offer this brief to address those statutes as relevant to DHS's Guidelines for the Enforcement of Civil Immigration Law (the "Guidance").[1]

STATUTORY AND PROCEDURAL BACKGROUND

In September 2021, the Secretary of Homeland Security adopted the Guidance to provide guidelines on the "apprehension and removal" of noncitizens. J.A. 110-120. The Guidance identifies three categories of noncitizens as priorities for apprehension and removal: (1) those who pose "a danger to national security"; (2) those who pose a "threat to public safety, typically because of serious criminal conduct"; and (3) those who pose "a threat to border security," whom the Guidance defines as noncitizens who are apprehended at the border or who arrived in the United States after November 1, 2020. J.A. 113-116. The Guidance further provides a framework for determining whether a noncitizen poses a threat to public safety. Rather than relying on "bright lines or categories," the Guidance calls for an assessment of "the totality of the facts and circumstances," J.A. 113, which include both "aggravating factors" that favor enforcement, such as "the gravity of the offense of

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for *amici* state that all parties have consented to the filing of this brief.

conviction" and the "use or threatened use of a firearm or dangerous weapon," and "mitigating factors," such as "advanced or tender age" and "military or other public service." J.A. 114. The Secretary explained that the Guidance thus allows DHS to "use the resources we have in a way that accomplishes our enforcement mission most effectively and justly." J.A. 113.

By its terms, the Guidance "does not compel an action to be taken or not taken" in any particular case and "leaves the exercise of prosecutorial discretion to the judgment of [DHS] personnel." J.A. 118. And it applies only to "apprehension and removal," J.A. 113; it "does not provide guidance pertaining to detention and release determinations" for noncitizens already in DHS custody. J.A. 415.

Nor does the Guidance purport to create, expand, guide, or cabin discretion where none currently exists. *See* J.A. 157 (recognizing that "discretion only may be exercised within the bounds of the law").

DHS acknowledged that two statutory provisions, 8 U.S.C. §§ 1226(c) and 1231(a)(2), require that certain noncitizens be detained during the pendency of removal proceedings or while awaiting removal. J.A. 159-160.

Under § 1226(c), which is titled "Detention of criminal aliens," DHS "shall take into custody" noncitizens convicted of certain offenses when they are released from criminal custody, 8 U.S.C. § 1226(c)(1), and "may release" such noncitizens "only" in limited circumstances, *id.* § 1226(c)(2). Once a noncitizen subject to § 1226(c) is in custody, "that noncitizen generally must remain in custody during the pendency of removal proceedings" unless release is authorized by § 1226(c)(2) or a court order. J.A. 160.

Section 1231(a)(2) governs the detention of noncitizens who have already been issued a final order of removal. Subsection 1231(a)(1) describes a 90-day period after a final removal order issues. 8 U.S.C. § 1231(a)(1)(A). Subsection 1231(a)(2), titled "Detention," provides that DHS "shall detain" the noncitizen during that 90-day removal period, and that "[u]nder no circumstance" shall DHS release a noncitizen who is removable on certain criminal or terrorist grounds. *Id.* § 1231(a)(2).

DHS explained that the Guidance is "consistent with" and "do[es] not purport to override" those mandatory detention provisions. Rather, it seeks to guide the exercise of "deep-rooted . . . enforcement discretion when it comes to decisions that occur *before* detention, such as who should be subject to arrest, detainers, and removal proceedings." J.A. 158 (cleaned up) (emphasis added).

The lower courts disagreed with the agency. In the district court's view, the Guidance was contrary to law because it "[conferred] discretion [on officers] to independently decide who will be detained and when—if ever." J.A. 370; *see also* J.A. 369-374. Similarly, the court of appeals concluded that some applications of the enforcement discretion contemplated by the Guidance likely violate the "mandatory detention" requirements in §§ 1226(c) and 1231(a)(2). J.A. 476; *see also* J.A. 472-479.

SUMMARY OF ARGUMENT

Whether the DHS Enforcement Guidance violates 8 U.S.C. §§ 1226(c) and 1231(a)(2) is "the core of the dispute" in this case. J.A. 289-290. The courts below relied on the alleged violation of what they saw as detention mandates in those statutes throughout

their analysis. Yet those interpretations were fundamentally flawed. *Amici* write to address those interpretations.

As an initial matter, the Guidance in no way *prohibits* DHS officers from arresting or detaining people covered by §§ 1226(c) and 1231(a)(2). *See* J.A. 118. It provides only nonbinding guidance, and leaves ultimate decisional authority in DHS officers to be exercised on a case-by-case basis. Nor does it purport to create discretion where it does not exist. Thus, if the statutes at issue impose mandates, the Guidance does not speak to, much less override, any mandated actions. Moreover, the Guidance excludes decisions regarding detention and release from its scope, and thus cannot violate any detention requirements that those statutes impose. *See* J.A. 160, 415. Instead, the Guidance addresses how DHS should implement its concededly discretionary authority to make the antecedent decision whether to seek an individual's removal.

