

---

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 FOR STATES OF NEW YORK, CALIFORNIA,  
CONNECTICUT, DELAWARE, ILLINOIS, MAINE,  
MARYLAND, MASSACHUSETTS, MINNESOTA,  
NEVADA, NEW JERSEY, NEW MEXICO, OREGON,  
RHODE ISLAND, VERMONT, AND WASHINGTON, AND  
THE DISTRICT OF COLUMBIA, AS AMICI CURIAE  
IN SUPPORT OF PETITIONERS**

---

---

ROB BONTA  
*Attorney General  
State of California*  
MICHAEL MONGAN  
*Solicitor General*  
HELEN H. HONG  
*Deputy Solicitor General*  
JAMES F. ZAHRADKA II  
*Supervising Deputy  
Attorney General*  
CHRISTOPHER PAUL  
KAILANI MEDEIROS  
*Deputy Attorneys General*  
455 Golden Gate Ave.  
Ste. 11000  
San Francisco, CA 94102

LETITIA JAMES  
*Attorney General  
State of New York*  
BARBARA D. UNDERWOOD\*  
*Solicitor General*  
ESTER MURDUKHAYEVA  
*Deputy Solicitor General*  
ANDREA W. TRENTO  
*Assistant Solicitor General*  
28 Liberty Street  
New York, New York 10005  
(212) 416-8016  
barbara.underwood@ag.ny.gov  
*\*Counsel of Record*

---

*(Counsel listing continues on signature pages.)*

---

**TABLE OF CONTENTS**

	<b>Page</b>
Table of Authorities .....	ii
Interests of Amici States .....	1
Statement of the Case.....	3
Summary of Argument .....	6
Argument.....	7
I. The Guidelines Are Not Contrary to Law. ....	7
A. The Guidelines Do Not Contravene Section 1226(c) or Section 1231(a).....	7
B. The Guidelines Are Consistent with a Longstanding Tradition of Prosecutorial Discretion. ....	11
II. The Guidelines Reflect DHS’s Reasoned Judgment Regarding Prioritization of Enforcement Resources. ....	17
A. The Guidelines Seek to Enhance Public Safety. ....	17
B. The Guidelines Promote Public Health and the Stability of Communities.....	20
Conclusion.....	25

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arizona v. Biden</i> , No. 3:21-cv-314, 2022 WL 839672 (S.D. Ohio Mar. 22, 2022) .....	4
<i>Arizona v. Biden</i> , 40 F.4th 375 (6th Cir. 2022) ...	4, 8, 18
<i>Arizona v. United States</i> , 567 U.S. 387 (2012)...	8, 10, 14
<i>Bond v. United States</i> , 572 U.S. 844 (2014) .....	13
<i>Brown v. Heymann</i> , 62 N.J. 1 (1972) .....	16
<i>Carrick v. Locke</i> , 125 Wash. 2d 129 (1994).....	16
<i>Cockerham-Ellerbee v. Town of Jonesville</i> , 176 N.C. App. 372 (2006) .....	14
<i>The Confiscation Cases</i> , 74 U.S. (7 Wall.) 454 (1868).....	12
<i>Deegan v. State</i> , 711 N.W.2d 89 (Minn. 2006).....	16
<i>Demore v. Kim</i> , 538 U.S. 510 (2003) .....	9, 10
<i>Department of Homeland Sec. v. Thuraissigiam</i> , 140 S. Ct. 1959 (2020) .....	15
<i>Gananian v. Wagstaffe</i> , 199 Cal. App. 4th 1532 (2011).....	13
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).....	12, 13
<i>Hernandez Avilez v. Garland</i> , No. 20-16142, 2022 WL 4101174 (9th Cir. Sept. 8, 2022).....	9
<i>In re Advisory Op. to the Governor</i> , 732 A.2d 55 (R.I. 1999).....	16
<i>In re Aiken County</i> , 725 F.3d 255 (D.C. Cir. 2013) .....	12, 15
<i>Jennings v. Rodriguez</i> , 138 S. Ct. 830 (2018).....	10
<i>Johnson v. Guzman Chavez</i> , 141 S. Ct. 2271 (2021) ..	10

<b>Cases</b>	<b>Page(s)</b>
<i>Marine Forests Soc’y v. California Coastal Comm’n</i> , 36 Cal. 4th 1 (2005) .....	16
<i>Marshall v. Ellison</i> , 132 Ill. App. 3d 732.....	14
<i>Matter of Joseph</i> , 22 I. & N. Dec. 799 (BIA 1999).....	9
<i>Morris v. County of Marin</i> , 18 Cal. 3d 901 (1977).....	13
<i>Murphy ex rel. County of Rensselaer v. Dwyer</i> , 101 A.D.2d 376 (N.Y. App. Div. 1984).....	13
<i>Murphy v. Smith</i> , 138 S. Ct. 784 (2018) .....	8
<i>Nielsen v. Preap</i> , 139 S. Ct. 954 (2019).....	10
<i>Puerto Rico v. Franklin Cal. Tax-Free Trust</i> , 579 U.S. 115 (2016).....	8
<i>Reno v. American-Arab Anti-Discrimination Comm.</i> , 525 U.S. 471 (1999).....	15
<i>State v. Rice</i> , 174 Wash. 2d 884 (2012).....	14
<i>State v. Wheat</i> , 573 S.W.2d 126 (Mo. App. 1978) .....	14
<i>Town of Castle Rock v. Gonzales</i> , 545 U.S. 748 (2005).....	8, 15
<i>United States ex rel. Eisenstein v. City of New York</i> , 556 U.S. 928 (2009).....	9
<i>Vretenar v. Hebron</i> , 144 Wis. 655 (1988).....	14
<i>Wilcox v. Niagara of Wis. Paper Corp.</i> , 965 F.2d 355 (7th Cir. 1992).....	8
 <b>Constitution</b>	
U.S. Const.	
art. II, § 2, cl. 1 .....	12
art. II, § 3.....	12

<b>Laws</b>	<b>Page(s)</b>
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104- 208, 110 Stat. 3009-546.....	8
6 U.S.C. § 202(5).....	3
8 U.S.C.	
§ 1101(a) .....	1
§ 1226(c).....	passim
§ 1226(e) .....	9
§ 1231(a) .....	passim
N.Y. County Law § 700(1).....	13
 <b>Regulations</b>	
8 C.F.R.	
§ 274a.12(a) .....	22
§ 274a.12(c).....	22
 <b>Miscellaneous Authorities</b>	
Adelman, Robert, et al., <i>Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades</i> , 15 J. of Ethnicity in Crim. Just. 52 (2017), <a href="https://www.immigrationresearch.org/system/files/Urban%20crime%20rates%20and%20the%20changing%20face%20of%20immigration%20Evidence%20across%20four%20decades.pdf">https://www.immigrationresearch.org/system/fi les/Urban crime rates and the changing face of immigration Evidence across four decade s.pdf</a> .....	19
Aleaziz, Hamed, & Alejandra Reyes-Velarde, <i>Biden Administration Remade ICE After Trump: Will It Last?</i> , L.A. Times (Aug. 19, 2022), <a href="https://www.latimes.com/california/story/2022-08-19/biden-administration-remade-ice-immigration-trump">https://www.latimes.com/california/story/2022- 08-19/biden-administration-remade-ice- immigration-trump</a> .....	18