Even if the Guidance actually prohibited DHS officers from arresting persons subject to §§ 1226(c) or 1231(a)(2), there would be no basis for the district court's vacatur order, because neither statute deprives DHS of its background prosecutorial discretion to decide whether to initiate or pursue removal proceedings or effectuate an individual's removal.

Section 1226(c) creates no enforceable mandate to arrest all noncitizens with qualifying criminal history, but applies only where DHS pursues removal proceedings. The provision leaves intact DHS's well-established discretion to "decline to institute [removal] proceedings [or] terminate proceedings," *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) ("*AADC*"); *accord Arizona v. United States*, 567

U.S. 387, 396 (2012); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Where the agency has decided not to pursue removal, § 1226(c) has nothing to say, because whatever detention it requires is necessarily incidental to seeking removal. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Once DHS decides not to seek removal, there is no basis, much less requirement, for detention. And it is that discretionary decision—whether or not to seek removal—that the Guidance addresses, and the statute leaves to DHS discretion.

Moreover, even if § 1226(c) were applicable in cases where DHS has chosen not to seek removal, it does not impose an arrest mandate enforceable by third parties. Because prosecutorial discretion is such a bedrock principle of law enforcement, courts are properly reluctant to interpret statutes to afford third parties the right to compel an agency to initiate an enforcement action. Thus, even "seemingly mandatory legislative commands" do not create arrest mandates enforceable by third parties (such as the States here) absent "some stronger indication" than the word "shall." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 761 (2005).

Prosecutorial discretion is a necessary aspect of virtually all forms of law enforcement; it allows for individualized justice, and for efficient allocation of limited resources. It is therefore a longstanding background principle of all forms of law enforcement, including immigration law. *See AADC*, 525 U.S. at 484. As a result, any statute seeking to override prosecutorial discretion by empowering third parties to compel an arrest or prosecution requires an extraordinarily clear statement. *Castle Rock*, 545 U.S. at 761. Section 1226(c) contains nothing that meets that requirement.

For related reasons, § 1231(a)(2) creates no right of third parties to compel DHS to arrest all individuals with orders of removal who are within the statutory "removal period." Much like § 1226(c), under § 1231(a)(2), DHS retains discretion to "decline to execute a final order of deportation," *AADC*, 525 U.S. at 484. Where DHS declines to execute removal, § 1231(a)(2) does not require the noncitizen's detention, as the only legitimate purpose of detention is to effectuate removal. Because § 1231 preserves DHS's discretion not to seek removal, therefore, the Guidance, which merely guides that discretion and requires no particular action, does not conflict with the statute. Moreover, § 1231(a)(2), which provides merely that DHS "shall detain" during the removal period, cannot even begin to meet *Castle Rock*'s requirement of an exceptionally clear statement overriding prosecutorial discretion to afford a third party the right to compel arrest.

Finally, even if the States' statutory interpretations had merit, the relief ordered by the district court far exceeds the scope of any supposed violation. The dramatic mismatch between the limited number of individuals covered by those provisions and the much larger group of potentially removable noncitizens covered by the Guidance underscores the district court's error in vacating the Guidance in its entirety. The district court effectively invalidated the Guidance on its face on the basis of a handful of situations in which it found a conflict with the statutes. Thus, at most the court should have invalidated the Guidance's enforcement only in those limited situations.

ARGUMENT

I. THE GUIDANCE MERELY GUIDES DISCRETION WHERE IT EXISTS AND DOES NOT ADDRESS DETENTION ISSUES, AND THEREFORE DOES NOT OVERRIDE ANY STATUTORY MANDATES.

As a threshold matter, the Guidance cannot contravene any mandates imposed by 8 U.S.C. §§ 1226(c) or 1231(a)(2) for two reasons.

First, the Guidance merely provides nonbinding guidance to decisions left to DHS's discretion, and therefore by definition does not address, much less contravene, any statutorily mandated action. DHS has prosecutorial discretion to pursue, or not pursue, removal against an individual noncitizen—and the States have not contended otherwise. *See* Opp'n to Mot. for Stay 36 n.5. The Guidance provides guidelines to DHS officers on how to exercise that discretion—that is, "who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders," J.A. 111, and "whether it makes sense to pursue removal at all," J.A. 112 (quoting *Arizona*, 567 U.S. at 396). The Guidance does not purport to transform any mandatory obligation into a discretionary one, but merely provides guidelines for exercising discretion where discretion exists.

The Guidance explicitly "does not compel an action to be taken or not taken," even as to the prosecutorial decisions that it covers, much less as to any non-discretionary obligations of DHS officers. J.A. 118. In addition, in issuing the Guidance, DHS explicitly affirmed that "discretion only may be exercised within the bounds of the law." J.A. 157. Thus, where a statute

eliminates or limits discretion, the Guidance does not apply.

Second, the Guidance does not address "detention and release determinations"—the determinations that §§ 1226(c) and 1231(a)(2) govern. J.A. 415. It addresses only the distinct, discretionary decision about whether to seek removal, by apprehending noncitizens, instituting removal proceedings, and executing removal orders. It does not speak to detention and release determinations with respect to those who DHS has chosen not to remove. It applies to the decision whether to pursue an individual's removal, and not the subsequent decision whether to keep an individual in custody in aid of removal.

As a result, even assuming §§ 1226(c) and 1231(a)(2) impose any mandates enforceable by third parties as to "detention and release determinations," the Guidance cannot contravene those mandates, because it addresses only the antecedent discretionary decisions as to whether to pursue removal at all, and does not address the subsequent decision regarding "detention and release."

II. NOTHING IN THE GUIDANCE VIOLATES § 1226(c).

Section 1226(c) provides that DHS "shall take into custody" a noncitizen who is "deportable" or "inadmissible" based on specified criminal offenses, "when the alien is released" from criminal custody, and prohibits that noncitizen's release pending removal proceedings except in limited circumstances. 8 U.S.C. § 1226(c). In the States' view, this statute requires the arrest of *all* noncitizens with criminal history triggering that provision, and the Guidance is

contrary to law because it permits officers to decline to make such arrests. *See* Opp'n to Mot. for Stay 35-36 & n.5. But as noted above, Point I, *supra*, that view fundamentally misapprehends the Guidance, which does not prohibit *any* enforcement action, much less any action that might be required by § 1226(c).

Even if the Guidance prohibited certain enforcement actions, moreover, the States' argument would still fail. That is because § 1226(c) does not disturb, either explicitly or implicitly, the Executive's well-established discretion to decline to initiate removal proceedings, or to terminate such proceedings. *See AADC*, 525 U.S. at 484. All the provisions of § 1226 are predicated on DHS's pursuit of removal proceedings, and therefore none of those provisions—including § 1226(c)—applies where DHS elects not to pursue removal. The statute governs detention pending removal proceedings, and does not require detention where DHS has decided not to pursue removal. When a DHS officer has decided to exercise their discretion not to pursue the removal of an individual noncitizen, § 1226(c) does not come into play.

Additionally, because prosecutorial discretion is a bedrock background principle of immigration law enforcement, as of law enforcement more generally, "some stronger indication" than the word "shall" is required to create a mandate to arrest that is enforceable by third parties. *Castle Rock,* 545 U.S. at 761. Respondents point to various policy considerations that might have led Congress to command arrests—but similar policy considerations were present in *Castle Rock* itself. There simply is "no 'stronger indication' from Congress in [§ 1226(c)] that 'shall' creates a judicially enforceable mandate." *See Arizona v. Biden*, 40 F.4th 375, 392 (6th Cir. 2022).

A. Section 1226(c) Does Not Address, Much Less Mandate, Initiation Or Continuation Of Removal Proceedings.

Nothing in § 1226(c), titled "Detention of Criminal Aliens," so much as mentions the decision to initiate or continue removal proceedings, much less mandates such action. And because those decisions remain in the discretion of DHS, the Guidance's terms addressed to those decisions do not contradict § 1226(c).

The conclusion that § 1226(c) does not mandate the pursuit of removal has been uncontested in this litigation. Neither of the lower courts suggested that § 1226(c) mandates the initiation or continuation of removal proceedings. And the previous Fifth Circuit opinion in this litigation emphasized that § 1226(c) does not eliminate "the government's traditional prerogative to decide who to charge in enforcement proceedings (and thus who ends up being detained)." *Texas v. United States*, 14 F.4th 332, 338-39 (5th Cir. 2021).[2] Likewise, in the stay proceedings before this Court, the States did not contest that immigration authorities "have discretion never to begin" proceedings against an individual described in § 1226(c). Opp'n to Mot. for Stay 36 n.5. The States' concession is well advised.

Congress enacted § 1226(c) against a well-established backdrop of prosecutorial discretion in immigration enforcement. As this Court explained in

---

[2] The en banc Fifth Circuit vacated this decision without opinion, after the Interim Guidance had been replaced with the Guidance at issue here (thus mooting claims as to the Interim Guidance). *Texas v. United States*, 24 F.4th 407 (5th Cir. 2021) (en banc).

AADC, it has long been the case that throughout "the initiation or prosecution of various stages in the deportation process . . . the Executive has discretion to abandon the endeavor," 525 U.S. at 483, and that "[t]o ameliorate a harsh and unjust outcome, the [agency] may decline to institute proceedings [or] terminate proceedings" seeking a removal order. *Id.* at 484 (quoting 6 C. Gordon, S. Mailman, & S. Yale–Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998)). "[A]t the time [§ 1226(c)] was enacted," the agency "had been engaging in [this] regular practice" of "exercising that discretion for humanitarian reasons or simply for its own convenience." 525 U.S. at 483.

That discretion is a "*principal* feature of the removal system," which calls on federal officials to "decide whether it makes sense to pursue removal at all." *Arizona*, 567 U.S. at 396 (emphasis added); *see also Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522 (BIA 2011) (rejecting statutory interpretation that would impose "a purported restraint on the DHS's exercise of its prosecutorial discretion" in immigration enforcement). As this Court has explained,

> [d]iscretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to

> his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Arizona, 567 U.S. at 396-97.