<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
American Immigr. Council, Fact Sheet, <i>Immigrants in the United States</i> (Sept. 21, 2021), <a href="https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_the_united_states_0.pdf">https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants in the united states 0.pdf</a> .....	22
American Immigr. Council, Fact Sheet, <i>Value Added: Immigrants Create Jobs and Businesses, Boost Wages of Native-Born Workers</i> (Jan. 1, 2012), <a href="https://www.americanimmigrationcouncil.org/research/value-added-immigrants-create-jobs-and-businesses-boost-wages-native-born-workers">https://www.americanimmigrationcouncil.org/research/value-added-immigrants-create-jobs-and-businesses-boost-wages-native-born-workers</a> .....	23
American Immigration Council, <i>Map the Impact of Immigration</i> (n.d.), <a href="https://data.americanimmigrationcouncil.org/map-the-impact/">https://data.americanimmigrationcouncil.org/map-the-impact/</a> .....	21
Arthur, Rob, <i>Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office</i> (May 18, 2017), <a href="https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation/">https://fivethirtyeight.com/features/latinos-report-fewer-crimes-in-three-cities-amid-fears-of-deportation/</a> .....	20
Association for Neighborhood & Hous. Dev., <i>The Forgotten Tenants: New York City 's Immigrant Small Business Owners</i> (2019), <a href="https://anhd.org/sites/default/files/anhd_icc_report_final_march_2019.pdf">https://anhd.org/sites/default/files/anhd icc report final march 2019.pdf</a> .....	24
Azoulay, Pierre, et al., <i>Immigration and Entrepreneurship in the United States</i> (Nat'l Bureau of Econ. Rsch., Working Paper No. 27778, 2020), <a href="https://www.nber.org/system/files/working_papers/w27778/w27778.pdf">https://www.nber.org/system/files/working_papers/w27778/w27778.pdf</a> .....	23

<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
Bains, Chiraag, <i>How Immigrants Make Communities Safer</i> , The Marshall Project (Feb. 28, 2017), <a href="https://www.themarshallproject.org/2017/02/28/how-immigrants-make-communities-safer">https://www.themarshallproject.org/2017/02/28/how-immigrants-make-communities-safer</a> .....	19
Bever, Lindsey, <i>Hispanics Are ‘Going Further Into the Shadows’ Amid Chilling Immigration Debate, Police Say</i> , Wash. Post (May 12, 2017), <a href="https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/">https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/</a> ....	20
Butcher, Kristin F., & Anne Morrison Piehl, <i>Why Are Immigrants ‘Incarceration Rates so Low? Evidence on Selective Immigration, Deterrence, and Deportation</i> (Nat’l Bureau of Econ. Rsch., Working Paper No. 13229, 2007), <a href="https://www.nber.org/system/files/working_papers/w13229/w13229.pdf">https://www.nber.org/system/files/working_papers/w13229/w13229.pdf</a> .....	19
Camarota, Steven A., & Karen Zeigler, Ctr. for Immgr. Studies, <i>Immigration Population Hits Record 46.2 Million in November 2021</i> (Dec. 20, 2021), <a href="https://cis.org/Camarota/Immigrant-Population-Hits-Record-462-Million-November-2021">https://cis.org/Camarota/Immigrant-Population-Hits-Record-462-Million-November-2021</a> .....	21
Capps, Randy, et al., Migration Pol’y Inst., Fact Sheet, <i>Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins</i> (Dec. 2020), <a href="https://www.migrationpolicy.org/sites/default/files/publications/mpi-unauthorized-immigrants-stablenumbers-changingorigins_final.pdf">https://www.migrationpolicy.org/sites/default/files/publications/mpi-unauthorized-immigrants-stablenumbers-changingorigins_final.pdf</a> .....	22, 24

<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
Ciancio, Alberto, <i>The Impact of Immigration Policies on Local Enforcement, Crime and Policing Efficiency</i> vii (2017) (Ph.D. dissertation, University of Pennsylvania), <a href="https://repository.upenn.edu/cgi/viewcontent.cgi?article=4017&amp;context=edissertations">https://repository.upenn.edu/cgi/viewcontent.cgi?article=4017&amp;context=edissertations</a> .....	20
Giovanni Peri & Justin C. Wiltshire, Univ. of Cal. Davis, Glob. Migration Ctr., <i>The Role of Immigrants as Essential Workers During the Covid-19 Pandemic</i> (last updated Apr. 27, 2020), <a href="https://globalmigration.ucdavis.edu/sites/g/files/dgvnsk8181/files/inline-files/Immigration%20Fact_Role%20of%20Immigrants%20as%20Essential%20Workers%20during%20the%20COVID-19%20Pandemic.pdf">https://globalmigration.ucdavis.edu/sites/g/files/dgvnsk8181/files/inline-files/Immigration%20Fact_Role%20of%20Immigrants%20as%20Essential%20Workers%20during%20the%20COVID-19%20Pandemic.pdf</a> .....	23
Glenn, Heidi, <i>Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver</i> , Nat'l Pub. Radio (Mar. 21, 2017), <a href="https://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver">https://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver</a> .....	20
Hallett, Nicole, <i>Rethinking Prosecutorial Discretion in Immigration Enforcement</i> , 42 <i>Cardozo L. Rev.</i> 1765 (2021) .....	17, 18
Markowitz, Peter L., <i>Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty</i> , 97 <i>B.U. L. Rev.</i> 489 (2017) .....	12, 15
Martinez Jr., Ramiro, & Matthew T. Lee, <i>On Immigration and Crime</i> , in 1 <i>Criminal Justice 2000</i> (Gary LaFree ed., 2000), <a href="https://www.ncjrs.gov/criminal_justice2000/vol_1/02j.pdf">https://www.ncjrs.gov/criminal_justice2000/vol_1/02j.pdf</a> .....	19



<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
Minier, Jenny, Univ. of Ky. Ctr. for Equality & Soc. Just., <i>Immigrants Benefit the Community and Economy</i> (Sept. 2017), <a href="https://cesj.as.uky.edu/sites/default/files/CESJ%20Position%20Paper%203%20-%20DACA%20-%20Minier.pdf">https://cesj.as.uky.edu/sites/default/files/CESJ%20Position%20Paper%203%20-%20DACA%20-%20Minier.pdf</a> .....	23
New Am. Econ., <i>Immigrants and the Economy in the United States of America</i> (n.d.), <a href="https://www.newamericaneconomy.org/locations/national/">https://www.newamericaneconomy.org/locations/national/</a> .....	23
New Am. Econ., <i>New York Archives</i> (n.d.), <a href="https://www.newamericaneconomy.org/locations/new-york/">https://www.newamericaneconomy.org/locations/new-york/</a> .....	22
Nowrasteh, Alex, et al., <i>Illegal Immigration and Crime in Texas 4</i> (Cato Inst. Working Paper No. 60, 2020), <a href="https://www.cato.org/sites/cato.org/files/2020-10/working-paper-60.pdf">https://www.cato.org/sites/cato.org/files/2020-10/working-paper-60.pdf</a> .....	19
Orrenius, Pia, <i>Benefits of Immigration Outweigh the Costs</i> , <i>The Catalyst</i> , issue 2 (George W. Bush Inst. Spring 2016), <a href="https://www.bushcenter.org/catalyst/north-american-century/benefits-of-immigration-outweigh-costs.html">https://www.bushcenter.org/catalyst/north-american-century/benefits-of-immigration-outweigh-costs.html</a> .....	23
Sherman, Arloc, et al., Ctr. On Budget & Pol’y Priorities, <i>Immigrants Contribute Greatly to U.S. Economy, Despite Administration’s “Public Charge” Rule Rationale</i> (Aug. 15, 2019), <a href="https://www.cbpp.org/research/poverty-and-inequality/immigrants-contribute-greatly-to-us-economy-despite-administrations">https://www.cbpp.org/research/poverty-and-inequality/immigrants-contribute-greatly-to-us-economy-despite-administrations</a> .....	23