DHS's discretion regarding the institution or termination of removal is but one species of a more general, equally well-recognized principle of prosecutorial discretion that applies whenever the government (whether federal, state, or local) is charged with enforcing the law. "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831; *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that the decision to enforce the criminal laws is the "'special province' of the Executive" (quoting *Heckler*, 470 U.S. at 832)); *Confiscation Cases*, 7 Wall. 454 (1869) (noting, in property confiscation civil suits brought by the United States, that "[u]nder the rules of the common law it must be conceded that the prosecuting party may relinquish his suit at any stage . . . .").

The principle of enforcement discretion is ubiquitous and longstanding for good reason:

> An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Heckler, 470 U.S. at 831. *Accord City of Seabrook v. Costle*, 659 F.2d 1371, 1375 (5th Cir. Unit A 1981) (explaining that the "doctrine of prosecutorial discretion" is grounded in part on the recognition that "enforcement agencies are duty-bound to allocate those resources in the interest of the general public as they perceive it, not in the causes deemed most important by" third parties).

Nothing in § 1226(c) limits immigration authorities' longstanding discretion to decline to initiate or pursue removal proceedings in particular cases. By its terms, § 1226(c) addresses when DHS will "take" a noncitizen "into custody," and when it "may release" that person. It does not contain *any* language addressing whether the government will "commence," "initiate," "begin," or "maintain" removal proceedings. *Cf.* 8 U.S.C. § 1226a(a)(5) (section entitled "Commencement of proceedings," providing that the agency "shall place [certain noncitizens] in removal [or criminal] proceedings" within a specified timeframe). Given the strength of the bedrock tradition of prosecutorial

discretion, any suggestion that the statute silently imposes such a mandate is untenable. It is not the Court's role to "rewrite" the statute that Congress enacted. *Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.") (quoting *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005)).

"Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019). Congress expressly addressed the initiation of removal proceedings in other provisions that were also enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 110 Stat. 3009–546. For example, 8 U.S.C. § 1252(g), the provision addressed in *AADC*, bars judicial review of DHS's decisions "to commence proceedings," among other things—which this Court interpreted as expressly *acknowledging* the agency's discretion on that score. *See AADC*, 525 U.S. at 483-484. Similarly, in 8 U.S.C. § 1229(d)(1), Congress provided that "the Attorney General shall begin any removal proceeding as expeditiously as possible." If Congress had wanted § 1226(c) to direct DHS to "commence" proceedings, it knew how to say so. Yet § 1226(c) is conspicuously silent on the initiation or continuation of proceedings. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 558 U.S. 233, 249 (2010) (alteration in original) (quoting *Jama*, 543 U.S. at 341).

Thus, § 1226(c) cannot be read to displace the Executive's longstanding discretion to decline to initiate proceedings or to terminate proceedings as it sees fit. It leaves such decisions to DHS's discretion, and the Guidance document speaks only to those discretionary decisions.

B. Nothing In The Guidance Violates Any Mandate In § 1226(c).

The States' principal contention is that § 1226(c) mandates the *arrest* of individuals with qualifying criminal history, even when DHS has exercised its conceded discretion not to seek their removal. And, the States continue, they can enlist federal courts to enforce that mandate against the federal government. *See* Opp'n to Mot. for Stay 35-36 & n.5. That interpretation of § 1226(c) fails for two independent reasons.

First, § 1226(c) does not and could not impose a free-floating arrest requirement untethered to immigration proceedings. The only legitimate purpose of immigration detention is to aid in removal. *See Zadvydas*, 533 U.S. at 690. If at any point DHS decides not to pursue removal, detention would serve no lawful purpose. Indeed, if DHS does not intend to seek an individual's removal, it would be unconstitutional to arrest them under the immigration laws because detention in that setting would serve no valid immigration purpose. Such arbitrary, purposeless detention is the paradigmatic deprivation of liberty without due process. *See id.*

Thus, § 1226(c) does not apply when DHS has exercised its discretion not to pursue removal. Whatever mandates the statute might impose are themselves conditional: When DHS chooses not to

pursue proceedings, either before or after an individual is taken into custody, § 1226(c) does not mandate anything at all. And, as explained above, § 1226(c) does not require DHS to initiate or continue removal proceedings—only to detain certain people while it seeks their removal. As a result, DHS maintains the discretion to decline to pursue removal against any noncitizen, even one with qualifying § 1226(c) convictions. And when it exercises that discretion by considering the factors set forth in the Guidance and decides not to proceed against a particular individual, § 1226(c) does not apply.

The statutory structure confirms this common-sense reading. Section 1226 as a whole governs arrest and detention *pending removal proceedings*, and therefore does not apply where DHS decides not to pursue removal. Section 1226(c) is an exception to the overall arrest and detention authority under § 1226(a), which in turn is entirely predicated on the pursuit of removal proceedings. As this Court has explained, § 1226(a) authorizes custody only "pending removal proceedings." *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018); *accord* 8 C.F.R. § 1236.1(b)(1) (warrants authorizing arrest under § 1226(a) may be issued "[a]t the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed"). And when a person is arrested and detained under § 1226(c)—an "exception" to the general authority to arrest and hold or release under subsection (a)—that authority must still "spring[] from subsection (a)." *Nielsen v. Preap*, 139 S. Ct. 954, 960, 966 (2019). Thus, § 1226(c), like § 1226 more generally, applies only "during removal proceedings," *Demore v. Kim*, 538 U.S. 510, 517-518 (2003), and any directive it contains could only apply

in furtherance of such proceedings, *see Arizona*, 40 F.4th at 391.

Notably, this two-step statutory structure—permitting an initial discretionary determination as to whether to seek removal, and then directing arrest and detention where the agency has decided to seek removal—is replicated in a neighboring provision, 8 U.S.C. § 1226a(a), titled "Detention of terrorist aliens." As in § 1226(c)(1), the terrorism statute provides that the government "shall take into custody any" noncitizen "certified" as being removable on terrorism or related grounds or otherwise dangerous to national security. *Id.* §§ 1226a(a)(1), (3). And, like § 1226(c)(2), it limits release from custody. *Id.* § 1226a(a)(2). However, these directives—enforceable mandates, on the States' theory in this case—are explicitly predicated on DHS's initial *discretionary* choice about *whether* to certify a noncitizen under the statute. Whether a noncitizen will be "certified" is entirely up to the Executive: "The Attorney General may certify an alien under this paragraph . . . ." *Id.* § 1226a(a)(3). And likewise, the choice whether to revoke certification is left to "the Attorney General's discretion." *Id.* § 1226a(a)(7). Just as in § 1226(c), the directives about arrest and detention—whether or not they are enforceable—are subject to a preliminary exercise of discretion that the statute does not constrain.

Second, even if § 1226(c) applied where DHS had already elected not to pursue removal, it would not create an arrest mandate enforceable by States or other third parties against the federal government. In light of "[t]he deep-rooted nature of law-enforcement discretion," even "seemingly mandatory legislative commands" do not create arrest mandates enforceable by third parties against the government absent "some

stronger indication" than the word "shall." *Castle Rock*, 545 U.S. at 761 (citing *Chicago v. Morales*, 527 U.S. 41 (1999)). Absent the clearest of indications to the contrary, the discretion to arrest belongs to the enforcing agency, not third parties.

As Sixth Circuit Chief Judge Sutton recently explained, there is "no 'stronger indication' from Congress" that § 1226(c) "creates a judicially enforceable mandate." *Arizona*, 40 F.4th at 391. The States have suggested that indications of congressional dissatisfaction with enforcement practices and desire to increase detention of noncitizens subject to § 1226(c) "provided whatever clear statement of intent *Castle Rock* may require." Opp'n to Mot. for Stay 37-38. But the same was true in *Castle Rock* itself. The legislative history of the Colorado law at issue there indicated grave dissatisfaction with existing enforcement of domestic violence laws, and a desire for more domestic violence arrests. *Castle Rock*, 545 U.S. at 779-781 (Stevens, J., dissenting) (explaining statute was part of "a nationwide movement of States that took aim at the crisis of police underenforcement in the domestic violence sphere"); *id.* at 759-760 & n.6 (majority opinion) (noting legislator's statement that "[t]he police *must* make probable cause arrests"). Still, this Court held that "shall" was insufficient to create a mandate enforceable against the government. So too, here.

The court of appeals suggested that *Castle Rock* "was based, not on a police department-wide policy of not enforcing restraining orders, but rather an individualized instance of nonenforcement." J.A. 478. But that is a distinction without a difference. It is not plausible that, for example, the Court's analysis of the Colorado statute would have been the exact opposite had the suit been a class action or joined

claims that alleged a pattern or practice of non-enforcement. *See Castle Rock*, 545 U.S. at 760 ("We do not believe that *these provisions of Colorado law* truly made enforcement of *restraining orders* mandatory.") (emphasis added and omitted). In any event, the claim asserted in *Castle Rock* was in fact a pattern-or-practice-type claim: namely, that the "police department had 'an official policy or custom of failing to respond properly to complaints of restraining order violations' and 'tolerate[d] the non-enforcement of restraining orders by its police officers." *Id*. at 754 (alteration in original).[3]

In the stay proceedings before this Court, the States argued that "Congress has instructed [the federal Petitioners] to detain certain criminal aliens 'when the alien is released' from criminal custody, not when they have determined whether to institute removal proceedings." Opp'n to Mot. for Stay 36 n.5. But that contention ignores the central significance of the pursuit of removal proceedings in the statutory scheme. As explained above, *all* the arrest and detention powers in § 1226 are predicated on pursuit of removal, and the statute leaves the predicate decision whether to pursue removal to DHS's discretion. If DHS has declined to pursue proceedings, § 1226 in general, and subsection (c) in particular, simply does not apply.