<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
Tarr, G. Alan, <i>Interpreting the Separation of Powers in State Constitutions</i> , 59 N.Y.U. Ann. Surv. Am. L. 329 (2003) .....	16
TRAC Immigration, <i>Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases</i> (Jan. 18, 2022), <a href="https://trac.syr.edu/immigration/reports/675/">https://trac.syr.edu/immigration/reports/675/</a> .....	10
U.N. Dep’t of Econ. & Soc. Affairs, Population Div., <i>International Migration 2020: Highlights</i> (2020), <a href="https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesapd_2020_international_migration_highlights.pdf">https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undesapd_2020_international_migration_highlights.pdf</a> .....	21
U.S. Congress, Joint Econ. Comm., <i>Immigrants are Vital to the U.S. Economy</i> (Apr. 6, 2021), <a href="https://www.jec.senate.gov/public/index.cfm/democrats/2021/4/immigrants-are-vital-to-the-u-s-economy">https://www.jec.senate.gov/public/index.cfm/democrats/2021/4/immigrants-are-vital-to-the-u-s-economy</a> .....	22
U.S. Internal Revenue Serv., <i>Aliens Employed in the U.S. – Social Security Taxes</i> (last updated Aug. 17, 2022), <a href="https://www.irs.gov/individuals/international-taxpayers/aliens-employed-in-the-us-social-security-taxes">https://www.irs.gov/individuals/international-taxpayers/aliens-employed-in-the-us-social-security-taxes</a> .....	22
U.S. Internal Revenue Serv., <i>Taxation of Nonresident Aliens</i> (last updated June 2, 2022), <a href="https://www.irs.gov/individuals/international-taxpayers/taxation-of-nonresident-aliens">https://www.irs.gov/individuals/international-taxpayers/taxation-of-nonresident-aliens</a> .....	22

## INTERESTS OF AMICI STATES

The States of New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia submit this amicus curiae brief in support of petitioners.

Amici have a strong interest in supporting the executive authority to set law enforcement priorities, in order to deploy limited government resources to promote the fairness, effectiveness, and integrity of criminal and civil enforcement systems. In amici's experience, establishing such priorities does not eliminate a law enforcement officer's capacity to make case-specific determinations; rather, it performs the important function of informing those inherently discretionary decisions and providing benchmarks for consideration in the exercise of discretion.

Amici States are also home to millions of noncitizens who are valued and active contributors to our communities, work forces, and civic organizations.<sup>1</sup> These state residents attend school, serve as essential workers, enlist in the military, and care for the sick and elderly. They also support millions of U.S.-citizen family members. Immigrants add billions to federal, state, and local budgets by paying taxes and spending their income. Amici thus have a significant interest in supporting the federal government's judgment to devote

---

<sup>1</sup> This brief uses "noncitizen" in place of the statutory term "alien," which refers to "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The brief also uses "immigrant" to refer more broadly to all foreign-born individuals, including those who have been naturalized.

its limited immigration enforcement resources toward the subset of removable immigrants who pose a substantial threat to public safety in their communities, rather than adopt a haphazard approach that can inflict substantial harms on immigrants, their families, and their larger communities.

This case implicates amici's interests in several respects. First, a ruling that the federal guidelines challenged here are inconsistent with the Immigration and Naturalization Act (INA) could undermine principles of prosecutorial discretion that have guided law enforcement at both the state and federal levels of government. Interpreting federal immigration statutes to require the federal government to apprehend, detain, institute removal proceedings against, and remove qualifying noncitizens intrudes on executive enforcement prerogatives in a way that would be in tension with longstanding principles that have guided state law enforcement discretion since the Nation's founding.

Second, judicial interference with the federal guidelines at issue could undermine amici's interests in the safety and stability of immigrant communities. There is no dispute that the federal government is unable to enforce the Nation's immigration laws against every noncitizen who might be subject to detention or removal. The challenged guidelines address this reality by following the past practice of specifying priority categories of removable noncitizens—generally, those removable noncitizens who pose the greatest threat to public safety—and providing individual enforcement officers with factors to consider in identifying priority removal candidates. Vacatur of the guidelines could result in unprincipled and random enforcement actions that undermine the health and stability of communities

by detaining and removing productive residents, rather than dangerous individuals.

### STATEMENT OF THE CASE

On September 30, 2021, Secretary of Homeland Security Alejandro Mayorkas issued *Guidelines for the Enforcement of Civil Immigration Law* (J.A. 111-120) pursuant to his authority to “establish national immigration enforcement policies and priorities,” 6 U.S.C. § 202(5). The Guidelines explained that the U.S. Department of Homeland Security (DHS) did “not have the resources to apprehend and seek the removal of every one” of the “more than 11 million undocumented or otherwise removable noncitizens in the United States.” (J.A. 112.) Accordingly, the Guidelines established “civil immigration enforcement priorities” pursuant to which three categories of noncitizens—those who posed a “threat to our national security, public safety, and border security”—were “prioritize[d] for apprehension and removal.” (J.A. 113.)

By their terms, the Guidelines “do[] not compel an action to be taken or not taken” and “leave[] the exercise of prosecutorial discretion to the judgment of” DHS personnel. (J.A. 118.) Likewise, the Guidelines “[are] not intended to, do[] not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.” (J.A. 120.)

On September 30, 2021, DHS also released a memorandum articulating the agency’s “significant considerations” in promulgating the Guidelines, including resource limitations (J.A. 130-137, 156-157), public safety considerations (J.A. 144-148), the enforcement of other laws (J.A. 148-149), the impact of immigration

enforcement priorities on States (J.A. 149-155), and the availability and feasibility of alternative approaches (J.A. 160-164). The memorandum also situated the Guidelines in the context of a century-old practice by DHS (and its predecessor agencies) of developing prospective prosecutorial discretion policies to guide the agency's enforcement activities. (J.A. 124-130.)

Two different groups of state plaintiffs sued to challenge the Guidelines. Arizona, Montana and Ohio sued in the U.S. District Court for the Southern District of Ohio and obtained a preliminary injunction against application of the Guidelines. That injunction was subsequently reversed by the Sixth Circuit. *See Arizona v. Biden*, No. 3:21-cv-314, 2022 WL 839672 (S.D. Ohio Mar. 22, 2022), *rev'd & remanded*, 40 F.4th 375 (6th Cir. 2022). The Sixth Circuit reasoned that, among other deficiencies, the plaintiffs were unlikely to succeed on the merits of their claims that the Guidelines violated the Administrative Procedure Act (APA). 40 F.4th at 390-93. The court concluded that the Guidelines did not conflict with provisions of the INA governing the detention and removal of certain noncitizens because of the "considerable discretion already embedded in the immigration system." *Id.* at 390. The court also concluded that the Guidelines were not arbitrary or capricious because DHS had considered the relevant issues and had offered a satisfactory explanation for its decision. *Id.* at 392-93.