---

[3] Notably, even before *Castle Rock*, the Fifth Circuit recognized that "shall" often imposes no enforceable mandate "when duties within the traditional realm of prosecutorial discretion are involved." *City of Seabrook*, 659 F.2d at 1374 n.3. And in contrast to the court of appeals' suggestion below that the *Castle Rock* principle does not apply to federal agencies, J.A. 478, *City of Seabrook* rejected an attempt to enforce a purported statutory mandate against the Environmental Protection Agency.

Earlier in this litigation, the States maintained that "[§] 1226(c)(1) requires detention *even for aliens who will never face removal proceedings*." *Texas*, 14 F.4th at 338 n.54 (emphasis added). But the Fifth Circuit properly rejected that interpretation as "at odds with the text and [this Court's] reading of it." *Id.* It would make no sense for Congress to authorize, much less mandate, an immigration enforcement arrest for someone against whom DHS has decided *not* to seek removal. As the Fifth Circuit understatedly observed: "There would, of course, be other concerns with indefinite detention for someone not facing removal." *Id.* These concerns are constitutional, because, as noted above, immigration detention is constitutionally impermissible if it is not in aid of removal. *See Zadvydas*, 533 U.S. at 690. Indeed, if DHS reached a decision not to pursue removal against an individual upon his release from criminal custody, but then detained him anyway, that detention would violate the Due Process Clause. There is no reason to believe that Congress obliquely required arrest and indefinite detention that serves no purpose and would be unconstitutional.

Finally, the States and lower courts relied on *Preap* to suggest that § 1226(c) imposes an arrest mandate enforceable against the government. But like this Court's other precedents addressing § 1226(c), *Preap* was a case "in which detainees *subject to enforcement action* were seeking their release." *Arizona*, 40 F.4th at 392 (quoting *Texas*, 14 F.4th at 338) (emphasis added). And as explained above, the Guidance does not address detention and release issues at all, but only the discretionary decisions to pursue an individual's removal. Thus, the Sixth Circuit recognized that "[i]n explaining that detainees are not entitled to bond hearings or release under these

statutes, the [Supreme] Court had no occasion to consider whether the statutes subject the Department to a judicially enforceable mandate to arrest" noncitizens whom DHS has decided *not* to remove. *Id*; *see also Texas*, 14 F.4th at 338.

Preap never suggested that § 1226(c) requires arrest where DHS *has chosen not to pursue proceedings*, nor that it constrains in any way DHS's discretionary choice to pursue such proceedings. To the contrary, *Preap* held that subsection (c) is "simply a limit on the authority conferred by subsection (a)." 139 S. Ct. at 966. And as explained above, § 1226(a) applies only "pending a decision on removal." *Id*. at 959. The same is true of § 1226(c). Nothing in the Guidance remotely prohibits an arrest for someone who both has qualifying criminal history under § 1226(c) *and* against whom DHS has decided to pursue removal proceedings, or is still considering whether to pursue such proceedings.[4]

III. NOTHING IN THE GUIDANCE VIOLATES § 1231(a)(2).

The Guidance also does not violate 8 U.S.C. § 1231(a)(2). That statute addresses detention after a removal order becomes administratively final. Titled

---

[4] *Preap* noted that "it would be very strange for Congress to forbid the release of aliens who need not be arrested in the first place." 139 S. Ct. at 970. That observation describes precisely those noncitizens against whom DHS had decided to pursue removal proceedings—like those at issue in *Preap*. It would be equally strange for Congress to require arrest of noncitizens who DHS has decided not to remove. As explained above, if DHS chooses to forego proceedings, or to drop them, then § 1226(c) does not apply at all, so it requires neither arrest nor continued detention. Congress could not, consistent with the Due Process Clause, authorize detention that is not in furtherance of removal.

"Detention," it provides that DHS "shall detain" a noncitizen ordered removed "[d]uring the removal period." *Id*. That period typically begins when a removal order becomes administratively final, and lasts 90 days. *See id*. §§ 1231(a)(1)(A), (B)(i); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2281 (2021). Section 1231(a)(2) goes on to state that "[u]nder no circumstance during the removal period shall [DHS] release an alien" found removable on certain specified grounds. Because, as already explained, the Guidance does not address detention or release decisions, but speaks only to the discretionary decision to pursue removal, nothing in the Guidance could possibly violate the detention provisions of § 1231(a)(2). *See* Point I, *supra.*

The States, however, maintain that § 1231(a)(2) mandates *arrest* as well, and that the Guidance violates that mandate by authorizing DHS not to arrest certain noncitizens with final removal orders. *See* Opp'n to Mot. for Stay 9, 35-36. Again, as an initial matter, nothing in the Guidance *prohibits* arrests of any kind. The States' view seems to be that the Guidance is illegal because it "did not *instruct* officers to . . . arrest . . . aliens subject to . . . section 1231(a)(2)." *Id*. at 9 (emphasis added). But if § 1231(a)(2) already instructs officers to do so, the Guidance need not repeat that instruction. And its mere silence on the matter does not establish any conflict. If DHS officials are required to arrest by § 1231(a)(2), then the Guidance does not countermand that instruction, because by its terms it only addresses *discretionary* decisions. The Guidance does not purport to transform any mandatory obligation into a discretionary decision, but merely guides discretion where it exists.