In the case giving rise to this appeal, Texas and Louisiana sued in the U.S. District Court for the Southern District of Texas and, after trial, were awarded final judgment and obtained vacatur of the Guidelines. (J.A. 405.) After concluding that the plaintiffs had standing and that the Guidelines were subject to

judicial review, the district court held that the Guidelines' priority enforcement categories "flatly contradict[] the detention mandates under [8 U.S.C. §] 1226(c) and [8 U.S.C. §] 1231(a)(2)." (J.A. 370.) Under the court's reading of the statutes, section 1226(c) identifies specific categories of noncitizens that the Attorney General "shall take into custody," and articulates a limited set of circumstances in which the Attorney General "may release" such persons, 8 U.S.C. § 1226(c)(1)-(2). Section 1231(a)(2) provides that the Attorney General "shall detain" any alien who has been ordered removed during the "removal period," which is defined as the "period of 90 days" following the order of removal. *Id.* § 1231(a)(1)(A), (a)(2). Those provisions, the district court reasoned, imposed mandatory obligations in conflict with the Guidelines. (J.A. 370-374.) The district court also held that the Guidelines were arbitrary and capricious because DHS purportedly inadequately considered recidivism risks and reliance interests. (J.A. 374-382.)

The federal defendants appealed and sought a stay of the district court's judgment in the Fifth Circuit. The Fifth Circuit denied the stay application. (J.A. 486.) In relevant part, the court rejected DHS's argument that its prosecutorial discretion allowed it to establish the priorities set forth in the Guidelines, because, in the court of appeals' view, agency-wide policies were not entitled to the kind of deference normally afforded case-by-case enforcement determinations. (J.A. 477.) The court concluded that the Guidelines were (i) contrary to sections 1226(c) and 1231(a) and (ii) arbitrary and capricious. (J.A. 472-483.)

The federal defendants sought a stay in this Court. On July 21, 2022, this Court denied the application for stay, but granted certiorari before judgment on three

questions. (J.A. 487.) This brief addresses the second of these questions: whether the Guidelines are “contrary to 8 U.S.C. § 1226(c) or 8 U.S.C. § 1231(a), or otherwise violate the Administrative Procedure Act.” (J.A. 487.)

### **SUMMARY OF ARGUMENT**

The Guidelines are not contrary to 8 U.S.C. §§ 1226(c) and 1231(a). Although these provisions use the term “shall,” which is often construed to impose mandatory duties, the broader statutory context in which those provisions are situated makes clear that they should not be so interpreted in this instance. Moreover, interpreting sections 1226(c) and 1231(a) to impose mandatory duties intrudes upon the Executive’s historical prosecutorial discretion over immigration enforcement. A decision that chips away at executive law enforcement prerogatives, even in this narrow context, could have a ripple effect that disturbs law enforcement authority at all levels of government.

The Guidelines also reflect DHS’s reasoned decision to prioritize enforcement efforts to remove noncitizens who pose the greatest threat to public safety. Where, as here, enforcement resources are limited and could not practically be deployed against all potentially removable noncitizens, prioritization guidance reasonably focuses enforcement efforts on direct threats to public safety. The Guidelines also deemphasize enforcement with respect to noncitizens who provide critical support to their families and communities and who, in amici’s broad experience, have been productive members of society.



## ARGUMENT

### I. The Guidelines Are Not Contrary to Law.

The Guidelines are not contrary to law under the APA because 8 U.S.C. §§ 1226(c) and 1231(a)(2) do not require DHS to arrest and initiate proceedings or execute removal orders against every noncitizen falling within the ambit of those subsections. The Guidelines are intended to inform (but not control) the exercise of prosecutorial discretion in individual cases and are part of a long history of agency policies regarding enforcement of the immigration laws. A ruling that the Guidelines conflict with the INA would contravene the long-standing view that enforcement duties are traditionally committed to the discretion of the executive and are not subject to judicial second-guessing.

#### A. The Guidelines Do Not Contravene Section 1226(c) or Section 1231(a).

Section 1226 provides that the Attorney General “shall take into custody any” noncitizen who is inadmissible or deportable under certain specified provisions of the INA and “may release” such a person only for certain law enforcement-related purposes. 8 U.S.C. § 1226(c)(1)-(2). Section 1231(a)(2) provides that, after an order of removal has been entered, the Attorney General “shall detain” the noncitizen during the 90-day “removal period” following the order of removal; “[u]nder no circumstance” may the Attorney General release a noncitizen who has been found inadmissible or deportable under one of four specified statutes. *Id.* § 1231(a)(2). If the noncitizen is not removed after 90 days, the removal and detention period may be extended under certain circumstances, *id.* § 1231(a)(1)(C), but

the noncitizen “shall” otherwise be released under supervision, *id.* § 1231(a)(3).

While “the word ‘shall’ usually creates a mandate,” *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018), “[i]t is of course commonplace that not every use of the word ‘shall’ is treated as mandatory for legal purposes,” *Wilcox v. Niagara of Wis. Paper Corp.*, 965 F.2d 355, 359 n.6 (7th Cir. 1992).<sup>2</sup> This treatment is particularly the case in the law enforcement or immigration enforcement context, where constitutional executive enforcement prerogatives and practical enforcement concerns combine to insulate most enforcement determinations from judicial review. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005); *Arizona v. United States*, 567 U.S. 387, 396 (2012). See *infra* at 11-16. Here, the context of the INA’s broader statutory scheme demonstrates that “shall” should not be construed to require apprehension of all qualifying noncitizens.

*First*, as the Sixth Circuit observed, the “shall detain” requirement in section 1231(a)(2) is accompanied by language directing that “under no circumstance” should certain criminal noncitizens be released by the Attorney General during the removal period. See *Arizona*, 40 F.4th at 391-92. If DHS had no discretion under section 1231 whether to “detain” a noncitizen during the removal period, the directive that certain noncitizens should be released “under no circumstance”

---

<sup>2</sup> Because the relevant provisions of sections 1226(c) and 1231(a) were passed as part of the same amendment to the INA, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 303(a), 305(a)(3), 110 Stat. 3009-546, 3009-585, 3009-598 (amending and enacting sections 1226 and 1331, respectively), the term “shall” as it appears in both provisions should be given the same meaning. See *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125-26 (2016).

in that same provision would amount to surplusage. The district court’s rejection of such discretion in this case thus “contradict[s] well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions.” *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009).

*Second*, the provision of the statute that insulates from judicial review “any action or decision by the Attorney General under [section 1226] regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole,” 8 U.S.C. § 1226(e), further reflects that section 1226(c) does not impose a mandatory detention requirement. Congress’s decision to make the Attorney General’s determination to detain or release a qualifying noncitizen pursuant to section 1226—including any decision whether to “take into custody” a noncitizen pursuant to section 1226(c)(1) or release any such noncitizen pursuant to section 1226(c)(2)—nonreviewable reflects Congress’s intent not to impose a mandatory duty here.

*Third*, section 1226(c) provides only for detention incident to removal proceedings, but the decision to bring (or not to bring) removal proceedings as against any noncitizen is quintessentially a matter of prosecutorial discretion. *See Demore v. Kim*, 538 U.S. 510, 527-28 (2003) (noting that 1226(c) “governs detention of deportable criminal aliens pending their removal proceedings”); *cf. Matter of Joseph*, 22 I. & N. Dec. 799, 807 (BIA 1999) (holding that a noncitizen is not subject to section 1226(c) if the government is “substantially unlikely to prevail on its charge [in] the underlying removal case”); *Hernandez Avilez v. Garland*, No. 20-16142, 2022 WL 4101174, at \*10 (9th Cir. Sept. 8, 2022) (holding that section 1226(c) “applies throughout the

administrative and judicial phases of removal proceedings”). Nothing in section 1226(c) or elsewhere in the INA requires DHS to institute removal proceedings against every potentially qualifying noncitizen. Nor do any of this Court’s prior decisions suggest a contrary result.<sup>3</sup> To the contrary, “[a] principal feature of the removal system is the broad discretion exercised by immigration officials,” who are entrusted with making the first-order decision as to “whether it makes sense to pursue removal at all.” *Arizona*, 567 U.S. at 396. Yet the mandatory removal of all noncitizens subject to section 1226(c)(1) is exactly the theory pursued by the plaintiff States, and exactly what the district court erroneously interpreted section 1226(c) to require.<sup>4</sup> (J.A. 100, 349.)

---

<sup>3</sup> See, e.g., *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280 & n.2 (2021) (noting that “[a]liens *who are arrested and detained* may generally apply for release on bond or conditional parole,” except for those who are subject to mandatory detention pursuant to § 1226(c) (emphasis added)); *Nielsen v. Preap*, 139 S. Ct. 954, (2019) (holding that *detained noncitizens* falling within the categories covered by § 1226(c)(1) were subject to the mandatory detention requirements of § 1226(c)(2), and thus were not entitled to bond hearings, even if they were not arrested until well after their release from criminal confinement); *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018) (holding that “§ 1226(c) mandates detention *pending a decision on whether the alien is to be removed from the United States*” (emphasis added)); *Demore*, 538 U.S. at 531.

<sup>4</sup> In addition, to read into section 1226(c) a mandatory requirement to institute removal proceedings would not only collide with prosecutorial discretion, but also dramatically exacerbate a significant immigration court backlog. See TRAC Immigration, *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases* (Jan. 18, 2022) ([internet](#)) (noting  
(continues on next page)

*Finally*, the Guidelines and the supporting memorandum expressly acknowledge DHS’s strict compliance with sections 1226(c) and 1231(a) *once removal proceedings have commenced*. The memorandum explains that, when a noncitizen subject to section 1226(c)(1) is apprehended, “that noncitizen generally must remain in custody during the pendency of removal proceedings unless otherwise eligible for release pursuant to § 1226(c)(2).” (J.A. 160.) Similarly, the memorandum acknowledges that detained noncitizens who are prohibited from being released under section 1231(a)(2) “must remain detained for the duration of the removal period.” (J.A. 160.) Accordingly, the Guidelines exercise DHS’s discretion to seek removal of qualifying noncitizens in a manner that is entirely consistent with the requirements imposed by these provisions.

**B. The Guidelines Are Consistent with a Longstanding Tradition of Prosecutorial Discretion.**

General principles of prosecutorial discretion also weigh against interpreting sections 1226(c) and 1231(a)(1) to impose a mandatory requirement to apprehend and detain all noncitizens covered by those provisions in all circumstances, regardless of DHS’s capacity to do so or the agency’s determination that the public would be better served by a more-targeted approach.

---

that the backlog of cases pending in the immigration courts stood at approximately 150,000 in 2001, and rose to nearly 1.6 million by December 2021). (For authorities available on the internet, URLs are provided in the table of authorities. All sites were last visited September 19, 2022).

Prosecutorial discretion has been a hallmark of the Executive's law enforcement authority since the Nation's founding. *See, e.g.*, Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. Rev. 489, 497-503 (2017). Such discretion has deep roots in the constitutional separation of powers, as well as the President's constitutional authority to (among other things) "take Care that the Laws be faithfully executed," and to "grant Reprieves and Pardons for offenses against the United States." U.S. Const. art. II, § 3; *id.* art. II, § 2, cl. 1; *see In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) (Kavanaugh, J.).

Historically, the federal executive branch has exercised its prosecutorial discretion not only on an individual, case-by-case basis, *see, e.g.*, Markowitz, *supra*, 97 B.U. L. Rev. at 497 (describing how "President George Washington personally directed that numerous criminal and civil prosecutions be initiated and that others be halted"), but also at a categorical level, *see, e.g., id.* at 502 (describing the federal establishment of a "Corporate Leniency Policy" that "grant[ed] effective immunity from criminal prosecution to corporations" that self-report and take remedial steps regarding certain criminal activity). And the discretion afforded the Executive under this principle has historically extended to both criminal and civil enforcement matters. *See, e.g., The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 456-57 (1868) (executive branch has discretion whether to pursue civil-forfeiture enforcement action).

At the administrative level, it has been well settled 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 v. Chaney*, 470 U.S. 821, 831 (1985). This

judicial deference is because courts have properly recognized that an agency's enforcement determination "often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* These factors include not only "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." *Id.*

Such concerns are equally present at the level of state criminal and civil enforcement. Courts have "traditionally viewed the exercise of state officials' prosecutorial discretion as a valuable feature of our constitutional system." *Bond v. United States*, 572 U.S. 844, 865 (2014). For example, "[p]rosecutorial discretion is basic to the framework of the California criminal justice system," *Gananian v. Wagstaffe*, 199 Cal. App. 4th 1532, 1543 (2011) (quotation marks and emphasis omitted), so that California courts decline to construe statutes that use the word "shall" "to foreclose a governmental entity's or officer's exercise of discretion," *Morris v. County of Marin*, 18 Cal. 3d 901, 910 (1977). So, too, in New York, where the law provides that it "*shall* be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts," N.Y. County Law § 700(1) (emphasis added), but courts recognize that the district attorney also retains "wide latitude and discretion to allocate and utilize both the manpower and resources of his office in the manner believed to be most effective to the discharge of his duties," and "need not prosecute every violation or offense," *Murphy ex rel. County of Rensselaer v. Dwyer*, 101 A.D.2d 376, 377-78 (N.Y. App. Div. 1984).