But even if the Guidance expressly *prohibited* such arrests where DHS has exercised its discretion not to execute removal, there would be no conflict with § 1231(a)(2). First, as with § 1226(c), § 1231 applies only where the Executive has chosen to execute an individual's removal order. The power to "decline to execute a final order of deportation" has long been recognized as within the agency's prosecutorial discretion. *AADC*, 525 U.S. at 484 (citation omitted); *see also Nken v. Holder*, 556 U.S. 418, 439-440 (2009) (Alito, J., dissenting) ("Once an order of removal has become final, it may be executed at any time"—but "the Executive Branch" may still "stay its own hand."); *Asika v. Ashcroft*, 362 F.3d 264, 268 n.5 (4th Cir. 2004) (per curiam) (quoting a 2000 Executive Branch memorandum explaining that "a statute directing that the INS 'shall' remove removable aliens would not be construed by itself to limit prosecutorial discretion," and explaining that this "practice has been sanctioned by courts in both the immigration and criminal context") (cleaned up). Here, too, the purpose of detention is to effectuate removal, so detention where DHS has elected not to pursue removal would serve no purpose and thus be unconstitutional. As with § 1226(c), where the Executive exercises its discretion to decline to pursue an individual's removal, § 1231's detention provisions do not apply.

Second, even assuming that § 1231(a)(2) encompasses arrest in such cases, it does not create a mandate enforceable by third parties under *Castle Rock*. Section 1231(a)(2) provides only that DHS "shall detain" during the removal period; it does not say anything directing DHS to "arrest" any noncitizens, "apprehend" them, or "take them into custody." If even a statute stating that government officials "shall

arrest" does not create an arrest mandate enforceable by third parties, then *a fortiori* a statute that is *silent* as to arrest cannot do so. *See Castle Rock*, 545 U.S. at 761.

That conclusion is reinforced by context, as here too, "Congress has shown that it knows how to adopt the omitted language." *Rotkiske*, 140 S. Ct. at 361. Indeed, various provisions in the Immigration and Nationality Act contrast authority to "detain" with authority to "arrest" (or synonyms thereof). Section 1226(a), for example, addresses (as its title states) "[a]pprehension and detention" as separate authorities. That statute provides that a noncitizen may be "*arrested* and detained," and goes on to provide that DHS "may continue to detain the arrested alien." 8 U.S.C. § 1226(a) (emphasis added). Other examples are common. *See, e.g.*, 8 U.S.C. § 1226(b) (DHS may "rearrest the alien under the original warrant, and detain the alien"); *id.* § 1252c(a) ("State and local law enforcement officials are authorized to arrest and detain" certain noncitizens); *id.* § 1357(g)(10)(B) (addressing cooperation in the "identification, apprehension, detention, or removal" of noncitizens). Indeed, elsewhere in § 1231, Congress used the term "arrest" yet chose not to do so in § 1231(a)(2). *Id.* § 1231(a)(4)(A) (addressing the "possibility of arrest" on criminal charges).

Section 1231(a)(2) includes no arrest mandate, much less any that satisfies *Castle Rock*'s standard for a mandate enforceable by third parties. The States' contention that the statute nevertheless requires arrest, and that they can enforce that mandate by vacating the Guidance, thus must fail.

IV. EVEN IF THERE WERE STATUTORY VIOLATIONS, THEY WOULD REPRESENT ONLY A SMALL PROPORTION OF ALL PERSONS ADDRESSED BY THE GUIDANCE, AND WOULD NOT WARRANT VACATING THE GUIDANCE AS A WHOLE.

The district court vacated the Guidance in full. But the ostensible conflicts it identified affect a tiny percentage of the prosecutorial decisions the Guidance covers. As the district court itself acknowledged: "This case is not about aliens in general, or even aliens who are in the United States illegally." J.A. 291. Rather, the States' arguments and the opinions below focus narrowly on asserted violations of §§ 1226(c) and 1231(a)(2) when the Guidance is applied to individuals subject to those statutory provisions. Yet those statutes cover only a minuscule proportion of all people covered by the Guidance. Thus, even if the States were correct as to individuals covered by §§ 1226(c) and 1231(a)(2), that conclusion would invalidate the Guidance only as to those narrow circumstances, and not in the many other circumstances that the Guidance addresses. In effect, the district court provided facial relief for a narrow as-applied challenge, even though the challengers did not even claim that the Guidance violates the immigration laws in the vast majority of instances it covers.