Indeed, many States’ statutory enforcement regimes—as interpreted by their respective courts—bear similar characteristics.<sup>5</sup>

Against this backdrop, it is of little surprise that prosecutorial discretion has guided the federal executive branch’s enforcement of the Nation’s immigration laws for decades. As the district court found below, “DHS has never apprehended and removed all removable aliens,” much less “all aliens covered in Section 1226(c) or Section 1231(a)(2).” (J.A. 297.) As a result, and as this Court has observed, enforcement discretion is “[a] principal feature of the removal system,” including as to “whether it makes sense to pursue removal at all.” *Arizona*, 567 U.S. at 396. And once removal proceedings are underway, “[a]t each stage the Executive

---

<sup>5</sup> See, e.g., *Marshall v. Ellison*, 132 Ill. App. 3d 732, 739 (1985) (holding that “the very nature of law enforcement requires that an officer have freedom to exercise his discretion,” and interpreting “shall” in a criminal statute to impose a “directory” rather than “mandatory” obligation); *Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372, 376 (2006) (“Although the use of the word ‘shall’ in these statutes implies that law enforcement has a mandatory duty to arrest those in violation of a protective order, without any ability to exercise any discretion such an interpretation is unreasonable.”); *State v. Rice*, 174 Wash. 2d 884, 899 (2012) (“[A]lthough the legislature sometimes speaks in mandatory terms when authorizing the filing of certain criminal charges, that language is subject to the legislature’s own general and underlying acknowledgment of prosecutorial charging discretion.”); *Vretenar v. Hebron*, 144 Wis. 655, 665-66 (1988) (noting that the court has never interpreted the mandatory-seeming “shall” in a criminal enforcement statute “to limit in any way the prosecuting attorney’s discretion on whether to prosecute a particular case”). See also *State v. Wheat*, 573 S.W.2d 126, 127 (Mo. App. 1978) (“[T]he statute, despite the use of the word ‘shall’ in directing prosecutorial action, has been interpreted to allow normal prosecutorial discretion in its use.”).



has discretion to abandon the endeavor.” *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999); see *Department of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983 n.28 (2020) (Alito, J.) (noting that “the Executive always has discretion not to remove”). Since 1975, agencies charged with enforcing immigration laws “have issued a series of prosecutorial discretion memoranda that set forth basic guidelines for agency lawyers and agents to follow in making prosecutorial discretion determinations.” Markowitz, *supra*, 97 B.U. L. Rev. at 508.

The Guidelines are properly considered a part of this longstanding history of prosecutorial discretion. Although sections 1226(c) and 1231(a) provide that DHS “shall” detain certain noncitizens, such a “seemingly mandatory legislative command[.]” is—without more—insufficient to overcome the “deep-rooted nature of law-enforcement discretion.” *Town of Castle Rock*, 545 U.S. at 761. Instead, there must be a “stronger indication” from Congress that “shall” imposes a mandatory duty and creates a judicially enforceable mandate. See *id.*; see also *In re Aiken County*, 725 F.3d at 263 (“Congress may not *mandate* that the President prosecute a certain kind of offense or offender.”). There is no such indication in sections 1226(c) and 1231(a) or elsewhere in the INA.

Moreover, interpreting the INA to compel prosecutorial action without a clear statement imposing such a duty could have implications in other contexts, including state civil and criminal law enforcement. Under the federal Constitution, “[t]he Executive’s broad prosecutorial discretion and pardon powers” are rooted in part in “the Constitution’s separation of powers.” *In re Aiken County*, 725 F.3d at 264. But any pronouncement about the federal government’s enforcement obligations in

view of constitutional separation of powers principles would not necessarily be confined to the federal immigration context. State courts often “rely on federal principles regarding the separation of powers doctrine in order to interpret [their own respective] constitution’s stand on this issue.” *Carrick v. Locke*, 125 Wash. 2d 129, 135 (1994).<sup>6</sup> In any event, respondents offer no basis in this case to erode bedrock principles of law enforcement discretion on which federal and state governments rely.

---

<sup>6</sup> See also *Marine Forests Soc’y v. California Coastal Comm’n*, 36 Cal. 4th 1, 29 (2005) (“we have looked to federal decisions for assistance in interpreting our state constitutional separation of powers doctrine in instances in which there were no fundamental differences between the relevant constitutional provisions”); *Deegan v. State*, 711 N.W.2d 89, 95 (Minn. 2006) (holding that when interpreting the Minnesota constitution “[a]s a general rule we favor uniformity with the federal constitution”); *Brown v. Heymann*, 62 N.J. 1, 9 (1972) (“There is no indication that our State Constitution was intended, with respect to the delegation of legislative power, to depart from the basic concept of distribution of the powers of government embodied in the Federal Constitution.”); *In re Advisory Op. to the Governor*, 732 A.2d 55, 110 (R.I. 1999) (opinion of Flanders, J.) (“[O]n the whole, the same separation-of-powers principle is indeed applicable both to federal and state questions involving legislative appointments to executive entities.”). See generally G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. Ann. Surv. Am. L. 329, 330 (2003) (noting that “State courts may follow federal precedent in interpreting state provisions dealing with the structure and operation of state government, just as they may follow federal precedent in interpreting state declarations of rights”).

## **II. The Guidelines Reflect DHS’s Reasoned Judgment Regarding Prioritization of Enforcement Resources.**

The Guidelines and the accompanying memorandum reflect DHS’s extensive consideration of the potential costs and benefits of its revised prioritization scheme. Among other things, DHS explains that “a civil immigration enforcement framework that lacks clear priorities is likely to increase fear and sow mistrust between noncitizens and government,” which can undermine law enforcement priorities and public health. (J.A. 153.) The memorandum also observes that the Guidelines promote the use of valuable and limited resources on “the arrest and removal of individuals who are threats to public safety,” rather than productive residents contributing to their communities. (J.A. 154.) Amici agree that the Guidelines reflect reasoned policy choices aimed at enhancing public safety, health, and community stability.

### **A. The Guidelines Seek to Enhance Public Safety.**

First, the Guidelines’ prioritization of enforcement efforts “on those who pose a threat to national security, public safety, and border security” (J.A. 113) is reasonably aimed at identifying dangerous removable noncitizens for enforcement action. Under the previous administration’s policy, enforcement guidance “had the effect of prioritizing most undocumented immigrants for removal,” which, due to the lack of agency resources, meant that enforcement was not meaningfully guided by any prioritization at all.<sup>7</sup> “Instead, whether someone

---

<sup>7</sup> Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 *Cardozo L. Rev.* 1765, 1786 (2021).

was slated for removal depended on being in the wrong place at the wrong time—a kind of random enforcement that is not tied to priorities at all,” and certainly not to any effort aimed at identifying the most dangerous removable noncitizens for enforcement.<sup>8</sup> In fact, the absence of prioritization under the previous administration’s policies was itself a departure from earlier approaches that, as the Guidelines do here, prioritized threats to “national security, public safety, and border security” in allocating enforcement resources. *See Arizona*, 40 F.4th at 382 (describing policies issued in 2011 and 2014).

The Guidelines reflect a rational and well-reasoned policy determination to prioritize for removal those noncitizens who are most likely to threaten public safety. The district court erroneously concluded that DHS failed to substantiate its reasoning because DHS relied on recidivism and abscondment statistics that focused on all noncitizens, and not those “implicated by the statutes at issue in this litigation: those covered by Sections 1226(c) and 1231(a)(2).” (J.A. 376.) But implicit in the district court’s critique is the incorrect assumption that, but for the Guidelines, all of the removable noncitizens covered by sections 1226(c) and 1231(a)(2) would be targeted for enforcement by DHS. The pertinent question is whether those noncitizens subject to enforcement under a standard-less framework are more likely to recidivate or abscond than those noncitizens identified as posing the greatest threat to public safety prioritized for enforcement under the Guidelines. So framed, the question answers itself.

---

<sup>8</sup> *Id.* at 1787-88; *see, e.g.*, Hamed Aleaziz & Alejandra Reyes-Velarde, *Biden Administration Remade ICE After Trump: Will It Last?*, L.A. Times (Aug. 19, 2022) ([internet](#)).

In any event, studies have repeatedly shown that immigrants commit significantly less crime than U.S.-born residents.<sup>9</sup> In Texas, for instance, the criminal conviction rate in 2018 for noncitizens without legal status was 45 percent lower than the rate for native-born Americans.<sup>10</sup> In fact, increased migration often corresponds with drops in crime rates.<sup>11</sup> For example, analyses of major cities such as New York, Chicago, Miami, and El Paso have shown that the rates of violent crime are lower in areas with more immigrants.<sup>12</sup> This lower crime rate makes particular sense in the context of noncitizens, who face more serious consequences than citizens do (i.e., removal) if they commit a crime.

DHS also reasonably concluded that the clear enforcement priorities established by the Guidelines would promote trust and cooperation with law enforcement among immigrant communities and free local law enforcement agencies to deploy their own limited resources more effectively. As the accompanying memo-

---

<sup>9</sup> See, e.g., Kristin F. Butcher & Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates so Low? Evidence on Selective Immigration, Deterrence, and Deportation* 24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13229, 2007) ([internet](#)); Ramiro Martinez Jr. & Matthew T. Lee, *On Immigration and Crime*, in 1 *Criminal Justice 2000*, at 485, 514-15 (Gary LaFree ed., 2000) ([internet](#)).

<sup>10</sup> Alex Nowrasteh et al., *Illegal Immigration and Crime in Texas* 4 (Cato Inst. Working Paper No. 60, 2020) ([internet](#)).

<sup>11</sup> Chiraag Bains, *How Immigrants Make Communities Safer*, The Marshall Project (Feb. 28, 2017) ([internet](#)).

<sup>12</sup> *Id.* (citing analyses); see Robert Adelman et al., *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 *J. of Ethnicity in Crim. Just.* 52, 70 (2017) ([internet](#)) (finding immigrants in urban areas less likely to commit crime than native-born residents).

randum correctly noted, “civil immigration enforcement activity may have adverse effects on the enforcement of other laws,” as “noncitizen victims and witnesses in criminal investigations” may be less likely to cooperate with law enforcement if they “are potentially subject to removal.” (J.A. 148-149.)

In amici’s experience, uncertainty about immigration enforcement leads to substantial decreases in crime reporting from immigrant communities even during periods of increased crime.<sup>13</sup> Data from time periods with clearer federal immigration enforcement priorities reflects that such policies “did not increase crime” but “rather led to an increase in policing efficiency, either because [they] allowed police to focus efforts on solving more serious crimes or because [they] elicited greater cooperation of non-citizens with police.”<sup>14</sup> The Guidelines are therefore rationally aimed at promoting public safety.

### **B. The Guidelines Promote Public Health and the Stability of Communities.**

The Guidelines also reasonably prioritize enforcement resources away from those noncitizens who benefit their communities. As the supporting memorandum

---

<sup>13</sup> See Lindsey Bever, *Hispanics Are ‘Going Further Into the Shadows’ Amid Chilling Immigration Debate, Police Say*, Wash. Post (May 12, 2017) ([internet](#)); Rob Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight.com (May 18, 2017) ([internet](#)); Heidi Glenn, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver*, Nat’l Pub. Radio (Mar. 21, 2017) ([internet](#)).

<sup>14</sup> Alberto Ciancio, *The Impact of Immigration Policies on Local Enforcement, Crime and Policing Efficiency* vii (2017) (Ph.D. dissertation, University of Pennsylvania) ([internet](#)).

notes, “the grandmothers, clergy, teachers, and farm-workers who have lived and worked in the United States, contributing to the country without causing harm, should not be a priority based solely on the fact that they are removable.” (J.A. 161.)

In this approach, the Guidelines appropriately recognize that immigrants—including noncitizens—are a vital and substantial part of our Nation. As of November 2021, 46.2 million people living in the United States were born in another country.<sup>15</sup> This large immigrant population is unsurprising given that more individuals choose to migrate to the United States than to any other country.<sup>16</sup> Amici in particular are home to some of the largest immigrant populations—amounting to nearly 24 million immigrant residents.<sup>17</sup> Immigrants enrich their communities, including the amici States, in a variety of ways. And it is amici States’ experience that noncitizens—including many of those who are or may become removable for one reason or another—benefit their communities in the same ways.

For one, immigrants play a critical role in fueling and sustaining state economies. Every year, immigrants contribute hundreds of billions of dollars in

---

<sup>15</sup> Steven A. Camarota & Karen Zeigler, Ctr. for Immgr. Studies, *Immigration Population Hits Record 46.2 Million in November 2021* (Dec. 20, 2021) ([internet](#)).

<sup>16</sup> See U.N. Dep’t of Econ. & Soc. Affairs, Population Div., *International Migration 2020: Highlights 10* (2020) ([internet](#)).

<sup>17</sup> See Am. Immigration Council, *Map the Impact of Immigration* (n.d.) ([internet](#)) (filtered by State).

taxes and consumer spending.<sup>18</sup> This includes removable noncitizens who are authorized to work in the United States, as they must pay taxes on income generated here.<sup>19</sup> Immigrants also start businesses that generate billions of dollars in revenue.<sup>20</sup> For example, the most recent data available shows that in 2019, immigrant-led households in New York paid \$37.9 billion in federal taxes and \$23.5 billion in state and local taxes, of which \$2.2 billion and \$1.4 billion were paid by undocumented immigrants.<sup>21</sup> That same year, immigrants in New York had \$130.1 billion to spend as consumers (of which \$22.8 billion were held by undocumented immigrants and generated \$7.3 billion in business income).<sup>22</sup> Additionally, a significant percentage of immigrants work in industries that are important to state economies and communities, including farming,

---

<sup>18</sup> See U.S. Congress, Joint Econ. Comm., *Immigrants are Vital to the U.S. Economy* 5 (Apr. 6, 2021) ([internet](#)) (in 2019, immigrants paid \$492 billion in state, local, and federal taxes and wielded \$1.3 trillion in spending power).

<sup>19</sup> See U.S. Internal Revenue Serv., *Taxation of Nonresident Aliens* (last updated June 2, 2022) ([internet](#)); U.S. Internal Revenue Serv., *Aliens Employed in the U.S. – Social Security Taxes* (last updated Aug. 17, 2022) ([internet](#)). Certain classes of otherwise removable aliens may obtain employment authorization. See, e.g., 8 C.F.R. § 274a.12(a)(10)-(11), (c)(14), (c)(18). In 2018, approximately 15 percent of unauthorized immigrants had a temporary status or deferral of deportation with work authorization. Randy Capps et al., Migration Pol’y Inst., Fact Sheet, *Unauthorized Immigrants in the United States: Stable Numbers, Changing Origins* 2 (Dec. 2020) ([internet](#)).

<sup>20</sup> Am. Immigr. Council, Fact Sheet, *Immigrants in the United States* 5 (Sept. 21, 2021) ([internet](#)) (in 2019, immigrants generated \$86.3 billion in business revenue).