The mismatch between the claimed statutory violations and the ordered relief is stark. There are millions of undocumented people in the United States, along with millions of other people with legal status who might be subject to immigration

enforcement.[5] The Guidance applies to all of them, and helps guide individual DHS officials' exercise of discretion as to whose removals to prioritize. *See* J.A. 112 (noting "there are more than 11 million undocumented or otherwise removable noncitizens in the United States," and the agency must prioritize in choosing to pursue enforcement against them). But the arguments and the reasoning below concerned only the small subset of those individuals subject to §§ 1226(c) and 1231(a)(2). Indeed, the district court went "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)." J.A. 376; *see also* J.A. 481 (court of appeals emphasizing that "the relevant population at issue in this case" are "aliens covered by § 1226(c) or § 1231(a)(2)"). Thus, the rationale and the relief granted simply do not match.

Consider first § 1231(a)(2). That statute, by its plain terms, applies only during the 90-day "removal period." *See Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1832 (2022) (explaining that other provisions control after removal period). Thus, the States' § 1231(a)(2) claim—whatever its merits—speaks only to noncitizens issued removal orders who are still within the removal period, not those for whom the

---

[5] See Migration Policy Inst., Profile of the Unauthorized Population, https://bit.ly/3jTAk74; DHS Office of Immigr. Statistics, Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2015-2019 at 1 (Sept. 2019) (over 13 million permanent residents), https://bit.ly/3mvRBoX; DHS Office of Immigr. Statistics, Population Estimates of Nonimmigrants Residing in the United States: Fiscal Years 2017-2019 at 1 (May 2021) (over 3 million students, workers, and others), https://bit.ly/3JecAXn.

period has expired, or those not subject to a final order of removal because their proceedings are still pending or because DHS has not initiated proceedings.

The number of noncitizens still in the 90-day removal period is vanishingly small in comparison even to the total number of noncitizens with removal orders, much less as compared to the number of noncitizens who might be out of status or otherwise subject to removal. There are nearly 1.2 million outstanding removal orders, J.A. 425. The total number of removal orders issued through regular removal proceedings that are within the 90-day removal period make up *less than 1 percent* of those outstanding orders.[6] As to the remainder, the federal government has frequently stayed its hand for years—often because of ongoing challenges to those orders, such as pending circuit court appeals or motions to reopen, or as a result of discretionary grants of deferred action or temporary protected status. And, of course, § 1231(a)(2) says nothing at all about the many millions of other noncitizens who do not have an administratively final removal order at all, because removal proceedings have not been initiated or are still ongoing.

Much the same is true of § 1226(c). It applies only to people removable by virtue of certain specified criminal conduct. That category, too, represents only a very small proportion of the overall population of potentially removable noncitizens. A recent study indicates that, as of 2010, some 97% of the overall

---

[6] *See* Hausman, David K., *Fact Sheet: Noncitizens in the Removal Period*, https://tinyurl.com/58hfxsks.

U.S. population had never spent time in prison.[7] And that figure is even greater for noncitizens, the population potentially subject to § 1226(c): Researchers have consistently found that undocumented immigrants, for example, have substantially lower crime rates than native-born citizens.[8]

By any estimation, the vast majority of potentially removable noncitizens are not covered by either of these statutes. Yet the district court vacated the Guidance *in toto*.

Had some part of the Guidance violated those statutes, the district court might have vacated the offending portion of the Guidance—for example, any provisions barring officers from making arrests that the district court concluded were required by enforceable statutory commands. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-166 (2010) (noting availability of partial vacatur); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006) (courts should "limit the solution to the problem"). Or it might have held the Guidance invalid as to individuals covered by §§ 1226(c) and 1231(a)(2).

---

[7] Flurry, Alan, *Study estimates U.S. population with felony convictions*, UGA Today (Oct. 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions/.

[8] *See, e.g.*, Light, Michael T., He, Jingying, & Robey, Jason P., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas* 1, PNAS, Vol. 117, No. 51 (Dec. 22, 2020), https://www.pnas.org/doi/pdf/10.1073/pnas.2014704117 (finding that, relative to undocumented immigrants, U.S.-born citizens are over twice as likely to be arrested for violent crimes, 2.5 times more likely to be arrested for drug crimes, and over 4 times more likely to be arrested for property crimes).

Instead, the district court vacated the Guidance in full. It asserted it was unable to strike only those provisions of the Guidance it found inconsistent with §§ 1226(c) and 1231(a)(2) because the Guidance is not "divisible." J.A. 397-398. That approach compounded error upon error. It was error to find statutory violations without any textual connection to the Guidance. And it was double error to use that very lack of a textual basis to justify vacating the Guidance wholesale—even though the two statutory provisions the district court found contradicted are, even on the district court's reading, irrelevant to the vast majority of persons whose treatment might be influenced by the Guidance.

CONCLUSION

For the reasons above, *amici* respectfully request that the Court reverse the judgment of the district court.

Respectfully Submitted,

Michael K.T. Tan
Omar C. Jadwat
Anand Balakrishnan
Daniel A. Galindo
Noor Zafar
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Cody Wofsy
Counsel of Record
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770
cwofsy@aclu.org