<sup>21</sup> New Am. Econ., *New York Archives* (n.d.) ([internet](#)).

<sup>22</sup> *Id.*



cleaning and maintenance, and home health care.<sup>23</sup> This economic impact has remained true during the COVID-19 pandemic, with immigrants disproportionately putting their lives at risk by working at high rates in essential sectors.<sup>24</sup> Immigrants also fill gaps in the labor market by taking low-wage jobs that U.S.-born workers often decline and by moving around the country to work in markets experiencing labor shortages.<sup>25</sup>

In addition to participating in the labor force, immigrants create jobs for U.S.-born workers by starting businesses. Studies have found that immigrants are more likely than U.S.-born individuals to start businesses, and that they “act more as ‘job creators’ than ‘job takers.’”<sup>26</sup> In 2019 alone, more than 3.2 million immigrants nationwide operated their own businesses.<sup>27</sup> And, according to a 2019 report, immigrants

---

<sup>23</sup> Arloc Sherman, et al., Ctr. on Budget & Pol’y Priorities, *Immigrants Contribute Greatly to U.S. Economy, Despite Administration’s “Public Charge” Rule Rationale* (Aug. 15, 2019) ([internet](#)).

<sup>24</sup> Giovanni Peri & Justin C. Wiltshire, Univ. of Cal. Davis, Glob. Migration Ctr., *The Role of Immigrants as Essential Workers During the Covid-19 Pandemic* (last updated Apr. 27, 2020) ([internet](#)).

<sup>25</sup> See Jenny Minier, Univ. of Ky. Ctr. for Equality & Soc. Just., *Immigrants Benefit the Community and Economy* (Sept. 2017) ([internet](#)); Pia Orrenius, *Benefits of Immigration Outweigh the Costs*, *The Catalyst*, issue 2 (George W. Bush Inst. Spring 2016) ([internet](#)).

<sup>26</sup> E.g., Pierre Azoulay, et al., *Immigration and Entrepreneurship in the United States* (Nat’l Bureau of Econ. Rsch., Working Paper No. 27778, 2020) ([internet](#)); see Am. Immigr. Council, Fact Sheet, *Value Added: Immigrants Create Jobs and Businesses, Boost Wages of Native-Born Workers* (Jan. 1, 2012) ([internet](#)).

<sup>27</sup> New Am. Econ., *Immigrants and the Economy in the United States of America* (n.d.) ([internet](#)).

owned nearly half of the small businesses in New York City, employed nearly half a million New Yorkers, and contributed \$195 billion to the city's gross domestic product.<sup>28</sup> The Guidelines deprioritize enforcement against those noncitizens who are less likely to pose threats to public safety, and thus more likely to play the productive roles in society reflected by this data.

The Guidelines also reasonably account for mitigating factors designed to ensure that noncitizens' ties to family members and the community are considered as part of the exercise of enforcement discretion. For example, some of the "mitigating factors that militate in favor of declining enforcement action" include "the impact of removal on family in the United States, such as loss of provider or caregiver," and "military or other public service of the noncitizen or their immediate family." (J.A. 114.)

In so doing, the Guidelines correctly recognize that noncitizens have deep familial and social ties to the United States. As of 2018, about 1.6 million unauthorized immigrants were married to U.S. citizens and another 675,000 were married to lawful permanent residents.<sup>29</sup> Over 4 million U.S.-citizen children had at least one unauthorized immigrant parent, as did 100,000 nonimmigrant or legal permanent resident children.<sup>30</sup> Removal of individuals from these households could have devastating economic and social

---

<sup>28</sup> Ass'n for Neighborhood & Hous. Dev., *The Forgotten Tenants: New York City's Immigrant Small Business Owners* 3 (2019) ([internet](#)).

<sup>29</sup> See Capps et al., *supra*, at 2.

<sup>30</sup> *Id.*

impacts on the individuals' families and the communities in which they live. Removing these individuals could also force States and local governments to provide services and other economic assistance to the families of detained or removed family members.

As noted above, the Guidelines do not require individual immigration officers to give dispositive weight to any of these factors and do not otherwise direct an outcome in any given case. Instead, the Guidelines are intended to inform the decision-making of individual officers and do so through reasoned and appropriate policy judgments about law enforcement priorities.

### CONCLUSION

The judgment of the U.S. District Court for the Southern District of Texas should be reversed.

Respectfully submitted,

ROB BONTA  
*Attorney General*  
*State of California*

MICHAEL MONGAN  
*Solicitor General*

HELEN H. HONG  
*Deputy Solicitor General*

JAMES F. ZAHRADKA II  
*Supervising Deputy*  
*Attorney General*

CHRISTOPHER PAUL

KAILANI MEDEIROS  
*Deputy Attorneys General*

LETITIA JAMES  
*Attorney General*  
*State of New York*

BARBARA D. UNDERWOOD\*  
*Solicitor General*

ESTER MURDUKHAYEVA  
*Deputy Solicitor General*

ANDREA W. TRENTO  
*Assistant Solicitor General*  
barbara.underwood@ag.ny.gov

September 2022

\* *Counsel of Record*

*(Counsel listing continues on next page.)*

WILLIAM TONG  
*Attorney General*  
*State of Connecticut*  
165 Capital Ave.  
Hartford, CT 06106

KATHLEEN JENNINGS  
*Attorney General*  
*State of Delaware*  
820 N. French St.  
Wilmington, DE 19801

KWAME RAOUL  
*Attorney General*  
*State of Illinois*  
100 West Randolph St.  
Chicago, IL 60601

AARON M. FREY  
*Attorney General*  
*State of Maine*  
6 State House Station  
Augusta, ME 04333

BRIAN E. FROSH  
*Attorney General*  
*State of Maryland*  
200 Saint Paul Pl.  
Baltimore, MD 21202

MAURA HEALEY  
*Attorney General*  
*Commonwealth of*  
*Massachusetts*  
One Ashburton Pl.  
Boston, MA 02108

KEITH ELLISON  
*Attorney General*  
*State of Minnesota*  
75 Rev. Dr. Martin Luther  
King Jr. Blvd.  
St. Paul, MN 55155

AARON D. FORD  
*Attorney General*  
*State of Nevada*  
100 North Carson St.  
Carson City, NV 89701

MATTHEW J. PLATKIN  
*Acting Attorney General*  
*State of New Jersey*  
25 Market St.  
Trenton, NJ 08625

HECTOR BALDERAS  
*Attorney General*  
*State of New Mexico*  
P.O. Drawer 1508  
Santa Fe, NM 87504

ELLEN F. ROSENBLUM  
*Attorney General*  
*State of Oregon*  
1162 Court St. N.E.  
Salem, OR 97301

PETER F. NERONHA  
*Attorney General*  
*State of Rhode Island*  
150 S. Main St.  
Providence, RI 02903

*(Counsel listing continues on next page.)*

SUSANNE R. YOUNG  
*Attorney General*  
*State of Vermont*  
109 State St.  
Montpelier, VT 05609

KARL A. RACINE  
*Attorney General*  
*District of Columbia*  
400 6th St., NW  
Washington, D.C. 20001

ROBERT W. FERGUSON  
*Attorney General*  
*State of Washington*  
P.O. Box 40100  
Olympia, WA 98504